

The Alabama Lawyer

Vol. 58, No. 5

July 1997

The Making of the Video,
"To Serve The Public"

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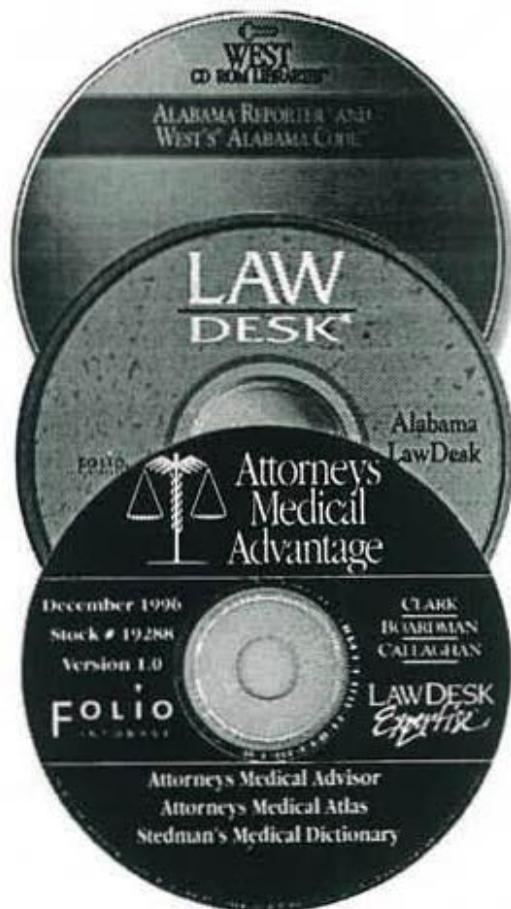
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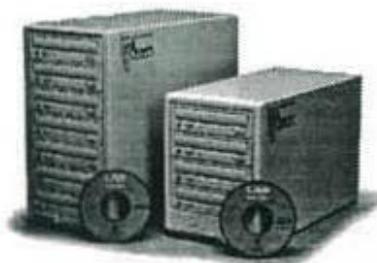


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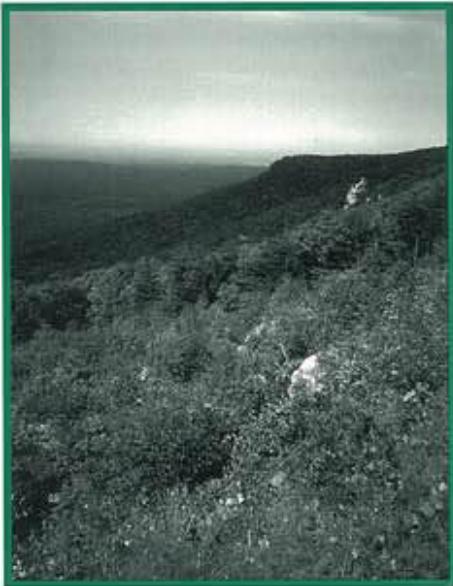
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The Alabama Lawyer

Vol. 58, No. 5 July 1997



On the Cover

View from Cheaha State Park, Cleburne County, Alabama. At 2,407 feet above sea level, Cheaha Mountain is the highest point in Alabama. The 2,799-acre park has hiking trails, campsites, a hotel, and a small lake.

—Photo by Paul Crawford, JD, CLU

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PRESIDENT'S PAGE

By Warren B. Lightfoot

Reflections . . .

I write my last article for *The Alabama Lawyer* with mixed feelings. This past year has been pretty hectic but gratifying. We have gotten some things done and have come up short on others. The single improvement made at the state bar has been the employment of **Laura Calloway**, who is available to help sole practitioners and small firms with computerization and office management. Ms. Calloway is highly qualified and has been practicing in Montgomery with Blanchard & Calloway. In the coming months, we will be publicizing Laura and her skills and encouraging you, our members, to take advantage of her capabilities.

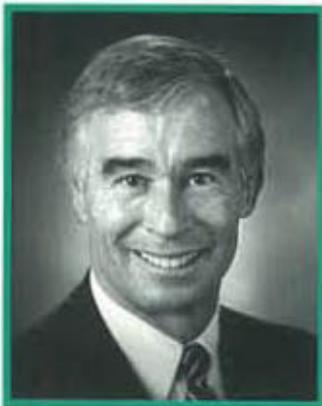
On the negative side we were unable to get a pay raise for lawyers defending indigents. Our lawyers have been paid for years at the abysmally low rate of \$40 an hour for in-court time and \$20 an hour for out-of-court time (both rates are the lowest in the nation). The board of bar commissioners unanimously passed a resolution urging the legislature to correct this terrible situation; Keith Norman and I met with the Governor and with Bill Gray (who gave us their unqualified support), but the legislation failed to pass. This problem simply must be addressed as soon as possible.

Back on the positive side, we instituted the **Legal Milestones Program**, conceived by **Pat Graves** of Huntsville, whereby memorials will be dedicated from time to time around the state commemorating historical acts of courage or rectitude by our colleagues (see article on page 244 of this issue). We created an **Elder Law Section**, which is available to assist the elderly with legal problems. We celebrated Law Week and continued our Bar-School Partnership Program on a statewide basis with dozens of schools

participating. We produced a video, which is now available at local bar associations and libraries, to inform the public about what our members do, both inside and outside the profession.

We corresponded with the Governor asking that he allow the judicial pay raise bill to become law. Unfortunately, he disagreed with us and vetoed the bill. I think the consensus of our membership is that we must provide sufficient pay to maintain excellence among our judiciary, and the pay raise bill would have been a step in the right direction.

Finally, by the time you read this, I hope that the **Judicial Selection Committee** will have reported the results of its hard work to the Board of Bar Commissioners and that our board will have adopted its proposed constitutional amendment as a recommendation to the legislature. **Frank Wilson** chaired that committee and the other hardworking members were **Joe Cassidy, Fred Gray, Larry Morris, Tabor Novak, Jim Pratt, Stan Starnes, and Marshall Timberlake**. We all owe them a debt of gratitude for the hours they have spent on this project. The work has truly been nonpartisan in every respect and has been a genuine effort to improve our system of selecting appellate judges. The current system may be preferred from time to time by whichever political group believes it is in control, but most of the public believes it is inappropriate, if not degrading, for judicial candidates to have to raise prodigious sums of money and then to spend it all in undignified campaigns. If the legislature adopts this recommendation, then the proposed constitutional amendment will be on the ballot in November 1998, and if the public approves it, we will have taken a significant step toward



Warren B. Lightfoot

restoring sanity and prestige to the selection of our appellate judges.

I close with a note of thanks, a note of appreciation to all of you for allowing me to serve, and a note of deep gratitude to all those among our members who work so hard every day to make our association a better one and to see that our profession fulfills its obligations of leadership to the public. I am reminded of the passage from the *Book of Luke* that cuts across all creeds: "To whom much is given, much is required." You, our members, have been given a great deal, in terms of intellectual ability, the capability of prioritizing, the gift of analysis, a work ethic; day in and day out, you are using those talents to improve our profession and the quality of life the public in general. You who go about those tasks—helping a small business survive; furnishing judgment to a board, a council or committee; assisting the powerless; insisting that a corporation recognize proper conduct; teaching a class in church or synagogue; taking a stand for principle; carving out time from a busy schedule to raise a child; or be a mentor to another—you are our unsung heroes, and you are the people who daily make a difference. Your name is legion. ■

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EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman

HOUSE BILL 692



Keith B. Norman

One of the casualties of this year's legislative session was House Bill 692. Sponsored by lawyer-legislator **Demetrius Newton** of Birmingham, H.B. 692 would have increased the compensation for attorneys appointed in criminal cases. The current \$20 per hour out-of-court and \$40 per hour in-court compensation was last increased in 1981!¹ Fewer and fewer attorneys are willing to handle criminal cases because of the low rates of compensation for appointed counsel. It is worth noting that attorneys representing the state in civil matters are paid a minimum of \$85 per hour.

Specifically, H.B. 692 would have done the following:

1. Raised the hourly rate paid to attorneys appointed to represent indigents in criminal cases to \$55 per hour both in and out of court.
2. Raised the maximum allowable fees to the following levels:
 - a. No limit in capital cases;
 - b. \$3,500 where the original charge was a Class A Felony;
 - c. \$2,500 where the original charge was a Class B Felony;
 - d. \$1,500 where the original charge was a Class C Felony;
 - e. \$2,000 in juvenile cases;
 - f. \$2,000 for each level of appellate work; and
 - g. \$1,000 for post-conviction work.
3. Additional expenses incurred by this legislation would have been funded by a \$28 increase in the filing fees for criminal and civil case filings.

The \$55 flat rate provided in H.B. 692 would have been in addition to reimbursement of reasonable expenses that may include office overhead. The

office overhead issue was decided by the Alabama Court of Criminal Appeals in 1993, *May v. State*, 692 So.2d 1307 (Ala. Cr. App. 1993), *Cert. Quashed*, 672 So.2d 1310 (Ala. 1995).

Many telephone calls and letters were written by members of the Board of Bar Commissioners and others urging the passage of H.B. 692. Other people, such as Indigent Defense Committee member **Joel Williams** of Troy, personally visited legislators seeking their support for H.B. 692. For a while, during this year's regular session, it appeared that H.B. 692 had a very good chance of becoming law. The House Ways and Means Committee gave the bill a favorable report and the House Rules Committee gave it a favorable placement on the House calendar. Unfortunately, as the remaining legislative days dwindled, a log jam of pending legislation developed, making it impossible for H.B. 692 to be considered and transmitted to the Senate in time for favorable action. (A similar bill introduced by lawyer-legislator **Howard Hawk** of Arab was unsuccessful during last year's regular session.)

There is good reason to hope that legislation to increase the compensation for attorneys appointed to represent indigent criminal defendants can be successful in next year's regular session. A great deal of ground work has been laid during the last two regular sessions to make legislators aware of this significant problem and its likely negative impact on the administration of justice in our state. If this legislation is to be successful in the future, we need the help of the entire legal profession. I hope that you will make it a point to contact your state

representative and state senator and urge them to support this important and much needed legislation the next time it is introduced.

Update: February 1997 Bar Examinees Educational Debt Load

First-time examinees:	199
Examinees having educational debt:	105 (53 percent)
Total debt of examinees:	\$3,710,500
Average debt of examinee with educational debt:	\$35,388
Educational debt range:	>\$1,500 to <\$90,000
Monthly debt service on \$35,388 (7.5 percent interest rate for ten years):	\$418

Endnote

1. By comparison, Alabama's neighboring states pay the following: Florida—Fees range from \$50 to \$100 per hour, in-court and out-of-court. The amount is discretionary with the court and varies county by county. Fees are capped at \$3,500 except in death cases. Georgia—Fees range from \$40 to \$90 per hour for out-of-court time; \$45 to \$90 for in-court time. The amount of the fee is discretionary with the court and depends on the experience of the attorney and the complexity of the case. Louisiana—Fees are \$57.65 per hour for in-court and out-of-court time. Mississippi—Fees are \$40 per hour out-of-court time and \$60 per hour in-court time. Additional allowance for overhead of up to \$25 per hour. South Carolina—\$50 per hour out-of-court and in-court time. Tennessee—\$40 per hour out-of-court and \$50 per hour in-court time.

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About Members

A.J. Cooper announces a change of address to 1050 17th Street, N.W., Suite 400, Washington, D.C., 20036. Phone (202) 293-5910.

L. Vastine Stabler, Jr. announces the opening of his office at 600 Luckie Drive, Suite 412, Birmingham, 35223. The mailing address is P. O. Box 531161-1161. Phone (205) 802-7290.

Gary P. Wilkinson, formerly with Hill, Young & Wilkinson, announces the opening of his office at 115 1/2 Mobile Plaza, Florence, 35630. The mailing address is P. O. Box 689, 35631. Phone (205) 764-1947.

Mercedes Murrell announces the relocation of his office to 315 W. Ponce de Leon Avenue, Suite 533, Decatur, Georgia

30030. The mailing address is P. O. Box 2242, 30031-2242. Phone (404) 659-3900.

Richard W. Whittaker announces a change of address to 300 E. Lee Street, Enterprise, 36330. The mailing address is P. O. Box 311166, 36331-1166. Phone (334) 393-5146.

Paul G. DeLaitch announces the relocation of his office to 6772 Taylor Circle, Montgomery, 36117. Phone (334) 244-1934.

John A. Gant, formerly with Lloyd, Scriber & Gray, announces the opening of his office at 4 Office Park Circle, Suite 215, Birmingham, 35223. Phone (205) 868-0093.

Hayes A. Lowe announces a change of address to 1873 Montclair Drive, Vestavia Hills, 35216.

Mark D. Owsley, formerly with Robbins, Owsley & Wilkins, announces the opening of his office at 211 E. North Street, P. O. Box 6105, Talladega, 35161. Phone (205) 362-1821.

Ron D. Marlow announces the opening of his office at 1612 3rd Avenue, North, Suite A, Bessemer, 35020. Phone (205) 425-5225.

Elise Moss announces a change of address to Trinity United Methodist Church, 607 Airport Road, Huntsville, 35802. Phone (205) 883-3200.

Tim W. Fleming, formerly with the Trimmier Law Firm, announces the opening of his office at 2504 Dauphin Street, Suite K, Mobile, 36606. Phone (334) 473-4878.

Edward E. Price, formerly with Cleveland & Colley, announces the opening of his office at 50 Lightwood Road (Holtville/Slapout), Deatsville, 36022. Phone (334) 569-1144.

Among Firms

Alfa Insurance Company announces **Al Scott** of Montgomery is the new general counsel and secretary for the Alfa Companies. The mailing address is P.O. Box 1100, Montgomery, 36111. Phone (334) 613-4313.

Roy Lynn Vanderford announces a change of address to the **Office of the District Attorney**, 25 W. 11th Street, Box 10, Anniston, 36210. Phone (205) 231-1770.

David Vance Lucas has been promoted to senior counsel of **Intergraph Corporation** at its corporate headquarters in Huntsville. Phone (205) 730-2243.

James L. Sumner, Jr. announces a change of address to the **Alabama Ethics Commission**, P.O. Box 4840, Montgomery, 36104-4840.

J. Langford Floyd has been appointed **Baldwin County District Judge**. The mailing address is P.O. Box 1452, Bay Minette, 36507.

Helmsing, Lyons, Sims & Leach announces that **R. Alan Alexander** has become a member, and **J. Casey Pipes** has become an associate. The mailing address is P.O. Box 2767, Mobile 36652-2767. Phone (334) 432-5521.

Miller, Hamilton, Snider & Odum announces that **Hugh C. Nickson, III**, **David F. Walker** and **Thomas J. Woodford** have become associates. Offices are located in Mobile, Montgomery and Washington, D.C.

Beasley, Wilson, Allen, Main & Crow announces that **Blaine C. Stevens**, **J. Cole Portis** and **W. Daniel Miles, III** have become members. Offices are located at 218 Commerce Street, P. O. Box 4160, Montgomery, 36103-4160. Phone (334) 269-2343.

Balch & Bingham announces that **Felton W. Smith**, **Glenn G. Waddell** and **Lois S. Woodward** have become partners. **Martin E. Burke**, **Charles A. Burkhart**, **Kendall C. Dunson**, **Robert P. Fowler**, **Miriam G. Harris**, **Jamison H. Hinkle, M.** **Leah Hudson**, **Douglas B. Kauffman**, **John W. McCullough**, **John Pickering**, **William W. Stewart**, **Spencer M. Taylor**, and **Angela F. Thornhill** have become associates.

Jeffrey L. Luther and **Rudene C. Oldenburg** announce the formation of **Luther & Oldenburg**, and that **Danny J.**

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Collier, Jr. and Michael A. Montgomery have become associates. Offices continue to be located in the AmSouth Center at 63 S. Royal Street, Suite 609, Mobile, 36602. The mailing address continues to be P.O. Box 1003, 36603. Phone (334) 433-8088.

Feld, Hyde, Lyle & Wertheimer announces that **Robert Gardner** has become an associate. Offices are located at 2100 SouthBridge Parkway, Suite 590, Birmingham, 35209. Phone (205) 802-7575.

Huie, Fernambucq & Stewart announces that **Philip R. Collins** has become an associate. Offices are located at 800 Regions Bank Building, 417 20th Street, North, Birmingham, 35203. Phone (205) 251-1193.

Pierce, Ledyard, Latta & Wasden announces that **Edward G. Isaacs Bowron** has joined the firm. Offices are located at 1110 Montlimar Drive, Suite 900, Mobile, 36609. Phone (334) 344-5151.

Harris, Caddell & Shanks announces that **David W. Langston** has become an associate. Offices are located at 214 Johnston Street, S.E., and the mailing address is P.O. Box 2688, Decatur, 35602. Phone (205) 340-8000.

King & Spalding announces that **Gregory M. Beil** has joined the firm. Offices are located at 191 Peachtree Street, Atlanta, Georgia 30303-1763. Phone (404) 572-4600.

John A. Taber, Michael W. Rountree, Spence A. Singleton and Brantley W. Lyons announce the formation of **Taber, Rountree, Singleton & Lyons**. Offices remain at 200 Interstate Park Drive, Suite 237, Montgomery, 36109-5403. Phone (334) 270-8291.

Robbie J. Priest and Peter Davis announce the opening of their office at 412 S. Court Street, Suite 411, Shoals Office Building, Florence, 35630. Phone (205) 764-1711.

Loftin, Herndon & Loftin announces that **Patrick O. Miller** has become an associate. Offices are located at 1705 7th Avenue, Phenix City, 36867. Phone (334) 297-1870.

Keith J. Nadler, formerly with Najjar Denaburg, announces the formation of **Nadler & Associates**. Offices are located at 3800 Colonnade Parkway, Suite 630, Birmingham, 35243. Phone (205) 969-1606.

Tanner & Guin announces that **J. Marland Hayes** has become a shareholder. Offices are located at 2711 University Boulevard, Tuscaloosa, 35403. Phone (205) 349-4300.

Todd H. Barksdale and Stuart Y. Johnson announce the formation of **Barksdale & Johnson**. Offices are located at 13 Office Park Circle, Suites 12 and 12A, Birmingham, 35223. Phone (205) 871-5630.

Pittman, Hooks, Dutton & Hollis announces that **Michael C. Bradley** has joined the firm. Offices are located at 1100 Park Place Tower, Birmingham, 35203. Phone (205) 322-8880.

Capouano, Smith, Warren & Klinner announces the relocation of offices to 322 Alabama Street, Montgomery, 36104. The mailing address will remain P. O. Drawer 4689, 36103-4689. Phone (334) 834-3891.

Clayton & Clayton announces the relocation of offices to 224 W. Broad Street, Eufaula, 36027. Phone (334) 687-3808.

Zieman, Speegle, Oldweiler & Jackson announces that **Anthony M. Hoffman** became a member. Offices are located at

107 St. Francis Street, 3200 First National Bank Building, Mobile, 36602. Phone (334) 694-1700.

Lusk, Fraley, McAlister & Simms announces that **Nicole McGill Johnson, David T. White, III and Lee T. Clanton** have become associates. Offices are located at 1901 6th Avenue, North, Suite 1700, AmSouth/Harbert Plaza, Birmingham, 35203. Phone (205) 323-7100.

Burnham & Klinefelter announces that **Jennifer H. Wilkinson and Timothy C. Burgess** have joined the firm. Offices are located at 1000 Quintard Avenue, SouthTrust Bank Building, Suite 401, P.O. Box 1618, Anniston, 36202. Phone (205) 237-8515.

Rosen, Cook, Sledge, Davis, Carroll & Jones announces that **Charles A. Thigpen** has become *of counsel* to the firm. Offices are located at 2117 River Road, P. O. Box 2727, Tuscaloosa, 35401. Phone (205) 344-5000.

John T. Campbell and Jeffrey E. Rowell announce the formation of **Campbell & Rowell**. Offices are located

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About Members, Among Firms

(Continued from page 199)

at 1572 Montgomery Highway, Suite 210, Birmingham, 35216. Phone (205) 979-9070.

Brown, Hudgens announces that **William A. Donaldson** became a member of the firm. Offices are located at 1495 University Boulevard, P. O. Box 16818, Mobile, 36616-0818. Phone (334) 344-7744.

Rumberger, Kirk & Caldwell announces the opening of offices at AmSouth/Harbert Plaza, Suite 2020, 1901 6th Avenue, North, Birmingham, 35203. **Craig P. Niedenthal** has become a partner and **Allison O'Neal Skinner** has become an associate. Phone (205) 327-5550.

Lucas, Alvis & Wash announces that **D. Bruce Petway** has joined the firm. Offices are located in Birmingham and Sheffield.

The Law Offices of **G. Thomas Yearout**, and **Duell & Spina** announce that they have merged. The new firm name is **Duell, Yearout & Spina**. The firm will consolidate offices in Birmingham in the fall of 1997 at a new location. ■



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BAR BRIEFS



• Retired **Montgomery Circuit Judge John Davis, III** has been named one of two "Alumni of the Year" at Cumberland School of Law, Samford University. The honorees, recognized at a Law Week banquet in March, are in keeping with the Cumberland tradition of recognizing graduates from two eras and locations.

Davis, a 1971 graduate, served 21 years as a Montgomery Family Court judge. He has served on a commission that studied Alabama's juvenile justice system, and was executive chairman of the Substance Abuse Youth Networking Organization (SAYNO) when Montgomery's anti-drug program was founded in 1989.

The Montgomery County boot camp, a rehabilitation program designed to instill discipline and self-esteem in juvenile criminals, was named for Davis upon his retirement in January.

• **Tameria S. Driskill** of Engel, Hairston & Johanson in Birmingham has been admitted to membership in the Commercial Law League of America. The CLLA was founded in 1895 and is the leading international organization of bankruptcy and commercial law professionals.

• **Robert E. Jones, III** and **Joseph C. Espy** have become Fellows of the American College of Trial Lawyers. Created in 1950 to recognize excellence in trial lawyers, the College includes members from every segment of the civil and criminal trial bar of the United States and Canada.

The induction ceremony recently took place at the Spring Meeting of the College in Boca Raton, Florida. Jones is a partner in the Florence firm of Jones & Trousdale and Espy is a partner in the Montgomery firm of Melton, Espy, Williams & Hayes.

• **Montgomery Circuit Judge Charles Price** was recently announced the winner of the 1997 John F. Kennedy Profile in Courage Award. The award, described by a former recipient as



Judge Price accepts awards from Caroline Kennedy.

the "Nobel in Government," is presented annually to a public official who has withstood strong opposition from constituents and powerful interest groups to follow what the individual believes is the right course of action.

"Judge Price demonstrated both integrity and courage in his rul-



Judge Price and family visit with Caroline and Ted Kennedy.

ing to support our nation's historical separation of church and state," said Caroline Kennedy, president of the Kennedy Library Foundation. "[R]ather than teach young Americans to ridicule the men and women who actively participate in politics, we should offer them examples of excellence

and courage. Judge Charles Price is such an example."

Past winners of the award include former United States Congressman Carl Elliott, Sr. of Alabama.

Quotes from Judge Price's acceptance speech:

"[I] have always believed that elected officials must adhere to a high standard of truthfulness and forthrightness, even when their re-election is threatened. I have tried to embrace one of President Lincoln's philosophies, 'Let us have faith that right makes might, and in that faith let us to the end dare to do our duty as we understand it.'

• • •

"[A]s an elected judge, I long ago made a pledge to respect the law, interpret the law, obey the law, and apply the law based on stare decisis, appellate court decisions, and/or legislative statutes and acts. Never have I committed myself as a judge to make a decision based on popularity or political expediency.

• • •

"I have no intentions of evading tough and hard decisions, for to do so would make me unworthy of the honor you have bestowed on me with this award. I hope I shall continue to be a credit to you, the judiciary, my family and, most importantly, myself. I hope I shall remain forever in the same class as those President Kennedy admired and included in his book, *Profiles in Courage*."



Bill Baxley and Judge Price at reception

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BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

Clarke County

Clarke County, located in southwest Alabama, is a county of lingering mystery and unanswered historical questions. Perhaps the most significant question surrounds De Soto's famous Battle of Mauvila. Did that battle take place within the boundary of present-day Clarke County? A second unanswered question is which Clarke, a father or a son, was the county's namesake? Finally, why was the area that became the county seat known by so many different names in its early years, and from what sources were the various names derived?

De Soto's Spanish soldiers ventured into present-day Alabama at some point during his expedition which lasted from 1539 to 1543. Although it is undisputed that he traveled through much of the southeastern United States, including Alabama, after more than 450 years it is still impossible to say with absolute certainty that De Soto visited any specific site. The reason for this uncertainty is the lack of physical evidence left behind by his army.

In 1935, Congress approved the creation of the United States De Soto Expedition Commission to study the route of De Soto and make appropriate recommendations for a 400th Anniversary celebration. As part of the commission report, the location of the Battle of Mauvila—sometimes spelled Mabila, Maubila, Maubilla or Mauvilla—was placed in Clarke County between

the forks of the Alabama and Tombigbee rivers. The commission did not pinpoint a specific battle site.

This placement has been debated for years. Some historians and archaeologists believe that De Soto did not travel that far south, but instead fought at the forks of the Tombigbee and Black Warrior rivers, which would place the battle in present-day Greene County. Only additional archaeological exploration will settle this issue.

De Soto's Battle of Mauvila is reputed to be the single bloodiest encounter of

Indians with Europeans within the present boundary of the United States. Reports range from at least 6,000 to as many as 11,000 Indians killed. De Soto had 82 men killed, all of the rest were wounded, and most of his baggage and stores destroyed. The reason for the disparity in losses was due to the

swords, guns, armor and horses which the Indians had never seen.

Clarke County is located between two great rivers. Its eastern, western and southern boundaries are formed by the Alabama and Tombigbee rivers. Because of the rivers, many Indians made this territory their home until white settlement began in the late 1700s and early 1800s. Burial, ceremonial and habitation mounds located along the rivers give historic evidence of the Indian presence. The oldest white settlement in the area was located at Choctaw Bluff, on the Alabama River. It was founded by the James and Darrington families in 1789.

Because of their proximity to the Indians and to the ease of transportation provided by the river systems, the settlers



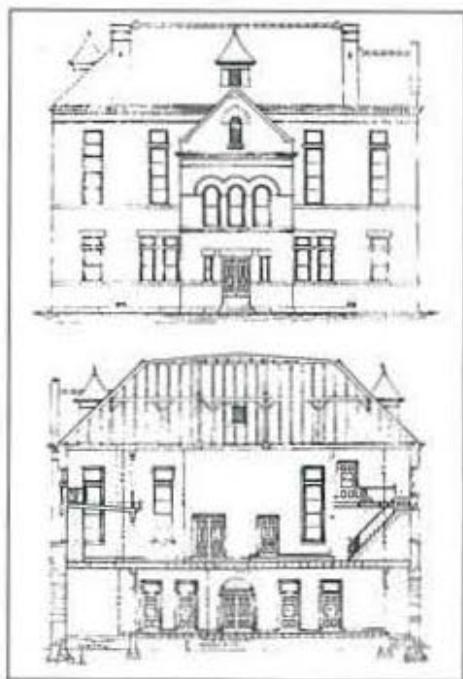
This old frame building served as the Clarke County Courthouse from 1832 until 1898.



Clarke County

Established: 1812

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.



Clarke County Courthouse elevations, 1899 to 1955; approximate total building cost \$13,000

in what would become Clarke County built many forts, redoubts and defensive structures to provide security. In fact, Clarke County has been the site of more military fortifications than any other county in Alabama, including Fort Carney, Fort Cato, Curry's Fort, Fort Easley, Glass Redoubt, Landrum's Fort, Fort Lavier, McGrew's Fort, Fort Madison, Mott's Fort, Powell's Fort, Fort Siquiefield, Turner's Fort, and Fort White.

Clarke County was created by the Mississippi Territorial Legislature on December 10, 1812 from territory taken from Washington County. At that time, the United States was in the midst of its second war with Great Britain. Also, war on the frontier with the Creek Indians was threatening.

This background sets the scene for the second Clarke County mystery. Most historians believe that Clarke County was named for General John Clarke, a hero of the War of 1812. One important historian, however, believes that the county was named for his father, General Elijah Clarke.

General Elijah Clarke was born in 1733. He was a Revolutionary War fighter in Georgia from 1776 to 1783. His popularity continued up until the time of his death in 1799. Clarke County in Georgia, whose county seat is Athens, site of the University of Georgia, was named for him.

John Clarke, Elijah's son, had been born in North Carolina in 1766 but moved with his family to Georgia. At age 15 John Clarke was appointed a lieutenant in the Continental Army. At age 16 he became a captain. He served under his father in a number of battles. By age 21 he was promoted to major.

John Clarke continued with his military career. He distinguished himself in actions against the Indians in Georgia. Like his father he rose to the rank of general. In 1812, Governor Early of Georgia gave him command of the forces assigned to protect the seacoast and defend the southern boundary of Georgia.

It was at this time that the Mississippi Territory established a new county. Historian Willis Brewer proposed that General John Clarke, who was only 46 in 1812, had not achieved sufficient fame or notoriety to have a county named for him. Clarke subsequently became a hero in the War of 1812, was a presidential elector in 1816, and was chosen Governor of Georgia in 1819 and 1821. In 1827 he moved to west Florida where he died of yellow fever on October 12, 1832 at the age of 66.

Brewer theorized that the Georgians who settled Clarke County were more inclined to have their county named for the elder General Clarke who died some 13 years previously, than for his son, the younger General Clarke, whose great military and political contributions were still in the future. The uncertainty still exists although most reference works attribute the name of the county to General and later Governor John Clarke.

During the Creek Indian War of 1813 to 1814, only two Alabama forts were ever attacked by the Indians. Fort Mims in Baldwin County was captured and its inhabitants massacred on August 30, 1813. The other fort attacked was Fort Siquiefield in Clarke County.

On the afternoon of September 2, 1813, a burial party at Fort Siquiefield had completed the funeral of the families of Ransom Kimball and Abner James whose cabins had been attacked the day before in an episode that came to be known as the Kimball-James Massacre. A war party of Red Stick Indians attacked the mourners and a group of women washing clothes at a

nearby creek. The women were surrounded; however, Isaac Hayden, seeing this grave situation, attacked the Indians with his pack of hunting hounds. History refers to this incident as Hayden's "Dog Charge" which sent a veritable "canine army" against the Indians. This diversion allowed all but one of the women to escape back to the fort. The Red Sticks then rushed the fort, but were repelled. No other significant encounters took place in Clarke County, and the Indian War ended at Horseshoe Bend on March 27, 1814.

The first courts to be held in Clarke County, Mississippi Territory took place at the home of John Landrum, located in the vicinity of present-day Winn, on the first Monday in February 1813. This place has previously been mentioned as Landrum's Fort. It was located approximately 11 miles west of Fort Siquiefield.

During the territorial years county courts continued to be held in private homes. In 1814 John Landrum's house was still being used. In 1815, court was held at the home of Dr. Biddle in Pine Level, the original name of the current-day town of Jackson. In 1816 court again was held at John Landrum's house. In 1817, Alabama became a territory but courts continued to be held in private homes.

On November 21, 1818, the Alabama Territorial Legislature appointed seven commissioners to select the proper location for a courthouse in Clarke County. The appointees were Lemuel J. Alston, Alexander Kilpatrick, Joseph Hearn, Solomon Boykin, William Coleman, William Anderson, and William Goode, Sr.

Apparently these commissioners did not complete their task because on December 13, 1819 seven new commissioners were appointed. The new commissioners were William A. Robertson, Joseph B. Earle, John Loftin, Samuel B. Shields, William F. Ezell, Robertus Love, and Edmund Butler. They were authorized to fix the seat of justice for Clarke County at a location not to exceed three miles from its center, after giving due regard to health, water and accommodations. The selection was to be made by the first Monday in March 1820. In the meantime, courts were ordered held at the home of William Coate.

Building Alabama's Courthouses

(Continued from page 205)

The place selected by the commissioners was not far from the residence of Coate. A village soon grew around the site. This location served as the county seat of Clarke County from 1819 to 1832. On December 7, 1820, the legislature decided that it should be officially known by the name of Clarkesville.

Clarkesville did not prove to be popular as the county seat location due in large part to an inadequate water supply. On January 15, 1831, the legislature called for an election to be held on the first Monday in April 1831, to poll public sentiment on keeping the courthouse at Clarkesville or moving it to the geographical center of the county. Ballots in the election carried the names "Clarkesville" and "Center." The election result called for a change. Clarkesville, never a large place, became just another rural town and later disappeared entirely.

Five commissioners were appointed to select the site for the courthouse near the center of the county. These commissioners were William Murrell, John Loftin, a commissioner in 1819, Robert Herrin, Joshua Wilson, and James Magoffin. The location they chose had been known by several names, which brings up the third Clarke County historical mystery. Why were there so many names? From where were these names derived?

During the Creek Indian War of 1813 to 1814, a small defensive fortification had grown up in the center of the county, called Fort White. The name possibly arose because the fort was intended to protect "white" settlers. Or perhaps it took its name from a settler named White. The actual derivation of the name is unknown.

In 1815 James Magoffin from Philadelphia, who would serve on the county seat selection commission in 1831, opened a small establishment near Fort White. The settlement that grew up around his business became known as Magoffin's Store. Magoffin's Store was made a polling place as early as 1818.

Within a few years the area became known by two other names. In some documents it was called Smithville, and in others it was called Macon. Both of

these designations may have been local family names, but historians are not sure. To add to the confusion, James Magoffin was the postmaster in this same area of a post office, established on April 21, 1820, which was officially called Post Oak Level. This post office was discontinued in 1824, but re-established on May 24, 1827. On April 16, 1828, the name of the post office was changed officially to Grove Hill, because of a stand of oak trees on the plateau where the town was located.



Photo of Clarke County Courthouse, 1899 to 1955

At some point in the 1840s, the "center" of Clarke County, at various times known as Fort White, Magoffin's Store, Smithville, Macon, Post Oak Level, and Grove Hill, became consolidated under the name Grove Hill. Most early court documents used the name Macon, but since there was already a Macon recognized by the post office department in another county of Alabama, the official post office name of Grove Hill eventually became the official town name. The exact date is a mystery lost in Alabama history.

The first courts were held in the new county seat on December 28, 1832. A frame courthouse building was constructed in Grove Hill around that time. A photograph taken shortly before the structure was torn down in 1898 shows a one-story building surrounded by a

fence. There appear to be steps over the fence. The jail was located behind this building. The building had a front entrance containing an extended portico and a side entrance covered by an awning. This first Grove Hill courthouse was replaced by a handsome brick structure completed in 1899.

The construction of a brand new courthouse in Grove Hill in 1899 was not a foregone deed. There were several movements that could have changed Clarke County history. Some were economic. Others were political.

First of all, the single biggest change in Clarke County following the Civil War was the arrival of the railroad in the late 1880s. The line came up from Mobile, crossed the Tombigbee River at Jackson, moved up the Bassett Creek valley east of Grove Hill, passed through Whatley, and extended up to Thomasville in the north on its way out of the county into Wilcox County, and on toward Selma.

Communities prospered along the railroad. Many busy sawmill towns sprang up. The large municipality of Thomasville owes its very existence to the railroad. On the other hand, Grove Hill, the county seat, was by-passed.

Another factor arose in north Clarke County. Citizens began a movement for the creation of a new county. It would consist of a portion of northern Clarke County, southern Marengo County and western Wilcox County. Thomasville would be the hub and county seat of this new creation. The proposal was to name the new county Herndon. In 1891, the Alabama Senate defeated the Herndon County bill by only five votes.

A third important event took place in November 1892. A bill passed the legislature calling for an election to "permanently locate the county seat." The election, set for March 13, 1893, pitted Grove Hill, the centrally located county seat, against Jackson, on the railroad and the Tombigbee River, and Whatley, a newly established town located on the railroad approximately five miles southeast of Grove Hill.

The supporters of Jackson felt that they should win the election because their city was on a river and a railroad. Also, Jackson had strong support from the Thomasville area. Many residents from Thomasville

thought that if Jackson became county seat, Thomasville would have a better chance of getting support for the establishment of the new county of Herndon and thus become a county seat itself. Grove Hill, though not on a railroad or river, was still the centrally located site. Its citizens felt it was the most convenient location for the majority of Clarke County farmers. Whatley was a late entry. It promoted its central location and also its position on the railroad. When the vote was finally tallied from the hotly contested election, Grove Hill had 1,552 votes, Jackson, 518, and Whatley, 307. Grove Hill remained the county seat.



The Clarke County Courthouse, 1997

of seating comfortably over 400 people. A handsome judge's stand and bar rail set off the other end of the room — the west end. On the same story are located the two petit jury rooms. Above these is the grand jury room and a waiting room attached. All rooms can be heated and made comfortable, with fireplaces or stoves. The court room ceiling is 20 feet above the floor; the offices on first floor are 12 feet from floor to ceiling. On the north-east corner is a handsome tower running up from ground to tip of finial about 92 feet. The large court room is lighted and ventilated by 17 large windows which are about 3 feet wide and over 12 feet high. All the windows in the house have the Wilby patent Venetian Blind. The entire house is wainscoted to a height of 3 feet with yellow pine ceiling. The walls are plastered with Acme Patent Cement as hard as rock. The walls are built of brick made almost on the spot, hard and gray in color. The roof is of the best Bangor slate and will last for all time. The gutters are of copper and the cornice of galvanized iron, thoroughly protected against rust."

Photos of the 1899 courthouse show that it was an imposing structure for such a small, rural county. However, by 1911, the building was found to be too small. An annex had to be built. The contractors were Straiton Brothers and Ward. The cost was \$10,000.

By the mid-20th century the 1899 Clarke County Courthouse was no longer adequate for the needs of the county. The present courthouse was started in 1954 and completed in 1955. The architect was Charles H. McCauley of Birmingham and the builder was S. J. Curry and Company.

The building consists of three parts: a central section and two wings. The central section features a double glass door flanked by windows. The door and its adjoining windows are grouped under a gabled portico supported by four large Doric columns. The building is modern but reminiscent of the Greek Revival style. The porch area is distinguished from the rest of the red brick building by light colored, stucco walls.

The central section is flanked by two slightly recessed wings. The roof lines are flat but the roof of the central section is higher than the roof of the wings. The south wing forms an L shape and projects out from the horizontal line of the building.

The courthouse was remodeled in 1976. The architect for this latest project was Luther Hill and the contractor was Southern General Contractors, Inc. It is anticipated that the present courthouse will serve Clarke County for many more years. ■

The author acknowledges the assistance of James A. Cox, publisher of *The Clarke County Democrat*; former Probate Judge Fred L. Huggins; Thomasville attorney Edmon H. McKinley; and the Alabama Historical Commission for assistance in obtaining materials used in this article.

SOURCES:

"150th Anniversary of the County Seat of Clarke County, Alabama," *The Clarke County Democrat*, Thursday, November 25, 1962; *Clarke County Historical Society Quarterly*, volume 8, number 2, Fall 1983; *Clarke County, Alabama and Its Surroundings, From 1540 To 1877*, Reverend T. H. Ball, 1882, reprinted 1962; *History of Clarke County*, John Simpson Graham, 1923; *Historical Sketches of Clarke County, Alabama*, Clarke County Historical Society, 1977.



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LEGISLATIVE WRAP-UP

Welfare Reform

The recently enacted Federal Welfare Reform Act requires each state to pass certain laws to continue to obtain federal funding. In Alabama this resulted in the following five bills being passed:

1. State Directory of New Hires—Act #228

This Act requires the Department of Industrial Relations to establish a State Directory of New Hires. The new reporting procedure shall require all employers to obtain certain information from newly hired, recalled or rehired individuals. This information will be used by the Department of Human Resources to cross-match these individuals with individuals who have outstanding legal child support obligations. Furthermore, the information procured under the New Hire Directory will be cross-matched with individuals receiving worker's compensation benefits to eliminate individuals from receiving worker's compensation benefits when they are simultaneously employed.

Additionally, persons who have received more food stamp benefits than they were entitled to shall be identified at the time of application for unemployment compensation. Re-payment will be through deduction and withholding of unemployment benefits.

Effective October 1, 1997.

2. Support Collections—Act #229

Section 38-10-8 of the *Code of Alabama* is amended to provide for the delineation of distributions relating to

support collections. It specifically provides for the distribution when there are two or more existing child support orders. When there is both a current child support order and one involving a prior order of accumulated arrearages the current support order has priority. If the amount collected is insufficient to satisfy all the support and arrearages due, the department is directed to allocate a pro rata share of the amount collected in the manner prescribed by this section.

The state treasurer is directed to deposit the collection of supports received by the state department into a separate, interest-bearing account. The interest credited to that account is to be credited to the Public Welfare Trust Funds with the interest to be used for the general welfare purposes under that fund.

The act becomes effective on the first day of the third month following its becoming law.

Effective July 1, 1997.

3. Uniform Interstate Family Support—Act #245

The Alabama Law Institute began a study several years ago reviewing the Uniform Interstate Family Support Act drafted by the National Conference of Commissioners on Uniform State Laws which had been drafted by the Commission in 1992 and adopted by a majority of the jurisdictions in the United States. In 1996 the law was amended to provide a smoother transition between those jurisdictions who had adopted UIFSA as well as to make other improvements. UIFSA will replace Alabama's current Interstate Income Withholding laws.

Section 201 forms the basis for jurisdiction over non-residents. It includes, among other circumstances, jurisdiction over a non-resident who has asserted parentage in the new Alabama's Punitive Father's Registry as provided in *Ala. Code* § 26-10c-1.

Section 202 deals with one of the

major problems of the current Interstate Income Withholding laws which is that there may be several support orders from different states in effect at the same time. UIFSA adopts a one-order system and resolves disputes between competing jurisdictional assertions by establishing a priority for the tribunal in the child's home state. If the child does not have a home state, then the first filing controls.

A major change under UIFSA will be the concept of continuing exclusive jurisdiction over a child support order (CEJ). Under Section 205 if Alabama issues a child support order consistent with this act it has continuing, exclusive jurisdiction over the child support orders as long as one of two circumstances continues to exist: first, so long as Alabama remains the residence of the obligor, the obligee or the child for whose benefits the support order is issued to, and, second, Alabama retains CEJ unless all of the parties file written consents with an Alabama court to allow another court to modify Alabama's order and assume continuing, exclusive jurisdiction.

Likewise, Alabama will be required to recognize the continuing, exclusive jurisdiction of another tribunal which has issued a child support order under a law substantially similar to this act. Moreover, a temporary order that is issued *ex parte* or pending a resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in that issuing state.

However, if a child support order of this state is modified by another state in compliance with this act then Alabama loses its continuing, exclusive jurisdiction with regard to the perspective enforcement of Alabama's order and may only enforce the order that was modified as to the amounts accruing before the modification and enforce the non-modifiable aspects of the order and provide



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other appropriate relief for violations of Alabama's order which occurred before the effective date of the modification.

Under subsection (f), if Alabama issues a spousal support order then it has continuing, exclusive jurisdiction throughout the existence of the support obligation. Conversely, Alabama may not modify a spousal support order that is issued by another state that has continuing exclusive jurisdiction over that order.

Section 207 provides that if there is only one child support order then that order must be recognized. Furthermore, this section provides that if two or more child support orders have been issued with regard to the same obligor and child a procedure is established whereby Alabama will determine which order to recognize for purposes of continuing, exclusive jurisdiction.

Under Section 305, if Alabama is the responding state receiving a petition for support it may order the obligor to comply with it including ordering income withholding, setting aside property to satisfy the support order or placing liens and ordering execution on the obligor's property. Furthermore, the court may order the obligor to seek appropriate employment by specific methods, order reasonable attorney fees and grant any other available relief. The act specifically prohibits Alabama or any other state from conditioning payment of support upon compliance by a party with provisions relating to visitation.

Section 310 provides that the Department of Human Resources (DHR) is the information agency under this act.

Section 312 provides that if a court or agency finds that the health, safety or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information, it may order that the address of the child or party or other identifying information not be disclosed in a pleading or other document that is filed under this act.

Section 313 concerns cost and fees and specifically provides that the petitioner, whether it is the obligor or the obligee, may not be required to pay a filing fee or other costs. However, if the obligee prevails the court or agency may assess against the obligor the cost of the filing fees, reasonable attorney fees and other costs, necessary travel and other

expenses incurred by the obligee or the obligee's witnesses. Attorney fees may be taxed as costs and may be ordered paid directly to the attorney who may then enforce the order in the attorney's own name. Subsection (c) requires the tribunal to order the payment of costs and reasonable attorney fees if the tribunal determines that the hearing was requested primarily for delay.

Section 314 provides limited immunity for the petitioner who is physically present in the state to participate in a proceeding under this act so that the petitioner is not amenable to service of civil process.

Section 316 provides special rules of evidence and procedure to be used in the enforcement of this act.

Article 5 provides a new procedure whereby an income withholding order may be sent directly to an employer in a second state without the necessity of utilizing a court in that state. Under section 502(b) an employer who receives an income-withholding order from another state shall treat that income withholding order as if it had been issued by a court of this state.

Section 504 provides that an employer who complies with an income-withholding order that has been issued in another state in accordance with this act is not subject to civil liability to the individual or agency regarding that withholding of child support from the obligor's income.

Conversely, Section 505 establishes a penalty for an employer who willfully fails to comply with an income-withholding order issued by another state. The sanctions will be the same that would be imposed on an employer for failing to comply with an Alabama income withholding order.

Section 506 provides that an obligor may contest the validity of the income withholding order issued by another state in the same manner as if the order had been issued by an Alabama court.

Section 507 provides a mechanism in which a party may seek enforcement of a support order or income withholding order that has been issued by another state to Department of Human Resources. The Department of Human Resources may use any administrative procedures it is authorized to use in

Alabama to enforce the support order or income withholding order. If the obligor does not contest the administrative enforcement then the order need not be registered. If the obligor contests the validity of the administrative enforcement of the order then DHR must register the order pursuant to Article 6 of the act.

Article 6 provides the mechanism for the enforcement and modification of a support order after registration.

Section 602 provides the procedure to register an order for enforcement.

Section 603 provides that an order from another state that is registered in Alabama is enforceable in the same manner and is subject to the same procedures as an order that has been issued by an Alabama court.

Section 605 provides for notice of the registration of the support order or income withholding order that has been issued in another state. The failure to contest the validity of the order within 30 days after the date of service obtained



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under the Alabama Rules of Civil Procedure will result in the confirmation of the order. This will preclude any further contest of that order with respect to any matter that could have been asserted. When registration of an income order has been completed the court will notify the obligor's employer pursuant to the Alabama income withholding law.

Section 606 establishes the procedure to contest the validity or enforcement of the registered order.

Section 607 provides the defenses that are available to contest the registration or enforcement of an order.

Section 611 provides for limited circumstances in which Alabama may modify a child support order that has been registered in this state. Once Alabama has properly assumed jurisdiction to modify a child support order that has been issued in another state Alabama becomes the court having continuing, exclusive jurisdiction.

Section 613 specifically provides that

if all the parties are residents of Alabama and the child does not reside in the state issuing the child support order then Alabama has jurisdiction to enforce and modify the other state's order in a proceeding to register this order.

Article 7 establishes a procedure for a determination of parentage.

Section 905 provides that effective January 1, 2000 sections 30-4-80 through 98 and 30-3-90 through 99 of the *Code of Alabama* will be repealed. Moreover, after December 31, 1997 no actions may be filed under the preceding provisions.

Section 906 provides that all proceedings that are filed prior to January 1, 1998 shall be governed by the laws in effect at the time of the commencement of the proceedings. However, those proceedings shall be governed by this act after December 31, 1999. Proceedings filed after January 1, 1998 shall be governed by this act. This act takes effect January 1, 1998.

4. Family Assistance Program—[Bill did not pass]

This Act creates a family assistance program to be operated by the Department of Human Resources for providing benefits to needy families pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the Federal Welfare Reform Law.

Under Section 5 the Department is charged with the responsibility of establishing eligibility requirements and benefit levels for the program. For example, under subsection (d) benefits for a family may not be increased upon the birth of a child ten months or more after the date of the approval of this Act.

Section 7 establishes some minimum eligibility requirements including a requirement of successful participation in the work program. The recipient or application for family assistance benefits must assist in the establishment of paternity of the father of a child who is born outside of marriage. Furthermore, the applicant must indicate whether any individual member of the household has been convicted for the possession, use or distribution of a controlled substance.

Subsection (b) establishes circumstances in which benefits under the Family Assistant program will be denied. For example, there is generally a 60-month limit upon receipt of benefits.

Also ineligible will be individuals who: (1) have been convicted of making fraudulent statements in order to receive certain federal benefits; (2) are fleeing to avoid confinement after they have been convicted of certain crimes; or (3) are fleeing because they have violated a condition of probation or parole. Moreover, an individual who is convicted of a felony that has as an element the possession, use or distribution of a controlled substance is also ineligible. Unqualified aliens must be denied benefits.

Section (9) specifies that no adult in the family assistance work program funded by the federal government shall be employed by an employer if a permanent employee is laid off in order to create a vacancy to be filled with the adult seeking to participate in the work activities pursuant to the federal assistance program.

Section (10) requires any person who is 20 years or older who is otherwise eligible for family assistance program to attend school if that person has not graduated from high school or obtained a GED equivalent and is physically and mentally able to attend school.

Moreover, the person must be a parent or caretaker of the dependent child with child care available and in a work program of at least 20 hours a week and his or her assessment indicates that additional education is needed.

Subsection (b) requires that a caretaker who is receiving benefits must ensure that the minor, dependent child attends school.

Section (11) requires that as a condition of eligibility for benefits through the Family Assistance Program, each applicant must assign any rights to support to the Department. The applicant must cooperate in establishing the paternity of a child born out of wedlock. If the Department determines that the applicant is failing to cooperate the Department shall reduce or terminate assistance to the family.

Under Section (12), in order to receive benefits, an unmarried individual under 18 who has a minor child that is at least 12 weeks old and has not obtained a high school education or equivalency must live with his or her parent or guardian unless the Department determines that such living arrangement would be not in the best interest of the minor child. If a minor child in this sit-

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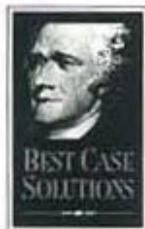
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uation is not living with his or her parent or legal guardian or other appropriate adult relative, then the Department will make appropriate living arrangements. The minor will be placed in some otherwise appropriate adult supervised supportive living arrangement.

Section (14) requires the Department to provide child care for eligible participants who require such care for 12 months so that they may accept employment or remained employed. Moreover, they must provide transportation up to six months or reasonable reimbursement for a period of six months to allow individuals to participate in an allowable work activity.

Section (15) creates a State Family Welfare Reform Coordinating Council that is to serve as the coordinating body for welfare reform.

Section (16) creates the Alabama Welfare Reform Oversight Commission. It is the duty of the commission to assure Alabama's compliance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

Section (17) establishes a County Welfare Reform Coordinating Council for each county. The council is established to further the goals of the family assistance work program. Each County Welfare Reform Coordinating Council is to act as a facilitator between local county employers and applicants for and recipients of the family assistance benefits.

Section (17) requires the Department to develop a personal responsibility contract for each family. Among other things the plan is to establish employment goals and to inform the individual of the services the Department may provide that individual toward reaching those goals.

Section (20) provides that generally each caretaker receiving assistance under the program is required to engage in work once the Department determines that the recipient is ready for work. Subsection (c) exempts adults from mandatory work activity under specified circumstances. Subsection (d) sets up the minimum average number of hours to work per week as not fewer than 20 per week or 35 hours per week for a two-parent family.

The act becomes effective July 1, 1997.

5. Alabama Child Support Reform Act of 1997—S.458

Section 3 authorizes the State Title IV-

D Agency to enter into agreements with financial institutions whereby when a financial institution receives notice of a lien or levy from the agency the financial institution shall encumber and surrender to the agency any amounts up to the amount of the lien in an account with the financial institution in the name of or available to be withdrawn by any non-custodial parent who is subject to a child support lien or levy.

Subsection 4 provides that the state Title IV-D Agency may secure information regarding an individual and the individual's employer through administrative subpoena to any public or private company or agency such as a utility or cable television company.

Section 5 requires a Social Security number of each party subject to a divorce to be included in the divorce certificate filed in the office of vital statistics. Moreover, all divorce decrees, support orders, paternity determinations and acknowledgments shall include in the record the Social Security number of each party subject to the decree order or deter-

mination or acknowledgment. Likewise the Social Security number of both parties to the marriage shall be placed on the marriage license and certificate sent to the Office of Vital Statistics. The Social Security number of each deceased individual shall be placed by the Office of Vital Statistics on the death certificate.

Section 6 provides for the establishment and operation of the State Disbursement Unit that shall provide for the collections and disbursements of payments made under support orders. Subsection (c) delineates the responsibilities of the State Disbursement Unit which includes providing one location for the employer to send the income withholding payments.

Section 7 provides for the establishment of a state Case Registry.

Section 8 provides the state title IV-D agents with broad powers in situations when there is no action pending before a court relating to parties or issues to establish paternity or to establish, modify or enforce support orders. Specifically, they are provided the authority to order



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genetic testing, to subpoena information, to order the implementation of withholding orders and increase the amount of monthly support payments to include arrearages if there is overdue support. Also in cases when there is a support arrearage the agency may intercept or seize periodic or lump sum payments from a state or local agency including worker's compensation and lottery winnings, as well as seizing assets of the obligor held in financial institutions and attaching public and private retirement funds. This section includes provisions for due process safeguards including requirements for notice and opportunity to contest the actions and an opportunity to appeal on the record to a judicial tribunal.

Section 9 concerns filing of notice of liens against real or personal property by the non-custodial parent who resides or owns property in this state and owes past due support payments under 42 U.S.C.A. § 666(a)(4).

Section 26-17-22 of the *Code of Alabama* is amended to provide that a signed, voluntary acknowledgment of paternity that is completed in accordance with that section is considered a legal finding of paternity subject to a right of rescission of 60 days. After the 60-day period, the signed, voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress or material mistake of fact. The burden of proof in that instance is upon the challenger.

Section 30-3-60 is amended to expand the definition of income to include any other continuous or periodic income from whatever source, whether earned or unearned except as

expressly limited by law. It specifically provides that income includes payments made pursuant to a pension or retirement program as well as unemployment compensation and workman's compensation and disability payments.

Effective July 1, 1997.

Advance Directive for Health Care

These two acts that deal with advance directives amend *Ala. Code* §§ 2-8A-2 through 22-8A-10 and a second bill that amends § 26-1-2.

Act #187—Advance Directives for Health Care enumerates that one can execute a document that may include a living will, the appointment of health care proxy or both. It further sets out a statutory form which is to be signed by the person granting the power and witnessed by two parties and a signed acceptance by the person accepting the health care directives. This Act was signed by the Governor and was effective on April 15, 1997.

Act #360—The second act, which is an amendment to Alabama's current durable power of attorney law, expressly provides that a person may designate, under a durable power of attorney, an individual who will be empowered to make health care decisions on behalf of an individual in the manner set forth in the Natural Death Act. It provides further that all durable powers of attorney executed prior to the effective date of this act shall be effective to the extent specifically provided in this act. This bill is effective May 8, 1997.

Law Institute Legislation

The following Law Institute drafted bills were also passed by the Legislature:

Uniform Multiple Persons Account Act—H.375

UCC Article 5 (Letters of Credit)—H.374

Uniform Interstate Family Support Act—Act #245

Transfer on Death Securities Registration—H.707

See March 1997 *Alabama Lawyer* for review of these bills.

The next "Legislative Wrap-Up" will include all other items passed during the 1997 Regular Session of the Legislature.

Institute Home Page—www.law.ua.edu/ali

The most recent information concerning any of the above bills can be obtained on the Internet by searching the Alabama Law Institute's home page. During the Session the status of the above bills has been kept up to date each Friday. The text of these bills is also available online along with bill numbers and sponsors.

Under the "Links to Law" related cites there is a "click on" to the home page for state government, which includes the Legislature, state agencies and constitutional officers such as the Governor's office and Secretary of State. There are also connections to the state bar, Alabama School of Law and Cumberland School of Law.

Anyone wishing any other or further information concerning the Institute or any of its projects may obtain this information by contacting Bob McCurley, Director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, Alabama 35486-0013; fax (205) 348-8411 or phone (205) 348-7411. ■

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Spring 1997 Admittees



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Number sitting for exam	369
Number certified to Supreme Court of Alabama	186
Certification rate*	50.4 percent
Certification Percentages:	
University of Alabama School of Law	71 percent
Cumberland School of Law	75 percent
Birmingham School of Law	38 percent
Jones School of Law	55.1 percent
Miles College of Law	4.3 percent

*Includes only those successfully passing bar exam and MPRE



Sophia Saint Berson (1997), Stephen D. Berson (1995) and Jack F. Saint (1982) admittee, husband and father



Elizabeth Utsey Sadler (1997), Leon Sadler (1995), William L. Utsey (1965) and Jeff Utsey (1995) admittee, husband, father and brother



William R. Mayfield (1997) and Robin Mayfield Weyant (1993) admittee and sister



John Kenyon Rainer (1997) and Donna Harrison Rainer (1997) husband and wife admittees



Theresa Ann Terrebonne (1997) and Victor L. Miller, Jr. (1980) admittee and fiance



Adler Rothschild (1997) and David B. Zimmerman (1994) admittee and son-in-law



Horace G. Williams, III (1996), Horace Williams (1968) and Chip Nix (1973) admittee, father and cousin



Jeremy P. Lucas (1997) and George P. Lucas (1980) admittee and father



Gregory Smalling Graham (1997) and A. Bruce Graham (1984) admittee and father



Natasha G. Waldrop (1997) and Charles W. Gamble (1968) admittee and uncle



L. Brooks Bardette (1997) and Alan Bardette (1981) admittee and brother



Arthur F. Ray, III (1997) and A. Kelli Wise (1995) admittee and wife



John M. Gibbs (1997) and Sebie Gibbs Sellers (1987) admittee and sister



Patrick B. Hale (1997), Oscar Hale (1976), Ashley Hale Rives (1994) and Robert D. Rives (1996) admittee, father, sister, brother-in-law



Laurel Ann Musto (1997) and Patrick Timothy Cronin (1997) wife and husband admittees



Lisa Whigham Taylor (1997), Jerry Taylor (1988), Boyd Whigham (1976) and Ed Kendall (1994) admittee, husband, father and brother-in-law



David Philip Lee Campbell (1997) and Robert Craig Campbell, III (1967) admittee and father



J. Bradley Proctor (1997) and Lister Hill Proctor (1968) admittee and father



John McClung (1997) and G.A. Lindsey (1958) admittee and father-in-law



C. Wilson Blylock (1997), Hendon Blylock DeBray (1981) and Thomas R. DeBray (1981) admittee, sister and brother-in-law



Thomas Firke Adams (1997) and Joe W. Adams (1968) admittee and father-in-law



Cynthia Wilson Williams (1997) and Paul C. Williams (1996) admittee and husband



Parker Steele (1997) and Judge Rodney R. Steele (1954) admittee and father



Kelly Cain Bachuss (1997) and Douglas R. Bachuss, Jr. (1996) admittee and husband



James H. Porter, III (1997), Louise C. Porter (1986) and James H. Porter (1965) admittee, wife and father



Wes McCollum (1997), Jere Beasley (1962) and Julie Beasley (1992) admittee, father-in-law and sister-in-law



David Jennings Wible (1997) and Jim T. Norman, III (1997) cousin admittees



Tammy S. Jones (1997) and Alfred Q. Booth (1979) admittee and cousin

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Johnson, Nicole McGill
Jones, Heather Clyde
Jones, Laurence Lea
Jordan, Jennifer Renee
Katz, Julie Frances
Kennedy, John Michael
Kornis, Paul Ricky
Lampkin, Paula Frances
Lavender, Rejeana Marie
League, James William III
Lee, Dale Ray
Lee, Vivian Lee Foster*

*Lindquist, Benjamin Lloyd
Lofis, John Lindsey
Logan, Henry Walter
Lucas, Jeremy Pierce
Luck, Aaron John
Manning, Albert Alan
Marshall, Foster Fitzgerald
Martin, Nathaniel
Mather, Richard Edward
Mayfield, William Rodgers
McArdle, Scott Thomas
McCartha, Jason Paul
McCartney, Sheila Joan
McClung, John Lacey
McColl, William Duncan D.
McCollum, John Wesley Jr.
McCoy, Ronald Chester
McDaniel, Kelli Frances
McGinnis, Janine Marie
McVeigh, Brian Alan
Miller, Michael Britt
Mills, Wallace Damon
Morgan, Michael David
Morris, Kathleen Brooks
Moxey, Richard Gwin III
Moyer, David Scott
Murdock, Douglas Craig
Musto, Laurel Ann
Nachtrieb, Dennis Wayne
Newell, Alfred Turenne IV
Newell, Michael Earl
Nix, Richard Davis Crozier
Norman, Jim Tom III
Norwood, Phillip Lane
Olmstead, Craig Drake
Paine, Michael Thomas
Partridge, Samuel Scott
Payne, Edward William
Peacock, David Allen
Porter, James Herrin III
Powell, Michelle Renee Brenny
Proctor, John Bradley
Rainer, Donna Harrison
Rainer, John Kenyon Sr.
Ramsey, David Wade
Ray, Arthur Franklin II
Rivers, Clarence IV*

*Roberts, Lisa Ann Brown
Rochester, Terrell Burtyn
Rothschild, Adler
Russell, Lee Martin Jr.
Rutland, Michael Alan
Sadler, Rachel Elizabeth Utsey
Sandlin, Ronald Phillip
Sherling, Braxton Paul
Smith, Jane Creekmore
Smith, Johnnie Lynn Branham
Snouden, Clarence Franklin III
Spilman, Joseph Leroy III
Stalley, Dana Ellen Burgess
Stankoski, Daniel Robert Jr.
Stankoski, Joseph Clark
Stanley, James Charles II
Steele, Parker Blair
Stoves, Jason Alexander
Strong, Claire Renee Crutchfield
Taylor, Helene Hoehn
Taylor, Lisa Whigham
Tellman, Robert Sidney III
Terrebonne, Theresa Ann
Thomas, David Dirk
Thomas, Gregory Charles
Thompson, Mark Lee
Tipton, Kelly Ann
Tufts, Robert Allen
Tyndall, Lee Griffin
Van Dyke, Judith Dianne Croft
Vickery, Barry Edward
Waldrop, Natasha Glyn
Wall, Benjamin Reynolds III
Westphal, Kristin Jean
White, Charlene Lashay
White, Robin Leann Elliott
Wible, David Jennings
Wilder, David James
Williams, Cynthia Denise Wilson Lashorn
Williamson, Mary Yvonne McLemore
Williford, Doris Hubbard
Windham, Vaneta Lynne
Woosley, Craig Noel
Zarzaar, Joseph Anthony Jr.*



MEMORIALS

Lisa Michelle Shannon

The Alabama State Bar lost one of its newest and most promising members on March 13, 1997 with the death of Lisa Michelle Shannon, age 25. Lisa was an associate with the law firm of Cabaniss, Johnston, Gardner, Dumas & O'Neal in Birmingham, Alabama.

Lisa was born on May 24, 1971 in Birmingham, Alabama. She attended Vestavia Hills High School and graduated in 1989 as its salutatorian. She was a talented member of her high school debate team and during her senior year was named the Birmingham Kiwanis Club Youth of the Year and the WVTM-Channel 13 Youth of the Year.

Lisa attended Wake Forest University on a Reynolds Scholarship and earned a B.A., *summa cum laude*, in English literature in 1993. On the dean's list all eight semesters, she was named to a number of academic honor societies, including Phi Beta Kappa, Omicron Delta Kappa, Golden Key Honor Society, Mortar Board, and Sigma Tau Delta. Despite her busy academic schedule at Wake Forest, she still found the time to volunteer as a Big Sister in the Big Brothers/Big Sisters organization. As a crowning achievement of her undergraduate career, she was chosen to speak at her commencement.

After Wake Forest, Lisa attended the University of Virginia School of Law. She was an editorial board member of the *Virginia Environmental Law Journal* and a teaching assistant in



first-year legal research and writing classes. She received her J.D. from Virginia in 1996 and was admitted to the Alabama State Bar that same year.

Lisa had a passion for the arts and for travel. She played the classical piano, studied art history, and read literature voraciously. She especially enjoyed reading British romantic poetry (John Keats was her favorite) and was an excellent poet herself. Her travels took her to Italy, England, France, Spain, and Germany, and in 1988 she went to the former Soviet Union as an American/Soviet Youth Ambassador.

The number of individuals who love Lisa and miss her greatly is legion.

She is survived by her parents, Dr. William M. and Charlotte A. Shannon; a sister, Mrs. Kimberly A. Hullett; a brother, Mr. David M. Shannon; a grandmother, Mrs. Edna M. Shannon; aunts Ms. Regina M. Shannon and Mrs. Judy K. Rushing; an uncle, Mr. William M. Striplin, III; and a beloved nephew, Kasey D. Hullett.

In honor of Lisa's memory, the Lisa Michelle Shannon Memorial Fund has been established to benefit a deserving student at Vestavia Hills High School each year. Contributions can be sent to:

Vestavia Hills High School

c/o Ms. Marilee Dukes, Debate Coach

2235 Lime Rock Road

Birmingham, Alabama 35216

—Joseph V. Musso
Birmingham, Alabama



Arthur Davis Shores

The Birmingham Bar Association lost one of its most dynamic members through the death of Arthur Davis Shores on Monday, December 16, 1996. He was a native of Birmingham, having been born in what is known as the Wenonah section of the city on September 25, 1904, and attended the TCI Schools and the Birmingham Public Schools. Arthur Shores was a graduate of Talladega College and LaSalle University.

Beginning a great career in 1937 after having served as a teacher and principal in the Bessemer City School System for a number of years, Arthur Shores entered the arena of law well prepared to face the vagaries of practice. His was a general practice, but

because of the life and times of the 1930s, 1940s, 1950s and 1960s, Arthur Shores became known as the protector of personal rights and civil liberties. He was involved in landmark decisions affecting equal pay for minority teachers, open accommodations in public facilities, voting rights and public school desegregation.

Not stopping with those notable achievements, Arthur Shores was instrumental, working with Dr. A.G. Gaston, in establishing the Citizens Federal Savings Bank in 1956 and was a part of the group that founded the American National Bank, now known as the National Bank of Commerce.

Known to many as a protector, Arthur Shores exemplified the very best in manhood. He was a loving husband and father, a proud serving mem-

ber of his church and a tireless civic worker. He was known nationally and internationally, but most important, he was well known in this state and this city.

Whereas, the Birmingham Bar Association mourns the death of one of its proud members who served untiringly in the legal profession for more than 50 years; and

Whereas, Arthur Shores was a true friend, gentleman and a fine example of what is good and honorable in men; and

Whereas, we are all better people and the quality of life in the State of Alabama has been advanced because of his work.

—Carol Ann Smith, president
Birmingham Bar Association

Robert Harold Allen

Eglin AFB, Florida

Admitted: 1975

Died: February 24, 1996

George Ross Bell

Birmingham

Admitted: 1947

Died: February 28, 1997

William D. Bolling

Mobile

Admitted: 1948

Died: November 17, 1995

Larry Wayne Dobbins

Boaz

Admitted: 1978

Died: January 26, 1997

Walter Eugene Garrett

Uriah

Admitted: 1953

Died: April 25, 1997

Thomas C. Hollingsworth

Birmingham

Admitted: 1982

Died: December 10, 1996

Herbert S. Rice, Sr.

Montgomery

Admitted: 1937

Died: April 24, 1997

Samuel Tenebaum

Birmingham

Admitted: 1924

Died: April 14, 1997

John Edward Wilson, Jr.

Mobile

Admitted: 1936

Died: January 1, 1997

Arthur J. Hanes

Birmingham

Admitted: 1948

Died: May 8, 1997

Michael Donald Cook

Valley

Admitted: 1973

Died: May 11, 1997

SHARON VANDERVORT • JOEL DUBINA
 PAUL BRANTLEY • ROBERT WINSTON LEE
 DEBRA GOLDSTEIN • GIRL SCOUTS
 BOY SCOUTS • MILTON WESTRY
 TANYA ROBINSON • ANITA KELLY
 ALEX HOLTSFORD • FLOYD GILLILAND
 JANIE GILLILAND • PHIL COLLINS
 TIM LEWIS • CHARLES HAIGER
 ANNA NORTHINGTON • MALCOLM
 CAIMICHAEL • WARREN LIGHTFOOT
 BRAXTON LOWE • KIM OLIVER • LYNN
 CAMPISI • DOUG MCELVEY • ED HAYDON
 TERESA NORMAN • TEDDI CARTTURNER
 LEURA GARRETT • RICK KUYENDALL
 JOHN BAKER • ROBERT MERRILL
 GRAHAM GEORGE • WILLIAM COLEMAN
 LAURA CRUM • EUGENE W. REESE
 TERRY L. BUTTS • ALVA MADDOX
 RENEAU P. ALMON • HAROLD F. SEE, JR.
 HENRY M. KENNEDY • RALPH COOK
 JANIE SHORES • BILLY BLEDSOLE
 PAMELA ROBINSON • SHARON YATES
 PAM BASCHAB • JOHN OLIVER II • SAM
 RUMORE • JOHN OWENS • ROBERT LUSK
 ED PATTERSON • MILTON MOSS • JEAN
 BROWN • DALE MARSH • JIM WILLIAMS
 MELISSA BURGESS • BONNIE MAINOR
 DAWN HOWARD • MYRNA MCHENRY
 RODERICK PALMER • JUDITH KEEGAN
 SUSAN WILKERSON • K. DAKES • J.S.
 HOOPER • SHEILA WALL • TRACY DANIEL
 JIM LOCKE • PEGGY GARRETT • KATHERINE
 CHURCH • PONZELLA FULLER • MELODY
 ALLISON • KARON BOWDRE • STAN
 STAINES • JEFF KIRBY • STEVE BENEFIELD
 MARSHALL TIMBERLAKE • ROONEY MAX
 CATHY WRIGHT • BRUCE BARZE • MIRIAM
 HARRIS • DEBORAH BRADEN • TWALA
 GRANT WALLACE • MICHAEL EMERT
 SUSAN HAYES • JILL EVANS • BRAD BISH-
 OP • MARIAN HUMPHRIES • DENNIS PAN-
 TAZIS JARRIED TAYLOR • JULIE MIXSON
 DWIGHT MIXSON • ASHLEY MIXSON • ALI
 WILBURN • CANDY CALDWELL • ADAM
 JONES • EVAN WILSON • SHERRI WILSON
 DENNIS ANDERSON • HENRY WHITE
 MARK WHITE • DR. LOWELL BROOM
 TRACEY WHITE • JANET BONDS
 DR. HELEN TROUGH • MARY LYNN BATES

The Making of the Video, “To Serve the Public”



The Alabama State Bar is continually being asked by its members,

“How do we improve the image of the legal profession today?”

Our answer is,

“One lawyer at a time.

One program at a time.”

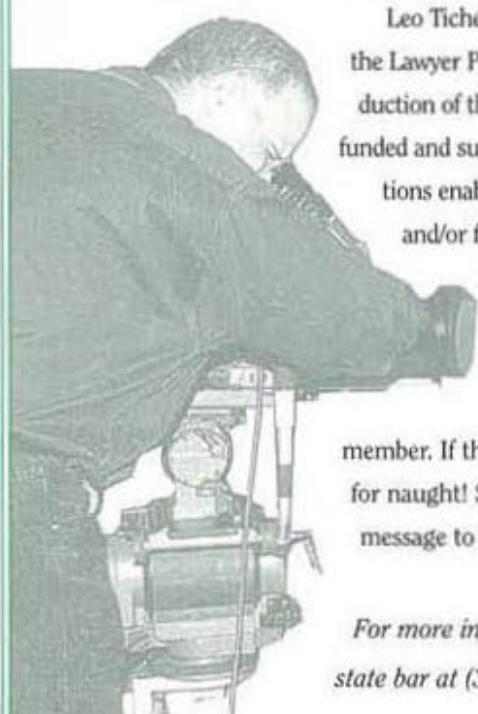
The ASB's ongoing effort to answer this question led to the development of a video presentation for lawyers to easily use in their own communities.

“To Serve the Public” is a complete public service video presentation that includes an eight-minute video, a handbook of speech points, and detailed informational brochures for the audience. Designed for use in speaking to civic and community groups, including schools, every local bar association in the state received at least one free copy of the video presentation and 300 brochures. Highlighted programs include Lawyer Referral Service, Alternative Dispute Resolution Center, Law Week, Drug Awareness projects and School Partnership programs.

Leo Ticheli Productions of Birmingham worked with a sub-committee of the Lawyer Public Relations Committee on shooting, editing and post-production of the video. The ASB Board of Bar Commissioners enthusiastically funded and supported the entire project. Five days of shooting in central locations enabled diversity in scenes and opportunities for over 60 lawyers and/or firms to participate. Designed for use during the upcoming three to five years, the video also allows editing of 30- and 60-second segments for radio and television announcements as part of a long-range relations plan.

The key to the program's success lies with each bar member. If the video is not seen by the public, our efforts will have been for naught! See page 221 to find out how you can get this important message to your community.

For more information, contact the Communications Department of the state bar at (334) 269-1515, ext. 8, 1-800-354-6154 or comm@alabar.org.





TO SERVE

THE PUBLIC



Law Week Activities



Marking the 40th Law Day celebration, this year's Law Day theme was "Celebrate Your Freedom". Included in the state bar-sponsored activities were a Partnership Program, placing lawyers in a year-long partnership with individual classrooms, and the second annual Law Day Essay and Poster contest, which drew over 1,000 entries this year. In addition, during Law Week Alabama attorneys volunteered to speak at schools and civic groups, conduct courthouse tours and provide answers to legal questions through free legal call-in lines. A unique program that has won national and state recognition took place in Escambia County, where high school seniors made up the jury in actual circuit court cases and determined the outcome of each case.

The winners of this year's Essay and Poster Contest were:

Poster Contest, Grades K-3

First Place—DeRyan Austin, Union Springs Elementary

Second Place—Megan S. Graves, Crestline Elementary, Hartselle

Third Place—Lashonda Wheeler, Union Springs Elementary

Honorable Mention—Chloe Jeffries, Walker Elementary, Northport

Poster Contest, Grades 4-6

First Place—T.J. Scarbrough, Baker Elementary, Mobile

Second Place—Chris Roberts, Baker Elementary, Mobile

Third Place—Lyle Curry, Floyd Middle School, Montgomery

Honorable Mention (tie)—Matthew McKim, Head Elementary, Montgomery; Kimberly Cauthen, Vaughn Road Elementary, Montgomery; Ifueko Osemwota, Bear Exploration School, Montgomery

Essay Contest, Grades 7-9

First Place—Lynette Frazier, Baldwin Junior High School, Montgomery

Second Place—Rachel McAbee, Hartselle Junior High School

Third Place—Bill Walker, Hartselle Junior High School

Essay Contest, Grades 10-12

First Place—Sarah Beasley, Muscle Shoals High School

Second Place—Lisa M. Sutterfield, Carroll High School, Ozark

Third Place—Kelle Cokeley, Carroll High School, Ozark

Honorable Mention—Karen Andrews, Carroll High School, Ozark

In addition, the State Law Library awarded a special Award of Merit for Creativity to fourth-grader Fae Zirlott of Hollinger's Island School in Theodore for the most creative poster.

First, second and third place winners receive U.S. Savings Bonds. Honorable mentions, as well as all participating schools throughout the state, receive certificates of recognition for their participation.



Law Day Committee members join volunteer judges from the JAG school at Maxwell AFB in presenting 1997 Law Day Poster Contest winners.

“To Serve the Public”

“It is really powerful . . .”

“The Lawyer’s Creed was so impressive—it reminded me of what a lawyer is supposed to be. . .”

“It makes me proud again to be a lawyer.”

— LAWYERS’ COMMENTS ON THE VIDEO

“I didn’t realize how many programs you had to help the public.”

“How can our school participate in your partnership program?”

“It was an excellent video ... with lots of helpful information.”

— THE PUBLIC’S COMMENTS ON THE VIDEO

HOW CAN YOU DO YOUR PART?



- **Make sure your bar association sees the video as soon as possible.**
- **Take every opportunity to show this presentation in your community, from schools to churches to civic groups and organizations.**
- **If you haven’t already volunteered, check YES below to volunteer to present the program in your area when requested. Then fax the form to COMMUNICATIONS at (334) 261-6310.**

TO SERVE THE PUBLIC is a complete public service video presentation that includes an eight-minute video, a handbook of speech points and detailed informational brochures for the audience. Designed for use in speaking to civic and community groups, including schools, every local bar association in the state received at least one free copy of the video presentation and 300 brochures. Highlighted programs include Lawyer Referral Service, Alternative Dispute Resolution Center, Law Week, Drug Awareness Projects and School Partnership Programs. Using guidelines and information provided to them, Leo Ticheli Productions of Birmingham worked with a sub-committee of the Lawyer Public Relations Committee on shooting, editing and final production of the video. The ASB Board of Bar Commissioners enthusiastically funded and supported the entire project. Five days of shooting in central locations enabled diversity in scenes and opportunities for over 60 lawyers and/or firms to participate. Designed for use during the upcoming three to five years, the video also allows editing of 30- and 60-second segments for radio and television announcements as part of a long-range public relations plan.

Objectives of the Lawyer Public Relations Committee project were to: 1) highlight public service programs and resources of the state bar, focusing on the public as the true beneficiary of our legal system; 2) feature real Alabama lawyers involved in their communities to present a positive message about the legal profession in Alabama, and 3) make it easy for individual attorneys to take this message out to their communities.

The key to the success of the program lies with each individual bar member. If the video is not seen by the public, our efforts will have been for naught!

The challenge now is for Alabama attorneys to use this presentation in each of their communities to help create that positive image ... “one lawyer at a time”.

**FOR FURTHER INFORMATION, CONTACT COMMUNICATIONS, ALABAMA STATE BAR
AT (334) 269-1515, 1-800-354-6154, OR comm@alabar.org.**

____ YES, I will volunteer to assist in presenting the ASB **TO SERVE THE PUBLIC** video to civic, school and community groups in my area.

NAME _____ BAR ASSOCIATION _____



DISCIPLINARY NOTICE

Reinstatement

•Former Birmingham attorney **Cecil W. Elledge, Jr.** was reinstated to the practice of law by order of the supreme court, effective April 14, 1997. [Pet. No. 92-007]

Disability

•Gadsden attorney **Jim Lester Wilson** was transferred to disability inactive status, effective April 15, 1997. Wilson's transfer was ordered by the Supreme Court of Alabama pursuant to a prior order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c); Pet. No. 97-03]

•Birmingham attorney **Michael Alan Newsom** was transferred to disability inactive status, effective March 7, 1997. Newsom's transfer was ordered by the Supreme Court of Alabama pursuant to a prior order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c); Pet. No. 97-02]

Disbarments

•Birmingham attorney **Anthony M. Falletta, III** has consented to disbarment by order of the Alabama Supreme Court, dated April 17, 1997. His name has been stricken from the roll of attorneys licensed to practice law in the State of Alabama. Falletta's disbarment was a result of his having been convicted in the United State District Court for the Northern District of Alabama for conspiracy to commit extortion, failure to file an income tax return in connection with a cash-related transaction and tampering with a witness. [Rule 23(a)(2); Pet. No. 97-04]

•Mobile lawyer **Thomas Earle Bryant, Jr.** was disbarred by order of the Supreme Court of Alabama effective March 26, 1997. Bryant has consented to disbarment based upon his felony conviction in the Circuit Court of Montgomery County, Alabama for a charge of six counts of theft of property, first degree. [Rule 23; Pet. No. 97-01]

Suspensions

•Pelham attorney **William Felix Matthews** was interimly suspended by Order of the Disciplinary Commission of the Alabama State Bar, effective May 23, 1997. Matthews was suspended pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure.

The Office of General Counsel filed a petition pursuant to Rule 20(a) based upon Matthews' refusal to comply with

repeated requests for information from the Office of General Counsel.

The Disciplinary Commission further ordered that **Matthews** be restricted from maintaining a trust account. [Rule 20(a); Pet. No. 97-09]

•Eufaula attorney **Christie Gregory Pappas** was interimly suspended by Order of the Disciplinary Commission of the Alabama State Bar, effective May 20, 1997. Pappas was suspended pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure.

The Office of General Counsel filed a petition pursuant to Rule 20(a) based upon affidavits evidencing that Pappas had engaged in and continued to engage in a pattern of multiple instances of unprofessional, improper and fraudulent conduct.

The Disciplinary Commission further ordered that Pappas be restricted from maintaining a trust account. [Rule 20(a); Pet. No. 97-08]

•On March 27, 1997, Mobile lawyer **Harry S. Pond, IV** was temporarily suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar. Based on information provided, the Disciplinary Commission concluded that Pond's continuing conduct was likely to cause immediate and serious injury to a client or to the public. The Alabama State Bar must bring formal charges against Pond within 28 days of the interim suspension. [Rule 20(a), Pet. No. 97-002]

•On March 21, 1997, Tuscaloosa lawyer **Darryl Clarence Hardin** was temporarily suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar. Based on information provided, the Disciplinary Commission concluded that Hardin's continuing conduct was likely to cause immediate and serious injury to a client or to the public. [Rule 20(a); Pet. No. 97-003]

•On April 14, 1997, Tuscaloosa lawyer **John Archie Acker, Jr.** was temporarily suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar. This suspension follow Acker's conviction of a "serious crime" pursuant to Rule 20 of the Rules of Disciplinary Procedure. [Rule 20(a); No. 97-004]

•On April 21, 1997, Birmingham lawyer **Huel Malone**

Carter was temporarily suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar. This suspension follows Carter's convictions of "serious crimes" pursuant to Rule 20 of the Rules of Disciplinary Procedure. [Rule 20(a); No. 97-006]

• On April 21, 1997, Birmingham lawyer **Robert James Hayes** was temporarily suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar. This suspension follows Haye's convictions of "serious crimes" pursuant to Rule 20 of the Rules of Disciplinary Procedure. [Rule 20(a); No. 97-007]

• On April 21, 1997, Birmingham lawyer **Robert Bryan Roden** was temporarily suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar. This suspension follows Roden's convictions of "serious crimes" pursuant to Rule 20 of the Rules of Disciplinary Procedure. [Rule 20(a); No. 97-005]

• By order of the Supreme Court of Alabama, Birmingham attorney **David E. Hampe, Jr.** was suspended from the practice of law in the State of Alabama for a period of 60 days effective April 25, 1997. Hampe was found guilty of sharing legal fees with a non-lawyer in violation of Rule 5.4, Alabama Rules of Professional Conduct. [ASB No. 94-71]

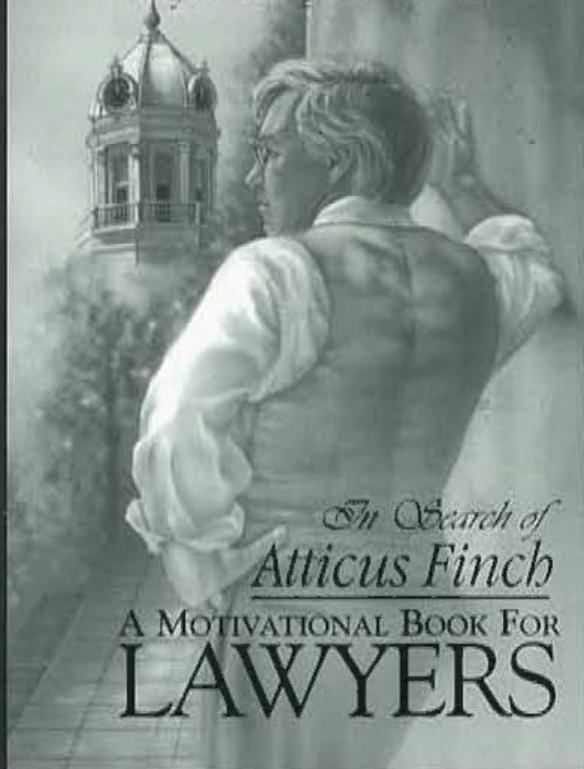
• On May 9, 1997 the Alabama Supreme Court entered an

order suspending **Barbara C. Miller** for a period of 91 days effective May 9, 1997. Miller was initially suspended by the Disciplinary Board of the Alabama State Bar on October 18, 1995. Miller appealed to the Alabama Supreme Court and the suspension was affirmed on September 6, 1996. An application for rehearing was overruled on April 16, 1997. A suspension of 91 days or more requires the lawyer to petition to be reinstated to practice law. [ASB No. 95-192]

Public Reprimand

• Bessemer lawyer **Richard Larry McClendon** received a public reprimand without general publication for having failed to comply with a request for information from a disciplinary authority, a violation of Rule 8.1(b), Alabama Rules of Professional Conduct. Four separate grievances were filed against McClendon with the Alabama State Bar. However, attempts by the Office of General Counsel of the bar to investigate these matters were frustrated by McClendon's failure to timely respond to the grievances in question. McClendon pled guilty to a violation of Rule 8.1(b) in each of the four matters, and received a separate reprimand for each case file. Further, McClendon was placed on a two-year probationary period, during which time he is to file semi-annual reports to the Office of General Counsel concerning his continued evaluation and counseling by a professional counselor. [ASB Nos. 92-368, 92-460, 93-317 & 93-368] ■

Mike Papantonio
with foreword by Morris Dees



A must read for every lawyer in America today!

"On a warm June night in 1966, I saw *To Kill a Mockingbird*. When Atticus Finch walked from the courtroom and the gallery rose in his honor, tears streamed down my face. I wanted to be that lawyer. Mike Papantonio's *In Search of Atticus Finch* shows how we can all be Atticus Finches, both as lawyers and people."

— Morris Dees

Southern Poverty Law Center

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— John F. Romano, Editor

Trial Diplomacy Journal

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— James O. Haley

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PROGRAM HIGHLIGHTS

"MUST-SEE" PLENARY!

GOOD LAWYERING IN THE '90s:

Secrets Good Lawyers and Their Best Clients Know
Noted lawyer/author Stephen Comiskey, McLean, Virginia, shares his insights.
Co-sponsored by West Group and ASB.

A LOOK BACK — A LOOK AHEAD

ASB President Warren B. Lightfoot moderates blue ribbon panel featuring former chief justices Howell Heflin, C.C. "Bo" Torbert and Ernest C. "Sonny" Hornsby.

ALABAMA STATE BAR

WELCOME HOME!

COMING HOME TO MONTGOMERY

Alabama State Bar 120th ANNUAL MEETING

July 16-19, 1997
Montgomery

CUTTING-EDGE TOPICS

FOCUS ON THE FUTURE

BEYOND COMPUTER BASICS:

Telecommunications and the Internet for Lawyers
Frederic S. Baum, esq., New York, N.Y. helps you discover the present — and the future — of law on the Internet.
Co-sponsored by Lexis-Nexis and ASB.

A-Z: NUTS AND BOLTS OF STATE COURT PRACTICE

This seminar features Supreme Court Justice Ralph Cook and former Circuit Judge Kenneth Simon. Presented by Alabama Lawyers Association.

Thursday morning's plenary speaker, Stephen W. Comiskey, will motivate you while discussing why you should be less concerned, or even unconcerned, about the public's apparent dissatisfaction with the legal profession generally, and more concerned, or even only concerned, about whether clients are satisfied with you as their lawyer. Comiskey will explain why you can only be a good lawyer to your own clients, and why that's what you should

measure your own success and satisfaction against.

Comiskey's specific guideposts for good lawyering are found in his book, *A Good Lawyer*, as well as some of the principles and traits of a good lawyer.

A Good Lawyer will be available for purchase at the state bar's registration table for a reduced price of \$20 each or you may purchase a copy directly from Comiskey & Hunt at \$25 per copy.

PACT—A State Program for College Savings

Are you worried about the affordability of a college education for your children? The rising cost of higher education is one of the major concerns facing families today. According to the United States General Accounting Office, college tuition has increased 234 percent since 1980. In contrast, the median family income increased by only 82 percent. Accordingly, the portion of family income required to pay college tuition nearly doubled.

As the cost of college tuition continues to increase at an alarming rate, families are uncertain of how to plan and save to meet college expenses. Alabama's Prepaid Affordable College Tuition (PACT) Program offers a solution. PACT is a state program administered by State Treasurer Lucy Baxley's office. A contract for the prepayment of four years of college tuition and mandatory fees is offered to the public for Alabama children in the ninth grade or younger.

Parents, grandparents or any other sponsor may purchase a contract for a child who is a resident of the state. The price of the contract is based on the age of the child at the time of purchase, with a choice of three payment options. Currently, the average public tuition for one year is \$2,331. Based on this average and future increases, PACT will pay approximately \$11,900 for a 1997 high school graduate's college tuition. When you contrast this with the 1997 lump sum payment of \$7,457 for a newborn, PACT should appeal to most families who are looking for a good savings plan.

The 1997 enrollment period will be September 1-September 30. For additional information and an application, call the PACT office at 1-800-252-7228 or (334) 242-7514.

Time is money.
We'll save you both.



Here's a business proposition from Avis just because you're a member of **Alabama State Bar**. We'll give you special discounts at participating Avis locations. For example, take **20% off** our **Avis Select Daily** rates and **5% off** promotional rates. What's more, Avis has some of the most competitive rates in the industry. And with the **Avis Wizard® System**, you'll receive our best available rate when you mention your **Avis Worldwide Discount (AWD) number: A530100**.

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So make it your business to take advantage of all the member benefits that Avis has waiting for you. Please show your **Avis Member Savings Card** or **Association Membership ID card** at time of rental. For more information or reservations, call Avis at: **1-800-831-8000**. And be sure to mention your **Avis Worldwide Discount (AWD) number: A530100**.

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Alabama State Bar Members
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	17	Elder Law: What Every Practitioner Must Know in Giving Legal Advice - Birmingham
	24	Medical Malpractice - Birmingham
	31	Civil Procedure/Appellate Practice - Birmingham
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RECENT DECISIONS

By Wilbur G. Silberman

Third Circuit follows Eleventh Circuit in holding punitive damages resulting from "fraud judgment" are non-dischargeable

Cohen v. DeLa Cruz (In re Cohen), 106 F.3d 52, (3rd Cir. Feb. 6, 1997). Landlord was held to have been guilty of fraud by reason of over-charging his tenant. The landlord filed chapter 7. The bankruptcy court, which was affirmed by the District Court, held that the debtor had violated the State law and allowed treble damages. The total amount of the judgment was determined to be non-dischargeable. On appeal to the Third Circuit, the question was the dischargeability of punitive damages.

The court first stated that under Section 523(a)(2)(A), there is a conflict among the circuits as to its interpretation. The subsection presently reads: "(a) a discharge under...this title does not discharge an individual debtor from any debt...(2) for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by (A) false pretenses, a false representation, or actual fraud...." The Ninth Circuit has held that the words "to the extent obtained by" limit the exception to compensatory damages only, while the Eleventh Circuit held that the lan-

guage does not exclude punitive damages. The Third Circuit in this case determined that it would follow the Eleventh. In so doing, it reasoned that liability under state law for damages incurred by fraud, punitive as well as compensatory, constitute a debt under the Bankruptcy Code. The Third Circuit distinguished the analysis of the Ninth Circuit, and flatly disagreed, stating that the Ninth Circuit's reasoning "strained the structure of the statute as a whole...." The opinion concluded by holding that the language in question does not distinguish actual from punitive damages, but rather contractual debts tainted with fraud from debts for mere contract or failure to pay.

Comment: Note that the decision follows the Eleventh Circuit, but that the statute refers only to "false pretenses, a false representation, or actual fraud," and thus punitive damages unless covered by another exception, could be dischargeable.

Second Circuit admonishes district judges on relief from stay under §363(m)

In re Gucci, 105 F.2d 837 (2nd Cir. Jan. 30, 1997). The bankruptcy court authorized the chapter 11 trustee to sell the Gucci trademarks and licensing rights. Certain parties immediately sought a stay pending appeal to the district court which was denied. The district court affirmed the bankruptcy court, and denied a stay pending appeal to the circuit court. The district judge also denied a brief stay to allow the appellants time to seek a stay in the Second Circuit.

On appeal, the Second Circuit first stated that for an *unstayed* order of sale, its power was limited to whether the property was bought by a purchaser

in good faith, citing the Eleventh Circuit case of *In re the Charter Co.*, 829 F.2d 1056 (1987); regardless of the merit of the challenge, the appellate court, in absence of a stay cannot modify or reverse, other than for the lack of good faith by the purchaser.

The appellate court then added that it is important that district judges "appreciate the special consequences of denying a stay of a bankruptcy sale, even a very brief stay to permit this court time to consider whether it believes a stay pending appeal is warranted...." [I]n this age of wire fund transfers, a district judge deciding *whether* to stay a bankruptcy sale pending appeal or pending appellate consideration of such a stay, should be aware that a closing occurring immediately after a stay is denied will substantially limit the scope of an appeal.

Comment: The admonition refers only to the district court, but it would seem that it would equally apply to the bankruptcy court, where the first motion for a stay is made.

Bankruptcy Judge Jack Caddell sanctions credit union \$15,000 for violation of discharge injunction

Matter of Harvey L. Arnold, 206 B.R. 560 (Bkrty N.D. Ala.). The credit union pursued debtor's wife for collection of a deficiency balance of \$5,395.81 on an automobile loan of which she was a co-debtor, and which was discharged in her husband's bankruptcy. After debtor's wife could not resolve the matter, the credit union required debtor to agree to pay the "discharged debt", which would allow him to rejoin the credit union. A note was executed by both, with over \$10,000 being paid over the next five years. After discovering the credit union might be



Wilbur G. Silberman

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guilty of the discharge injunction, the debtor initiated a proceeding to have the matter reopened. The bankruptcy court first held that the credit union failed to meet the requirements of §524(c) as to reaffirmation, that repayment was not voluntary under §524(f) as it was made under extreme pressure, and that under the Eleventh Circuit opinion in *In re Hardy*, 97 F.3d 1384, 1388, sanctions may be awarded, albeit caution should be exercised. Judge Caddell then determined that the credit union was guilty of willful "disregard and disrespect of the bankruptcy laws with malicious intent," and required a credit of funds collected in full satisfaction of the wife's debt, refund of the balance to the debtor with 18 percent interest, refund of certain other payments, payment of attorney's fee of \$2,431.25, and \$15,000 punitive damages.

Comment: This was an egregious case, but it should be a wake-up call to overzealous lenders.

Release of chapter 7 debtor from guaranty of corporation is reasonable equivalent value to defeat fraudulent conveyance claim, but is not new value for purpose of preference if corporation is insolvent

In re Martin, 206 B.R. 646 (Bkrtcy M.D. Ala. 1993). The trustee filed a preference action for recovery of \$105,062.49 paid within 90 days of a chapter 11 bankruptcy. The defendant insurance company contended the debtor, Don Martin, and C&C Land Company were alter egos and that C&C gave new value making the alleged preference non-avoidable. According to the facts, C&C in March and April 1980 contracted to purchase 50 residential lots from Alfa, and on April 6, 1988 in addition to cash gave a mortgage of \$242,500 to Alfa. Martin executed the note as president of C&C, and also gave a personal guaranty. After various payments and extensions, on November 3, 1989, Martin Realty and Construction Company paid \$105,062.49 to Alfa in full payment of the balance. The trustee sued to recover this payment as a fraudulent conveyance as Martin, the debtor, received no consideration, the value having gone to C&C. The court rejected this contention, determining that debtor was a contingent creditor because of the guaranty, and as such there was a reasonable equivalent value by the extinguishment of the guaranty.

The trustee also contended that the payment was preferential. Alfa defended on the ground that C&C was the alter ego of the debtor, and would be paid in full from the bankruptcy proceeds as a secured creditor. The court denied the alter ego theory on the facts. It also held against Alfa on the argument that Don Martin indirectly received a benefit as the sole stockholder of C&C, stating that as C&C was insolvent, there was no monetary benefit. Lastly, it rejected affirmative defenses under §547(c)(1) and (2) holding there was no substantially contemporaneous exchange for new value, as the alleged new value did not go to the debtor.

Comment: I have no opinion as to why a 1993 case is now being reported. This was reported in the April 9, 1997 advance sheet of West. The case was affirmed on appeal to the Eleventh Circuit. ■

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Consumer Finance— The Fuel That Drives the Economy

By Maurice L. Shevin

The United States of America has produced the most enviable systems of government and economics in the world. Our democratic values are the model for freedom-loving people everywhere. Our democratic form of government has fostered the development of capitalism. It is the partnership between capitalism and democracy that has spurred the development and production of consumer goods that have made our lives both richer and more fulfilling.

A Walk Through Time

Consumer goods were not always so readily available in our country. In the late 19th century, the United States economy was undergoing transformation from an agrarian to an industrial society. There were no mass-manufactured consumer goods to speak of. The average working-class citizen, newly urbanized, could rarely get access to even small amounts of credit. The financial system in existence at the time did not fill this need.

Banks, at that time in our history, were basically commercial lending institutions. We have such a wide range of choices today for the obtaining of credit (e.g., banks, thrifts, credit unions, credit cards, retailers, mortgage banks, and finance companies) that it is

hard to imagine life without credit sources. However, grantors of consumer credit and credit opportunities largely did not exist in the 19th century. Banks alone controlled capital, and that meant that for the average person no money was available. Another capital source was clearly needed and came in the form of the consumer finance company.

The origins of the finance industry started with the jewelry business. Frank Mackey was a jeweler who began offering unsecured personal loans to average income consumers in order to support the purchase of his goods. This is how Household Finance Company started in 1878, becoming the first of many companies that have stepped in to serve the credit needs of America's consumers. (*Global Funding/Local Lending: The Market Funded Consumer Lending Industry*, Furash & Company, April 1995.)

There were early legal impediments, including usury laws which did not permit lending at rates that were profitable enough to support time-price sales. In the late 19th Century, loan sharks were widespread, charging abusive interest rates. The lack of legitimate consumer credit and the problems associated with the underground market prompted a study in 1907 by the Russell Sage Foundation. As a result of the study, there was widespread adoption of the Uniform Small Loan law drafted in 1916. (*Technical Studies of the*

National Commission on Consumer Finance, 1972, p. 388.)

This law established guidelines for the provisions of small cash loans. It mandated an all-inclusive fee to prevent hidden charges. It also raised the usury ceilings to make small lending profitable, setting the ceiling for small loans at 3.5 percent per month. By 1922, 24 states had adopted reform legislation patterned after the Uniform Small Loan law. Today's Alabama Small Loan Act rate is 3 percent per month on amounts not in excess of \$200, and 2 percent per month on the next \$550. (See § 5-18-15 *Code of Alabama* (1975, as amended).)

The Uniform Small Loan law effectively legitimized the consumer finance industry, allowing it the opportunity to grow and prosper. Until the 1930s, finance companies were essentially the only consumer lenders in the United States. The first large commercial bank with a committed consumer loan program was National City Bank of New York in 1928, the predecessor to CitiCorp. Commercial Banks did not enter the consumer loan market to a significant degree until the late 1930s. Prior to that time, some banks had an expertise in discounting and taking assignment of consumer credit contracts. One example of such a bank active in Louisiana and the south was the Bunke Bank of Louisiana. Thus, these banks were indirectly in the consumer finance business.

During the Great Depression, finance companies enabled their customers to purchase hard goods, appliances and cars, while the banks withdrew from the market. Throughout its history, the consumer finance industry has been responsible for most of the innovations in consumer finance, including credit cards, automobile financing, and home equity lines of credit.

World War II caused great interruption in consumer finance in the United States. By the 1950s, however, demand for consumer credit re-emerged and consumer finance lenders played that decade's prominent role in providing credit to blue collar, lower and middle income workers. Beginning in the 1950s, America saw the finance companies affiliated with the automobile manufacturers, such as Ford Motor Credit, GMAC and Chrysler Financial, begin to take off. What followed was an unprecedented growth in the sale of automobiles to the average consumer. Similarly, as a result of the programs originated by Household, Beneficial and others, durable consumer goods became widely available.

The types of loan products offered by consumer finance companies include secured and unsecured personal loans, the financing of small ticket items at retail stores to the financing of the purchase of automobiles, home equity lines of credit, residential first mortgages and credit cards. It is undeniable that the availability of consumer credit has not only supported, but driven, the mass production of consumer goods, which has in turn driven the American economy to ever increasing heights.

A Highly Regulated Industry

The consumer finance industry is one of the most heavily regulated industries in the United States of America today. Since most of us, from time to time, borrow money or make purchases on an installment basis, the government rightfully regulates this industry. The finance industry is subject to a multitude of federal statutes including: the Federal Truth-In-Lending Act, the Consumer Leasing Act, the Fair Housing Act,

the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Real Estate Settlement Procedures Act, the Home Mortgage Disclosure Act, and the Fair Debt Collection Practices Act, to name just a few of the federal laws. There are countless federal regulations as well, including a vast array of trade regulation rules promulgated by the Federal Trade Commission and the Federal Reserve Board.

In addition, every state in the United States regulates the consumer finance industry. Thus, consumer finance companies which operate in more than one state are licensed and examined by each state and must comply with a different set of rules in every state in which they operate. These rules commonly include limitations on rates of interest, maturity and types of loan. In addition, the states frequently regulate the method of rate calculation, rebate requirements, loan size limit, convenience and advantage testing, maximum rates on credit insurance, and mandatory disclosures.

Further, consumer finance companies are subject to the general overlay of federal law and regulations including anti-trust, equal employment opportunity, environmental laws and so forth. The large finance companies that go to the capital markets for money must also be concerned with the rating of their debt securities. Accordingly, not only are all levels of government involved in oversight, but market forces provide some of the best oversight in connection with consumer finance lending.

There are over 1,200 licensed consumer finance companies operating in Alabama today, employing thousands of Alabamians. These licensees' gross outstanding in 1996 total more than \$10.3 billion. The scrutiny that licensees undergo in our state is formidable. Only a handful of industries come anywhere close to having the same level of oversight.

The Customer Base

Unlike commercial banks, consumer finance companies tend to serve more marginal consumers. The customer base tends to be older than the general population for all product lines. The median age customer for almost every product line offered by finance companies is closer to 40 and is well above 40 for real estate-related borrowing. The median age in the United States of America in 1995 was 34 years. (Survey results undertaken by Furash & Company)

The customer base of finance companies tends to include more blue collar workers and retired people, i.e., those not generally served well by commercial banks. The customer of con-

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sumer finance companies tends to have a lower household income than the median national household income level of \$33,290. The median family income of finance company borrowers for home equity loans in 1993 was \$35,000 versus \$50,000 for bank and thrift customer loans. (University of Michigan, Survey of Consumers, November 1993 to March 1994.) According to Federal Reserve Board data compiled in a 1992 survey, finance companies' customer base has a higher percentage of non-white and Hispanic homeowners—22 percent for finance companies versus 5 percent at banks and thrifts. Data available from the Federal Reserve survey shows that consumer finance company borrowers tend to have lower incomes. They are less educated, and include a higher percentage of non-white borrowers, are less likely to own a home, less likely to have a checking account and have a slightly higher ratio of debt payments to income than bank borrowers. Certainly, the finance company customers are less sophisticated than the bank customer on the average. They tend to have more of their financial assets in

retirement accounts and cash value of life insurance, less in stocks, mutual funds and bonds, and about the same share in transaction accounts, CDs and savings bonds and other managed funds.

However, the important point that must not be overlooked is that if only bank loans were available to American consumers, the credit needs of our nation would be vastly under-served. Those customers who are credit-impaired because they have low income, no credit history, poor credit history, or have made lifestyle choices that limit their ability to get bank loans would have a very difficult time making purchases on credit. Customers with complex financial situations, such as self-employed people, would not find it easy to borrow at commercial banks. And, there are people who are simply intimidated and who do not feel welcomed by banks.

The Business Reality

Typically, it is easier and quicker to get a loan at a finance company than at a bank. Finance companies sometimes charge a

higher price for loans than banks—but certainly not always. It is unquestionable that finance companies take on more risks, offer loans that require more interaction with the borrower, and provide more service and flexibility than commercial lenders. The trade-off between price on the one hand and service and flexibility on the other is one of the differentiating factors between the two groups of lenders. The costs to finance companies of the additional risks they accept, and of providing the service and flexibility that they offer, often account for the price differences. Lending to credit impaired and lower income individuals requires more interaction by the lender with the borrower. "Character" of the borrower is a critical factor in the likelihood of repayment, and must be relied upon even more heavily in the absence of financial resources available to middle and higher income borrowers with strong credit histories. It is a fact that lower income borrowers are more likely to skip payments frequently and/or default. This type of lending requires a special expertise and a commitment to a localized distribution system.

The fixed cost of making small loans is a factor that also must not be ignored. It takes the same amount of or more effort to originate and service a small loan of than a large one. Funding costs for the finance company have traditionally been higher as well. Therefore, interest rates must cover the higher costs of funding and of servicing the loans as well as covering the higher risks, while always keeping in mind that the purpose for entering business is a return on equity, i.e., making a profit. Profit is not a dirty word, and one that we as Americans surely recognize as being the hallmark of capitalism.

When you put all of this together, the lending risks, the cost of capital, the distribution system necessary for the operation of consumer finance companies, the burden of regulatory oversight, and the market oversight, it is easy to understand why consumer finance companies often must charge rates in excess of those of commercial banks in order to make an acceptable level of profit. When one studies the relationship between the American economy and the consumer, it becomes easier to understand the valuable service performed by consumer finance

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companies, and the role that they serve in our economy.

The Human Reality

There are those in Alabama and elsewhere who see the finance company lender as the Shylock in Shakespeare's *Merchant of Venice*. They paint all companies that finance receivables or make consumer loans with the same brush—whether a multi-billion dollar automobile finance company, a major retailer in the market, a local finance company, or a pawn shop, check-cashing outlet, or a rent-to-own center. Such generalizations are generally misguided, and if allowed to govern our actions, would result in a devastating blow to the economics of our state, if such views prevail.

For every story that a consumer advocate relates concerning the unfairness, immorality or unlawful conduct of a finance company employee, there are equally compelling stories that lenders can relate about how a consumer unfairly, immorally and illegally entered into a consumer credit transaction with the specific intent to defraud the lender or credit retailer. The bankruptcy reporters are full of cases dealing with consumer fraud. Credit insurance companies too frequently pay claims only to find that pre-existing conditions were not truthfully disclosed. And what of the pervasive standard which seems to have become the norm that contractual amounts and due dates of payment are apparently only "targets" and "goals", and not binding obligations? The few instances of obnoxious and excessive lender behavior make for great anecdotes and even better lawsuits. However, they are still statistical anomalies.

There have always been, and always will be, bad actors in every walk of life. We have politicians who sometimes abuse the public trust. We have lawyers who sometimes steal their clients' money. However, to paint all politicians as corrupt and all attorneys as thieves would be not only untrue, but tragic.

Alabama suffers from chronic illiteracy and poverty. These conditions do account for the many low-paying jobs that abound in our state. Low-income earners account for a large percentage of finance company customers. However, this segment of the economy is entitled by law to credit. Only utopian social planners would deny credit to lower and middle income consumers. To lay the historical factor of illiteracy and poverty at the doorstep of the consumer finance industry is patently absurd.

To say that credit insurances that are sold in connection with consumer credit transactions are a waste of money and are *per se* fraudulent transactions, only shows the failure of understanding of those who would advocate such a position. The fact of the matter is that credit insurance is a valuable product to assist those who borrow with the intent to repay their debts, but are set back by disability, unemployment and even death. The fact is that lower income, blue collar workers are not often solicited by life insurance agents to buy standard term or whole life policies. The best availability of such products for these consumers is often found at the finance company or credit retailer. The premium on such insurances is not pure profit. There is a real risk which is insured, and insurance claims are paid each and every day on behalf of customers who have covered losses.

There are more consumer finance transactions entered into in the United States of America on a daily basis than any other

type of bilateral transaction. It is not unreasonable to expect that there will be a large number of abuses, even occurring daily. However, for the hundreds of millions of transactions that occur each year, the percentage of consumer credit transactions that are consummated to the consumer's satisfaction, and in accordance with law and regulation, is extremely high.

Conclusion

Do we indict an industry because of a few practices that some deem unworthy? While not advocating for a purely free market, "anything goes" approach to consumer finance, I hope that we are long past the point in this country that Big Brother tells us what lifestyle decisions to make.

Regulation is the art of drawing a fine line. Regulation must be carefully thought through. Poor and overly restrictive laws and regulation can shut down the availability of credit. I do not think that anyone would argue for that, although some seem to think that they know what is best for the rest of us.

On the other hand, reasonable restrictions that still enable those in the consumer finance industry to make a profit do serve the legitimate interest of all citizens. The consumer finance industry in the United States and in the State of Alabama advocates reasonable legal restrictions and regulations. It is the consumer finance industry in this state that led the push for reform in 1995 and 1996. Because of a hostile legal climate, consumer finance was in danger of drying up in Alabama, and those in the industry recognized and responded to this danger.

Yes, there is a profit motive, and consumer finance is an industry, not a public service. However, consumer finance is the most important fuel in driving the economic success of this country and this state. To characterize it as a "poverty industry" is a mischaracterization of historical proportion.



Maurice L. Shevin

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ALABAMA'S POVERTY INDUSTRY

By Thomas J. Methvin

Poverty is a way of life for many Alabama residents. Unfortunately, the growth of those living in poverty is nurtured by an industry that continually develops new ways to tighten its hold on these Alabamians. Alabama's poverty industry is comprised of several different industries—consumer finance companies, pawn shops, check cashing outlets, rent-to-own centers, and debit insurance companies. Alabama provides a safe haven for this industry due to our lack of regulation and our neglect of public education.

In Alabama, one in six adults are functionally illiterate.¹ One in every three adults do not have a high school education or G.E.D. certificate.² During the 1993-94 school year, other states spent an average of \$5,767 per student on education.³ Alabama, however, spent only \$4,037 per student. Alabama ranks 46th out of 50 states in dollars spent per child on education.⁴

In addition to our high illiteracy rate, Alabama has some of the weakest consumer protection laws in the entire country, especially in the area of consumer finance. For example, most states have a limit on the interest rate that can be charged on consumer loans. In Alabama, on loans over \$2,000, there is no numerical limit on the interest rate charged. Likewise, there is very little regulation on pawn shops, rent-to-own centers and check-cashing outlets, since their transactions are not considered loans. Pawn shops are allowed to charge an annual interest rate of 300 percent on their transactions. The effective interest rate on a typical rent-to-own transaction can be as high as 600 to 700 percent.



Thomas J. Methvin
Thomas J. Methvin is a graduate of the University of Alabama and Cumberland School of Law. He served as president of the Montgomery County Bar Association and the Montgomery County Trial Lawyers' Association. He is a shareholder in the firm of Beasley, Wilson, Allen, Main & Crow.

Further, most states have a strong deceptive trade practices act. These acts often prohibit unfair practices of the poverty industry. In Alabama, many finance companies and all insurance companies are exempt from our Deceptive Trade Practices Act. Our only regulations dealing with consumer finance are found in the Mini-Code. The Mini-Code is called "Mini-Code" because it started out as a very stringent set of regulations and was gradually watered down by the finance and banking lobby. Thus, the result was a "Mini-Code". The Mini-Code is really mini-regulation.

As stated above, Alabama's uneducated population coupled with its lack of regulation make it a natural choice for the poverty industry. Below is a discussion of various ways the Alabama poverty industry wreaks havoc on its victims.

Consumer Finance Industry

Many finance companies target Alabamians who are unable to receive a loan from traditional lending sources. The finance companies make loans to these consumers at much higher interest rates than traditional banks. Many times there are needless and useless charges placed on the loans. Most consumers are not aware of these charges. Other times, consumers names are forged to loan documents.⁵ One consumer alleged her name was forged to a mortgage and her home was foreclosed on and sold.⁶ These predatory lending practices cannot be justified. Apparently, some finance companies attempt to justify some of these practices by arguing that they are willing to make loans to people who normally could not receive credit. However, the higher interest rate more than compensates for any extra risk. The extra risk should not be reflected in add on fees that are useless to consumers.

A. Insurance Packing

There are various types of insurance that protect finance companies from loss: credit life, credit disability, involuntary unemployment insurance, collateral protection insurance, non-filing insurance, and force-placed insurance. All of these insurance products provide major benefits to the finance company, but very little benefit to the consumer. The premiums for this insurance are financed at the point of sale. Of course, the consumer pays the premium plus interest to the finance company.

Finance companies have a motive to place insurance on all loans. The actual loan is nothing more than a loss leader for ancillary insurance products.⁷ The insurance premium charged increases the amount financed, which increases the interest and profit to the company. Also, the finance company or its employees receive a commission from the sale of some of these insurance products. Most of the time, the sale of the insurance product is through one of the finance company's subsidiaries or sister corporations, which adds to the profit. Alabama law allows the finance companies to sell insurance through their subsidiaries, if the relationship between the companies is disclosed somewhere in the document (usually the fine print). Alabama allows some of the lowest loss ratios in the country on these products. This means that the insurance companies are paying out very little in claims and are keeping most of the premium dollar as profit.

Credit life insurance is one form of credit insurance. It is designed to pay off the loan balance in the event of the con-

sumer's death. Alabama allows nearly the highest credit insurance rates in the entire country. Credit life insurance is the most costly life insurance sold in Alabama. The premium on this insurance is pure profit.⁸ Many consumers are told by finance companies that they are required to purchase credit life insurance in order to receive the loan.⁹ An ex-employee of one finance company doing business in Alabama states that the company trains its employees to require credit life insurance as a condition to making the loan.¹⁰ An ex-employee of another finance company doing business in Alabama states that the company has a credit life penetration rate of 90 percent. This means 90 percent of its loans have credit life insurance on them.¹¹ However, it claims it does not require credit life insurance.

Of course, it is illegal to require credit life insurance as a condition to making the loan.¹² In *Lambert v. Bill Heard Chevrolet Co.*,¹³ the plaintiffs alleged that the car salesman told them that in order to obtain financing through Mercury Finance, credit life and credit disability insurance must be purchased. The trial court granted summary judgment for the defendant based on the statute of limitations, stating that the documents the plaintiffs signed clearly contradicts what they were told. The Alabama Court of Civil Appeals reversed and remanded based on *Hicks v. Globe Life & Accident Ins. Co.*,¹⁴ holding that the plaintiffs have a right to trust who they deal with and are not required to investigate the truthfulness of every statement made to them. In *Hicks*, Justice Shores stated in her concurring opinion, "It is unrealistic to conclude that a layman, even one with a college education, such as Mrs. Hicks, could understand an insurance policy if she read it."¹⁵ Many people who deal with the finance companies are unable to comprehend the documents they sign.¹⁶ Therefore, their trust in the people they deal with leaves them wide open for abuse.

In a recent similar case, *Fisher v. JMIC Life Ins. Co.*,¹⁷ plaintiff, who had a master's degree and taught school, purchased a used car. She alleged that she was told by the salesman that credit life insurance was required in order to purchase the car. When she purchased the car, she did not read the sales contract which clearly showed that the credit insurance was optional. The court of civil appeals reversed summary judgment stating that if plaintiff presents substantial evidence that defendant fraudulently represented a material fact, even if the representation conflicts with the written terms of a contract, plaintiff's

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fraud claim survives a motion for summary judgment.

However, the court of civil appeals in *Garner v. JMIC Life Ins. Co.*,¹⁸ and the Alabama Supreme Court in *Robinson v. JMIC Life Ins. Co.*,¹⁹ recently held that such an analysis does not apply to a suppression claim. In these cases, plaintiff claimed that defendant suppressed the fact that they were purchasing credit life insurance even though the documents plaintiffs signed clearly showed they were purchasing the insurance. Plaintiffs could read and write. The courts held that the fraudulent suppression claim was due to go out on summary judgment because there was no suppression. The information was disclosed in the documents.

The amount of credit life placed on loans in Alabama has been shown to be excessive. In *McCullar v. Universal Underwriters Life Insurance Co.*,²⁰ the plaintiff brought a fraud action based on the sale of an excessive amount of credit life insurance associated with an automobile purchase. The premium for the credit life sold to the plaintiff was based on the total amount of the plaintiff's payments over time. Plaintiff alleged fraud based on the credit life insurance premiums being calculated on the total of the payments, \$20,742, instead of calculating it based on the amount financed, \$15,108.54. Plaintiff argued that the most the insurer would ever pay on a claim was less than the total of the payments. The Alabama Supreme Court stated that charging for credit life insurance based on the total of the payments was wrong.²¹ This practice of inflating the amount of coverage and thereby, the premium, increases the profit for the finance and insurance company, while causing the consumer to be deeper in debt.

Most of the time, there are health questions that are required to be answered before the credit life insurance policy can be issued. Some finance companies realize that if the questions are answered in a fashion showing the consumer is in bad health, the insurance will not issue. Therefore, some don't ask the health questions so that the policy will issue. This practice is known as "clean sheeting". Later, when a claim is made, the insurance company can use the bad health of the consumer as grounds to deny the claim.²²

In *Miller v. Dobbs Mobile Bay, Inc.*,²³ credit life insurance was sold to the insured during the sale and financing of a used car. The car salesman told the insured that without the insurance, he would be unable to get the loan. During the negotiations, the insured informed the salesman that he did not want the insurance and that he was very ill. The salesman indicated that the insurance would be valid anyway and did not answer the health questions properly. Four months later, Miller died of lung cancer. A claim against the credit life policy was denied due to Miller's poor health condition when he purchased the policy.²⁴ The Alabama Supreme Court held that the fraud claim died with the insured, and that breach of contract and bad faith claims were a jury question.²⁵

In *Union Sec. Life Ins. Co. v. Crocker*,²⁶ the plaintiff brought a fraud action, based on the defendant's failure to disclose material information. She complained that the defendant knew of her husband's heart condition and that the insurance

he was selling would not pay any benefits as a result. The Alabama Supreme Court held that whether an insurance agent has a duty to disclose the conditions of payment for the credit life policy was a question for the jury.

Another form of credit insurance, which has been required as a condition to making a loan, is credit disability or credit accident insurance. This insurance is designed to make the payments of the consumer if he becomes disabled or is in an accident. Many consumers don't even know they have this insurance. Others have made claims on such insurance that have never been paid.²⁷ A former employee of one finance company doing business in Alabama stated that she was trained not to remind consumers they had this insurance when they came into the office to make a payment and looked disabled.²⁸ The most common basis used to deny claims is that the consumer was disabled at the time he took out the policy. However, many times no questions are asked regarding whether or not the consumer is disabled at the time the loan is made. This, again, is clean sheeting.

In *Wiley v. General Motors Acceptance Corp.*,²⁹ Daisy Wiley financed a car and credit disability insurance through the defendant. The credit disability insurance was to make her payments if she became disabled. After suffering a stroke, Ms. Wiley missed two payments, and the third was made by the insurer, before the defendant repossessed and sold the car. The Alabama Supreme Court found substantial evidence that "GMAC [had] made . . . an implied promise not to repossess the car if it knew that she had purchased credit disability insurance and that she had . . . complied with the terms of the policy . . ."³⁰

Another type of credit insurance is involuntary unemployment insurance. This insurance is designed to make the payments of the consumer if he loses his job involuntarily. In the fine print of many of these insurance policies, there is a provision that the consumer must be employed for 12 consecutive months before taking out the insurance. Again, many times, no questions are asked regarding the length of the consumer's employment at the time he takes out the insurance. However, often the consumer's lack of employment for the specified period is used by the insurance company as grounds to deny coverage. If the consumer knew of these requirements or was able to read and comprehend the operative language, he would not waste his money on such useless coverage.

Another area of insurance packing in the consumer finance industry deals with collateral protection insurance. Many finance companies require that collateral protection insurance be sold through the finance company. Of course, it is perfectly permissible to require insurance on the collateral. It is illegal, however, to require the consumer to purchase collateral protection insurance through the finance company.³¹ On many occasions, consumers are told they must buy the collateral protection insurance through the finance company in order to obtain the loan.³² The value of the collateral often is overstated, which causes the premium on the insurance to be higher than the premium the consumer would pay elsewhere. As stated above, there is a motive for the finance company to charge



as high a premium as possible. The finance company receives interest on the total amount financed; it also receives commissions. Often, the insurance is sold through a related corporation which allows extra profit for the companies.

The Federal Trade Commission has enacted strict regulations regarding household goods being used as collateral in consumer loans. Generally, most household goods cannot be used as collateral.³³ However, many finance companies take a security interest in these goods solely to charge collateral protection insurance on it. Some finance companies have taken a security interest in such things as fishing poles, clock radios, blankets, televisions, and other similar items. Since the finance company has no intention of repossessing such items, it is not real collateral, and it is improper to charge insurance on it. This is simply another way the creative poverty industry extracts money from its victims.

Non-filing insurance is a type of insurance wherein the finance company charges a fee to the customer in lieu of filing a UCC financing statement. The finance company charges a premium and supposedly gives the premium to an insurance company to cover the finance company in case it attempts to repossess the collateral and is unable to do so, solely because it failed to perfect its security interest by filing a UCC financing statement. Theoretically, the finance company can then look to the insurance company for payment of the value of the collateral.

There are many abuses with non-filing insurance. Often, consumers are charged premiums and there is no insurance at all. The finance company simply keeps the money. Other times, the money is paid to an insurance company and 100 percent of the premium is returned to the finance company. On other occasions, the non-filing insurance is charged on collateral that the debtor finances at the point of purchase. Non-filing insurance on this transaction is generally useless because UCC financing statements are not required to perfect the security interest in such goods. Therefore, non-filing insurance is not necessary in most cases. The motive for this is to increase the amount financed.

The final type of collateral protection insurance is force-placed insurance. At the time of the loan, many consumers take out their own collateral protection insurance from a separate company. However, if the consumer does not keep the collateral protection insurance, the finance company has the right to purchase collateral protection insurance on the collateral. It is permissible for the finance company to buy insurance similar to the insurance that the consumer allowed to lapse. However, many finance companies have abused this privilege by purchasing insurance that gives them more protection than the consumer originally had with his own insurance. For example, there are some policies force-placed that protect the finance company against the consumer's default. In other words, if the borrower doesn't make his payments to the finance company, the insurance policy will cover the payments. Other provisions provide that the policy only pays on claims if the collateral is repossessed. The premiums on these policies are the highest allowed by law and to make matters worse, the finance compa-

nies are allowed to charge interest on the premium. Therefore, the finance company has a motive to find the most expensive policy available. This results in higher charges to the consumer.

The area with the most abuse involves the method of calculating the premium. On many occasions, the insurance premium is based on the gross balance of the loan, but in the event of a total loss of the collateral, the insurance will only pay the actual cash value, or depreciated value of the collateral. Many times, the collateral is worth less than the gross balance of the loan; i.e., cars, mobile homes and other assets that depreciate. While the consumer pays a higher premium based on the total amount owed plus interest, the most the insurance will ever pay is a lesser amount, i.e., the depreciated value of the collateral. This practice violates the Alabama Department of Insurance guidelines.³⁴

Each of these insurance products provide very little benefit to consumers. Finance companies reap the real benefits of these products at the expense of consumers who can least afford to pay the price.

B. "Renewing" Loans or Flipping

Consumer finance companies not only profit from the amount of insurance sold, but their profit is also driven by repeat business. Unfortunately, repeat customers are not always made aware of the options available to them.

When customers borrow money from some finance companies, those companies begin the process of maintaining that customer's indebtedness. After several payments are made, the consumer typically receives a letter from the company that explains that they are entitled to additional money if they will come down and sign for it. Usually, this is a very small amount of money. However, in order to get the additional money, the previous loan is "renewed", with all the accompanying fees and charges of a new loan. This includes additional premiums for all the insurance products that are being "re-packed" as part of a second loan. Further, the operation of the Rule of 78s in the early payment of interest and insurance charges results in a heavy penalty for those who refinance.

In *Emery v. American General Finance, Inc.*,³⁵ the plaintiff brought an action under 18 U.S.C. §§1961 *et seq.*, because she received a letter informing her that additional money had been set aside especially for her. Furthermore, she presented evidence that the defendant had purposefully concealed her option to receive another loan and intentionally "flipped" her current loan, thereby, increasing her indebtedness at a much higher cost. In her complaint, she alleged that the practice of "loan flipping" was a "racketeering activity" within the meaning of RICO §1962(c).³⁶ The court recognized that "she has not been selected to receive the letter because she is a good customer, but because she belongs to a class of probably gullible customers for credit; the purpose of offering her more money is not to thank her for her business but to rip her off"³⁷ The court further held that flipping is a sleazy sales practice.³⁸ While the court held there was no RICO violation, it certainly agreed that flipping is egregious.



Flipping is wrong. Although Alabama appellate courts have never ruled on this practice, it is easy to see that such a pattern of intentionally cheating unsophisticated consumers would present a cause of action for fraudulent suppression or an outright intentional misrepresentation.

C. Dealer Arranged Loans

Many consumer financial transactions take place through dealers, i.e., sellers of goods such as cars, mobile homes, televisions, stereos, and washing machines. Most of us have seen advertisements discussing dealer financing for such a sale.

Most of the time this dealer-arranged financing is handled in the following manner. The finance company gives the dealer all of the necessary documents for the consumer to consummate the loan, i.e., a retail installment contract, mortgage or UCC financing statements, Truth-in-Lending documents, etc. After selling the product, the dealer gets the consumer to sign all of the finance papers. In actuality, this is a loan from the finance company to the consumer, with the consumer making all payments to the finance company, not the dealer. On paper, however, the dealer is shown to be the lender.

This paper trail is created so the finance company can claim that it is purchasing the loan from the dealer and not making a direct loan to the consumer. Since the finance company is purchasing the loan, it can assert that it can purchase the loan for less than face value of the loan or at a discount. The discount is usually agreed to prior to the underlying loan being consummated.

In reality, the finance company simply keeps a portion of the amount financed in each deal. In other words, when the finance company "buys the loan", the finance company will keep, for example, \$500 of the amount financed and never pay it to the dealer. The amount retained by the finance company never leaves the hands of the finance company, yet the consumer is obligated to pay it back and is charged interest on it.

Practically, the act of buying the loan at a pre-approved discount or keeping part of the amount financed requires the dealer to raise his price by \$500 (as in the example above) to make the same profit he would make if the money had not been kept by the finance company. It has been argued that the \$500 that the finance company keeps is a finance charge, as defined in the Mini-Code.³⁹ If it is a finance charge, it should be disclosed to the buyer.

Another form of dealer discount works as follows. The dealer will call the finance company and ask at what interest rate the finance company is willing to make a loan to a particular consumer. The finance company agrees to make the loan at 10 percent, for example. The dealer will then add 2 percent on top and make the loan at 12 percent. The dealer and finance company will split the 2 percent. The consumer is never told that the finance company was willing to loan the money at 10 percent. This is sometimes referred to as the yield spread premium.⁴⁰ Many times, the consumer would have never entered into the loan if he had known that he could have gone directly to the finance company and gotten the financing cheaper.

In *Smith v. First Family Financial Services*,⁴¹ the plaintiff brought a fraud action based on the defendant's failure to disclose a

yield spread premium. The Alabama Supreme Court held that the yield spread premium "is a cost of borrowing money ... It is a material fact that the borrower is entitled to know before completing the loan closing. It is a material fact that a mortgage broker has an obligation to disclose to a borrower."⁴²

After the *Smith* opinion, the financing lobby supported and secured passage of an amendment to the Mini-Code, which states that there is no duty to disclose the above mentioned yield spread premium.⁴³ The amendment dealt with the Mini-Code only. It did not affect whether there was a common law duty to disclose.

After the Mini-code amendment, the court of civil appeals issued a significant ruling in *Bramlett v. Adamson Ford and Ford Motor Credit Co.*⁴⁴ In *Bramlett*, the plaintiff brought a claim for fraudulent suppression based on non-disclosure of a yield spread premium. Bramlett purchased a car from Adamson Ford and obtained financing for that purchase through Ford Motor Credit Company (FMCC). Adamson disclosed to the plaintiff that the interest rate would be 15.49 percent. After being told that he would receive "the best financing available,"⁴⁵ Bramlett inquired as to why the interest rate was so high. Adamson Ford told him that it "was because [he] was a poor credit risk."⁴⁶ The Alabama Court of Civil Appeals held that a duty to disclose the agreement between Adamson and FMCC to split part

of the interest charge arose when Bramlett inquired about the finance charge.⁴⁷ It also held that the issue of agency between Adamson Ford and Ford Motor Credit was a jury question. Obviously, this arrangement promotes higher finance charges and should be disclosed.

One of the most common defenses used in these cases by the lender is that the car dealer is not their agent. Therefore, they state that they cannot be liable for the car dealer's failure to disclose. In addition to *Bramlett*, the recent case of *Sanford v. House of Discount Tires*,⁴⁸ refutes that argument. In *Sanford*, plaintiff purchased tires from Discount Tires because it was offering a free cellular telephone through a separate cellular telephone company. Plaintiff alleged that Discount Tires, as a dealer and agent for the phone company, misrepresented that the phone was free. The lower court dismissed the case against the cellular phone company on summary judgment, stating there was no evidence of agency between it and Discount Tires. The Court of Civil Appeals reversed, holding that agency between Discount Tires and the cellular phone company, was a jury question. Under the reasoning of *Sanford*, agency in a dealer-lender relationship can be a jury question.

It is clear that the split in interest charges, yield spread premiums and discounted car loans drive the prices up for Alabama consumers and should be disclosed. In fact, in real estate transactions, the yield spread premium must be disclosed to the consumer under the Real Estate Settlement Procedure Act (RESPA). Many times the hike in price has a direct relation to the creditworthiness of the customer. This amounts to a "poverty tax" which adversely affects many Alabamians. These charges should be disclosed, so that consumers can make meaningful decisions.



Pawn Shops

Alabama residents with poor credit histories or who are inexperienced with traditional lending institutions are forced to use alternative sources for loans. Pawn shops and "pawn your title" businesses have become one of the most widely used forms of financing in this state.

Alabama allows pawn shops to charge exorbitant interest rates with "secured" transactions. By statute, a pawn shop is allowed to charge up to 25 percent of the original transaction amount, *per month*.⁴⁹ With regard to small loans, Alabama allows interest rates of 2-3 percent per month depending on the outstanding balance.⁵⁰ Pawns are exempted from the Alabama Small Loan Act.⁵¹ Therefore, as compared to conventional interest charges, a pawnbroker is allowed to charge much higher rates. In fact a pawn broker can charge an annual interest rate of up to 300 percent on one transaction. This makes a pawn transaction one of the most profitable poverty industries in the state.

Also, there is tremendous growth in the "pawn your title" industry. Most "pawn your title" operations loan money on the title of a car. Many times the amount of money loaned is very small in relation to the value of the vehicle being pawned. The consumer provides personal identification, an extra set of car keys, and their signed car title for a nominal loan.⁵² The finance company charges on the "loan" can be as much as 25 percent interest per month. At the end of each month, the loan is renewed. If the customer becomes delinquent in his payments, the extra set of keys makes repossession easy. Since the consumer signed the title over to the pawn shop, he no longer owns his car. When customers are desperate for money, they will pay almost anything to get it. This includes handing over their car, which many times, is their only transportation to and from work. Obviously, there is much room for abuse in this area.

In *Floyd v. Title Exchange and Pawn of Anniston*,⁵³ the Alabama Supreme Court determined that this questionable pawn transaction is permissible under Alabama law. Controversy arose over whether the car title was "tangible property", as defined in The Pawn Shop Act.⁵⁴ The court remained skeptical as to whether a title is tangible property which could be pawned under the Alabama Code, but determined that a car title is not a "chose in action" which is expressly excluded.⁵⁵ Therefore, "pawn your title" operations are allowed to make loans at exorbitant interest rates on collateral that is often valued at several times the loan amount. When the consumer does not repay, he loses his vehicle or other valuable collateral.

Check-Cashing Outlets

Another type of business that is growing in Alabama is the check-cashing industry. This growth is attributable to the number of Americans who do not use banks or other depository institutions. In 1977, 9 percent of Americans did not use banking services, but by 1996, that figure had risen to 14 percent.⁵⁶

Typically, check-cashing outlets charge a percentage of the check for their service of cashing the check. The percentage depends on the type of check. "Only seven states limit fees



charged by check-cashing stores, and even these regulations aren't always honored."⁵⁷ Many times the charges are as high as 10 percent of the value of the check.

As more Alabama residents use alternative systems for banking and loans, check-cashing outlets will continue to prosper while Alabamians pay exorbitant fees and few regulations protect their interests.

Rent-To-Own Centers

In the rent-to-own industry, "just a few bucks a week" entices the poor into tremendous debt and obligation. For the poor, the chance to own a household appliance, such as a washer and dryer, is enough to contract away their savings potential. Rent-to-own customers routinely pay much more for products than what they pay for the same item at most retailers.⁵⁸ A typical effective annual interest rate for many of these transactions is 600 to 700 percent. These consumers are unable to obtain traditional credit due to their low incomes, employment or spotty credit history. Therefore, the rent-to-own centers are many times their only place to turn.

Up to 70 of the customers of some stores receive government assistance.⁵⁹ In the typical transaction, the consumer makes weekly payments. As long as the consumer completely conforms to the rental agreement, he can keep the merchandise at the end of the agreement. However, if one payment is late or missed, the customer forfeits all of the previous rental payments and must begin the rental process over in order to keep the merchandise.

In Alabama, these transactions are not considered loans.⁶⁰ Therefore, the industry is not required to follow the Alabama Mini-Code. The sales practices of some rent-to-own companies can be characterized as "hard sell". Most salespeople in this industry are trained to quote payments in the weekly format. This makes the payment seem affordable. Some companies include warranty charges and insurance charges in the payments. These charges provide very little benefit to the consumers; however, they pay the price for this on top of the already outrageous interest rates.

The Debit Insurance Industry

Some companies in the debit insurance industry have been major players in the Alabama poverty industry for many years. Insurance companies are relatively unregulated in Alabama. The Alabama Department of Insurance is underfunded and understaffed. With a staff of 80, the Insurance Department has only two investigators charged with the responsibility of investigating all consumer complaints against Alabama insurance companies. By contrast, the Florida Insurance Department has 72 people to investigate consumer complaints, while Georgia has seven.⁶¹ Alabama is prime hunting ground for debit insurance companies that want to profit from the poor.

Debit insurance is distinguished from other types of insurance because of the agent's involvement and the smaller value of the policies. The debit agent goes to the policyholder's home once a month (or more often) and collects a small amount of premium, usually in cash, for the policies. Typical policies are \$500 burial insurance policies, small life insurance policies, accident expense

policies, hospital expense policies, disability policies, cancer policies, and Medicare supplement policies. When the policyholder gives the agent money, the agent is trusted to take the money back to the company and credit it to the policyholder's account. Normally, the agent is required to give the policyholder a receipt showing he has received the money or to put a check mark in the policyholder's payment book showing that the money has been received.

Many of the policyholders are low income, illiterate and unsophisticated in dealing with insurance. On many occasions, these policyholders have their policies canceled and the cash value stolen by the agent, or the agent never credits their policy with the premium payment they made. Policyholders have loans taken out on their policy without their knowledge, and they are talked into canceling their old policies with cash value and taking out new policies. On other occasions, policyholders have their signatures forged to important documents, and they are sold useless and duplicative policies.

Alabama's Supreme Court has reviewed many suits involving debit insurance companies.⁶² Any family member who is misled and injured by such actions may have a cause of action. In *National States Insurance v. Jones*,⁶³ the Alabama Supreme Court held that a niece had standing to bring an action regarding her aunt's policy, although she was not the applicant, the insured, the beneficiary, or the owner of the policy. In *Old Southern Life Insurance v. Woodall*,⁶⁴ the Alabama Supreme Court held that a husband could bring a fraud claim regarding an insurance policy covering his wife, because the husband had paid the policy premiums, was the exclusive party with whom the insurance company had dealt, and had suffered direct injury. In *Lowe v. American Medical Intern*,⁶⁵ the Alabama Supreme Court held that a plaintiff may bring a misrepresentation claim if she can show she has been injured. As stated above, an action may be brought by anyone who is misled and has injuries that result from the misrepresentation or suppression.

One of the primary defenses used by this industry is the statute of limitations. Many times, the policyholder does not even know he has been defrauded. Often the wrongful act took place more than two years prior to the policyholder filing a lawsuit. For instance, if the agent cashed in the consumer's policy or did not credit money to the policy account several years prior, the policyholder may not have been aware of it. In *Howard v. Mutual Savings*,⁶⁶ the Alabama Supreme Court held that the statute of limitations began to run when the lawyer told the client that she had a case. *Howard* is also the first case to use the justifiable reliance standard instead of a reasonable reliance standard when determining when a fraud should have been discovered. As a result, the statute of limitations is almost always a jury question.

As long as Alabama's Insurance Department is under-funded and understaffed, some debit insurance companies will be able to wreak havoc upon Alabama consumers. This lack of supervision, coupled with our uneducated population, makes stopping the unscrupulous practices of some debit insurance

companies impossible.

The Foremost Opinion

Recent changes in the law will have a significant impact on poverty industries ability to thrive. The case of *Foremost Ins. Co. v. Parham*,⁶⁷ involved Plaintiffs' suit against Foremost Insurance Company claiming that Foremost suppressed the fact that there was an extra premium charge for adjacent structure mobile home coverage and that Foremost, through its agents, told Plaintiffs that the first year's mobile home property insurance was free. Plaintiffs stated they did not read the documents they signed because they trusted Foremost's agents. The documents showed that the insurance was not free.

In that case, the supreme court overruled *Hickox v. Stover*,⁶⁸ which established the justifiable reliance standard. That standard eliminated the general duty on the part of a person to read the documents received in connection with a transaction. The court replaced that standard with the reasonable reliance standard, which is more closely associated with *Torres v. State Farm*.⁶⁹ Under the new standard, which applies to cases filed after the date of the opinion, a trial judge can enter a judgment as a matter of law in a fraud case where the undisputed evidence shows that the party claiming fraud was capable of reading and understanding the documents but made a deliberate decision to ignore the written documents.

Translated to the poverty industry, a perpetrator of fraud can purposely create lengthy documents with fine print that contradict what he is telling the consumer. As long as the consumer signs the document, his claim is subject to being thrown out on summary judgment, regardless of what he was told. This obviously allows wrongdoers to perpetrate fraud on unknowing citizens. If they get the signature on the document, they are arguably off "scott free".

Suggestions for Reform

The number one area that needs improvement in Alabama is education. We have failed pitifully in this regard. Our population is disproportionately illiterate compared to the rest of the country. If our population were to become more literate, they might be able to fight off the sleazy sales practices of some members of the poverty industry. As the Alabama Legislature debates tort reform, many Alabama residents are being injured by fraudulent consumer practices.

If some tort reform is passed, there are many other areas of the law that Alabama should also reform. For example, we should elect, instead of appoint, the Commissioner of Insurance. This would help that office be more directly accountable to consumers. Also, proper staffing and funding of the Department of Insurance would better protect consumers.

We should require pawn brokers and rent-to-own centers to charge commercially reasonable rates of interest, and we should enact a strong criminal fraud law to motivate Alabama's poverty industry to clean up any corrupt practices.

Lastly, Alabama should hold the insurance and finance industry accountable under the Deceptive Trade Practices



Act. This would then allow the Attorney General to bring suit directly against such offenders and alleviate the need for so many private civil lawsuits.

Conclusion

Alabama's poverty industry is alive and thriving. As long as our population is uneducated and there is very little money appropriated to regulate this industry, it will continue to thrive in Alabama. In order to stop Alabama's poverty industry, reform is needed. A more educated population, coupled with more regulation of this industry, should put us on the right track. ■

ENDNOTES

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26. *Union Sec. Life Ins. Co.*, 667 So. 2d at 691.
27. *Pate v. Rollison Logging Equip., Inc.*, 628 So. 2d 337 (Ala. 1993).
28. Dep. of Mary Robinson, *Shirley Smith v. American Gen. Fin.*, No. CV-95-096 (Circuit Court of Barbour County, Ala.).
29. *Wiley v. General Motors Acceptance Corp.*, 624 So. 2d 518 (Ala. 1993).
30. *Id.* at 521.
31. *Ala. Code* § 5-19-20(b) (1996).
32. *Merchants of Misery*, *supra* note 5, at 36.
33. 16 C.F.R. § 444.2(a)(4) (1996).
34. Bulletin of February 22, 1994, Ala. Dept. Ins. (AB-133).
35. *Emery v. American Gen. Fin., Inc.*, 71 F.3d 1343 (7th Cir. 1995).

36. *Id.* at 1345.
37. *Emery v. American Gen. Fin., Inc.*, 71 F.3d at 1347.
38. *Id.* at 1348.
39. *Ala. Code* § 5-19-1 (1996).
40. See *Smith v. First Family Fin. Servs.*, 626 So. 2d 1266 (Ala. 1993).
41. *Id.*
42. *Id.* at 1271.
43. *Ala. Code* § 5-19-6(c) (1996).
44. *Bramlett v. Adamson Ford.*, No.2950526, 1996 WL 730853 (Ala. Civ. App. Dec. 20, 1996).
45. *Id.*
46. *Id.*
47. *Bramlett*, No. 2950526, 1996 WL 730853, at*3.
48. *Sanford v. House of Discount Tires*, No. 2951197 (Ala.Civ.App. March 14, 1997).
49. *Ala. Code* § 5-19A-7 (1996).
50. See *Blackmon v. Downey*, 624 So. 2d 1374, 1376 (Ala. 1993).
51. *Ala. Code* § 5-18-4(b) (1996).
52. See *Floyd v. Title Exchange & Pawn of Anniston*, 620 So. 2d 576 (Ala. 1993).
53. *Id.*
54. *Ala. Code* § 5-19A-2(6) (1996).
55. *Floyd*, 620 So. 2d at 578.
56. *Merchants of Misery*, *supra* note 5, at 52.
57. *Id.* at 55.
58. *Merchants of Misery*, *supra* note 5, at 145.
59. *Id.* at 156.
60. *Ala. Code* § 8-25-1(5)(a) (1996).
61. NAIC, Insurance Department Resources Report 6 (1995).
62. See *Ex Parte Mary L. Gauntt*, 677 So. 2d 204 (Ala. 1996); *Ex Parte Bloodsaw*, 648 So. 2d 553 (Ala. 1994); *Boswell v. Liberty Nat. Life Ins. Co.*, 643 So. 2d 580 (Ala. 1994); *Willingham v. United Ins. Co. of Am.*, 642 So. 2d 428 (Ala. 1994); *Gray v. Liberty Nat. Life Ins. Co.*, 623 So. 2d 665 (Ala. 1993); *Grimes v. Liberty Nat. Life Ins. Co.*, 551 So. 2d 329 (Ala. 1989); *Liberty Nat. Life Ins. Co. v. Sherrill*, 551 So. 2d (Ala. 1989).
63. *National States Ins. Co. v. Jones*, 393 So. 2d 1361 (Ala. 1980).
64. *Old Southern Life Ins. v. Woodall*, 326 So. 2d 726 (Ala. 1976).
65. *Lowe v. American Medical Intern.*, 494 So. 2d 413 (Ala. 1986).
66. *Howard v. Mutual Savings*, 608 So. 2d 379 (Ala. 1992).
67. *Foremost Ins. Co. v. Parham*, No. 1950507 (Ala. March 14, 1997).
68. *Hickox v. Stover*, 551 So. 2d 295 (Ala. 1989).
69. *Torres v. State Farm*, 438 So. 2d 758 (Ala. 1983).

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OPINIONS OF THE GENERAL COUNSEL

By J. Anthony McLain, general counsel

Limited Liability Partnerships

Utilization of the Revised Uniform Partnership Act provisions regarding Registered Limited Liability Partnerships by lawyers who are licensed to practice law in the State of Alabama

Question:

"This letter is to request a formal written opinion from the Disciplinary Commission concerning the utilization of the Revised Uniform Partnership Act provisions regarding Registered Limited Liability Partnerships by lawyers who are licensed to practice law in the State of Alabama.

"Section 1010 of the Alabama Revised Uniform Partnership Act appears to allow professionals to render professional services as a member or as an employee of a Registered Limited Liability Partnership whether such Registered Limited Liability Partnership is an Alabama Registered Limited Liability Partnership or a foreign Registered Limited Liability Partnership. Paragraphs (d) and (e) of Section 1010 appear to limit this authority to the discretion of the licensing authority. Section 1010 is attached hereto and incorporated herein by this reference.

"Based upon the foregoing, we are concerned that without the issuance of a formal opinion by the Disciplinary Commission, lawyers attempting to utilize a Registered Limited Liability Partnership (whether Alabama or foreign) in the delivery of legal services, either as members or as employees, may be subject to disciplinary procedures. Therefore, we would appreciate your providing us with a written declaratory ruling as to the following questions:

"Under the Alabama Rules of Professional Conduct, Rules of

Disciplinary Procedure, Alabama Standards for Imposing Lawyer Discipline, and any other rules of the Alabama State Bar governing the professional conduct of lawyers, will it be permissible for (i) lawyers who are licensed to practice law in the State of Alabama to utilize an Alabama Registered Limited Liability Partnership in the delivery of legal services, (ii) lawyers who are licensed to practice law in the State of Alabama to be employed by an Alabama Registered Limited Liability Partnership for the delivery of legal services, (iii) lawyers who are licensed to practice law in the State of Alabama to utilize a foreign Registered Limited Liability Partnership in the delivery of legal services and (iv) lawyers who are licensed to practice law in the State of Alabama to be employed by a foreign Registered Limited Liability Partnership for the delivery of legal services?

"These questions appear to be relatively simple questions; however, a written opinion would be helpful to allow us to advise our clients concerning the usage of the Registered Limited Liability Partnership provisions of the Revised Uniform Partnership Act."

Answer:

An Alabama lawyer may form a limited liability partnership with other lawyers or professional corporations for the practice of law, so long as the lawyers in the partnership remain ethically responsible to their clients for the consequences of their own actions and the actions of the persons they supervise.



J. Anthony McLain

Discussion:

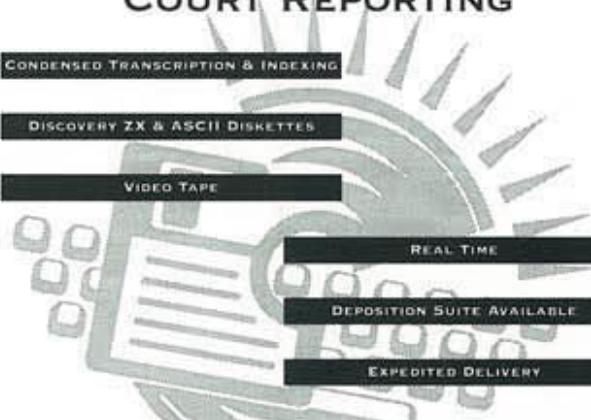
In RO-93-16, the Disciplinary Commission considered identical language to paragraphs (d) and (e) above in the context of the Alabama Limited Liability Company Act. That opinion is attached hereto for reference purposes.

Paragraphs (d) and (e) of Section 1010 of the Alabama Revised Uniform Partnership Act do not limit the right of lawyers to organize as a limited liability partnership, as you seem to suggest they do.

Paragraph (d) simply states that professionals do not evade the jurisdiction of their licensing authority by registering under the Act. Lawyers would still be subject to the Rules of Professional Conduct and any other rule or regulations applicable to the practice of law in Alabama.

Paragraph (e) of Section 1010 states that a licensing authority may impose requirements in addition to the Act on its members seeking to operate as limited liability partnerships. Paragraph (a) of Section 1010 makes it clear that an employee or partner of a limited liability partnership is responsible for the consequences of his or her own conduct. While the Act has, in effect, eliminated joint and several liability among law partners, all lawyers still remain ethically accountable for the wrongful conduct of those lawyers and nonlawyers whom they supervise. No additional requirements under paragraph (e) have been imposed at this time. [R0-96-09]

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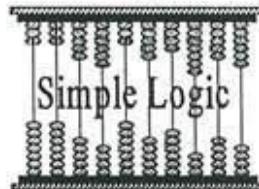
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Alabama Legal Milestones



*Pictured above are Alice Lee (at left) to whom **To Kill A Mockingbird** is dedicated, and Justice Gorman Houston (speaking).*

milestone is located at the 1903 Monroe County Courthouse. In Constitutional Village, retired Judge Daniel B. Banks, Jr., president-elect of the Huntsville-Madison County Bar Association, unveiled a milestone, written by Huntsville lawyer Shannon Smith, to Alabama's Constitution and statehood.

Milestones will consist of 18" x 24" bronze plaques which can be mounted on a pole, wall or stone. Each plaque will bear the logo of the Alabama State Bar, the title and text of the person or event memorialized, and a statement that it is placed by the state bar and the local bar association or other institution.

The plaques are produced by Art & Bronze of Kingwood, West Virginia and mounted by Clark Memorials of Birmingham. The cost of a milestone will be shared by the state bar and the local bar association.

The Legal Milestone Program will be administered by the newly created History and Archives Committee. A request for a milestone may be made by an individual or organization, e.g., the state bar, legislators, law schools, civic organizations, or the public. It is hoped that the local bar associations will take the primary initiative. Each proposal should include the proposed text and title. The committee will review each proposal, consider the propriety of the subject matter, and check the facts. Criteria will be good subject matter, geographic representation across the state and educational content. Originality is encouraged. The committee will make recommendations to the board of bar commissioners for final approval.

The Monroeville milestone challenges us: "The legal profession has in Atticus Finch a lawyer-hero who knows how to use power and advantage for moral purposes, and who is willing to stand alone as the conscience of the community." The plaque ends with "Symbolically, it is the legal profession that now sits in the jury box as Atticus Finch concludes his argument to the jury: 'In the name of God, do your duty.'"

Patrick H. Graves, Jr.
Huntsville-Madison County Bar Association

What is the common thread which binds the following: Hugo Black, the Alamo, Scottsboro Boys, Atticus Finch, General Holland "Howling Mad" Smith, and *New York Times v. Sullivan*? That thread is Alabama's legal history. The Alamo? Colonel William Travis, senior officer of the Alamo, practiced law in Clarke and Monroe counties before moving west. Captain James Butler Bonham, perhaps the Alamo's greatest hero, escaped the doomed make-shift fortification to seek reinforcements and voluntarily returned to certain death. Bonham practiced law in Montgomery. "Howling Mad"? Holland Smith graduated from the University of Alabama School of Law and practiced law briefly in Montgomery before joining the Marine Corps and gaining fame in the South Pacific during World War II.

Alabama has a rich and varied legal history. Our lawyers have played significant roles in the history of our state and country, not always in a legal context.

The Alabama State Bar has initiated the Legal Milestones Program to recognize our legal history. It will memorialize important individuals, events, institutions and cases. Its purpose is to remind the public how the law and the legal profession are woven into the fabric of our lives.

As part of Law Day 1997, Alabama's first Legal Milestones were dedicated in ceremonies at Monroeville and Huntsville. Justice J. Gorman Houston, Jr. commemorated a milestone which he wrote and captioned "Atticus Finch: Lawyer-Hero." It is mounted on an Alabama limestone boulder graciously donated by Vulcan Materials Company. The



At dedication of the marker are Shannon Smith, Hon. Daniel B. Banks, Jr., Wame S. Heath and Dwight Jennings.



May 13, 1997

Dear Mr. Lightfoot:

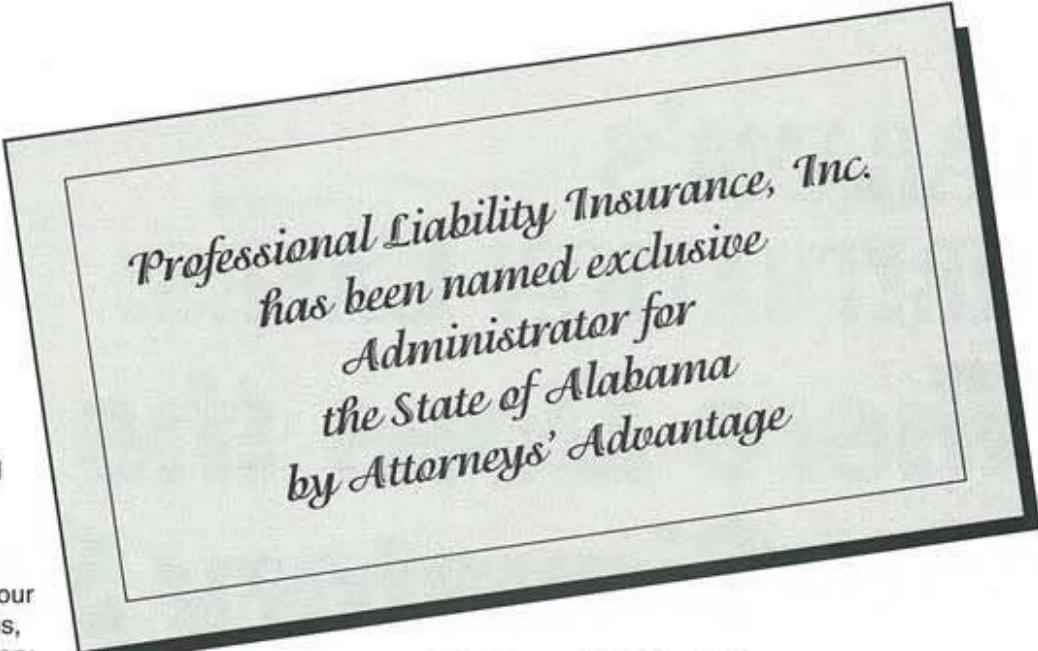
Although I was unable to be present at the inaugural ceremony of the Legal Milestones program, please accept my heartfelt thanks for a unique honor. Atticus would have been a bit non-plussed by the tribute, but deeply grateful!

Pat Graves's idea for legal milestones was an inspiration. In spite of some alarming specimens, in its history the Alabama bar has had some real-life heroes—lawyers of quiet courage and uncompromising integrity who did right when right was an unpopular and sometimes dangerous thing to do. They deserve permanent and visible reminders of their presence, and should be models for all who make the law a career.

Would you please convey to Mr. Graves and the Alabama Bar Association my gratitude for Atticus's milestone and the generosity of spirit that prompted its creation?

Sincerely yours,

Harper Lee



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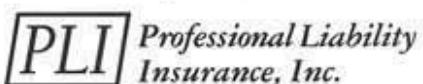
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ALABAMA'S ARBITRATION CASES: *Where Does the Non-Signatory Stand?*

By Patricia J. Ponder

The Federal Arbitration Act (FAA) provides that an arbitration clause in "a contract evidencing a transaction involving commerce...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹ As the Alabama Supreme Court has observed, "the Federal Arbitration Act establishes a strong federal policy favoring arbitration, requiring that the courts 'rigorously enforce' arbitration agreements."²

Despite this strong policy, an arbitration clause was not enforceable in Alabama prior to *Allied-Bruce Terminix, Inc. v. Dobson*, 513 U.S. 265 (1995), unless the parties to the agreement had contemplated "substantial interstate activity."³ Until that time, Section 8-1-41(3) of the *Alabama Code* was held to preclude the specific enforcement of a pre-dispute arbitration agreement unless federal law preempted state law.⁴ In *Allied-Bruce Terminix*, however, the United States Supreme Court decreed that there need only be a showing that the transaction in question *affects* interstate commerce.⁵ As prescribed by the Supreme Court, therefore, the law in Alabama no longer requires any subjective contemplation of interstate commerce on behalf of the parties before an arbitration clause is enforceable.⁶

Although it is now federal and Alabama law that an arbitration agreement in a contract evidencing a transaction involving commerce is enforceable "to the limits of Congress' Commerce Clause power,"⁷ questions still remain regarding how broadly an Alabama court will construe an arbitration provision. The particular imbroglio engaging the Alabama Supreme Court at this moment is whether a non-signatory to a contract containing an arbitration provision may compel arbitration pursuant to that clause. This article discusses whether there is a pattern to the court's recent decisions on this issue, and, specifically, whether Alabama is aligned with the federal cases in this regard.

Alabama Non-Signatory Cases

During 1996, four cases reached glaringly different conclusions on the non-signatory issue: *Ex parte Gray*, 686 So. 2d 250 (Ala. 1996); *Ex parte Martin*, No. 1951420, 1996 WL 650307 (Ala., Nov. 8, 1996); *Ex parte Jones*, 686 So. 2d 1166 (Ala. 1996);⁸ and *Ex parte Gates*, 675 So. 2d 371 (Ala. 1996). In 1997, the Alabama Supreme Court continued this trend of apparent contrariety in three more decisions, *Ex parte Isbell*, No. 1951384, 1997 WL 99725 (Ala., Mar. 7, 1997), *Prudential Securities, Inc. v. Micro-Fab, Inc.*, No. 1951265, 1997 WL 99722 (Ala., Mar. 7, 1997), and *Ex parte Stripling*, No. 1951901, 1997 WL 127222 (Ala., Mar. 21, 1997).⁹ Examining these cases in chronological order, the Alabama Supreme Court's handling of the nonsignatory question may suggest a case of "one step forward, two steps back."

Ex parte Gates

The plaintiffs in *Ex parte Gates*, 675 So.2d 371 (Ala. 1996)¹⁰ brought claims sounding in fraud, breach of warranty and negligence in connection with the sale of a mobile home. A vendor, its salesman and a manufacturer were co-defendants, and all sought to invoke an arbitration provision in the sales contract which addressed "[a]ll disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract...."¹¹ The Alabama Supreme Court found this language sufficiently broad to hold that all claims in the suit were properly arbitrable, despite the fact that neither the manufacturer nor the salesman were signatories to the contract.¹² Deferring to the authority of *Allied-Bruce Terminix*, the court concluded that the FAA was applicable, and thus the trial court did not err in compelling arbitration of all claims.¹³

Ex parte Jones

The Alabama Supreme Court actually handed down two arbitration decisions bearing this title, and they are diametri-

cally opposed. In its initial opinion, *Ex parte Jones*, No. 1950117, 1996 WL 292060 (Ala., May 31, 1996) ("*Ex parte Jones I*"), the court considered the plaintiffs' application for a writ of mandamus directing the trial court to vacate its order granting a non-signatory insurance company's motion to compel arbitration pursuant to a loan agreement entered into between the plaintiffs and The Money Tree, Inc., a finance company, for the purchase of an automobile. As part of the loan transaction, The Money Tree's agent had sold the plaintiffs a collateral insurance policy issued by First Colonial Insurance Company. The cost of the policy was financed as part of the loan. The car was subsequently destroyed by fire, and the plaintiffs sued The Money Tree, First Colonial and The Money Tree's agent, alleging fraud and breach of contract.

The loan agreement between The Money Tree and the plaintiffs had contained an arbitration agreement which provided, in part, as follows:

All disputes, controversies or claims of any kind and nature between creditor and debtor arising out of or in connection with the within agreement as to the existence, construction, performance, enforcement or breach thereof shall be submitted to arbitration pursuant to the procedures under the following pre-dispute arbitration agreement....¹⁴

The plaintiffs argued that their claims against First Colonial were excluded from arbitration because First Colonial was not a signatory to this contract. The trial court disagreed.

In denying the plaintiffs' writ of mandamus, the Alabama Supreme Court adhered to federal policy favoring the enforcement of arbitration clauses under the FAA, concluding, as it had in *Ex parte Gates*, that the arbitration agreement was broad enough to encompass the insurance contract between the plaintiffs and First Colonial. Referencing Eleventh Circuit authority, the court ruled that the plaintiffs' claims against non-signatory First Colonial "should be arbitrated because they are founded on and are intertwined with the facts surrounding the underlying contract that contains the arbitration clause."¹⁵

Subsequently, however, on September 13, 1996, the court, *ex mero motu*, withdrew its original opinion in an abrupt about-face. In *Ex parte Jones*, 686 So.2d 1166 (Ala. 1996) ("*Ex parte Jones II*") the court held that the arbitration agreement at issue was enforceable only as to the signatories to the underlying loan transaction.¹⁶ Invoking general principles of Alabama contract interpretation,¹⁷ the court focused on the language of the contract to hold that the non-signatory was neither the referenced "debtor" nor the "creditor," and thus lacked standing to seek enforcement of the arbitration provision:

This Court has clearly held that one must be a signatory

to a contract in order to be bound by the contract: '[A] party cannot be required to submit to arbitration any dispute he has not agreed to submit.' *Old Republic Ins. Co. v. Lanier*, 644 So.2d 1258, 1260 (Ala. 1994). In *Ex parte Stallings & Sons, Inc.*, 670 So.2d 861, 862 (Ala. 1995), we held: 'We note that [one of the parties on appeal] was not a party to the stock purchase agreement. Thus, [that party] has no standing to seek enforcement of the arbitration provision therein...'¹⁸

In a strong dissent, Justice Maddox noted that the original decision, *Ex parte Jones I*, was based upon "well-reasoned" federal law, and that nothing had changed since the date of that opinion "except that this Court has changed its mind."¹⁹ Justice Maddox also observed that the question of the scope of an arbitration clause had been previously addressed in *Ex parte Gates*, an opinion which he considered properly consistent with the federal authorities.²⁰

Ex parte Martin

In *Ex parte Martin*, No. 1951420, 1996 WL 650307 (Ala., Nov. 8, 1996), vendor/manufacture relationships in connection with the sale of a mobile home were again involved, as in *Ex parte Gates*.

This time, drawing upon its revised opinion in *Ex parte Jones II*, the Alabama Supreme Court held that the manufacturer, a nonsignatory, "was not within the scope of the arbitration agreement."²¹ Significantly, however, the court also revisited *Ex parte Gates* and left that case standing as good law, although distinguished on its facts:

The arbitration clause in *Gates* clearly contemplated arbitration of claims brought by the signatories to the agreements and also arbitration of the claims brought by other, unnamed parties, if those claims arose from or related to the contract or the 'relationships' that resulted from the contract. [FN2] Nothing in the arbitration agreement the Martins signed indicates that its scope was intended to be so broad; the agreement specifically names only the Martins and Blue Ribbon Homes as parties to the agreement, and it applies the arbitration procedures to 'both' parties or to 'either' party.

This court has recently held that a non-signatory to a limited arbitration clause specifically referencing only the signing parties is not sufficiently broad to encompass a non-signatory defendant.²²

Ex parte Gray

On December 13, 1996, the Alabama Supreme Court again considered the non-signatory issue in another decision dealing with an arbitration provision in a retail buyer's order. In *Ex parte Gray*, 686 So.2d 250 (Ala. 1996), the court held that a salesman who was an agent of a principal which entered into a



contract having an arbitration provision was also entitled to compel arbitration of the claims against him. This decision seemed at least a partial return to the federal principles endorsed in *Ex parte Gates*, but then came 1997.

The Court Comes Full Circle: *Ex parte Isbell, Prudential Securities v. Micro-Fab* and *Ex parte Stripling*

In *Ex parte Isbell*, No. 1951384, 1997 WL 99725 (Ala., Mar. 7, 1997), the nonsignatory seeking to enforce the arbitration provision was yet again a mobile home manufacturer facing claims sounding in fraud, breach of warranty, and negligence. This time, the court chose to distinguish *Ex parte Jones II*, once again embracing *Ex parte Gates* and its federal authorities. As stated by the court:

In several cases, this Court has refused to bind non-signatories to arbitration agreements.... We cannot ignore, however, the trend toward binding non-signatories to arbitration agreements in cases where the language of the agreement broadly includes many parties. This trend is especially evident in the federal courts.... And we note, of course, that this Court in *Gates*, a case involving the very same arbitration agreement as that involved in this case, held that a non-signatory could enforce an agreement to arbitrate to which it was not a party if the language in the agreement was broad enough.²¹

Just as a clear trend favoring *Ex parte Gates* and the federal authorities appeared to be emerging, in the same breath the court handed down *Prudential Securities, Inc. v. Micro-Fab, Inc.*, No. 1951265, 1997 WL 99722 (Ala., Mar. 7, 1997). In a decision owing more perhaps to corporate alter ego theories than arbitration policy, the court relied once again on *Ex parte Jones II*. Prudential had argued that Micro-Fab's president had such a close relationship with his company as to bind Micro-Fab to the arbitration agreement applicable to its president's individual account, even though Micro-Fab was not a party to that agreement and, in fact, had not yet opened its own separate account at the time the president's contract was signed.²⁴ The court disagreed, reasoning that, "[c]onsidering the plain meaning of the language used in the contract between [Micro-Fab's president] and Prudential, we cannot hold that they intended for their agreement to encompass a relationship between Micro-Fab and Prudential that had not yet arisen at the time of the agreement."²⁵ Moreover, in the court's view, none of the factors that define a corporate alter ego situation had been implicated in this case.²⁶ Unsurprisingly, Chief Justice Hooper's dissent questioned whether it was necessary to consider this "reverse piercing of the corporate veil" argument when, in his opinion, the liberal language of the original arbitration agreement

between Micro-Fab's president and Prudential was broad enough to require arbitration of the claims against that company, of which the president was sole owner.²⁷

Shortly thereafter, in *Ex parte Stripling*, No. 1951901, 1997 WL 127222 (Ala., Mar. 21, 1997) the plaintiffs sued SouthTrust Bank, SouthTrust Securities and an employee of SouthTrust Securities on various theories related to the alleged fraudulent inducement of the plaintiffs to place their investments in a mutual fund. Based on an arbitration provision contained in applications the plaintiffs had signed for the SouthTrust Securities accounts, the trial court had ordered arbitration of all their claims.²⁸ The pertinent arbitration provision read as follows:

All controversies which may arise between the undersigned [Stripling and Tobin] and you [SouthTrust Securities] as introducing or clearing broker, your agents or employees, concerning any transaction or the construction, performance or breach of this or any other agreement between us...shall be determined by arbitration....²⁹

Because the complaint alleged that the individual employee was liable as an "agent" or "employee" of SouthTrust Securities, the court found that the language of the arbitration provision was broad enough to encompass the claims against him.³⁰

As to SouthTrust Bank, however, the court found that the plaintiffs' theory of recovery was apparently that the bank was liable for the actions of SouthTrust Securities as its agent, and the individual employee, as SouthTrust's "sub-agent". In a strict reading of the arbitration provision, therefore, the court held that the arbitration agreement could not apply to the claims brought against the bank because SouthTrust was not alleged to be

SouthTrust Securities' "agent or employee", but the opposite—its "principal."³¹ In addition, the

court foreclosed any consideration of whether the arbitration provision "otherwise encompass[ed] claims against SouthTrust as a nonsignatory to the account agreement", simply by citing *Ex parte Jones II*.³² Significantly, the court then pronounced that *Ex parte Jones II*'s holding (and its converse) stated a general rule of Alabama law:

...[Plaintiffs] argue that a recent case of this Court, *Ex parte Jones*, 686 So.2d 1166 (Ala. 1996), holds that a nonsignatory cannot be bound to an arbitration provision. We agree that this is the general rule. The converse of that general rule is that, generally, a nonsignatory cannot compel arbitration. Nothing in this case indicates that some exception should apply.³³

Accordingly, in *Ex parte Stripling*, the Alabama Supreme Court appeared to spin around yet again, elevating *Ex parte Jones II* to general rule status and relegating deference to *Ex parte Gates* and the federal principles to the dissenter's corner, once more.



Federal Law Would More Freely Allow Non-Signatories to Compel Arbitration

As observed by Chief Justice Hooper in his dissent to *Ex parte Martin*, federal courts, including the Eleventh Circuit, have liberally construed arbitration agreements to hold that a non-signatory to a contract may enforce an arbitration agreement contained in that contract.³⁴ These courts would generally allow non-signatories to compel arbitration where there is a close relationship between the signatory and the non-signatory, as well as between the claims subject to the arbitration clause and the claims alleged.³⁵ Where federal substantive law controls, therefore, there is generally a much greater probability that a strict reading of the arbitration provision will bow to greater emphasis upon agency principles and the litigation's underlying claims.³⁶

As stated in *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773 (2d Cir. 1995), in discussing the bases for binding non-signatories to an arbitration agreement, "[t]raditional principles of agency law may bind a non-signatory to an arbitration agreement."³⁷ Thus, in *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), cert. denied, U.S. , 130 L. Ed. 2d 123 (1994), the court applied agency theory to allow a principal, although a non-signatory, to compel arbitration where the charges against a parent company and its subsidiary were based on the same underlying facts, although the parent was not a formal party to the arbitration agreement.³⁸

Along with its emphasis on agency theory, the federal view also prescribes that "the focus of [the court's] inquiry should be on the nature of the underlying claims asserted...to determine whether those claims fall within the scope of the arbitration clause contained in the...agreement."³⁹ As stated by the Eleventh Circuit in *Sunkist Soft Drinks*, "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a Court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement."⁴⁰

As summarized in *Thomson-CSA, S.A. v. American Arbitration Association*, supra, the common thread among the federal cases is a general reliance upon estoppel theories:

Several courts of appeal have recognized an alternative estoppel theory requiring arbitration between a signatory and non-signatory. See *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993), cert. denied, U.S. , 115 S.Ct. 190, 130 L. Ed. 2d 123 (1994); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (7th Cir. 1984). In these cases, a signatory was bound to arbitrate with a non-signatory at the non-signatory's insistence because of 'the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract...and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations'....

...these estoppel cases all involve claims which are integrally related to the contract containing the arbitration clause.⁴¹

Should Federal Law Control an Alabama Pre-Dispute Agreement?

In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. , 134 L. Ed. 2d 902 (1996), the United States Supreme Court declared that "[c]ourts may not...invalidate arbitration agreements under state laws applicable only to arbitration provisions."⁴² In the year previous to *Casarotto*, the Eleventh Circuit had recognized that "[t]he issue of arbitrability under the United States Arbitration Act is a matter of federal substantive law."⁴³ Indeed, the Alabama Supreme Court itself has held that "when there is an agreement to arbitrate a dispute under the provisions of the Federal Arbitration Act, this Court will enforce that agreement, in accordance with the federal policy as expressed in the Federal Arbitration Act and court decisions construing that Act."⁴⁴

Another strong advocacy of federal principles came as recently as April 18, 1997, in *Coastal Ford, Inc. v. Kidder*, No. 1960005, So.2d (Ala. 1997):

...[T]he Federal Arbitration Act will apply to the arbitration provision if the contract is one involving interstate commerce in fact, so as to be within Congress's power to regulate under the Commerce Clause....

...A court faced with a motion to stay proceedings pursuant to an arbitration agreement must determine 'whether the language or 'scope' of the arbitration clause is broad enough to encompass the claims sought to be arbitrated.' *Allied-Bruce Terminix*, 684 So.2d at 103 (citation omitted). 'Such a determination must begin with a recognition of the federal policy favoring arbitration....' *Id.*, 684 So.2d at 104.⁴⁵

There would seem to be a strong argument, therefore, that an Alabama court should apply federal substantive law when interpreting an Alabama pre-dispute agreement, at least where that agreement invokes the Federal Arbitration Act. Leaving the federal preemption issue for another day, however, on closer analysis the Alabama and federal authorities may be becoming more closely aligned than appears at first blush.

Reconciling the Alabama Cases with Federal Law

It has long been the law in Alabama that "[a] party is estopped from assuming in a legal proceeding a position that is inconsistent with one the party has previously asserted."⁴⁶ Thus, Alabama law is arguably compatible with the federal

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authorities which would preclude a party from proceeding on a theory that a defendant is a principal's agent for purposes of asserting liability against that principal, while taking the inconsistent position that the principal was not, however, part of the underlying sales transaction for purposes of invoking an arbitration agreement. Indeed, certain of the Alabama Supreme Court's recent arbitration cases suggest that, where all defendants are implicated on agency principles under an arbitration provision addressing the very claims alleged, a plaintiff should be held equitably estopped from asserting that only a signatory may compel arbitration of the claims against him.⁴⁷

Certainly, the Alabama cases are aligned with the federal authorities in their recurring emphasis upon agency relationships. In *Ex parte Jones II*, the court denied the non-signatory's right to compel arbitration. Significantly, however, the defendants were a loan agency and the issuer of a collateral insurance policy. The plaintiffs did not even know that there was a separate insurance company involved until after their car was destroyed.⁴⁸ Similarly, in *Prudential Securities v. Micro-Fab*, the court clearly considered the fact that, even though the claims of the individual and his company involved the same kind of securities, those claims could "exist totally independent of one another" and did not "relate to the same transaction."⁴⁹

In contrast, in *Ex parte Gates*, vendor and manufacturer relationships were implicated in a singular transaction, and the plaintiffs not only knew at the time of the sale that they were dealing with both parties, but, based upon the claims asserted, allegedly relied upon this fact. As explained by Chief Justice Hooper, under these facts it was a theory of equitable estoppel which allowed the non-signatory to compel arbitration, due to the close relationship between the signatory and non-signatory, and the claims subject to arbitration and the claims alleged.⁵⁰

Subsequently, in *Ex parte Gray*, the Alabama Supreme Court left no doubt that consideration of agency relationships influenced its decision to allow the non-signatory to invoke the arbitration agreement:

As the trial court noted in its order compelling arbitration, the thrust of Gray's complaint against Crown and Pardue is that Pardue, as Crown's agent, while acting within the line and scope of his agency, falsely represented the condition of the vehicle Gray was buying. Clearly, Gray's claim comes within the arbitration agreement, and that agreement is binding upon all the parties and is enforceable under the controlling law. See *Ex parte Gates*, 675 So.2d 371 (Ala. 1996)...⁵¹

Finally, in *Ex parte Isbell*, the court again referenced *Ex parte Gates*, emphasizing the fact that "[a]ll of the defendants participated in a mutual business arrangement, the purpose of which was to sell mobile homes."⁵²



If subsequent courts continue to follow *Ex parte Gates*, the Alabama cases may increasingly share the federal emphasis on agency relationships and "the nature of the underlying claims asserted...to determine whether those claims fall within the scope of the arbitration clause."⁵³ Indeed, as expressed by the court in *Ex parte Gates*, "the essential question is whether the arbitration clause in that contract applies to the [plaintiff's] claims."⁵⁴ The question remains, however, whether *Ex parte Stripling* represents a solidification of the court's position away from *Ex parte Gates* (and adherence to federal authorities), or is merely the

latest snapshot of the court's fluctuating stance on this issue. In that regard, this article is hardly a definitive statement of the Alabama Supreme Court's position on the non-signatory issue, but merely an attempt to track and define its struggle in that regard.

Conclusion

At first blush, the Alabama Supreme Court's decisions on the issue of the non-signatory's right to compel arbitration appear to have followed no clearly discernible or predictable pattern. Upon closer analysis, however, the cases may suggest an increasing acknowledgment of federal principles which would favor the non-signatory's right to compel arbitration, by focusing more on the implicated agency relationships and claims asserted than on the narrow language of the underlying contract. Under the federal authorities, agency and equitable estoppel principles will generally apply to favor arbitration where a plaintiff is invoking identical claims against joint defendants and proceeding on a theory that one is the agent for purposes of its allegations against all.

If a tendency to favor the federal view prevails, then something less than the precise arbitration provision from *Ex parte Gates* may suffice in the future to allow a non-signatory to invoke an arbitration agreement. As the court observed in *Koullas v. Ramsey*, 1996 WL 596900 (Ala., Oct. 18, 1996), "[i]n the event of an ambiguity or uncertainty over the applicability of an arbitration clause, federal policy dictates that it be resolved in favor of arbitration...federal law favors arbitration where a *reasonable* interpretation of the arbitration agreement would cover the dispute."⁵⁵

ENDNOTES

1. 9 U.S.C. § 2.
2. *Ex parte McKinney*, 515 So.2d 693, 699 (Ala. 1987).
3. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 130 L. Ed. 2d 753, 761 (1995) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 628 So.2d 354, 355 (Ala. 1993)).
4. *Ex parte Gates*, 675 So.2d 371, 374 (Ala. 1996); see, e.g., *A.G. Edwards & Son v. Syvrud*, 597 So.2d 197 (Ala. 1992) (when the Federal Arbitration Act applies, Alabama law is preempted insofar as it purports to reject the specific

enforcement of a predispute arbitration agreement on public policy grounds).

5. *Allied-Bruce Terminix*, 130 L. Ed. 2d at 764, 769.
6. *Id.*
7. *Ex parte Gates*, 675 So.2d 371, 374 (Ala. 1996).
8. As discussed, *infra*, the Alabama Supreme Court has entered two separate opinions styled *Ex parte Jones*, withdrawing, *ex mero motu*, its initial opinion entered on May 31, 1996.
9. These are by no means the only 1996 and 1997 cases discussing the enforceability of arbitration provisions. See, e.g., *Koullas v. Ramsey*, No. 1951452, 1996 WL 596900 (Ala., Oct. 18, 1996); *Reynolds and Reynolds Co. v. King Automobiles, Inc.*, No. 1950854, 1996 WL 716978 (Ala., Dec. 13, 1996); *Coastal Ford, Inc. v. Kidder*, No. 1960005, ___ So.2d ___ (Ala., April 18, 1997). The cases discussed herein appear to be the most significant on the nonsignatory question, however.
10. *Ex parte Gates* was decided on January 26, 1996.
11. *Ex parte Gates*, 675 So.2d at 373 (emphasis added).
12. *Id.* at 375 (denying petition for writ of mandamus).
13. *Id.*
14. *Ex parte Jones I*, 1996 WL 292060 at *1.
15. *Id.* at *2 (citing, *inter alia*, *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 353 (11th Cir. 1993); *McBro Planning and Development Co. v. Triangle Electrical Constr. Co.*, 741 F.2d 342 (11th Cir. 1984)).
16. *Ex parte Jones II*, 686 So.2d at 1168.
17. As noted throughout this article, there is a question regarding what substantive law should control on the issue of the applicability of an arbitration provision to a nonsignatory. The United States Supreme Court's recent statement on this issue prescribes that "generally applicable [state law] contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the Federal Arbitration Act]." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. ___, 134 L. Ed. 2d 902, 909 (1996)(citing, *inter alia*, *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995)). The Supreme Court went onto qualify, however, that "[c]ourts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Id.* (emphasis in original).
18. *Ex parte Jones II*, 686 So.2d at 1168.
19. *Id.* at 1170 (J. Maddox, dissenting).
20. *Id.* at 1171.
21. *Ex parte Martin*, 1996 WL 650307 at *4.
22. *Id.* at *3 (citing *Ex parte Jones II*).
23. *Ex parte Isbell*, 1997 WL 99725 at *5 (citing, e.g., *Thompson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 779 (2d Cir. 1995); *Sunkist Soft Drinks v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), *cert. denied*, U.S. ___, 115 S.Ct. 190, 130 L.Ed.2d 123 (1994)).
24. *Prudential Securities v. Micro-Fab*, 1997 WL 99722 at *2.
25. *Id.*
26. *Id.* at *2 (affirming the trial court's denial of the defendants' motion to compel arbitration).
27. *Id.* at *3 (C.J. Hooper, dissenting).
28. *Ex parte Stripling*, 1997 WL 127222 at *1.
29. *Id.*
30. *Id.* (citing *Ex parte Gray*, 686 So.2d 250 (Ala. 1996)).
31. *Id.* at *2.
32. *Id.*
33. *Id.*
34. *Ex parte Martin*, 1996 WL 650307 at *4 (C.J. Hooper, dissenting).
35. *Id.* at *5, (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)).
36. See, e.g., *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753

(11th Cir. 1993), *cert. denied*, ___ U.S. ___, 130 L. Ed. 2d 123 (1994); *J.J. Ryan & Son, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342 (7th Cir. 1984)(all applying estoppel principles to allow the nonsignatory to compel arbitration).

37. *Thomson-CSF, S.A.*, 64 F.2d at 777 (citations omitted).
38. See *Ex parte Jones I*, 1996 WL 292060 WL 292060 at *2 (citing *Sunkist Soft Drinks*, 10 F.3d at 753; *McBro Planning & Development Company v. Triangle Electrical Construction Co.*, 741 F.2d 342 (11th Cir. 1984)).
39. *Sunkist Soft Drinks*, 10 F.3d at 757-58.
40. *Id.* at 757 (citing *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA.*, 863 F.2d 314 (4th Cir. 1988)).
41. *Thomson-CSF, S.A.*, 64 F.3d at 779 (some citations omitted).
42. *Casarotto*, 134 L. Ed. 2d at 909 (citing, *inter alia*, *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995)(emphasis in original)).
43. *Morewitz v. West of England Shipowners Mutual Protection & Indemnity Assoc. (Luxembourg)*, 62 F.3d 1356, 1364 (11th Cir. 1995), *cert. denied*, US ___, 116 S.Ct. 915, 133 L. Ed. 2d 845 (1996).
44. *Ex parte McKinney*, 515 So.2d 693, 698 (Ala. 1987)(citation omitted).
45. *Coastal Ford, Inc. v. Kidder*, No. 1960005, ___ So.2d at ___ (Ala. 1997). It should be noted that *Coastal Ford* did not address the nonsignatory issue. Moreover, the Court subsequently stated that "[n]evertheless, the question of whether a contract's arbitration clause requires arbitration of a given dispute remains a matter of contract interpretation. . . . [and] [t]he question whether an arbitration clause applies to a claim is a matter of state-law contract interpretation. . . ." *Id.*
46. *Born v. Clark*, 662 So.2d 669, 671 (Ala. 1995).
47. See *Ex parte Martin*, 1996 WL 650307 at *5 ("It appears clear to me that federal courts have been [w]illing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.") (citing *Thomson*, 64 F.3d at 779)(C.J. Hooper, dissenting).
48. See *Ex parte Jones II*, 686 So.2d at 1167.
49. *Prudential Securities v. Micro-Fab*, 1997 WL 99722 at *2.
50. See *Ex parte Martin*, 1996 WL 650307 at *5 (explaining *Ex parte Gates* as aligned with the federal decisions which rely on a theory of equitable estoppel).
51. *Ex parte Gray*, 686 So.2d at 251 (some citations omitted).
52. *Ex parte Isbell*, 1997 WL 99725 at *7.
53. *Sunkist Soft Drinks, Inc.*, 10 F.3d at 757-58.
54. *Ex parte Gates*, 675 So.2d at 374 (citation omitted); see *Koullas v. Ramsey*, No. 1951452, 1996 WL 59690 at *2 (denying arbitration because the claims did not "reasonably arise under" the sales contract).
55. *Koullas v. Ramsey*, 1996 WL 596900 at *4 (emphasis added).



Patricia J. Ponder

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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 income tax returns. I sincerely apologize. I would further unequivocally state that I had no intent of doing anything which would further denigrate the lawyers of this association in the eyes of the general public.

Thomas R. McAlpine, Mobile, Alabama

Notices

In the Supreme Court of Alabama

IT IS HEREBY ORDERED that Rule 28(a), Alabama Rules of Disciplinary Procedure, be, and is, amended to read as follows:

"(a) Prohibition of Practice. A lawyer who has been disbarred by consent or after hearing, or who has been suspended for more than 90 days, or who has been placed on disability inactive status pursuant to Rule 27 of these Rules, or who has voluntarily surrendered his or her license, may not resume the practice of law until reinstated by order of the Disciplinary Board."

IT IS FURTHER ORDERED that this amendment be effective August 1, 1997.

Hooper, C.J., and Maddox, Almon, Shores, Houston, Kennedy, Cook, Butts, and See, JJ., concur.

WHEREAS, the Board of Commissioners of the Alabama State Bar has recommended an amendment to Rule 15(b), Alabama Rules of Disciplinary Procedure; and

WHEREAS, the Court has considered the Board's proposed amendment;

IT IS THEREFORE ORDERED that Rule 15(b), Alabama Rules of Disciplinary Procedure, be amended to read as follows:

"(b) Official Duty Immunity. Members of the following shall be immune from suit for any conduct in the course of their official duties:

"(1) the Executive Committee of the Alabama State Bar;

"(2) the Disciplinary Commission;

"(3) the Disciplinary Board;

"(4) the General Counsel and the staff of the Office of the General Counsel;

"(5) local grievance committees and any executive committee or member of a local bar association while serving as a part of the local grievance process; and

"(6) a Bar Commissioner while participating in the grievance procedure.

"In addition, any financial institution reporting an overdraft of a lawyer's trust account pursuant to the provisions of Rule 1.15(e) of the Alabama Rules of Professional Conduct shall be immune from suit for any conduct in the course of its official duties in complying with Rule 1.15."

IT IS FURTHER ORDERED that this amendment be effective August 1, 1997.

Hooper, C.J., and Maddox, Almon, Shores, Houston, Kennedy, Cook, Butts, and See, JJ., concur.

WHEREAS, the Board of Bar Commissioners of the Alabama State Bar has recommended to this Court that Rule 1.15 of the Alabama Rules of Professional Conduct be amended; and

WHEREAS, the Court has considered the recommended amendment and deems that amendment appropriate;

IT IS, THEREFORE, ORDERED that Rule 1.15, Alabama Rules of Professional Conduct, be amended to read in accordance with the appendix attached hereto.

IT IS FURTHER ORDERED that this amendment shall be effective August 1, 1997.

Hooper, C.J., and Maddox, Almon, Shores, Houston, Kennedy, Cook, Butts and See, JJ., concur.

Rule 1.15 SAFEKEEPING PROPERTY

A lawyer shall hold the property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. No personal funds of a lawyer shall ever be deposited in such a trust account, except (1) unearned attorney fees that are being held until earned, and (2) funds sufficient to cover maintenance fees, such as service charges, on the account. Interest, if any, on funds, less fees charged to the account, other than overdraft and returned item charges, shall belong to the client or third person, except as provided in Rule 1.15(g), and the lawyer shall have no right or claim to the interest. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation.

A lawyer shall designate all such trust accounts, whether general or specific, as well as deposit slips and all checks drawn thereon, as either an "Attorney Trust Account," an "Attorney Escrow Account," or an "Attorney Fiduciary Account." A lawyer shall designate all business accounts, as well as other deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," or a "Regular Account." However, nothing in this Rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account, including, for example, fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, or agent or in any other fiduciary capacity.

(b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall not make disbursements of a client's funds from separate accounts containing the funds of more than one client unless the client's funds are collected funds; provided, however, that if a lawyer has a reasonable and prudent belief that a deposit of an instrument payable at or through a bank representing the client's funds will be collected promptly, then the lawyer may, at the lawyer's own risk, disburse uncollected client's funds. If collection does not occur, then the lawyer shall, as soon as practical, but in no event more than five (5) working days after notice of noncollection, replace the funds in the separate account.

(e) A lawyer shall request that the financial institution where the lawyer maintains a trust account file a report to the Office of General Counsel of the Alabama State Bar in every instance where a properly payable item or order to pay is presented against a lawyer's trust account with insufficient funds to pay the item or order when presented and either (1) the item or payment order is returned because there are insufficient funds in the account to pay the item or order or, (2) if the request is honored by the financial institution, any overdraft created thereby is not paid within 3 business days of the date the financial institution sends notifi-

cation of the overdraft to the lawyer. The report of the financial institution shall contain the same information, or a copy of that information, forwarded to the lawyer who presented the item or order.

A lawyer shall enter into an agreement with the financial institution that holds the lawyer's trust account pursuant to which the financial institution agrees to file the report required by this Rule. Every lawyer shall have the duty to assure that his or her trust accounts maintained with a financial institution in Alabama are pursuant to such an agreement. This duty belongs to the lawyer and not to the financial institution. The filing of a report with the Office of General Counsel pursuant to this paragraph shall constitute a proper basis for an investigation by the Office of General Counsel of the lawyer who is the subject of the report, pursuant to the Alabama Rules of Disciplinary Procedure. Nothing in this Rule shall preclude a financial institution from charging a lawyer or a law firm a fee for producing the report and maintaining the records required by this Rule. Every lawyer and law firm maintaining a trust account in Alabama shall hereby be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule and shall hold harmless the financial institution for its compliance with the aforesaid reporting and production requirements. Neither the agreement with the financial institution nor the reporting or production of records by a financial institution made pursuant to this Rule shall be deemed to create in the financial institution a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of a lawyer's overdrawing a trust account.

A lawyer shall not fail to produce any of the records required to be maintained by these Rules at the request of the Office of General Counsel, the Disciplinary Commission, or the Disciplinary Board. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or Rules of Disciplinary Procedure for the production of documents and evidence.

(f) A lawyer, except a lawyer not engaged in active practice pursuant to Alabama Code 1975, § 34-3-17 and 18, shall maintain a separate account to hold funds of a client. If a lawyer does not hold funds for a client, then he or she shall give written notice to the Secretary of the Alabama State Bar that the lawyer will not maintain such an account. A lawyer must so advise the Secretary of the Alabama State Bar within six (6) months of admission to practice or of a return to active practice. A lawyer who has previously given the notice required by this paragraph shall revoke that notice immediately upon establishing a separate account to hold the funds of a client by giving written notice of revocation to the Secretary of the Alabama State Bar.

(g) Unless a lawyer shall have given the notice specified in Rule 1.15(h), a lawyer shall hold the funds of a client or of a third person that are nominal in amount or that the lawyer expects to be held for a short period in one or more interest-bearing deposit accounts maintained at a bank, savings bank, savings and loan association, or credit union, whose deposits are insured by an agency of the federal government. A lawyer shall use the account only for the purpose of holding funds of clients or third persons that are nominal in amount or that the lawyer expects to be held in the account for a short period. The account shall be maintained under a written agreement with the depository that provides, among other things, that the depository (1) will not permit the lawyer to receive any interest, (2) will remit interest, less fees charged to the account (other than overdraft and returned item charges), at least quarterly to the Alabama Law Foundation or the Alabama Civil Justice Foundation, as the lawyer shall designate, (3) will transmit with each remittance a statement reflecting the name in which the account is maintained and the amount of interest remitted, with a copy to the lawyer, and (4) will provide information to the Alabama Law Foundation or the Alabama Civil Justice Foundation, as appropriate, as to the rate or rates of interest on the account.

(h) A lawyer, or a law firm on behalf of its lawyers as disclosed in the notice, may give written notice to

the Secretary of the Alabama State Bar that the lawyer does not intend to maintain the interest-bearing account otherwise required by Rule 1.15(g). This notice must be given within six (6) months of the lawyer's admission to practice or return to active practice, and may later be given only during the period between April 1 and June 1 of each year, to be effective as of June 1. The notice shall remain in effect until revoked or changed by the lawyer, or by a law firm on behalf of its lawyers. Notice given by a lawyer or law firm in compliance with prior DR 9-102(D)(3) to the Executive Director of the Alabama State Bar that the lawyer or law firm opted not to maintain the interest-bearing account required by DR-9-102(D)(2) shall remain effective without annual repetition.

(i) All interest transmitted to and received by the Alabama Law Foundation pursuant to Rule 1.15(g) shall be distributed by it for one or more of the following purposes:

- to provide legal aid to the poor;
- to provide law student loans;
- to provide for the administration of justice;
- to provide law-related educational programs to the public;
- to help maintain public law libraries;
- to help maintain a client security fund;
- to help maintain an inquiry tribunal; and
- for such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

(j) All interest transmitted to and received by the Alabama Civil Justice Foundation pursuant to Rule 1.15(g) shall be distributed by it for one or more of the following purposes:

To provide financial assistance to organizations or groups providing aid or assistance to:

- underprivileged children;
- traumatically injured children or adults;
- the needy;
- handicapped children or adults; or
- drug and alcohol rehabilitation programs.

To be used in such other programs for the benefit of the public as the Supreme Court of the State of Alabama specifically approves from time to time.

(k) A lawyer shall not fail to produce, at the request of the Office of General Counsel, the Disciplinary Commission or the Disciplinary Board, any of the records required to be maintained by these Rules. This obligation shall be in addition to, and not in lieu of, any other requirements of the Rules of Professional Conduct or Rules of Disciplinary Procedure for the production of documents and evidence.

COMMENT TO RULE 1.15 AS AMENDED EFFECTIVE JULY 1, 1997.

In addition to making stylistic changes, the amendment added the second paragraph in section (a) and added section (e) and section (k). It also added a sentence to the first paragraph of section (a) to set out the conditions under which a lawyer can deposit personal funds into a trust account.



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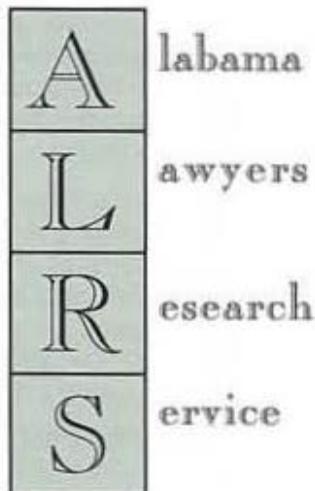
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