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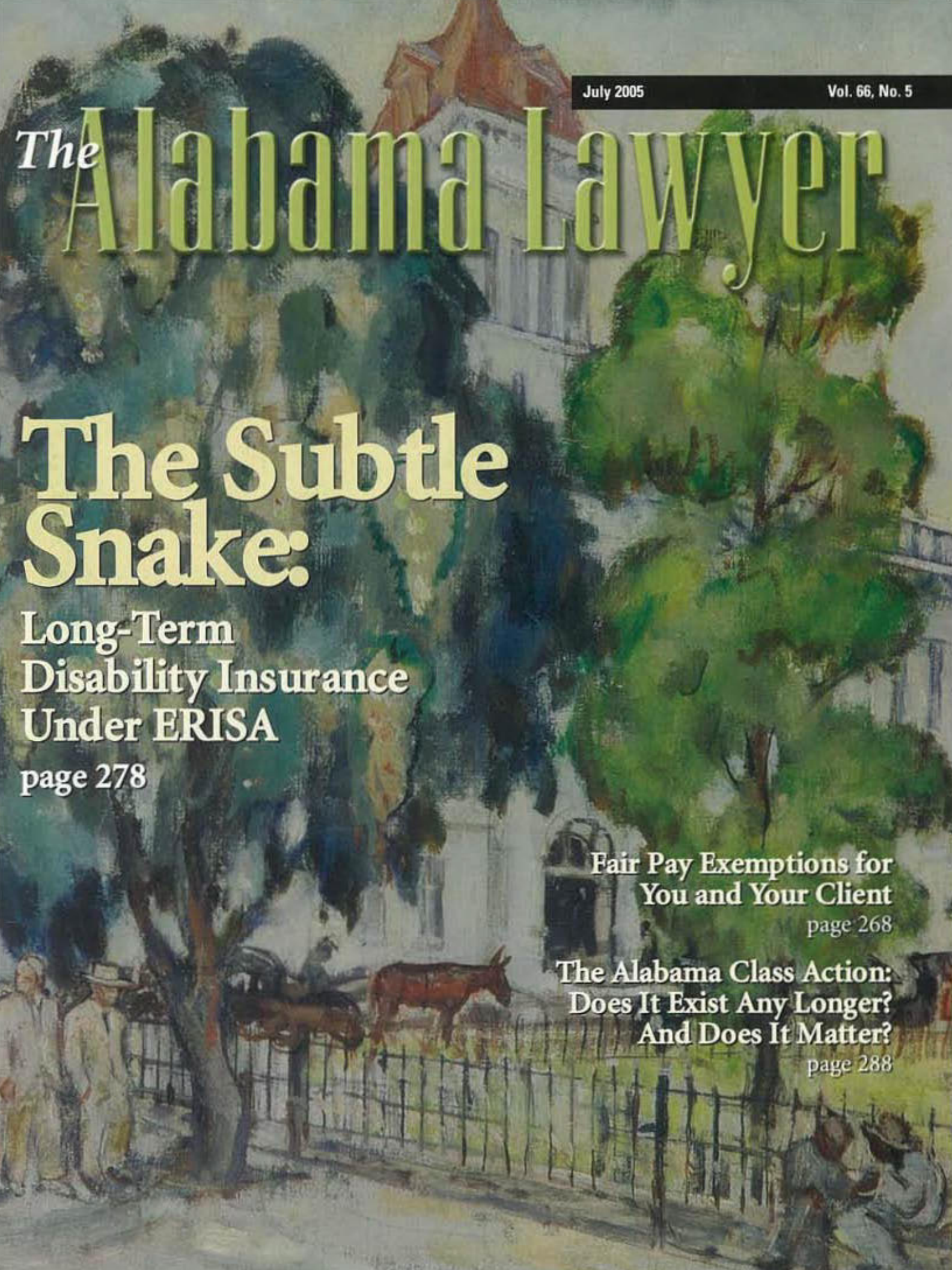
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The Alabama Lawyer

July 2005

Vol. 66, No. 5

ON THE COVER

Anne Goldthwaite, American, 1869-1944
Courthouse • Oil on canvas • 18 x 22 inches
 Montgomery Museum of Fine Arts, Montgomery.
 Gift of Miss Lucille Goldthwaite, 1946.

Anne Goldthwaite is one of Alabama's most renowned painters and graphic artists. *Courthouse* is typical of her painting style, which was influenced by her study of art in France between 1906 and 1913. Montgomery's old courthouse at the corner of Washington and Lawrence streets was built between 1852-1853; it was demolished in 1958 to make way for a new county courthouse.

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The Alabama Lawyer (ISSN 743-038) is published seven times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama, and additional mailing offices. POSTMASTER: Send address changes to The Alabama Lawyer, P.O. Box 4156, Montgomery, AL 36103-4156.

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Douglas McElvy

No Greater Gift

During the past year, I have traveled throughout the state and have enjoyed the privilege of speaking with so many dedicated, energetic and wise members of the legal profession. As I leave the office of president, I take this opportunity to share a few observations and thoughts. I hope that these comments will challenge many to think about our role as lawyers, not only to the profession, but also to our state and nation.

If you paint a portrait of America's national character, the **Rule of Law** would be a dominant image. A government ruled by law and not by men was to be the linchpin of our philosophy of government. The Founders were students of history, and they knew that great civilizations and governments had come and gone. They were concerned because, as John Adams put it, "There never was a democracy yet that did not commit suicide."¹ They realized that societies based on the rule of men failed and that those based on the rule of law prospered.

The phrase "Rule of Law" probably seems commonplace to most of us. We hear it and think of due process, equal protection, fundamental rights or separation of powers, but how did this phrase come to play such an integral part in the Western legal tradition? Is it still applicable to a modern democratic republic such as ours?

Eminent historian Paul Johnson notes that the concept of the Rule of Law had its roots in "the historic blend of two valuable but imperfect and distinct

moral/legal systems—the Greco-Roman and the Judeo-Christian—which together are much more than the sum of their parts."² He goes on to say that everyone wants moral order and justice, but "the chief problem that faces a civilization is how to translate morality and justice into a workable system of law."³ It seems to me that history proves that a government based on the Rule of Law provides the best answer.

A major victory for the Rule of Law came in a meadow called Runnymede in the year 1215. Archbishop Stephen Langton set himself as a mediator between the lawless King John and aggrieved feudal barons, which led to the signing of the **Magna Carta**. The freedoms it contained were important not only for the barons, but for the popular masses as well. The basis of this key document in legal and political history was the concept that both the king and his subjects were under the Rule of Law.

The Magna Carta dealt with, among other issues, religious freedom, the right to trial by jury of one's equals, and a prohibition against taxation without representation—themes that would be repeated 500 years later in America's struggle for independence. Yet, the struggle for freedom from the "divine right of kings" and, at times, tyranny did not end in the 13th century. The balance of power between the crown, the parliament and the people ebbed and flowed across the centuries.

At a time when it was not popular for anyone to talk about anyone or anything being "king" other than the king himself,

Samuel Rutherford wrote a book entitled *Lex, Rex—The Law and the Prince*. It was written in 1644, when ideas about civil government were in transition. The concept that “law is king” paved the way for the view that man had certain rights and liberties which could not be abused by any other authority, including a sovereign head of a nation or any form of government. The idea that there were certain transcendent, universal laws which preceded man-made laws gave birth to the further concept that those laws should be the basis of government for a nation and that for any human law to be valid it must be consistent with those transcendent laws or truths. Hence, the maxim: a government of laws and not of men, or that all men are under the Rule of Law.

Such a concept was risky in Rutherford’s time, but by the time our Founding Fathers were considering America’s deteriorating relationship with the British Crown, the concept had coalesced into a political theory that justified the separation with Britain. Thomas Jefferson wrote in the **Declaration of Independence** that there were certain “Laws of Nature and of Nature’s God”⁴ that demanded that kings act in certain ways toward their subjects. A violation of those universal principles was said to equal tyranny, and the Declaration of Independence went on to detail a long list of those violations by King George III that justified the colonies in declaring themselves a free and independent nation.

The Declaration captured these legal and governmental ideas in the following language:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁵

The signers felt strongly about this philosophy of government, which had as its fundamental premise that there are self-evident truths upon which the nation was to be established. One of these self-evident truths is that all people are created equal and that they are endowed by their Creator with certain unalienable rights. Therefore, all people have rights and dignity that no one can take away.

In the Founders’ eyes, this truth was so clear that it needed no proof. It was not a statement of religion but an expression of the philosophy of government of the United States. And, if you think about it, every nation has a philosophy of government that dictates the source of individual rights, the concept of equality and due process protections. That philosophy either presupposes transcendent truths or it does not. If transcendent truths are deemed to exist, then there must also be a source of those truths. Our Founders articulated the source as the “Laws of Nature and of Nature’s God.”

This does not mean that the government must endorse a particular belief about God or particular religious duties

to God. It simply means that every form of government in some way or another must deal with the concept of God when deciding its underlying philosophy of government. A nation’s government is either based upon laws as decided only by those in power (different philosophies of dictatorship), or by the “will of the people” (different philosophies of democracy), or by laws as decided by representatives under oath to uphold the Rule of Law within the context of fundamental and transcendent truths (representative republics).

Our Founders did not choose the extreme of a **theocracy**, as we see in Iran today, where the dictates of the ayatollah purport to be directives from God. Nor did the Founders choose a godless form of government, such as **communism**, where transcendent moral truths would be unwelcomed.



Acknowledging the role of God in the philosophy of government, our Founders adopted as part of their philosophy a jurisdictional separation between church (the duties one owes to God) and state (the duties one owes to government and society). But the separation was intended to nurture and protect the right of every person to think of God and spiritual matters as his individual conscience dictates. The idea was to protect religious freedom by employing a balance between religion and government. Sincerely held beliefs of all kinds were to enjoy a wide berth without government disturbance. However, it is clear that this was not intended to create a culture in which religion and the concept of God were extinguished.

The **Constitution**, adopted 12 years after the Declaration of Independence, provided the by-laws for the new government to function. It did not change the

philosophy of government articulated by our Founders in the Declaration. It embodied the concept that this would be a government of laws and not of men. Our Constitution, in what has become known as the **Supremacy Clause**, states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁶

The drafters saw through history that a government ruled by the will of whomever was in power, rather than constrained by law, would lead to disaster, and a strong constitution and adherence to the Rule of Law were the only ways to secure a safe, tranquil and prosperous society.

All of this comes down to this very important principle: To have civil order, both the government and the people must respect the Rule of Law. Man does not rule; the law rules. Man is to conform his actions to the law based upon fundamental and transcendent truths; the law is not to reflect current cultural trends that undermine the fundamental truths of the founding philosophy of government. Everyone is subject to the Rule of Law—the President, the Congress, judges and citizens—everyone. The ultimate tranquility and protection of society rests on the proper administration of the Rule of Law because its constraints prevent any one person or group from advancing his or her own personal agenda contrary to law.

If in the United States the majority could make any law it wanted, then we would not be governed by the Rule of Law, and no boundary would exist to the laws that could be devised. A Rule of Law not based on absolute, universal principles is no Rule of Law at all and will ultimately lead to tyranny. Our forefathers rejected this philosophy of government in favor of one that they correctly predicted would be the only way to an orderly society.

I am mindful that there is a different view of the Rule of Law which holds that these fundamental truths change as society and culture progress. These progressive truths are said to compose a "new moral order" which promotes "autonomy for the individual, equality and social justice."⁷ This new moral order seems inconsistent with the concept of self-evident truth espoused by the Founders and supported in numerous historical accounts. "In either case, it is said that the moral dimension is endangered: "The rule of law is in danger of being mangled because the moral base is being violently attacked."⁸

Can a nation establish a different philosophy of government than that upon which it was founded? Of course it can, but that choice must be a deliberate and calculated one that the people choose through a pre-determined process, as with a Constitutional amendment. I think history will prove that governments founded on a philosophy embracing transcendent truth will succeed

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as long as they remain in the path illuminated by that truth. "Western legal tradition has always been dependent . . . on belief in the existence of a body of law beyond the law of the highest political authority, once called divine law, then natural law, and recently human rights."⁹ Justice Anthony Kennedy recently said, "Americans find their identity in the United States Constitution."¹⁰ Indeed, America's identity is based on a strong Constitution, but that Constitution must be marked by stability and consistency.

Honorable J. Thomas Greene¹¹ in his treatise **"The Rule of Law: Endangered at Home? Threatened Abroad?"** argues that America's Rule of Law is under attack from many angles, such as unexplained rulings by appellate courts, interpretation by federal agencies to expand their power and authority, jury nullification and declarations by executive officials that legislative acts are unconstitutional.¹² Neither time nor space permit a discussion of each area, but as to declarations of public officers, Greene points out that perhaps the most vivid example exists in the "same-sex" arena, where local executive officials have proclaimed that "state statutes are unconstitutional, ignoring such laws on the supposition that they fail to provide equal protection of law."¹³ He observes, "[A] very important issue is presented as to whether officials within the executive branch of state and local government may assume a judicial role by proclaiming unambiguous state statutes to be trumped by their declarations that such laws are unconstitutional."¹⁴ Whether or not one believes that same-sex "marriage" is a protected constitutional activity is not the issue. The issue here is that in a nation governed by laws and not of men, there is a proper way to attempt to change the law.

"This novel phenomenon, which perplexes moralists and statesmen, is that large classes of otherwise respectable persons now hold the belief and act on the conviction that it is not only allowable, but even highly praiseworthy, to break the law of the land if the lawbreaker is pursuing some end which to him

or to her seems to be just and desirable."¹⁵

Perhaps the greatest tragedy of this take-the-law-in-your-own-hands approach is that it "seems to confound,

confuse and polarize many individuals and groups concerning how to oppose laws believed to be unconstitutional."¹⁶

This zeal for lawlessness to achieve social and political ends and the failure



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of executive officials and others to respect the Rule of Law erode confidence and encourage "cynicism about law, leading to a contempt for law, on the part of all classes of the population."¹⁷ The whole concept of a government of laws and not of men requires that challenges to existing law be conducted through legitimate channels consistent with the Rule of Law.

The damage done to our legal system should not be underestimated. No matter whether it is executive officials acting unilaterally outside the law or whether a court acting completely outside the constraints of established law, the respect for law and the concept of the Rule of Law are eroded. Harvard law professor Harold Berman summed it up:

"The traditional Western beliefs in the structural integrity of law, its ongoingness, its religious roots, its transcendent

qualities, are disappearing not only from the minds of law teachers and law students but also from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from the law itself. The law itself is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. The historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse."¹⁸

Events since 1985, when those words were written, seem to indicate that Berman indeed had a prophet's eye.

How can we best stop the erosion of this rich soil of America's legal tradition and Rule of Law? How can we best fulfill our crucial role as its protectors, guardians and

trustees of the Rule of Law? Our oath as Alabama lawyers provides some direction. It requires that we demean ourselves as lawyers; that we act with certain character; that we are faithful in our service to clients and the court; that we engage in no falsehood, greed or malice; and that we uphold the constitutions of Alabama and the United States, "so help me God."¹⁹ It's clear that our oath as attorneys requires that we view our profession as a calling, which requires that we act with the core values of truth, integrity and service. As lawyers, I can think of no greater gift we can give ourselves, our clients, the courts and the public than an impeccable example of high moral virtue and character. Our responsibility to uphold the law and the Constitution with an overriding zeal for truth and justice requires that we not allow novelty and innovation to override tradition and truth. It is my view that we have the

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responsibility to measure the value of proposed alterations of law and traditional morals by the yardstick of truth as declared in America's founding documents. If we lose sight of the historical and moral obligations of the Rule of Law, "we are vulnerable to the destruction of our freedom, our equality before the law and our self-respect."²⁰ The public is losing confidence in our legal system, and we, as lawyers and judges, have an important role to play in restoring that confidence.

As a state bar association, our mission statement recognizes a responsibility to "increase the public understanding and respect for law."²¹ This does not mean that as a mandatory bar the Alabama State Bar should wade into controversial, socio-legal issues like some of those mentioned in this article, but the bar does have an important role in promoting respect for law and educating the citizens of Alabama as to the meaning, operation, history and foundation of America's greatest gift, its Rule of Law.

I turn now to some final comments. I was honored and humbled to be selected to serve as state bar president. I leave the bar in the eminently qualified hands of **Bobby Segall**, I hope in at least as good a condition as when I commenced my term. If Bobby finds it so, it will be because of the outstanding leadership of our **state bar staff** and the excellent wisdom and discretion of the **Executive Council**, consisting of Vice President **Anthony Joseph, Sam Crosby, Tom Methvin and Gerald Paulk**, whose watchful eyes kept me from straying off the charted course, all for whom I am deeply grateful. I also extend a special note of thanks to **Bill Clark**, whose excellent work as past president made my job much easier. And, lastly, thank you for allowing me this great honor. ■

Endnotes

1. Letter from John Adams to John Taylor (Apr. 15, 1814) in 6 *The Works of John Adams* 484 (Charles Francis Adams ed., 1851).
2. Paul Johnson, "Why West Is Best," *National Review*, Dec. 3, 2001, available at www.nationalreview.com/03dec01/johnsonprint120301.html.

3. *Id.*
4. *The Declaration of Independence* para. 1 (U.S. 1776).
5. *The Declaration of Independence* para. 2 (U.S. 1776).
6. *U.S. Const.* art. VI, cl. 2.
7. J. Thomas Greene, "The Rule of Law: Endangered at Home? Threatened Abroad?," 2004 *A.B.A. Senior Lawyers Div. 6*, (quoting "Rule of Law," (John Sterling, ed) (Sept. 7, 2002), at www.lawandliberty.org/rulelaw.htm).
8. *Id.*
9. Harold J. Berman, *Law and Revolution* 45 (1983).
10. The Honorable Anthony M. Kennedy, circuit justice, Supreme Court of the United States, "Perspectives," address at the 2005 Eleventh Circuit Judicial Conference (May 13, 2005).
11. Honorable J. Thomas Greene is senior judge of the U.S. District Court for the District of Utah.
12. Greene, *supra* note 7.
13. *Id.* at 13.
14. *Id.*
15. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, at lix (1885).
16. Greene, *supra* note 7, at 13.
17. Berman, *supra* note 9, at 40.
18. Harold J. Berman, "The Crisis of Legal Education in America," 26 *B.C. L. Rev.* 347, 351 (1985).
19. "I do solemnly swear that I will demean myself as an attorney, according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person's cause for lucre or malice and that I will support the Constitution of the State of Alabama and of the United States, so long as I continue a citizen thereof, so help me God," *Ala. Code* § 34-3-15 (1975).
20. The Honorable Edith Jones, circuit judge, U.S., "Contemporary Threats to the Rule of Law," address at Princeton University's James Madison Program (Feb. 27, 2001).
21. Alabama State Bar, Report of Long-Range Planning Task Force 5 (1994).

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AI999(1-03)



By Keith B. Norman

Casemaker@alabar.org

The wait is finally over for **Casemaker**, the Alabama State Bar's online legal research library. Since the Board of Bar Commissioner's decision to join the Casemaker Consortium was announced last August, the wait for many bar members has seemed, I am sure, much longer than nine months. After the Casemaker announcement last August, I routinely received inquiries from lawyers about its rollout date and whether everything was still on track. Since Casemaker's rollout several weeks ago, I hope that most Alabama lawyers have had a chance to use this latest *free service* in the state bar's **"Electronic Suite of Services"** available to bar members.

Alabama is the 21st state to join the Casemaker consortium, and more states will be joining the consortium very soon. You can access other states' Casemaker Web libraries when logging in from www.alabar.org. Other consortium states now include: Colorado, Connecticut, Georgia, Idaho, Indiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, and Washington. When other states join the consortium, their libraries are automatically added to our existing material. Our online library will continue to expand as we include practice-related articles from *The Alabama Lawyer* magazine and other legal publications.

The Casemaker search engine is powerful. It allows you to formulate a search using natural language or Boolean search logic. Natural language allows you to type in a word or sentence and the search engine will recognize important words and phrases. For Boolean searches, enter keywords and connectors. There is even an "advanced" search format that allows you to enter data into fields. Simply plug in key information about a case, cite, syllabus, date, attorney, court, and more.

Another important feature of Casemaker is full-text searching. With full-text searching, you no longer have to rely on annotations to find out which cases are cited. For example, when you enter a code cite on a basic search screen and hit "search," you will retrieve the full text of all cases that discuss that code section in question. This lets you decide which cases are relevant without relying on the summary of someone who may not be a lawyer or even a law student.

We have heard many positive comments from Alabama lawyers who have used Casemaker in the short time that it has been available. I am confident that as more lawyers use Casemaker, they, too, will discover how indispensable this online resource will be to their practice. We will soon be adding other online tools that will benefit bar members. Stay tuned for future announcements about new services available in the state bar's growing "Electronic Suite of Services." ■

FREQUENTLY ASKED QUESTIONS ABOUT CASEMAKER®

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Casemaker® is a Web-based legal research library and search engine that allows you to search and browse a variety of legal information, such as codes, rules and case law, over the Internet. It is an easily searchable, continually updated database of case law, statutes and regulations.

When will Casemaker® be available in Alabama?

Casemaker® successfully launched June 17th, 2005. It's now available to all members of the Alabama State Bar.

What will the Casemaker® library contain?

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Where on the Internet will I find Casemaker®?

You'll access Casemaker® by going to the state bar's Web site (www.alabar.org) and logging in to the members' password-protected area. To log in you'll need to enter both the e-mail address you have on file with us and your bar ID number. This is the number on your bar card—NOT the number your received from AOC to put on pleadings.

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How will I learn to use Casemaker®?

Casemaker® is so easy to use that other bar associations that have already launched it have found that training sessions were not necessary. There's a built-in help system that provides you with

prompts depending on what you're trying to do when you access the help files. If you still have questions, though, you may call the Alabama State Bar at (334) 269-1515 between 9:00 a.m. and 4:00 p.m., Monday through Friday, and ask for Casemaker® help.

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Then you need to provide us with one *in writing*. You may do so by regular mail to the Alabama State Bar at P. O. Box 671, Montgomery, AL 36101-0671, by fax to (334) 261-6310, or by sending an e-mail to ms@alabar.org. You may designate your e-mail as "unpublished," which indicates you do not want it placed in the Online Bar Directory. Published e-mail addresses may be accessed by other Alabama State Bar members and the general public. *Please do not call us with your e-mail address. We cannot accept it that way.*

What if I don't know my bar number?

Look on your bar card. It's right under your name and starts with "ASB." If you can't find your bar card, you may submit a written request asking for your number to the Alabama State Bar at P. O. Box 671, Montgomery 36101-0671, by fax to (334) 261-6310, or by sending an e-mail to ms@alabar.org, and we'll mail a response to the address that we have on file for you.

Alabama Library Contents on Launch

- Alabama Constitution
- Alabama Code
- Alabama Session Laws, as enacted
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- Alabama Appellate Court Opinions (Civil & Criminal) from inception
- Alabama Rules of Civil Procedure
- Alabama Rules of Criminal Procedure
- Alabama Rules of Evidence
- All Local Court Rules
- Alabama Rules of Appellate Procedure
- Alabama Rules of Professional Conduct
- Alabama Rules for Imposing Lawyer Discipline
- Miscellaneous Court Rules
- Alabama Administrative Code

Federal Library Contents

- U.S. Constitution
- U.S. Code
- U. S. Supreme Court Opinions from 1935
- 11th Circuit Court of Appeals Opinions from inception
- Other U.S. Circuit Courts of Appeals Opinions vary
- U.S. Federal District Court Opinions for Alabama from 1981 forward
- Other U.S. Federal District Court Opinions vary
- Federal Rules of Procedure
- Federal Rules of Evidence
- Local Rules for all Federal Circuit Courts of Appeals
- Local Rules for all Federal District Courts
- Bankruptcy Court Rules

Reappointment of Tamara O. Mitchell, Bankruptcy Judge, Northern District of Alabama

The current 14-year term of the Honorable Tamara O. Mitchell, United States Bankruptcy Court, Northern District of Alabama at Birmingham, will expire January 3, 2006. The U.S. Court of Appeals for the Eleventh Circuit is presently considering Judge Mitchell's request for reappointment to a new 14-year term.

Upon reappointment, the incumbent would continue to exercise the jurisdiction of a bankruptcy judge as specified in Title 28, U.S. Code; Title 11, U.S. Code; and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101-122, 98 Stat. 333-346.

Members of the bar and the public are invited to submit to the Court of Appeals written comments concerning Judge Mitchell's reappointment. All comments will be considered confidential unless otherwise directed. Comments should be directed to Norman E. Zoller, circuit executive, Eleventh Circuit Court of Appeals, 56 Forsyth Street, NW, Atlanta, Georgia 30303.

Comments must be received no later than August 18, 2005.

Position Available: MCLE Director

The Alabama State Bar is now accepting applications by letter with resumes from qualified lawyers for the position of MCLE Director. These applications should be addressed and mailed to:

Keith B. Norman
Executive Director
P.O. Box 671
Montgomery, AL 36101

This person is responsible for all administrative operations of the state bar's Mandatory Continuing Legal Education program. This position requires an experienced lawyer with a strong professional background. Salary will be commensurate with experience and maturity. **The deadline for submission is August 15, 2005.** The Alabama State Bar is an equal opportunity employer.

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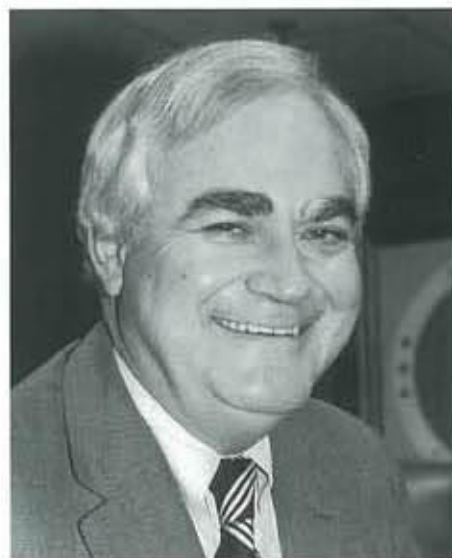
On September 6, 2004, the State of Alabama lost one of her greatest public servants. It was on that date that Montgomery resident Carl Lenford Evans, the chief administrative law judge of the Alabama Public Service Commission for over 26 years, passed away after a long battle with cancer.

Judge Evans, who was affectionately known by his friends and colleagues as “the Judge,” was recognized as Alabama’s foremost expert on utility regulation. Despite his deserved legal accolades, however, Carl Evans is remembered for much more than just his legal accomplishments—the Judge is remembered as a man who touched and molded lives for the better.

Judge Evans’ life journey began on May 17, 1932 in the small Jackson County community of Woodville, Alabama. Judge Evans was the youngest of eight children born to Walter and Alice Evans. It was on the Evans’ family farm that Judge Evans began to learn the humility and outstanding work ethic that would serve him so well later in his life.

Upon graduating from Woodville High School in 1950, Judge Evans went on to attend Florence State University, now the University of North Alabama, on a basketball scholarship. Judge Evans graduated from Florence State with a B.S. degree in 1955, and began a career shortly thereafter in the insurance industry as an adjuster with Crawford and Company.

It was also at that time that Judge Evans began his service in the Army Reserves. He served with distinction as a military policeman for ten years and achieved the rank of major. After being assigned to Montgomery in 1957, as part of his responsibilities with Crawford and Company, Judge Evans made the decision to attend the Jones School of Law in Montgomery with the objective of pursuing a career in the law. Judge Evans graduated from Jones in 1967 and went to work with the Alabama Public Service Commission as a staff attorney the same year. Judge Evans worked his way up the



ranks and became the chief administrative law judge at the Public Service Commission in March 1978.

As chief administrative law judge of the PSC, Judge Evans presided over thousands of cases and rendered some of the most important decisions in the history of the commission and the utility industry in Alabama. Judge Evans was widely respected for the integrity and fairness of his decisions and his unique ability to strike the delicate balance between the interests of Alabama’s utility consumers and the state’s utility companies.

Judge Evans’ unerring display of fairness, integrity and professionalism over his many years of service led the Alabama State Bar’s Administrative Law Section to award Judge Evans the distinguished Eugene W. Carter Medallion Award for public service in July 2003. Judge Evans is the only individual in the long history of the Eugene W. Carter Medallion Award to receive the award while still living.

Judge Evans was also honored for his exemplary service by the PSC in December 2003 when the commission named its entire public hearing complex in his honor. In its almost 120-year history, the PSC had never before named any of its facilities for any individual.

Perhaps the greatest legacy left behind by Carl L. Evans is that of his two sons, Carl, Jr. and Scott of Birmingham. Both Carl, Jr. and Scott chose to follow their father into the legal profession and both practice in Birmingham. Carl, Jr. is with the firm of Balch & Bingham LLP, while Scott is with the firm of Christian & Small.

Judge Evans is also survived by his wife, Elaine, who resides in Montgomery, and Mary Simmons Evans, the wife of Scott. Also surviving Judge Evans are Scott and Mary's two children, Mary Douglass and Carl Hulsey, who was born April 20, 2005.

Carl L. Evans indeed led a professional

and personal life that inspired others to higher ideals. He exemplified the qualities of courage, honor, dignity and integrity. He will be sorely missed, but the positive influence he had on his world and those around him will never be forgotten.

JOSEPH NICHOLAS LANGAN

Joseph Nicholas Langan, a distinguished senior member of the Mobile Bar Association, died November 2, 2004 at the age of 92. He leaves behind his unique 62-year career as a lawyer, a statesman, an Army Officer, and a religious and civic leader.

Joe Langan was born in Mobile in March 1912. He graduated from Murphy High School in 1931, after which he "read law" in the offices of several prominent attorneys. He passed the Alabama Bar Exam in 1936 and was admitted to the bar at that time. At his death, he was the only attorney practicing in Mobile who had not attended law school.

In 1951, he graduated from Springhill College, which subsequently awarded him the honorary degree of Doctor of Laws and where he served as a trustee for many years.

In 1939, he was elected to the Alabama State Senate where he had a distinguished career. His colorful political career also included service as a member of the Mobile County Commission, and then from 1953 through 1969, as City Commissioner and Mayor of the City of Mobile. That period of service spanned the tumultuous era of the civil rights movement and through the strong leadership of Joe Langan, Mobile avoided the conflicts and disruptions which had occurred in many other cities in the South. During that time, he served as president of the Alabama League of Municipalities, and as a member of the Executive Committee of the National League of Cities. He also served as an incorporator of and city attorney for the City of Chickasaw.

His military record was exceptionally distinguished. He enlisted in the Alabama National Guard in 1931 and served 30 years, including five in WWI and two during the Korean War. He was the recipient of the Bronze Star, was a graduate of the Army's Command and General Staff College and, at retirement, was serving as Commanding General of the 31st Infantry "Dixie" Division. He also served as state commander of the VFW, as a member of the State Board of Veterans Affairs and as state director for Selective Service.

His service to his church continued throughout his life, including the Fourth Degree of Columbus, an appointment as Knight of St. Gregory, and his receipt of the Catholic Social Services St. Valentine's award. Further, he was named Mobile Religious Leader of 1970 and was a founding member of the Friendly Sons of St. Patrick.

His reputation as an outstanding civic and political leader and financial expert resulted in his appointment to the board of directors of the First National Bank, the First Bank Group-Alabama and the Bank of Mobile. In addition, he served on numerous state and local boards and commissions, including St. Mary's Home and Catholic Social Services, and was elected Mobilian of the Year in 1957. He also served several years as local and state president of the Exchange Club of Alabama.

His contribution to education included not only his service as trustee of Springhill College, but also as a member of the advisory board of Bishop State



Community College, as a member of the Mobile Area Foundation for Higher Public Education and the University of South Alabama Foundation.

Great credit will be given Joe Langan for servicing as the bridge between the white and black communities resulting in peaceful race relations during the 1960's. He will also be remembered as a visionary who expanded Mobile's boundaries from midtown to the area west of Springhill, resulting in the growth of the city from about 33 square miles to 160 square miles.

Those who knew him best will affirm that Joe Langan always took strong stands in political matters without regard as to whether public opinion supported him or not. His position always was that one should do what is right, regardless.

He left surviving him his wife of many years, Maude Holcombe Langan, and 12 devoted nieces and nephews.

Alexander, Luke Edward

Russellville

Admitted: 1977

Died: March 11, 2005

Anderson, Susan Blalock

Montgomery

Admitted: 1979

Died: May 6, 2005

Bevill, Tom Donald Fike

Jasper

Admitted: 1949

Died: March 28, 2005

Corbitt, Jack

Ozark

Admitted: 1973

Died: April 25, 2005

Heflin, Howell Thomas

Tuscumbia

Admitted: 1948

Died: March 29, 2005

Maddox, Steve Wilson

Dothan

Admitted: 1950

Died: March 13, 2005

Mathews, Charles Thomas

Ashland

Admitted: 1953

Died: April 5, 2005

Paden, Benjamin Claude Jr.

Winston-Salem, NC

Admitted: 1973

Died: March 23, 2005

Permutt, James L.

Birmingham

Admitted: 1935

Died: March 12, 2005

Schwenn, Robert Paul

Huntsville

Admitted: 1960

Died: February 24, 2005

Smith, John Joseph Jr.

Birmingham

Admitted: 1970

Died: March 13, 2005

Underwood, Kenneth Wilder Jr.

Montgomery

Admitted: 1949

Died: March 7, 2005

Wiersma, Gary Stuart

Sumiton

Admitted: 1984

Died: January 9, 2005

WALTER P. CROWNOVER

Walter P. Crowover, a member of the Tuscaloosa County Bar Association, died May 10, 2004. He was born in Winchester, Tennessee on November 9, 1934. He graduated from the University of Alabama School of Law.

Walter practiced law in Tuscaloosa from 1962 until his death in 2004. His legal skills, good humor and kindness to all distinguished him in both the Tuscaloosa Bar Association and the community.

Walter further rendered exceptional service as bar commissioner of Tuscaloosa County from 1971 to 1998. During Walter's time as bar commissioner, he brought a sense of concern and compassion to all matters coming before him.

Walter was an active participant in the political process in Tuscaloosa County, and served as chairman of the Tuscaloosa County Democratic Executive Committee for many years.

Walter was preceded in death by his wife, Ellen Zimmerman Crowover.



Walter's brother, Bill Crowover, recently passed away. He is survived by his two children, Kenneth Crowover (Debbie) and Jo Ellen Johnson (Steve), four grandchildren, and his sisters, Dorothy Cain and Betty Ann Tillman.

ROBERT EDWARD LEE KEY

Robert Edward Lee Key was a native son of Conecuh County, Alabama.

He was educated in the public schools of Conecuh County and rendered distinguished service to his country in the China-Burma-India theatre of operations in World War II, and afterward in the United States Army Reserve, where he rose to the rank of colonel.

He graduated from the University of Alabama School of Law in the Class of 1949, and entered the practice of law at Evergreen.

Judge Key served as circuit solicitor of the 21st Judicial Circuit from 1953 until 1965, and earned a reputation as an aggressive but compassionate prosecutor. He was appointed circuit judge of the newly created 35th Judicial Circuit in

1965, where he served with distinction and without political opposition until his mandatory retirement in 1989. Judge Key faithfully served the citizens of Mobile County as a supernumerary circuit judge for 13 years, until his failing eyesight required him to leave the bench.

His keen intellect, his broad legal knowledge, his understanding of the human condition and his abiding faith in the rule of law earned his reputation as one of the state's most capable and respected jurists.

Judge Key was a faithful member of Evergreen Baptist Church, where he taught the Men's Bible Class for over 50 years.

He is survived by his widow, Marjorie Virginia Yeatman Key; his daughter Elizabeth Ann Key Scott; two grandchildren; and two great-grandchildren.

Hundreds of Posters and Essays Illustrate American Jury System in Law Day Contests



Law Day winners, teachers and judges with committee co-chairs Tim Lewis and Tommy Klinner (top row) and ASB President Douglas McElvy (front row, far right)

Alabama students shared their thoughts on this year's theme of "The American Jury: We the People in Action" through creative expressions of art or the imagery of the written word when over 130 posters and 20 essays were entered in this year's Law Day contests. In addition to members of the Alabama State Bar Law Day Committee, celebrity judges this year included "Today in Alabama" co-anchor **Judd Davis**; WSFA-TV photographer **Clarence Gibbons**; **Wanda Lloyd**, *Montgomery Advertiser* executive editor; and *Birmingham News* reporter **Stan Bailey**. **Col. Steve Lindsay** and **Lt. Laura Hanson**, both of the Judge Advocate General's office, Maxwell AFB, also helped with the judging. Montgomery attorneys **Tommy Klinner** and **Tim Lewis**, are co-chairs of the state bar's Law Day 2005 Committee.

Winners were recognized May 2nd at a special ceremony and luncheon held at the Supreme Court of Alabama. Following the presentation of awards by **Alabama State Bar President Douglas McElvy**, the students and their special guests were guests at a special luncheon at the Alabama State Bar, followed by a private tour of the supreme court.

There are three (3) classifications: Grades K-3 and 4-6 for posters; grades 7-9 and 10-12 for essays; and grades 7-12 in photography. Winners in the essay contest receive U. S. Savings Bonds in the amounts of \$200, \$150 and \$100, respectively; winners in the poster contest receive bonds in the amounts of \$125, \$100 and \$75. All winners receive engraved gold medals and award certificates. Schools of all winners receive certificates and teachers of the winners receive a \$25 contribution per award for use in their classrooms. ■

This year's winners include:

ESSAYS

1ST Place

GRADES 7-9

Meeda Stephenson

Hartselle Jr. High School
Wanda McAbee

GRADES 10-12

Nic Powell

Falkville High School
Marshall Mooney

2nd Place

Amber Patterson

Hartselle Jr. High School
Wanda McAbee

Choquette Wright

BTW HS Tuskegee
B. Hightower

3rd Place

Alanna Hutcherson

BTW HS Tuskegee
B. Hightower

Brittany Paul

BTW HS Tuskegee
B. Hightower

POSTERS

1ST Place

GRADES K-3

Alexia Williams

Union Springs Elementary
Carrie Harris

GRADES 4-6

Addison Tambling

Dalraida Elementary
Ms. Gisi

2nd Place

Caleb Sieg

Red Level Elementary
Ms. Robinson

Amber Hill

Dalraida Elementary
Ms. Gisi

3rd Place

Jon Cole Chesser

Red Level Elementary
Ms. Windham

Cory Livingston

Hartselle Jr. High School
Wanda McAbee

HONORABLE MENTION

Daniel Cheatman

Hartselle Jr. High

WINNING SCHOOLS

1. Falkville High School
2. Hartselle Jr. High School
3. BTW HS Tuskegee
4. Union Springs Elementary
5. Dalraida Elementary School
6. Red Level Elementary

Visitors to the bar's Web site at www.alabar.org can view all the winning posters and essays under the "Public" link.

- **University's Cumberland School of Law** recognized alumni, volunteers and friends of the school during Alumni Weekend events April 8 and 9. Two faculty members also received awards.

Robert K. Dawson, president of Dawson & Associates lobbying firm, Washington, D.C., was named 2005 Distinguished Alumnus. A 1971 Cumberland graduate and member of the ASB, Dawson is a former deputy assistant secretary of the Army and was associate director of the Office of Management and Budget for the White House during the Reagan administration.

Cumberland alumni **Michael V. Rasmussen**, **James H. Roberts, Jr.** and **Mark D. Pratt** were named Volunteers of the Year. They were honored for their work as coaches for various trial teams at the law school.

Rasmussen, a 1976 graduate, is an assistant U.S. Attorney, Northern District of Alabama, in Birmingham. Roberts, a 1994 graduate, is an assistant public defender in the Tuscaloosa

County office. Pratt, a 1995 graduate, is an attorney in private practice with Burton & Associates in Birmingham

Judge John C. Godbold and his wife, **Betty**, of Montgomery were named this year's Friends of the Law School. Judge Godbold holds senior status with the U.S. Court of Appeals, 11th Circuit, and is former chief judge, U.S. Court of Appeals, 5th and 11th Circuits. He is the Leslie S. Wright Professor of Law at Cumberland. The couple was honored for their devotion and support of the law school and its students.

Cumberland professor **T. Brad Bishop** was named one of the first recipients of the Harvey S. Jackson Excellence in Teaching Award at the law school. Bishop, who teaches contracts, municipal court practice and procedure, was recognized for his quality teaching of first-year students.

The award was established this year by Cumberland alumni **Edward R. Jackson** and **Richard E. Fikes** in honor of Jasper attorney **Harvey S. Jackson**. ■

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- CS-42 - Child Support Guidelines
- CS-43 - Child Support Notice of Compliance
- Custody Affidavit
- Wage Withholding Order
- Arrearage Report

Uncontested Divorce in Alabama 2.0 creates:

- Certificate of Divorce
- CS-47 - Child Support Information Sheet
- CS-41 - Child Support Obligations
- CS-42 - Child Support Guidelines
- CS-43 - Child Support Notice of Compliance
- Custody Affidavit
- Wage Withholding Order

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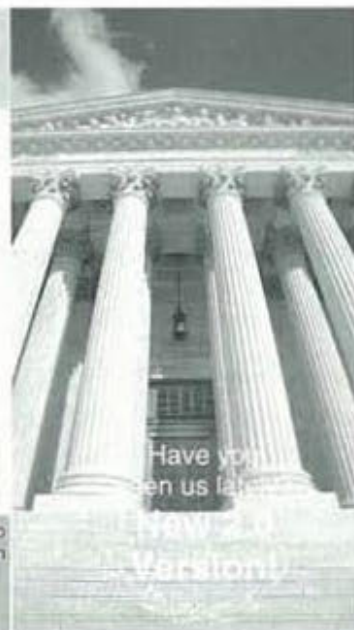
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Fair Pay Exemptions for You and Your Client

BY SUSAN E. MCPHERSON AND MATTHEW D. FRIDY

Last year the Department of Labor significantly changed the landscape of the so-called “white-collar” exemptions to the Fair Labor Standards Act’s (“FLSA”) wage and hour requirements.

Virtually all employers, lawyers and non-lawyers alike are affected by the FLSA overtime and minimum wage requirements. Codified at 29 U.S.C. § 201, *et seq.*, the FLSA requires that most employers pay their employees at least \$5.15 per hour and compensate them at a rate of at least time-and-a-half for all hours worked in excess of 40 per week.¹ The FLSA exempts several categories of employees from these wage and hour requirements, providing employers with necessary flexibility in making employment and other business decisions. The recent changes in the “white-collar” exemptions may significantly affect how you and your clients navigate the FLSA requirements.

On April 20, 2004, the Department of Labor released its final regulations regarding the exemption of certain “white-collar” employees from many of

the obligations placed on employers under the FLSA. These new rules are codified in Part 541 of Title 29 of the Code of Federal Regulations, and became effective August 23, 2004. The new rules revise the three basic tests (salary level, job duties and salary basis) that are applied to determine whether particular employees are exempt from the wage and hour regulations. The new rules represent the first major overhaul of the job-duties test since 1949, and the first increase in the salary-level test since 1975.

This article provides an overview of the new rules, called the “Fair Pay Rules,” so that attorneys can assess their own internal policies and protocols, and better advise their employer-clients on how to classify employees under the FLSA and how to avoid the relatively steep penalties for violations of the FLSA with regard to overtime pay and the minimum wage.

Overview of Changes

The new Fair Pay Rules were adopted to simplify the previous regulations, which many found too vague to be applied to particular employees with any confidence. With the changes, the Department of Labor has attempted to streamline the old tests for determining whether an employee is exempt from the wage and hour laws. For example, the "long" and "short" tests with respect to different salary levels for different exemptions have been replaced by a single "standard" test. Also, the new rules allow employers more flexibility in meting out unpaid disciplinary suspensions to exempt employees who, under the previous rules, would lose exempt status if suspended without pay for less than a full week. The Fair Pay Rules also include a new "safe harbor" provision for employers with exempt employees. Under the provision, an employer will not lose the exemption for employees from whom improper salary deductions are taken if the employer has adopted a "clearly communicated policy" that prohibits improper salary deductions, has established a mechanism by which employees can complain of improper deductions, reimburses employees for improper deductions, and makes a good faith commitment to avoid future improper deductions. Overall, these changes will significantly affect the way employers navigate the FLSA exemptions.

The New Fair Pay Rules

Under the new Fair Pay Rules, particular employees may be exempt from the wage and hour laws if they meet three distinct requirements or tests. First, under the **Salary Level Test**, an employee must be compensated at a rate of at least \$455 per week to qualify as exempt. Second, under the **Salary Basis Test**, an employee must be paid on a salary, rather than

hourly, basis. Finally, under the **Job Duties Test**, an employee must perform primary job duties that are administrative, executive or professional in nature. All three of these tests, described in substantially more detail below, must be met for an employee to qualify as exempt from the FLSA wage and hour requirements.

A. The Salary Level Test²

The Salary Level Test is the easiest of the tests to apply. Simply put, the employee must be compensated at a rate of at least \$455 per week. This amount must be paid "free and clear." In other words, the \$455 cannot include the value of non-monetary compensation that the employer furnishes to the employee, such as lodging or meals. For employers who have adopted pay periods longer than one week, the equivalent salary levels for those pay periods are as follows:

- Biweekly pay period: \$910.00
- Semimonthly pay period: \$985.83
- Monthly pay period: \$1,971.66.³

Note that the shortest pay period allowed for exempt employees is one week. Therefore, any employees who are paid more often than once a week will not qualify for the exemption.

B. The Salary Basis Test⁴

In addition to being paid the minimum amount described above, for an employee to be considered exempt from the FLSA wage and hour requirements, he or she must be compensated on a salary, as opposed to an hourly, basis. This means that the employer must regularly compensate the employee, "on a weekly or less frequent basis, a predetermined amount [... that] is not subject to reduction because of variations in the quality or quantity of the work performed."⁵ Generally, the employer must pay the exempt employee his or her "full salary for any week in which the employee performs any work," regardless of whether the employee actually worked a full week.⁶ The employer need not pay the employee for weeks in which the employee performed no work.

To maintain the exemption under the Salary Basis Test, the employer cannot deduct from the employee's predetermined salary because of "absences occasioned by the employer or by the operating requirements of the business."⁷ This prohibition is known as the "no pay-docking" rule. For example, the exemption cannot be maintained when an employer docks one day of pay from the employee's salary because the employee was asked not to come in because of a temporary closing of the work facility. If the employee is "ready, willing and able to work," the exemption will be lost if the employee's salary is reduced because of the lack of available work.⁸

The Fair Pay Rules identify several specific exceptions to the no-pay docking rule. Under these exceptions, employers can deduct from exempt employees' salaries without losing the exempt classification. The exceptions identified in the regulations include:

- An absence from work for one or more full days for personal reasons, other than sickness or disability;
- An absence from work for one or more full days due to sickness or disability if deduction is made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences;
- To offset any amounts received as payment for jury fees, witness fees or military pay;
- Penalties imposed in good faith for violating safety rules of "major significance," such as "no-smoking" rules in oil refineries;
- Unpaid disciplinary suspensions of one or more full days imposed in good faith for violations of workplace conduct rules, such as rules prohibiting harassment or workplace violence;
- A proportionate part of the employee's full salary may be paid for time actually worked in the first and last weeks of employment; and
- Unpaid leave under the Family and Medical Leave Act.⁹



...the “long” and “short” tests with respect to different salary levels for different exemptions have been replaced by a single “standard” test.

Deductions under these exceptions for time spent away from work may only be taken in full-day increments. This means, for example, that if an employee is absent from work for three and a half days for the purpose of taking care of personal matters, the first exception noted above, the employer can only deduct three days' worth of salary from the employee's pay. Thus, an employee must be paid for a full-day's work for any day in which he or she has worked at least part of the day. This full-day deduction increments rule, however, does not apply to the sixth and seventh exceptions listed above.

Examples of deductions that are not allowed under the Salary Basis Test and which could result in the loss of the employee's exempt status include:

- deducting one day of salary from an employee's pay because of a one-day closure at the workplace due to inclement weather;
- deducting from an employee's salary because the employee missed three days of work because of illness, when the employer does not have a salary-replacement benefit; and
- deducting a half-day's salary due to the employee's absence from work for half a day for personal reasons.

Whether improper deductions result in the loss of the exemption is determined based on the facts and circumstances present. If the facts demonstrate that the improper deductions were isolated and inadvertent and that the employer reimbursed employees for improper deductions, the employees will remain exempt. If, however, the facts demonstrate that the employer did not intend to pay its employees by salary or has an “actual practice” of taking improper deductions from exempt employees' salaries, the exemption will be lost, and those employees affected will be due overtime pay for hours worked in excess of 40 per week “during the time period in which the improper deductions were made.”¹⁰ Numerous factors are considered in determining whether the employer has an “actual practice” of taking improper deductions, including how often the employer took improper deductions, the number of improper deductions taken, the number of employees from whom improper deductions were taken, and the identities of the managers responsible for the improper deductions.¹¹

It is important to note that all employees in the same job classification who work under the manager responsible for the improper deductions will lose the exempt designation. Therefore, even if

improper deductions were made from the salary of only one exempt employee, all exempt employees with the same classification may be affected if there is a finding of “actual practice.” Conversely, employees under different job classifications or different managers likely will not lose their exempt status.

To ease the burden on employers who make good faith efforts to comply with the regulations and prevent improper salary deductions, the new Fair Pay Rules provide a safe harbor under which employers who take improper deductions will not lose their employees' exempt status if certain conditions are met. According to the safe harbor provision, found in 29 C.F.R. § 541.603(d), an employer will not lose the exemption for an improper deduction if (1) the employer has a clearly communicated policy prohibiting improper deductions; (2) the policy includes a mechanism by which employees can complain about



...the “safe harbor” provision will not protect employers who continue to make improper deductions after their employees complain.

improper deductions; (3) the employer corrects the improper deductions by reimbursing the improperly deducted funds; and (4) the employer makes a good-faith commitment to not take improper deductions in the future. Note, however, that the safe harbor provision will not protect employers who continue to make improper deductions after their employees complain.

C. The Job Duties Test

The Job Duties Test is the most complex of the three tests. Under this test, the employee must meet the requirements of at least one of three categories of employment for the FLSA exemption to apply.

The categories, described below, include professional, executive and administrative exemptions.

1. THE PROFESSIONAL EXEMPTION¹²

There are two types of professional exemptions. The first is the “learned professional.” To qualify under this exemption, the employee’s primary duty¹³ must be “the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.”¹⁴

Work requiring advanced knowledge is work that is intellectual in character. A learned professional generally relies on his or her advanced knowledge to analyze or interpret varying fact-patterns. Under the Fair Pay Rules, advanced knowledge is not considered the type of knowledge gained at the high school level.

A “field of science or learning” is one that typically has a professional status associated with it, such as theology, law, engineering and teaching. The requirement that the professional employee have customarily acquired his or her knowledge through a “prolonged course of specialized intellectual instruction” limits

the exemption to only those professions in which the instruction is generally necessary for being allowed to engage in the profession. The fact that the specialized knowledge is “customarily acquired” in this manner means that certain atypical situations may lead to the application of the learned professional exception, for example, to the rare lawyer who did not attend law school.

Note that paralegals and legal assistants usually will not meet the requirements for the learned professional exception. Although many paralegals and legal assistants have advanced degrees or specialized training in their fields, such education “is not a standard prerequisite for entry into the field.”¹⁵ Paralegals and legal assistants, however, may qualify as learned professionals in other fields and bring that specialized knowledge to the performance of their jobs. The regulations offer the following example, “if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.”¹⁶

The second type of professional is the “creative professional.” An employee qualifies as a creative professional if his or her primary duty is “the performance

of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."¹⁷ Recognized fields of artistic or creative endeavor include music, acting, writing and the visual arts.

2. THE ADMINISTRATIVE EXEMPTION¹⁸

An employee must meet two requirements, in addition to the Salary Level and Salary Basis Tests, to qualify as exempt under the Administrative Exemption. First, the primary duty of the employee "must be the performance of work directly related to the management or general business operations of the employer or the employer's customers."¹⁹ Second, the employee's primary duty "must include the exercise of discretion and independent judgment with respect to matters of significance."²⁰

Under the Fair Pay Rules, the "management or general business operations of the employer" relates to the running of the business rather than the creation of revenues for the business, for example, by being involved in the production and manufacture of the objects sold by the business or selling those objects on behalf of the employer. Work that involves the management and general business operations of the employer may include the type of work performed by accounting, quality control and human resources departments.

Under the second element of the administrative employee exemption, the exercise of discretion and independent judgment, the employee must generally evaluate different courses of conduct and decide which course will be taken. Of course, the exercise of discretion and judgment must relate to matters of significance. The regulations list several factors that should be considered when determining whether an employee exercises discretion and independent judgment with respect to matters of significance:

- Whether the employee has authority to formulate, affect, interpret or implement management policies or operating practices;

- Whether the employee carries out major assignments in conducting the operation of the business;
- Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
- Whether the employee has authority to commit the employer in matters that have significant financial impact;
- Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
- Whether the employee has authority to negotiate and bind the company on significant matters;
- Whether the employee provides consultation or expert advice to management;
- Whether the employee is involved in planning long- or short-term business objectives;
- Whether the employee investigates and resolves matters of significance on behalf of management; and
- Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.²¹

Examples of employees who typically meet the requirements of the administrative exemption include insurance claims adjusters, executive or administrative assistants to senior executives, and purchasing agents.

3. THE EXECUTIVE EXEMPTION²²

Three elements must be met for an employee to qualify under the executive exemption:

1. The employee's primary duty is the management of the enterprise or a customarily recognized department or subdivision;
2. The employee customarily and regularly directs the work of two or more other employees; and

3. The employee has the authority to hire or fire other employees, or has his or her suggestions as to hiring, firing, promotions or other changes of status given particular weight.²³

As to the first element, the regulations define "management" by listing numerous examples of management activities:

Interviewing, selecting and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.²⁴

A "department or subdivision" is a division of a business that has "a permanent status and a continuing function."²⁵

Examples of customarily recognized departments and subdivisions include companies' legal departments and human resources departments. Recognized departments and subdivisions can also include divisions within larger departments.

The second element of the executive exemption requires the employee's customary and regular direction of the work of two or more employees. "Customary and regular" denotes something more than occasional, but less than constant. Generally, giving direction to two or more employees at least once per week will qualify the employee under this element. However, one "who merely assists the manager

of a particular department" and actually supervises only when the manager is absent will not qualify for the exemption.²⁶

The fact that the exempt executive employee must supervise two or more employees means that he or she must supervise employees who, together, work at least 80 hours per week. Thus, supervising two part-time employees would not qualify the supervisor as an executive. Likewise, neither of two supervisors who share supervision of three fulltime employees would qualify for the executive exemption, as each would be deemed to supervise only one and a half employees.

The third and final element under the professional exemption, the authority to hire and fire, is straightforward except for its alternate requirement that the employee's suggestions as to hiring and firing must be given "particular weight." The regulations list several factors to determine whether an employee's suggestions are given "particular weight," including: "whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon."²⁷

D. Particular Exceptions to the Application of the Three Tests for Exemption

Regardless of the application of the three tests outlined above (salary level, salary basis and job duties), the new regulations provide that the exemption status of certain categories of employment are determined differently. Some of these more common fields and endeavors are discussed below.

1. COMPUTER-RELATED FIELDS²⁸

An employee engaged in computer-related employment is exempt from the wage and hour requirements of the FLSA

if three requirements are met. First, he or she must be compensated on a salary or fee basis at a rate of at least \$455 per week, or on an hourly basis at a rate of at least \$27.63 per hour. Second, he or she must work as a computer systems analyst, computer programmer, software engineer or other similarly-skilled worker in the computer field. Finally, he or she must have as his or her primary duty one of the following:

- (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- (2) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- (3) The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
- (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.²⁹

Being highly dependant on the use of a computer to perform one's work, like an architect or a civil engineer, does not necessarily qualify an employee for this exemption. To qualify, the employee must engage in computer systems analysis, programming or other similar computer-related work.

2. LAWYERS, DOCTORS, DENTISTS AND TEACHERS³⁰

The Salary Level and Salary Basis tests do not apply to lawyers, doctors (including residents and interns), dentists and teachers. Thus, if an employee is engaged in any of these professions, he or she need only meet the professional exemption under the Job Duties Test to qualify as exempt from the FLSA, regardless of how and how much he or she is paid.

3. BUSINESS PART-OWNERS³¹

An individual actively engaged in the management of a company in which he or

she owns at least 20 percent equity interest will qualify as exempt, regardless of whether he or she is paid on a salary basis.

4. HIGHLY-COMPENSATED EMPLOYEES³²

A stream-lined Job Duties Test applies to employees performing office or non-manual work who are paid total annual compensation of \$100,000 or more, at least \$455 per week of which is paid on a salary or fee basis. Under that test, the employee is exempt if he or she customarily and regularly performs at least one of the duties of an exempt professional, administrative or executive employee. The highly-compensated employee need not meet all of the requirements of one of the three categories to be exempt. The highly-compensated exemption does not apply to non-management employees engaged in manual labor.

Tips for Lawyers and Other Employers

The new Fair Pay Rules should streamline the classification process for "white-collar" employees and provide lawyer and non-lawyer employees alike greater flexibility and confidence in classifying employees. When attempting to comply with the new Fair Pay Rules, either in your firm or with your employer clients, be sure to remember the following:

- Familiarize yourself with the law and regulations of each state in which you and your employer-clients have employees. State laws and regulations may be different from the federal requirements outlined above. You and your clients must comply with the applicable state requirements as well as the new Fair Pay Rules.
- In light of the new regulations, now is a good time for your employer-clients



The new Fair Pay Rules should streamline the classification process for “white-collar” employees and provide lawyer and non-lawyer employees alike greater flexibility and confidence in classifying employees.

to review the classification and salary level of all employees.

- If your employer-clients have misclassified any of their employees or they want to change the employees’ classification to bring them within an exemption, they can use the new regulations as an opportunity to make changes.
- Be sure your employer-clients educate their managers about what deductions they may or may not take from exempt employees’ salaries.
- If you or your employer-clients have not developed or “clearly communicated” a policy prohibiting improper pay deductions, now is a good time to do so. ■

Endnotes

1. 29 U.S.C. §§ 206 and 207.
2. The regulations requiring the Salary Level Test can be found at 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1), 541.204(a)(1), 541.300(a)(1), and 541.600.
3. 29 C.F.R. § 541.600(b).
4. The regulations setting forth the Salary Basis Test can be found at 29 C.F.R. § 541.602 through 541.606.
5. 29 C.F.R. § 541.602(a).
6. 29 C.F.R. § 541.602(a).
7. 29 C.F.R. § 541.602(a).
8. 29 C.F.R. § 541.602(a).
9. 29 C.F.R. § 541.602(b).
10. 29 C.F.R. § 541.603(a) and (b).
11. 29 C.F.R. § 541.603(a).
12. The professional exemption regulations can be found at 29 C.F.R. §§ 541.300 through 541.303.
13. For purposes of all three categories of exemptions under the Job Duties Test, an employee’s “primary duty” is the principal, main, major or most important duty that the employee performs. If an employee spends more than half of his or her time performing work described under one of the three exemption categories, the employee will generally pass the Job Duties Test for exemption. Another factor considered in determining whether an employee’s particular work is his or her primary duty is the importance of the duty under consideration as compared to the employee’s other duties. 29 C.F.R. § 541.700.
14. 29 C.F.R. § 541.301(a).
15. 29 C.F.R. § 541.501(e)(7).
16. 29 C.F.R. § 541.501(e)(7).
17. 29 C.F.R. § 541.303.
18. The administrative exemption regulations can be found at 29 C.F.R. §§ 541.200 through 541.204.
19. 29 C.F.R. § 541.201(a).
20. 29 C.F.R. § 541.202(a).
21. 29 C.F.R. § 541.202(b).
22. The executive exemption regulations can be found at 29 C.F.R. §§ 541.100 through 541.106.
23. 29 C.F.R. § 541.100(a).
24. 29 C.F.R. § 541.102.
25. 29 C.F.R. § 541.103(a).
26. 29 C.F.R. § 541.104(c).
27. 29 C.F.R. § 541.105.
28. The regulations related to employees in computer-related fields are found at 29 C.F.R. § 541.400 through 541.402.
29. 29 C.F.R. § 541.400(a).
30. 29 C.F.R. §§ 541.303 and 541.304.
31. 29 C.F.R. § 541.101.
32. 29 C.F.R. § 541.601.

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By Brannon Buck

Thank You and Goodnight

The ASB Young Lawyers' Section is winding down another busy bar year. We held our annual **Iron Bowl CLE** in Birmingham and coordinated legal assistance for disaster victims of **Hurricane Ivan**. We helped organize two **bar admissions ceremonies** along with the **Alabama Supreme Court**. We provided assistance to the **Capital City Bar Association** in hosting the **Minority Pre-Law Conference** in Montgomery. We organized young lawyer volunteers to work with the **SpeakFirst** debate program in Birmingham. Our members have also served as representatives of our state at **American Bar Association** meetings during the year.

The highlight of our year, and our most recent event, was the **Young Lawyers' Sandestin Seminar** on May 20 and 21. **Craig Martin**, of the **Armbrecht Jackson** firm in Mobile, deserves credit for coordinating the seminar. The YLS thanks all of the sponsors who contributed to the seminar and made it a success again this year. Those sponsors include:

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Special thanks to the **Beasley Allen** firm for sponsoring the breakfasts, **Taylor Martino** for sponsoring the golf tournament, **Cunningham Bounds** for sponsoring the Friday night party, and **Foshee & Turner** and **Hare Wynn** for sponsoring the afternoon beach parties. We also thank our excellent group of speakers, including **Tommy Wells, Michael Worel, Norman Waldrop, David Marsh, Skip Ames, the Honorable Robert Hardwood, Jr., Tom Methvin**, and the **Honorable Joseph Battle**. We appreciate their time and effort.

The YLS has also been trying to improve its programs and services. We have been working with the Alabama Supreme Court and the federal courts to streamline the admissions ceremonies and, in particular, to make the on-site registration process for admittees more efficient. We are also working on establishing a **Young Lawyers' Section Web page** on the Alabama State Bar Web site that will provide more up-to-date information about section activities and information relevant to YLS members.

Thanks to all of those who have provided time and service to YLS programs throughout the year. ■

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The Subtle Snake:

Long-Term Disability Insurance Under ERISA

BY DAVID P. MARTIN

Introduction

Law firms, large and small, now provide an array of benefits both for lawyers and staff, usually governed by that reticulated statute known as the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (“ERISA”). One of these benefits, long-term disability, deserves a careful review before it is provided by an employer. In fact, it should be as carefully examined as other benefits but often this is not the case. There are numerous insurance companies providing such benefits with a wide range of plan provisions available. Without a careful selection of a disability plan or policy, there is a risk that you may see the benefit slither away before your eyes when it is needed most.

ERISA's specific remedies preempt state law claims, thereby allowing only those damages permitted by the statute. 29 U.S.C. §§ 1144(a) and 1132. Neither mental anguish damages nor punitive damages may be recovered. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) and *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991). Instead, the damages are typically limited to the benefits due, interest and, if the court so awards, attorney's fees. *Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1484-85 (11th Cir. 1995) and *Smith v. Am. Intern. Life Assur. Co. of N.Y.*, 50 F.3d 956 (11th Cir. 1995). There is no right to a jury trial. *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525 (11th Cir. 1990).

While these limitations may provide some comfort to the insurance company providing benefits, the employer, who may desire to see the employee obtain the benefits, may unhappily find itself a defendant. The plan administrator, which is often the employer, is a proper party.

Garren v. John Hancock Mutual Life Ins. Co., 114 F.3d 186 (11th Cir. 1997) and *Rosen v. TRW, Inc.*, 979 F.2d 191 (11th Cir. 1992). Under certain plans, an insurance company acting under ERISA may deny an employee's disability claim and even after suit is filed still only be liable for the benefits and interest. The employee's attorney's fees may be awarded but this is left to the discretion of the court. 29 U.S.C. § 1132(g). See, *Nightingale*, 41 F.3d at 1485 and *Curry v. Contract Fab. Inc. Profit Sharing Plan*, 891 F.2d 842 (11th Cir. 1990).

On the other hand, a disability plan not provided through an employer would be subject to state law, along with those disability plans that fall within the provisions of 29 U.S.C. § 1004, which include governmental plans, church plans, excess benefit plans and unfunded excess benefit plans. State law claims may result in other damages, including mental anguish or punitive damages. In many instances, the disability provider may feel more compelled to resolve a claim short of litigation than under an ERISA governed plan.

Employers may also have fiduciary duties under ERISA. At least one court has opined that there may be liability for the plan administrator (often the employer) that selects a company known to be a poor choice for providing disability benefits. *Radford Trust v. First Unum Life Insurance Co. of America*, 321 F. Supp. 2d 226 (D. Mass. 2004). A plan administrator is charged with fiduciary duties, one of the highest duties recognized under the law. 29 U.S.C. §§ 1002(21)(A) and 1104(a). While the 11th Circuit has not yet found improper selection of an insurance company to be a breach of fiduciary duty, the *Radford* case further underscores the importance of careful selection of a disability plan. It is hoped that this article will provide food for thought to assist in selecting long-term disability insurance.

What Type of Plan Do You Have?

A. What Is the Standard of Review Under the Plan?

ERISA defines a number of terms as used in the statute. First of all, the long-term disability plan usually refers to the document that governs the provision of disability benefits. 29 U.S.C. § 1003(1). It may also be called a policy by the insurance company. The summary plan description is usually the booklet, pamphlet or document given to participants of the plan. This document contains a summary of statutorily required information found in the actual plan document. 29 U.S.C. §§ 1021 and 1022. These two documents may set out the discretionary authority that is reserved by the plan administrator or fiduciary for deciding claims for disability benefits. This

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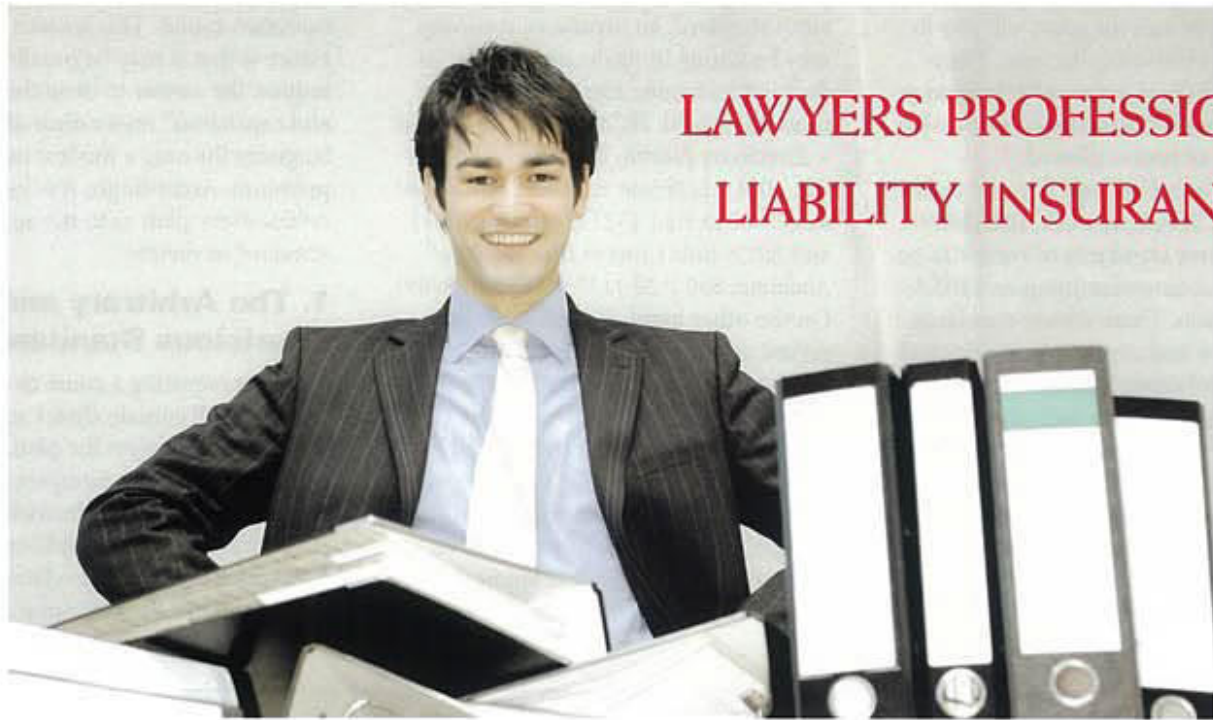
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will govern the role the court will play in reviewing the disability decision. There may be a full court review of a decision or a limited review. Cases may be won or lost on the type of review allowed.

According to *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101 (1989) there are three standards of review to be utilized by courts examining an ERISA claim decision. These review standards are arbitrary and capricious, heightened arbitrary and capricious and *de novo*. Since this opinion was published, there has been much litigation over the proper standard of review. Obviously, when a more limited review is required by a plan, this will naturally lead to a more aggressive denial of a disability claim. For example, under the arbitrary and capri-

cious standard, an insurance company may be wrong in its decision, but if its decision had some reasonable basis it must be upheld. *HCA Health Svcs. of Ga. v. Employers Health*, 240 F.3d 982 (11th Cir. 2001); *Levinson v. Reliance Standard Ins. Co.*, 245 F.3d 1321 (11th Cir. 2001) and *Jett v. Blue Cross & Blue Shield of Alabama*, 890 F.2d 1137 (11th Cir. 1989). On the other hand, if a full or *de novo* review of a claim is required under the plan, the claim administrator may conduct a less aggressive review of the claim since a decision may be overturned by a court if it is wrong alone.

One would think that the cost of the benefit plan would largely depend on what standard of review is applicable under the policy but evidence of such is

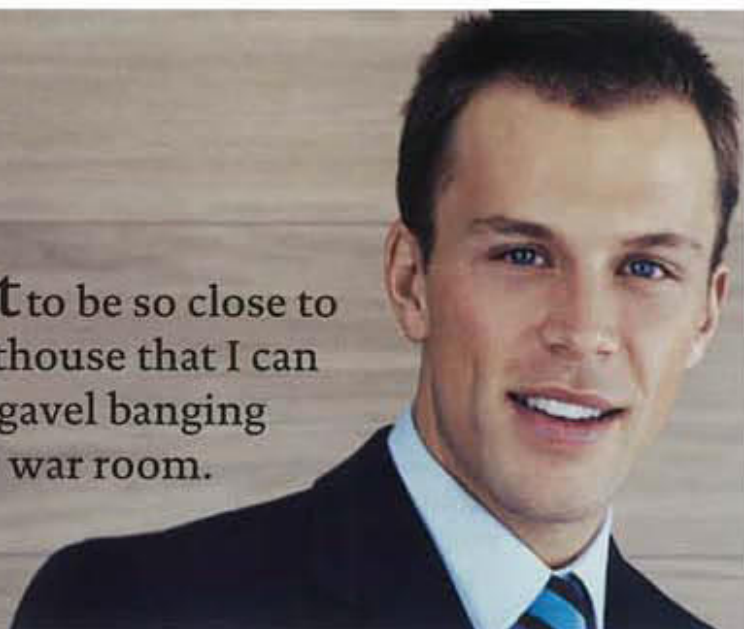
not often found. This writer's own experience is that it may be possible to request the carrier to drop this "arbitrary and capricious" reservation of discretion language for only a modest increase in premium. Accordingly, it is important to review every plan as to the applicable standard of review.

1. The Arbitrary and Capricious Standard

A plan requiring a court to utilize this standard will contain direct and succinct language which gives the plan discretionary authority to interpret policy or plan provisions, make decisions regarding eligibility for coverage and benefits, and resolve actual questions relating to coverage of benefits. See, *Kirwan v. Marriott*



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Corp., 10 F.3d 784 (11th Cir. 1994) and *HCA Health Svcs. of Ga.*, 240 F.3d at 985. Because the cases do not require precise "magic language," there has been much litigation over whether plans reserve discretion. At a minimum, the plan language must properly reserve discretionary authority to the appropriate fiduciary deciding the claim as to the issue involved in denying the disability claim. See, *Kirwan*, 10 F.3d at 788-89.

For example, suppose your law firm is listed as the plan administrator in the summary plan description, but all the decisions regarding the disability claim are actually made by the XYZ Insurance Company. If the plan only reserves discretion as to the plan administrator (your law firm), then could your firm overturn the decision of the XYZ Insurance Company? If not, was there some type of delegation of authority from your firm to XYZ Insurance Company allowing that company to exercise the discretion for your firm? Your firm may be a defendant as a result of a decision it never made and did not delegate. Examine the plan to determine who actually reserves discretion.

Suffice it to say that if your plan has language similar to that cited above, you may want to shop for a plan that doesn't have such language. If it is not your decision to obtain the disability plan for your firm, you may want to purchase a private disability plan to cover yourself. While it is not impossible to prevail in litigation with a plan under the arbitrary and capricious standard (see, *Levinson*, 245 F.3d at 1321), it remains true that a truly disabled person may not obtain benefits

**...it is important
to review every
plan as to the
applicable
standard of
review.**



if there is some reasonable basis for the insurance company's wrong decision. *HCA Health Svcs. of Ga.*, 240 F.3d at 994.

The insurance commissioners of at least four states have applied state law statutory prohibitions against discretionary clauses. At least for now in Illinois, Hawaii, Utah and California, long-term disability insurance policies with discretionary clauses, which would necessarily invoke the arbitrary and

capricious standard of review, arguably may not lawfully be sold. See, Utah Code Ann. § 31A-21-201(3); Haw. Rev. Stat. § 431:13-102; Ill. Ins. Code § 143; and Cal. Ins. Code, §§ 12921.5 and 12921.9.

According to *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), state laws specifically regulating insurance are not preempted by ERISA (29 U.S.C. § 1144) if the law is directed toward entities engaged in insurance and the law substantially affects the risk pooling arrangement between the insurer and the insured. It appears that states may be able to regulate discretionary clauses. So far, in the State of Alabama, such discretionary clauses remain legal.

2. The Heightened Arbitrary and Capricious Standard

The second standard of review is called the heightened arbitrary and capricious standard in the 11th Circuit. See, *HCA Health Svcs. of Ga.*, 240 F.3d at 985 and *Lee v. Blue Cross/Blue Shield of Alabama*, 10 F.3d 1547 (11th Cir. 1994). The plan may actually grant the fiduciary or administrator all discretion, but if the court finds a conflict of interest for the fiduciary or administrator, then the heightened arbitrary and capricious standard will apply. Under this standard of review, the court's role is to examine the claim decision in light of the conflict shown. *HCA Health Svcs. of Ga.*, 240 F.3d at 994-95 and *Yochum v. Barnett Banks*, 234 F.3d 541 (11th Cir. 2000). A conflict of interest has often been found where

funding for a disability plan comes directly from the coffers of the company rather than through a trust. For example, if your claim is denied and the claim would otherwise be paid out of the insurance company's assets, a conflict of interest may be found. *See, Lee*, 10 F.3d at 1552 and *Yochum*, 234 F.3d at 546-47.

The court's analysis in applying this standard of review commences with ascertaining whether the plan document has granted discretion. Secondly, a review is conducted to determine whether or not the decision was wrong. If the court determines that the decision was wrong, then the court proceeds to determine whether the claimant has proposed a reasonable interpretation of the plan and, if so, the court will look at whether the plan administrator's decision was reasonable. Even if the decision was wrong but based on a reasonable interpretation, the administrator is entitled to deference. The participant may yet be successful if it can be shown that the means of arriving at the decision was arbitrary and capricious.

Next, if there is a conflict of interest, the court is required to gauge the self interest of the claims administrator. If conflict is found, the burden shifts to the

claims administrator to prove that its interpretation of the plan was not tainted by self interest. The claims administrator must show that its wrong but reasonable interpretation of the plan benefits the class of participants and beneficiaries. If the claims administrator fails to show that its interpretation benefits the plan then it is not entitled to deference. *HCA Health Svcs. of Ga.*, 240 F.3d at 994-95.

3. The *de novo* standard of review


A *de novo* review applies when there is no reservation of discretion. *Firestone*, 489 U.S. at 115. The court will look over the claim decision and decide for itself whether the participant is disabled or not. A plan that falls under this standard of review, of course, is most favorable to a disability claimant under ERISA. The insurance company will not prevail if it is wrong but reasonable.

Under both the arbitrary and capricious and heightened arbitrary and capricious standards, the evidence before the court will largely be limited to the

facts known to the administrator before suit was filed, the means of deciding the claim and any conflict of interest. *See, Jett*, 890 F.2d at 1140; *Lee*, 10 F.3d at 1547 and *Shipp v. Provident Life and Accident Ins. Co.*, 214 F. Supp. 2d 1241, 1246 (M.D. Ala. 2002). Under these standards of review in the 11th Circuit, it may be possible to submit additional evidence, however, that may lead the court to remand the case to the plan administrator to reconsider and take action. *Jett*, 890 F.2d at 1140 and *Shannon v. Jack Eckerd Corp.*, 113 F.3d 208, 210 (11th Cir. 1997). However, under a *de novo* review in the 11th Circuit, the court may consider facts that were not before the administrator at the time the benefit determination was made. *Kirwin*, 10 F.3d at 789-90 and *Moon v. American Home Assur. Co.*, 888 F.2d 86, 89 (11th Cir. 1989).

B. What Is the Definition of Disability?

The definition of disability in a plan will involve the inability to perform work for compensation. However, there is no standard or statutory definition. A plan providing for an individual who is



A plan providing for an individual who is disabled when he is no longer able to perform the material duties of his own occupation has a much greater opportunity of meeting the definition of disability as opposed to a plan that defines disability as being unable to perform any occupa-

disabled when he is no longer able to perform the material duties of his own occupation has a much greater opportunity of meeting the definition of disability as opposed to a plan that defines disability as being unable to perform any occupation.

1. Full-time or part-time?

Plans also vary in their definition of disability as to the amount of work one is able to work in a week. One would naturally assume that an occupation would require an individual to work at least eight hours a day and 40 hours per week. However, some plans specify that you are not disabled if you are able to work part time or able to produce a certain low percentage of your income. Obviously, this matters a great deal, especially if the standard of review is arbitrary and capricious. In fact, some plans have been interpreted by plan administrators or insurers such that one would have to be virtually on a deathbed or in a coma before one would meet the definition of disability. The 11th Circuit, however, has frowned on interpreting a disability plan so narrowly. *Helms v. Monsanto Co., Inc.*, 728 F.2d 1416 (11th Cir. 1984). Nonetheless, a plan that relates to an inability to work 40 hours per week with reasonable continuity is preferred.

2. Own occupation, any occupation or both?

Obviously, the best plan to have is an "own occupation" plan, but this may cost more. However, when weighed against the downside of a pure "any occupation" plan or a plan that changes from an "own occupation" to an "any occupation" definition, it may be worth the cost. For example, if you become disabled from practicing law but could work as a desk security guard watching video monitors and making phone calls at night, you should receive disability under the own occupation definition. However, if the

plan switches to "any occupation" after a certain time period of disability then the ability to work as a desk security guard would preclude further disability benefits. While this may be reasonable under the plan, you may not think so if no jobs exist in your area given your limitations. From the insurance company's perspective, they are not going to get in the business of finding a job for the claimant. While a number of issues may be litigated in this situation, in the meantime you have no income. Again, the best course is to know what you are providing or purchasing.

3. Elimination Periods

Disability definitions may also have certain time limitations before benefits commence. Most long-term disability policies do not commence paying benefits until an elimination period is satisfied. For example, a plan may provide that one must be continuously disabled for 180 days before disability benefits commence. Do you, or do your employees, have other means of support for six months, in the event of disability? There are no regulations setting how long the elimination period may be, so again, that is a contractual matter which should be taken into account in selecting a disability policy.

4. Limitations on Benefits for Self-Reported Conditions and Mental/Nervous Conditions

Usually a plan will pay benefits until retirement age. However, many plans impose a limitation of benefits if the disability arises out of a mental or nervous condition or if the disabling condition arises from self-reported conditions. The time periods may be unusually short, such as for a 12- or 24-month time period. For example, an individual who suffers from migraine headaches, chronic fatigue syndrome or fibromyalgia may not have a test such as an MRI or X-ray

to confirm their condition or level of pain. A claim administrator may use the self-reporting condition clause to deny payment of the claim past the shortened benefit period.

This self-reporting condition limitation may also appear in the disability definition in the form of an objective proof requirement. If this appears, the actual definition of "objective" should be closely examined. It may be used to deny the claim completely. Some plan administrators, without express "objective" language, have been known to interpret plans to mean that there must be an X-ray, MRI or some form of diagnostic test to supporting a treating physician's opinion on disability. In other words, a personal examination by a treating physician may not be considered objective evidence.

In the 11th Circuit, if the objective evidence requirement is not set forth in the plan, then a plan administrator may not be justified in interpreting the plan so as to require such proof. See, *Nightingale*, 41 F.3d at 1484 citing *Helms*, 728 F.2d at 1420. In fact, a plan administrator's decision has been found to be arbitrary and capricious when new requirements for coverage are added to those enumerated in the plan.

As one can imagine, disabling pain can exist without an X-ray supporting it. Courts have recognized that pain, in and of itself, can be disabling even when its existence is unsupported by objective evidence. See, *Walden v. Schweiker*, 672 F.2d 835 (11th Cir. 1982). While the Social Security cases lead the way on this issue, the 11th Circuit has indicated that the body of law developed in connection with Social Security disability should be instructive in examining disability under ERISA. *Helms*, 728 F.2d at 1420-21, n6.

Every possible definition of disability in a plan cannot be examined here, as neither time nor space will allow. The importance of closely examining the definition of disability, however, cannot be

overemphasized.

C. What Administrative Review Process Is Required?

Every plan governed by ERISA is required to meet minimum requirements to provide a full and fair review of a claim within certain time frames. 29 U.S.C. § 1133 and 29 C.F.R. § 2560.503-1. However, there are variations in the plans on the market as to the number of appeals or reviews permitted during the administrative process. This is important because prior to litigation commencing, the administrative process must be exhausted, or it must be shown to be futile to exhaust the process. *Perrino v. Southern Bell Tel. & Tel. Co.*, 209 F.3d 1309 (11th Cir. 2000).

There actually is no administrative agency involved in deciding the claim, but rather the administrative process refers to the insurance company's claim determination and appeal within the company to review its own determination. While this may sound futile or unfair, what happens during the administrative review, or claims process, may lay the groundwork for court review of the claim. This is especially true if the standard of review is arbitrary and capricious. The claim's process or administrative review is one of the most important aspects of the case and should not be dismissed as a nuisance. A plan with more than one appeal should be selected so that there is opportunity to present all needed information. Information provided after exhaustion may be rejected from consideration, even though there is authority for it to be considered. See, *Shannon*, 113 F.3d at 210.

Under 29 U.S.C. § 1133 and 29 C.F.R. § 2560.503-1, the law requires the plan to clearly explain specific reasons for denying a claim, and it must give the participant a right to appeal that decision. It also must provide for a full and fair review of the claim. While a plan must provide at least one appeal, a plan would still be within the regulations if it required two appeals. A disability

claimant may prefer to have only one appeal so that the exhaustion requirements may be met more quickly, and so that suit may be filed sooner, if necessary.

Due to the fact that it is often difficult to assemble and provide medical evidence in short time periods, this writer prefers a plan with more than one appeal so that sufficient time may be allowed to present all documentation necessary for an appropriate record in the event that litigation must be filed. The regulations require appeals to be determined within 45 days, and even with an extension, an appeal must be decided within 90 days. 29 C.F.R. § 2560.503-1. This is not a substantial delay worthy of losing an opportunity to resolve the claim or to provide a good basis for litigation. After litigation is filed, many plans oppose any discovery and want to limit the evidence to the documents it has placed in its administrative record. See, *Sheppard & Enoch Pratt Hospital, Inc. v. Travelers Ins. Co.*, 32 F.3d 120 (4th Cir. 1994). Even though discovery may not be so limited (see, *Shipp*, 214 F. Supp. 2d at 1246), it is worthwhile to have ample time to submit all necessary supportive information.

D. Is There a Setoff Against the Disability Benefit?

Many disability plans provide a setoff for worker's compensation benefits, Social Security benefits, pension benefits and various other forms of benefits. It is important to understand the setoffs applicable before purchasing a disability plan because benefits may very well be reduced to a minimum benefit.

For example, lawyer Jane Doe became disabled from back injuries suffered as she was lugging 50 pounds of files to court. After waiting six months to satisfy the elimination period, and another 90 days for decision making, she obtained disability benefits of \$4,000 per month. She later obtained workers' compensation benefits that were approximately \$2,600 per month. These benefits were reduced because she received disability

from her employer, as allowed under the state law set-off provisions. *Ala. Code* § 25-5-57(c) (1975). She later applied for Social Security benefits as well, and after 12 months, received back benefits of \$1,800 per month, starting five months after her disability commenced.

Jane's disability carrier learned that she obtained workers' compensation benefits and, of course, wanted its money back under the set-off and reimbursement provisions of the plan. In the future, the plan will only pay a greatly reduced amount after recovering all prior overpayments. The workers' compensation carrier refused to reevaluate its payment in light of the now lower disability payment.

The carrier then inquired as to whether Jane Doe had Social Security benefits and learned that a year and a half after Jane Doe had been receiving long-term disability benefits, she obtained a lump sum of past Social Security benefits. These benefits, too, are offset against the disability benefit, as will future benefits. Jane Doe's son also received dependent's Social Security disability benefits of \$900 per month, which are also set off. The total amount of Social Security benefit received, with her son's payment, and the workers' compensation offset now exceeds Jane's disability benefit. As a result, the minimum benefit provisions in the plan are activated and Jane Doe is now entitled to \$100 per month for her long-term disability benefit.

Now the argument for increasing the workers' compensation benefit is very strong, but there is no clear case law yet to allow this. Jane has paid disability premiums for years only to have it hurt her workers' compensation benefits and to eventually only receive \$100 per month, after the Social Security benefits are setoff and after receiving no benefits for many months to repay overpayment. Jane is not happy, to say the least.

Again, there is much diversity in plans as to what setoffs are permitted against the long-term disability benefit. This should be examined very carefully in order to avoid purchasing illusory coverage. Setoffs are contractual not statutory, and not all

plans have the same setoffs. For example, dependent Social Security benefit setoffs are absent in many plans. However, many policies and plans do require a claimant to file for Social Security disability or benefits will be reduced by the estimated amount of Social Security.

E. Is There a Contractual Limitation As to When Suit May Be Filed?

ERISA does not provide a statute of limitations for benefit claims so it borrows the Alabama six-year limitations for breach of contract claim if the plan is provided in the State of Alabama. *Ala. Code* § 6-2-34 and *Harrison v. Digital Health Plan*, 183 F.3d 1235 (11th Cir. 1999). However, the plan may set a much shorter limitation of action time period. In the 11th Circuit a limitation of action provision of 90 days was upheld in connection with a health benefit plan. *Northlake Regional Medical Center v. Waffle House Systems Employee Benefit Plan*, 160 F.3d 1301 (11th Cir. 1998).

While it may not take that long to prepare a lawsuit in ERISA litigation, counsel will want to obtain a complete copy of the administrative record before filing suit. The final copy of the administrative record, of course, will not exist until there is final denial and all administrative remedies have been exhausted. While the plan administrator ordinarily should produce such documentation promptly, as required by regulations and the statute, 29 U.S.C. § 1132 and 29 C.F.R. § 2560.503-1(h)(2), such may not always be the case. An unreasonably short limitation of action period may be a detriment to conducting a complete review of the file before suit is filed.

F. How Often Is the Provider of Disability Benefits In Litigation?

Taking just a few minutes to conduct a simple insurance company name search

with your electronic legal research provider can easily determine the number of reported cases. With PACER and alacourt, pending cases that may never be reported may also reveal more valuable information. Additionally, a call to the State Department of Insurance and the Department of Labor may yield further information. In purchasing disability insurance, the frequency of litigation certainly should be taken into account. A simple check is prudent for employers who have fiduciary obligations in selecting a provider, as well as for your own benefit.

Policies Outside of ERISA

A disability policy purchased apart from your employer, of course, is not going to be governed by ERISA. Neither are governmental plans, as defined by 29 U.S.C. § 1003(32), or church plans as defined in 29 U.S.C. § 1003(33). Such plans are governed by state law leaving the usual remedies of breach of contract, bad faith or, perhaps, fraud.

Conclusion

The district court judge in *Loucks v. Liberty Life Assurance*, 337 F. Supp. 2nd 990, 991 (W.D. Mich. 2004) gave a colorful warning as to a disability plan to avoid:

Caveat Emptor! This case attests to a promise bought and a promise broken. The vendor of disability insurance now tells us, with some legal support furnished by the United States Supreme Court, that a woman determined disabled by the Social Security Administration because of multiple disabilities which prevent any kind of work, cannot be paid on the disability

insurance she purchased through her employment. The plan and insurance language did not say, but the world should take notice, that when you buy insurance like this you are purchasing an invitation to a legal ritual in which you will be perfunctorily examined by expert physicians whose objective it is to find you not disabled, you will be determined not disabled by the insurance company principally because of the opinions of the unfriendly experts, and you will be denied benefits.

The court concluded, "Although this Court regularly upholds claim determinations under the 'arbitrary and capricious' standard, in this case the claim administration was precisely that." *Id.* at 996. The court granted the plaintiff's motion for entry of judgment and denied the defendant's motion, and further gave leave for the plaintiff to seek attorney's fees and costs. The case was later settled and the opinion vacated. However, the point remains that it is better to avoid a plan that reserves all discretion than to take a chance at prevailing in the process.

Unexpected surprises hurt more when tragedy strikes. A close examination of a disability plan should reduce the number of surprises and assist in providing the best disability plan for you and your employees. You can also rest more assured that you have attempted to fulfill any fiduciary duties related to selecting disability insurance for your staff. If more employers closely examined their disability plans and made appropriate choices, perhaps market forces would make certain plan provisions



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The Alabama Class Action:

*Does It Exist Any Longer?
And Does It Matter?*

BY GREGORY C. COOK

Ten years ago, our firm authored two articles for *The Alabama Lawyer* regarding the rising tide of class actions and taking inventory of the basic requirements and types of such actions.¹ Since that time, the landscape has drastically changed, including two amendments to FRCP (1999 and 2003), a class action reform bill passed by the Alabama legislature, *Ala. Code* § 6-5-640 *et seq.*, and much more intense review by the Alabama appellate courts. Several weeks ago, the landscape changed again with the passage of the Class Action Fairness Act of 2005 (the "2005 Act") by Congress. This article aims to summarize the current Alabama law on certification of class actions, summarize the 2005 Act and highlight the changes since 1994. Despite these changes, there remains an appropriate role for Alabama class actions, and the majority of legal standards remain the same as in federal courts and as in the 1994 articles.

The number and result of class action appellate decisions in Alabama is striking from 1997 to the present, as compared to the previous years (very roughly speaking, from 1997 to the present, the decisions are 39-to-six against class actions, and, from 1990 to 1996, six-to-four for class actions). The legal reasons for this result appear to be centered upon: a lack of predominance for A.R.C.P. 23(b)(3) actions (the reason for the vast majority of rejections); sloppy, incomplete or obviously inaccurate class certification orders by the trial court; attempts to force actions into the mandatory class of A.R.C.P. 23(b)(2) that clearly do not fit; an unwillingness of the Alabama appellate courts to allow the "bifurcation" of complex actions to address the predominance issues; and a much more rigorous review of certification orders on appeal (especially those orders which appear to defer difficult management issues until later in the litigation).

Summary of Federal Changes

The Class Action Fairness Act of 2005 makes two types of changes to federal law: it substantially broadens federal jurisdiction (both original and removal) for class actions, and it heightens scrutiny of class action settlements (including attorney fees). These settlement issues are covered briefly in an endnote.² It is only effective for newly filed cases.

The 2005 Act establishes original jurisdiction over any class action if the matter in controversy exceeds \$5 million, exclusive of costs and interest, and if minimal diversity exists (that is, any class member is a citizen of a state different from any defendant). Damages are aggregated to determine if the \$5 million is met. A District Court *may*, in its discretion, decline to exercise jurisdiction in such a class action if the "primary defendants" are citizens of the state in which the action was filed, *and* between one-third and two-thirds of the members of the proposed plaintiff class are also citizens of such state (*must* decline if it exceeds two-thirds).³ There are listed exceptions to such jurisdiction, such as primary defendants that are states, state officials or other government entities, plaintiff classes less than 100, securities claims, and state law claims involving internal corporate affairs.

Removal is consistent with these original jurisdiction provisions. Further, a class action may be removed to federal court whether or not any defendant is a citizen of the state in which the action is brought, and may be removed by any defendant without the consent of all defendants. Remand orders are appealable (but these are discretionary appeals with very short

time deadlines making them unlikely to be frequently used). However, the multidistrict litigation transfer procedure, 28 U.S.C. § 1407, is not available to these actions. The 2005 Act also applies to "mass actions" (over 100 plaintiffs).

These provisions are dramatic extensions of federal court jurisdiction, but will not likely affect Alabama class actions where the majority of class members are from Alabama—unless there is no "primary" defendant or no defendant from whom "significant relief" is sought from Alabama. One possible effect may be the filing of new cases in federal court that conceivably might not have been filed in the State of Alabama.

General Background On Alabama Classes

Class actions in Alabama are brought under Rule of Civil Procedure 23, which is identical to pre-1999 F.R.C.P. 23 (even after changes to F.R.C.P. 23, the Alabama courts continue to state that federal decisions are persuasive authority). The class must meet the requirements of Ala. R. Civ. P. 23(a) *and* must fit within one of the types of class actions set forth in Ala. R. Civ. P. 23(b). Even then, certification of a class remains within the discretion of the trial judge "after considering practicality and manageability of the litigation."⁴ The new Alabama class action statute (echoing repeated federal decisions and recent Alabama decisions) insists that classes may be certified only after a "rigorous analysis." At all times it is the plaintiff's burden to prove the elements of Rule 23.⁵

A class of defendants may also be certified (apparently in very narrow circumstances). Subclasses may be created to handle conflicts or individualized issues, but each subclass must independently meet all of the requirements for a class. Whether a class can be certified should be determined "as soon as *practicable* after the commencement of the action" (note the deadlines in the new Alabama statute and the difference from the wording of amended F.R.C.P. 23).

Because of the provisional nature of a class certification, such a ruling can be changed throughout the course of the proceeding. The court may also make orders as may be necessary to avoid undue repetition and complication in presentation of arguments or evidence, allowing molding of the litigation. Once certified, a class action may not be dismissed or compromised without the approval of the court.⁶

The 23(a) Requirements

The four requirements of Ala. R. Civ. P. 23(a) are often referred to as numerosity, commonality, typicality and adequacy of representation.

Recent Alabama cases have rarely focused on any of these requirements as decisive, with the sometime exception being adequacy. In sum, these elements have changed very little over the last ten years.

The numerosity element is virtually never a decisive factor. Federal law has generally held that if a class number is at least 50, numerosity is met. The few Alabama cases rejecting numerosity are probably better analyzed as an inability to identify class members (typically a (b)(3) issue).⁷

The plaintiff must also show there are common questions of fact or law between all members of the class. Alabama cases have rarely found this factor decisive—probably because it is a much lower hurdle than the predominance factor discussed below and because the courts have found that this factor blurs with typicality.⁸ The cases rejecting certification on this basis are probably best understood as predominance cases.⁹ The trial court, however, must specifically identify the common issues of fact and law to define the class (or classes).

The class representative's claim must also be typical of the class claims. The concept is that differences between the claims of the representative and those of other members of the class will operate to the detriment of class members. Like numerosity and commonality, this factor has rarely been decisive in Alabama decisions. Courts sometimes blur typicality with the requirement that the named plaintiff be an adequate representative of the class.¹⁰

Although some cases, in determining typicality, appear to focus entirely upon whether "a plaintiff/class representative's injury arises from or is directly related to a wrong to a class and that wrong to the class includes the wrong to the plaintiff,"¹¹ the

more detailed opinions look more broadly and consider, among other things, individualized defenses that may exist against the representative,¹² whether certain individualized issues will receive inordinate attention (either for the representative's claim or the class' claim),¹³ and the question of whether the representative will be able to establish the bulk of the class' claim through his own claim.¹⁴

Finally, under Rule 23(a), a class representative must show adequacy. A class representative acts in a fiduciary role, and therefore, the court will examine the representative to assure the due process rights of the absent class members are protected. If the class representative lacks sufficient knowledge of the facts or claims, has interests adverse or potentially adverse to the class or is a meddler or interloper, the court may deny class certification.

The most important analysis in adequacy is whether there is a conflict of interest (even a potential conflict). In a key decision, the United States Supreme Court added considerable emphasis to this criteria, especially in settlement classes, and emphasized the constitutional aspects of this requirement. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court confronted a massive Rule 23(b)(3) class action, settling monetary claims for personal injury against a number of asbestos manufacturers. Despite an incredibly detailed trial court finding and record, the Court rejected the settlement,

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holding that class certifications decisions are subject to the same level of scrutiny even if they are the product of a settlement (although the particular factors considered may differ), and potential conflicts of interest among the class must be considered very carefully, especially when the settlement involves persons who may not realize that they are class members.

Other decisions have likewise scrutinized possible conflicts of interest and have considered whether certain class members may have benefited from the alleged wrongdoing, or whether there are major defenses or major elements that the class representative simply has no incentive to pursue (or which he may wish to avoid because of the effect upon himself).¹⁵

Another adequacy issue (and perhaps related to the conflict issue) is whether the class representative has chosen to ignore certain possible claims. Recently, the Alabama Supreme Court clarified this issue and held that the failure of a class representative to plead all claims can bar their adequacy, but normally only where such failure might create a *res judicata* bar for absent class members. *Regions Bank v. Lee*, 2004 WL 1859678 at *6 (Ala. Aug. 20, 2004) (limiting *Ex parte Russell Corporation*, 703 So. 2d 953 (Ala. 1997)).¹⁶

the threatened inconsistency is the possibility of having to pay money damages to one and not another, Rule 23(b)(1)(A) is not met. Instead, the courts and commentators usually assume that 23(b)(1)(A) classes are only appropriate when the defendant will truly be in a "conflicted position" (i.e., when different results would impair the defendant's ability to pursue a uniform, continuing course of conduct).¹⁸ The classic example of a Rule 23(b)(1)(A) class action is where suit is brought against a riparian up-river landowner by a down-river owner,

as it would be chaotic to permit various individual lawsuits by different down-river landowners. Rule 23(b)(1)(A) actions are appropriate where a defending part may be "obliged by law" to treat all similarly. An example would be where an action is brought against a municipality to invalidate or modify a bond issue or assessment.¹⁹

The Alabama Supreme Court has now apparently agreed with the Eleventh Circuit and held that certification for Rule 23(b)(1)(A) cases is limited to cases seeking injunctive and declaratory relief.²⁰

A Rule 23(b)(1)(B) class action requires that the adjudication might be injurious to the contentions of other individuals. Precedential effect or *stare decisis* is not sufficient, but the prejudice need not be as devastating as a defense of *res judicata*.²¹ According

to the notes to the Federal Rules, an example of this type of class action is a suit by shareholders to compel a dividend or recognize preemptive rights, or an action by an indenture trustee to protect the holders of securities.²² Rule 23(b)(1)(B) classes can be seen as a type of an interpleader action, that is, where there is a limited fund or a single object and many claimants.²³ Rule 23(b)(1)(B) is not appropriate, usually, for mass torts. The leading case on Rule 23(b)(1)(B) is *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) where the Supreme Court rejected Rule 23(b)(1)(B) in an asbestos class action based upon the theory of a "limited fund," holding that for such a certification to be appropriate, there must be substantial evidence of the limitation of the fund and that the limitation of the fund is independent of the agreement of the parties. Alabama cases likewise have been very strict in requiring substantial evidence of the limitation of the fund and barring the use of (b)(1)(B) based upon the theory that the amount of punitive damages available is limited.²⁴

Rule 23(b)(3)
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The Three Class Types

Disputes over whether actions satisfied one of the Rule 23(b) categories has fueled almost all of the recent Alabama Supreme Court class actions decisions. Rule 23(b)(1) actions (mandatory, no notice) are very rare (only one clear decision approving a [b][1] action in the last ten years in Alabama).

Rule 23(b)(1) actually establishes two somewhat unrelated types of class actions. The first is Rule 23(b)(1)(A) which establishes a class for the benefit of the defendant where "there is risk of inconsistent results leaving the party opposing the class in a quandary as to how he should govern himself..."¹⁷ Most decisions hold that if

Rule 23(b)(2)

Rule 23(b)(2) allows for mandatory, no-notice classes where the party opposing the classes acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or a corresponding declaratory relief with respect to the class as a whole. This type of class was designed primarily to handle constitutional and civil rights cases and has also been extensively used against governmental units, for environmental claims and for patent claims.²⁵

If the predominant relief sought is damages, the class should not be certified under Rule 23(b)(2). Determining the predominant relief has been a major dispute over the last ten years in Alabama, and it has been clearly settled by adopting the governing federal case law on how to determine when injunctive relief predominates. *Compass Bank v. Snow*, 823 So. 2d 667, 678 (Ala. 2001) (reverses (b)(2) certification; adopts *Allison v. Citgo Petroleum Corporation*, 151 F.3d 402, 414-415 (5th Cir. 1998) and holding that incidental damages under the *Allison* case are only those flowing directly from a defendant's liability to the class as a whole and do not exist where a calculation of damages would require individualized determinations). In fact, one recent Alabama Supreme Court case called into question whether a (b)(2) class could ever award any money damages of any kind (but did not absolutely foreclose the possibility).²⁶

Rule 23(b)(3)

The single most important reason that most class actions fail in Alabama is that they are forced to meet Rule 23(b)(3) and cannot. Rule 23(b)(3) is primarily a damages class, allowing opt out and requiring notice. Courts have considered this type of class to be less cohesive than (b)(2) and (b)(1) classes and have found that the reasons for class certification under (b)(3) are less compelling than the reasons for certification under (b)(1) and (b)(2). The standards for certification are considerably more stringent under Rule 23(b)(3).

Rule 23(b)(3) lists two requirements for class actions: common questions predominate, and the class action is superior to other methods. It also lists four factors (not intended to be exhaustive) to be analyzed: individual interest in controlling litigation, other ongoing litigation, desirability of concentrating litigation in this forum and the manageability of the potential class action. Alabama courts often analyze the manageability factor and superiority requirements together with predominance.²⁷

Most recent Alabama cases focus on the predominance requirement. These cases make clear that the predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a)(2) and that it is not sufficient that some common questions merely exist.²⁸ The court has recently written that the predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," and that in making this determination "courts examine the substantive law applicable to the claims and determine whether the plaintiffs pursuing sufficient proof that common questions of law or fact predominate over individual claims."²⁹ The court has also explained: "We have held that the necessity of individualized testimony from each class member to prove an essential element of the cause of action defeats class certification."³⁰

Perhaps the sharpest reaction of the Alabama Supreme Court has been to fraud and suppression claims (and the analytically similar breach of fiduciary duty claims). While there remains one older Alabama case affirming a class certification of a fraud case, all recent Alabama decisions have squarely rejected such a class certification. Some of these decisions have gone so far as to suggest that there could never be a fraud class certified and others have left a very narrow theoretical possibility.³¹ These decisions make clear that if there has been a variety of representations (or a variety of personal interactions between the class and different individuals), a certification is virtually impossible. Even if there has been a standard representation by one speaker (such as a written representation), the need to prove individual reliance appears to prohibit class certification (as can be, in different cases, whether there is a duty, whether the statute of limitations has run because of later information, and whether the reliance is reasonable based upon what the class member knew).³² Conspiracy claims have failed for the same reasons.³³

In repeatedly rejecting clearly inappropriate fraud class certifications, the Alabama Supreme Court has also rejected the tool of "bifurcation" (as well as rejecting any "presumption" of reliance theory (such as "fraud on the market" which applies to federal securities claims)).³⁴ Such methods have been used by some aggressive federal courts (and for certain statutory federal claims) and have reduced the predominance of individual issues. Clearly, the Alabama Supreme Court has come to believe, correctly, that the time and resources available to federal courts are substantially greater than the normal Alabama circuit court.

Likewise, the Alabama courts have repeatedly rejected certifications of unjust enrichment claims (on at least five separate occasions) based on a lack of predominance. One of the most recent examples is *Avis Rent A Car Systems, Inc. v. Heilman*, 876 So.2d 1111 (Ala. 2003). The Alabama Supreme Court refused certification of an unjust enrichment claim because each claim for unjust enrichment "depends on the particular facts and

circumstances of each case.” The court noted that it has “repeatedly held that such claims are unsuitable for class action treatment.”³⁵

Defenses have also been found to destroy predominance (including mitigation of damages, statute of limitations and voluntary payment).³⁶ However, the defense must be one that the preliminary facts show is not merely theoretical and which actually has been pled.³⁷ Likewise, the inability to identify class members will doom predominance.³⁸ In addition, the claim for emotional harm may limit any class action.³⁹ Counterclaims (again, if not merely theoretical and if they cannot be handled with management tools) can also doom predominance and manageability (and, if they place absent class members at risk of loss, doom superiority).⁴⁰

Similarly, if the class will involve the application of multiple states’ laws, predominance may be destroyed (and superiority defeated because of the difficulties of interpreting and applying correctly the law of multiple states). In fact, most Alabama cases dealing with nationwide class actions have failed on this reasoning.⁴¹ The court has emphasized that the trial court must determine with a rigorous analysis whether variations in state laws defeat the predominance requirement under Rule 23(b)(3).

The supreme court has also rejected a number of breach-of-contract class certifications based on predominance reasoning—claims that might involve fewer individual issues. These decisions have been based upon the conclusion that the contract has been ambiguous and, therefore, individual parole testimony would be necessary to determine the intent and understanding of the contracting parties. For instance, in *Mann v. GTE Mobilnet of Birmingham, Inc.*, 730 So. 2d 150 (Ala. 1999), the court not only denied class status to fraud claims but also to the breach-of-contract claim (the complaint alleged that the defendant’s rounding up of any portion of a cellular phone minute was a breach of contract). The court found that the cellular contracts were ambiguous and, therefore, the particular understanding of each customer would need to be individually reviewed for the breach of contract claim, thus defeating predominance under Rule 23(b)(3). This same reasoning defeated class certifications dealing with the interest rate on renewing CDs, the check posting order for NSF fees, fees in loan documents, taxes in lease documents, and severance benefits allegedly promised in group meeting.⁴²

The Alabama class action is not dead, however. It lives for (among others) certain contract claims, certain warranty claims, certain pure statutory claims, and true declarative and injunctive claims. For instance, in *Avis Rent A Car Systems, Inc. v. Heilman*, 876 So.2d 1111 (Ala. 2003), the court affirmed certain portions of a breach of contract class regarding whether or not certain franchise fees could be added to rental car charges. The court determined that the breach of contract claim could be certified because

not every ambiguity in a contract requires extrinsic evidence. The complete absence of any reference to a tax surcharge on the rental jacket did not create an ambiguity. These can be resolved through the normal canons of construction such as *ejusdem generis* and *noscitur a sociis*.

Likewise, the court has found predominance satisfied in a breach of warranty claim. In *Cheminova America Corporation v. Corker*, 779 So. 2d 1175 (Ala. 2000), the court affirmed a certification of a class for recovery of economic damages only for a warranty breach for the producer and distributor of skin care products alleging it contained dangerous and unlabeled ingredients. The trial court had rejected the fraud and suppression claims and the personal injury claims, but certified a national class under contract equity and the UCC. The court noted that “the principles of the UCC can be easily applied on a class-wide basis.”

In *Ex parte Government Employees Insurance Company (GEICO)*, 729 So. 2d 299 (Ala. 1999), an insured claimed that GEICO’s corporate policies regarding uninsured motorist coverage (imposing a setoff) were invalid. He asserted tort claims (bad faith, fraud, etc.), breach of contract and a declaratory judgment. The court reversed the class certification on all claims except the declaratory judgment, but held that such a claim was appropriately certified. Particularly interesting is the court’s determination that the monetary claims were not appropriate for certification under Rule 23(b)(2) or 23(b)(1).

Conclusion

The Alabama class action is not dead—but it has been properly limited to those cases affecting Alabama and limited to those claims and cases that Alabama circuit courts have the time and resources to manage. With the passage of the Class Action Fairness Act of 2005, the more difficult to manage class actions may find a forum in the federal courts. ■

Endnotes

1. Alan T. Rogers & Gregory C. Cook, “The Alabama Class Action” (Part I & II), 55 *Ala. Law.* 158 & 105 (1994).
2. Among other things, the 2005 Act limits the usefulness of coupon settlements by requiring that the portion of attorney’s fees attributable to the coupons will be based on value to class members of coupons redeemed, or else on the time counsel reasonably expended, in the court’s discretion. If the settlement includes coupons and equitable relief, attorney’s fees may be based on a combination of recovery of coupons and time reasonably expended, and requires that notice be given to the “appropriate” federal and state officials of a proposed settlement and that no approval can occur for 90 days after such notice.

- In addition to denying federal jurisdiction to cases where two-thirds of the class and the primary defendants are from the same state, the 2005 Act also denies jurisdiction for such two-third cases if at least one defendant (a) is a defendant from whom significant relief is sought, (b) whose alleged conduct forms a significant basis for the claims asserted and (c) is a citizen of the state in which the action was originally filed, given that no similar class action has been filed on behalf of the same plaintiffs against the same defendants during the preceding three years. Notably, the Act does not define "primary defendants" or "significant relief" or "significant basis."

4. *Marshall Durbin & Co. v. Jasper Utilities Board*, 437 So. 2d 1014, 1025 (Ala. 1983).

- Disch v. Hicks*, 2004 WL 2418061 (Ala. Oct. 29, 2004) (reversing approval of class action settlement because no rigorous analysis done in approval order); *General Motors Acceptance Corporation v. City of Red Bay*, 825 So. 2d 746, 748 (Ala. 2002) (reversing because § 6-5-641(e) "requires the trial court to conduct a rigorous analysis to determine whether the party seeking class certification has met the burden of proving that the requirements of Rule 23, Ala. R. Civ. P., had been satisfied"); *Allstate Insurance Company v. Ware*, 824 So. 2d 739, 744 (Ala. 2002) ("the punitive class representatives bear the burden of proving all of the Rule 23(a) criteria and at least one of the Rule 23(b) criteria.") (emphasis in original); *Ex parte Exxon Corp.*, 725 So. 2d 930 (Ala. 1998) (reversing class certification because of choice of law issues: "plaintiffs bear the burden of providing an extensive analysis of state law variations to determine whether there are insuperable obstacles to class certification"); see also *Ex parte CIT Communications Finance Corp.*, 2004 WL 1950292 (Ala. Sept. 3, 2004) (based upon § 6-5-641, stating that it is the burden of plaintiff to show why discovery is class related before certification if defendant objects).

6. Ala. R. Civ. P. 23(d) and (e).

- 7A Wright, Miller & Kane, *Federal Practice & Procedures: Civil 2d*, § 1762 at pp. 170-186 (1986)(listing cases); *Jones v. Firestone Tire & Rubber Co., Inc.*, 977 F.2d 527, 534 (11th Cir. 1992) (21 members is "generally inadequate"); *Cheminova America Corporation v. Corker*, 779 So. 2d 1175, 1179 (Ala. 2000) (finding numerosity for a nationwide class for a breach of warranty, "the numerosity requirement imposes no absolute minimum number ... the court can accept common sense assumptions in order to support a finding of numerosity and estimates of the class size suffice for the purpose of this rule"); *Ex parte Green Tree Financial*, 684 So. 2d 1302, 1308 (Ala. 1996) (forced placed insurance; reject class because, among other things, no evidence at all of numerosity).

8. *Avis Rent A Car Systems, Inc. v. Heilman*, 876 So.2d 1111, 1116 (Ala. 2003) (typicality and commonality blur); *Funliner of Alabama, LLC v. Pickard*, 873 So.2d 198, 210 (Ala. 2003) (predominance requirement "is far more demanding than the commonality requirement of Rule 23(a)"); *Cheminova America Corporation v. Corker*, 779 So. 2d 1175, 1179 (Ala. 2000) (commonality requirement "does not require that all questions

of law or fact be common ... a common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2)").

9. *General Motors General Acceptance Corporation v. Dubose*, 834 So. 2d 67, 78 (Ala. 2002) (reversing class certification because an ambiguity in the lease agreement regarding tax issues prevented the commonality requirement); *Mann v. GTE Mobilnet of Birmingham, Inc.*, 730 So. 2d 150, 155 (Ala. 1999) (refusing class because plaintiff could not establish commonality because the contract was ambiguous about rounding up of minutes on cell phone service); *Ex parte Government Employees Insurance Company (GEICO)*, 729 So. 2d 299 (Ala. 1999) (insured argued that setoff for uninsured motorist coverage was invalid and asserted bad faith, fraud, contract claims; certification reversed on lack of commonality).

10. 3 B. J. Moore & J. Kennedy, *Moore's Federal Practice* 23.06-2 (2d ed. 1991); 1 Newberg & Conte, *Newberg on Class Actions* § 3.13 (3d Ed. 1992); 7A *Wright, Miller & Kane*, § 1764 at pp. 228-232.

11. *Warehouse Home Furnishings Distributors, Inc. v. Whitson*, 709 So.2d 1144, 1149 (Ala. 1997).

12. *Cutler v. Orkin Exterminating Company, Inc.*, 770 So. 2d 67, 71 (Ala. 2000) (refusing certification of portion of class with arbitration clause because of typicality concerns); *Ex parte Gold Kist, Inc.*, 646 So. 2d 1339, 1342 (Ala. 1994) (certifying class but stating that "the possible existence of a defense unique to the claims of one or more of the named plaintiffs" was relevant to typicality but not fatal in that case); *Levine v. Berg*, 79 F.R.D. 95, 97 (S.D.N.Y. 1978) (refusing certification because of typicality because plaintiff failed to meet the burden of showing that his claims were typical of the class. The court noted specifically that the plaintiff's testimony had been so vague and unclear that it was impossible to assess whether or not the plaintiff would be subject to unique defenses).

13. *Angelastro v. Prudential-Bache Securities, Inc.*, 113 F.R.D. 579, 582 (D.N.J. 1986) ("that the unique circumstances or legal theory will receive inordinate emphasis, and that other claims will not be presented with equal vigor or will go unrepresented"); *Weiss v. York Hospital*, 745 F.2d 786, 809 n.36 (3rd Cir. 1983).

14. *Avis*, 876 So.2d at 1116, 1117 (reversing portions of certification regarding whether certain fees could be added to rental car charges because claims of individual renters were based on written terms of rental jacket unlike business travelers); *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 58 (S.D. Fla. 1990) (noting that the United States Supreme Court interprets the typicality requirement as meaning that the named representatives "must be able to establish the bulk of the elements of each class member's claims when they prove their own claims").

15. See, e.g., *Cutler v. Orkin Exterminating Company, Inc.*, 770 So. 2d 67, 71 (Ala. 2000) (refusing class certification for those class members with arbitration clauses

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- because class representative was inadequate to represent them; "absence of an arbitration clause in the contracts executed by Cutler and Lewin could present a conflict of interest between them and the dismissed homeowners"; *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987) (holding that a class representative must have suffered a cognizable injury on each and every cause of action asserted upon behalf of the class); *Greeley v. KLM Royal Dutch Airlines*, 85 F.R.D. 697, 700 (S.D.N.Y. 1980) (passenger who refused to settle a claim against the airline for lost and stolen baggage was not entitled to certification of a class that would include passengers who had settled, since there was no assurance that the plaintiff would "vigorously litigate" the questions of fact and law unnecessary to his individual claim, but essential to recovery for the passengers who had settled).
16. Two other surprising Alabama cases on adequacy arose prior to the current supreme court trends and, therefore, may be of questionable validity. See, e.g., *Ex parte Russell Corp.*, 703 So. 2d 953 (holding that plaintiff's counsels alleged threats to file an amendment to add class allegations as settlement leverage was irrelevant); *Warehouse Home Furnishings Distributors, Inc. v. Whitson*, 709 So.2d 1144 (Ala. 1997) (affirming class certification despite the argument that class representatives did not know the details of the complaint and had criminal convictions because such convictions had nothing to do with the case).
 17. Ala. R. Civ. P. 23, *Committee Comments*.
 18. Kaplan, "Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedures (I)," 81 Harv. L. Rev. 356, 388 (1967); 7A *Wright, Miller & Kane*, § 1773 at p. 429.
 19. See *GEICO*, 729 So. 2d at 306 (23(b)(1)(A) classes involve risk if "the prosecution of separate lawsuits would create the risk of inconsistent adjudications. A classic example would be separate lawsuits by individuals against a municipality concerning a bond issue, some individuals wishing to invalidate the issue, others to limit it and still others to enforce interest payments under the bonds . . . another example of the situation suggesting a Rule 23(b)(1)(A) class action would be where individual lawsuits concerning the rights and duties of riparian landowners could result in inconsistent rulings."); *Adams v. Robertson*, 676 So. 2d 1265, 1268 - 1269 (Ala. 1995); Advisory Committee Note to 1966 Amendment to Federal Rule 23.
 20. See *Funliner*, 873 So.2d at 207 (Ala. 2003) (reversing class certification in a plaintiff and defendant class action regarding video gaming machines, alleging public nuisance, unjust enrichment, conspiracy and statutory violations; Rule (b)(1)(A) "does not apply to actions seeking compensatory damages but is for actions in which only declaratory or injunctive relief is sought"); *In re Dennis Greenman Securities*, 829 F.2d 1539, 1545 (11th Cir. 1987); compare *Adams v. Robertson*, 676 So. 2d 1265, 1270 - 71 (Ala. 1995) (in a settlement case approving both a (b)(1)(A) and (b)(1)(B) class involving reformation of existing insurance policies and restitution for a small group and noting that the equitable and injunctive relief was predominant; later cases may cast some doubt on the scope of these holdings).
 21. Ala. R. Civ. P. 23, *Committee Comments*; *GEICO*, 729 So. 2d 299, 307 (Rule (b)(1)(B) actions are appropriate where the individual action "while not technically concluding the other members, might do so as a practical matter"); *In re Dennis Greenman Securities Litigation*, 829 F.2d at 1546.
 22. *Adams v. Robertson*, 676 So. 2d 1265, 1269 (Ala. 1995); Advisory Committee Notes to 1966 Amendment to Federal Rule 23.
 23. See *Ex parte Holland*, 692 So. 2d 811, 817 (Ala. 1997) ("Rule 23(b)(1)(B) focuses on situations where the interests of multiple claimants may be prejudiced by judgments in prior related cases such as one involving multiple claimants to a limited fund which would otherwise be exhausted before all of the claimants were able to share in that fund").
 24. *Ex parte Holland*, 692 So.2d at 817 (reversing punitive damage limited fund, barring this theory and bemoaning "failure of trial judges to conduct adequate factual inquiries into the financial condition of the defendant, so as to ascertain whether a 'limited fund' actually existed").
 25. 1 *Newberg on Class Actions*, § 4.11 (listing example cases); 7A *Wright, Miller & Kane*, §§ 1775, 1776.
 26. *Funliner*, 873 So.2d at 207 n.8 (citing *Ticor Title Insurance Company v. Brown*, 511 U.S. 117 (1994), noting the existence of "at least a substantial possibility" that actions seeking money damages are certifiable only under Rule 23(b)(3); but see *Robertson* (settlement class decisions which allowed money damages as "restitution").
 27. E.g., *Reynolds Metals Company v. Hill*, 825 So. 2d 100, 108 (Ala. 2002) (superiority failed because "the greater the number of individual issues, the less likely superiority can be established."); *Snow*, 823 So.2d at 675 ("The court noted approvingly that the superiority analysis is intertwined with predominance, that the need to apply the laws of multiple jurisdiction exacerbates the manageability problem").
 28. *Funliner*, 873 So.2d at 198.
 29. *Avis*, 876 So.2d at 1120 (arguably relaxing the predominance standard when it wrote: "the predominance requirement is met if there is a common nucleus of operative facts relevant to the dispute and as common questions represent a significant aspect of the case which can be resolved for all members of the class in a single adjudication"); *Cheminova America Corporation v. Corker*, 779 So. 2d 1175, 1181 & 1182 (Ala. 2000) (describing predominance as when "rulings on common issues of law was significantly advanced but resolution of identical or substantially similar questions and issues which would require resolution in connection with the individual's claims," "individual damages issues also did not destroy predominance, since the claim is based upon the amount paid for the product may be confirmed by a special master, or some other device which will lessen the burden on the court").
 30. *Smart Professional Photocopy Corporation v. Childers-Sims*, 850 So. 2d 1245, 1249 (Ala. 2002).
 31. *GEICO*, 729 So. 2d at n.3 (reversing certification of fraud case; "As prior federal case law has demonstrated, a fraud claim is wholly inappropriate for class treatment and should be handled in a separate proceeding").
 32. *Regions Bank v. Lee*, 2004 WL 1859678 (Ala. Aug. 20, 2004) (claim for fraud, suppression (among others) dealing with bond issue; class certification reversed for failure to meet predominance); *Voyager*, 867 So.2d 1065 (reversed certification where the allegation was that insurers charged premiums for credit life and credit property insurance and miscalculated them; fraud, suppression); *University Federal Credit Union v. Grayson*, 878 So.2d 280, 287-88 (Ala. 2003) (reversing class certification for fraud and breach of fiduciary duty claim where plaintiff alleged credit union included \$2.50 charge in loan documents and designated it as a filing fee when they filed nothing

- ["this court has previously noted that fraud actions are often not well suited for class certification," "determination that each class member's reliance would require individualized inquiry as to whether the reliance was reasonable based on all the circumstances surrounding the transaction including the mental capacity, educational background, relative sophistication, and bargaining power of the parties"]; *Reynolds Metals Company v. Hill*, 825 So. 2d 100, 105 (Ala. 2002) (fraud class reversed regarding severance benefits where former employer allegedly made promises to group meeting, "plaintiff employees cannot satisfy their burden of proof as to reliance without the necessity for individual testimony from each employee"); *Snow*, 823 So.2d 667; *GEICO*, 729 So. 2d 299 (reversing certification because of the need to have individual analysis of reliance (and discussing the need to have an individual analysis of the duty to disclose for suppression claims)); *Ex parte Green Tree Financial Corporation*, 723 So. 2d 6 (Ala. 1998) (decertifying fraud class of forced placed insurance, even though there were "written representations" because, among many other factors, there were individual issues of reliance); *Ex parte AmSouth Bancorporation*, 717 So. 2d 357 (Ala. 1998) (alleging a fraudulent scheme to convince depositors to switch from FDIC-insured investments to riskier securities sold by an AmSouth subsidiary, including allegations of fraud and suppression and including an extended discussion on the appropriateness of certification of fraud claims and remanding for consideration of certification of other non-fraud claims).
33. *Funliner*, 873 So.2d 198 (reversing class certification; conspiracy fails because underlying fails).
 34. *Ex parte Household Retail Services, Inc.*, 744 So.2d 871, 880 (Ala. 1999) (rejecting class certification of a fraud and suppression claim regarding the sale of satellite systems to consumers. Justice Lyons conducted a lengthy and detailed analysis of the appropriateness and history of fraud and suppression class actions and squarely rejected the option of "bifurcating" the reliance determination a "presumption-of-reliance" theory); *Ex parte Exxon Corp.*, 725 So. 2d 930, 933 (Ala. 1998) (refusing to adopt a "fraud-on-the-market" theory where the allegation was that Exxon had deceptively advertised that its gasoline was "superior"; but compare *Avis*, 876 So.2d 1111 (hints at bifurcation)).
 35. *Avis* 876 So.2d at 1123 & 1121, citing *Funliner*, 873 So.2d 198; *Voyager*, 867 So.2d 1065; *Smart Professional Photocopy Corporation v. Childers-Sims*, 850 So. 2d 1245 (Ala. 2002); *Reynolds Metals Company v. Hill*, 825 So. 2d 100 (Ala. 2002).
 36. See, e.g., *U-Haul Co. of Alabama, Inc. v. Johnson*, 2004 WL 1079804 (Ala. May 14, 2004) (reverses certification of breach of contract claim for charging sales tax and not rental tax because of voluntary payment defenses); *General Motors Acceptance Corp. v. Massy*, 2004 WL 1079877 (Ala. May 14, 2004) (reverses certification of forced placed insurance class because of voluntary payment defense and because of counterclaims; no discretion to omit consideration of these); *Funliner*, 873 So.2d 198 (rejecting class because, among many other reasons, statute of limitations defense would need to be evaluated individually); *Snow*, 823 So. 2d 667, 678 (Ala. 2001) (defense of mitigation of damages).
 37. *Avis*, 876 So.2d 1111 (rejecting voluntary payment defense because it had not actually been pled).
 38. *Funliner*, 873 So.2d 198; *Butler v. Audio/Video Affiliates, Inc.*, 611 So. 2d 330 (Ala. 1992) (rejecting class in bait and switch consumer fraud by a department store because, among many other reasons, inability to identify the class).
 39. *Funliner*, 873 So.2d 198 (reversing class certification which would have included emotional harm damages).
 40. See, e.g., *General Motors Acceptance Corp. v. Massy*, 2004 WL 1079877 (reverses certification on forced placed insurance because of voluntary payment and because of counterclaims; no discretion to omit consideration of these); *Snow*, 823 So. 2d 667, 668 (Ala. 2001) (reverses class because counterclaim by bank for amounts owed for bad checks in class about NSF fees defeats superiority. The court noted that the potential counterclaims also defeats superiority because it may risk exposure to liability that exceeds any potential recovery.); *Ex parte Water Works and Sewer Board of City of Birmingham*, 738 So. 2d 783 (Ala. 1999) (counterclaim for nonpayment of bills makes it unmanageable but noted the possibility of creating subclasses for handling the problems).
 41. *General Motors Acceptance Corporation v. City of Red Bay*, 825 So. 2d 746 (Ala. 2002) (failure of plaintiff to prove local acts in Alabama would not vary; explains need for plaintiff to prove and the need for rigorous review of this issue); *Snow*, 823 So. 2d 667 (Ala. 2001) (superiority fails because laws of different states); *Ex parte Green Tree*, 767 So.2d 1097 (rejecting class because of the need to review the law of 50 different states); *Ex parte Exxon Corp.*, 725 So. 2d 930 (Ala. 1998) (same); *Ex parte Citicorp Acceptance Company, Inc.*, 715 So. 2d 199, 204 (Ala. 1997) (plaintiff's burden; didn't analyze "such issues as choice of law and whether the acts of Citicorp were legal in other states;" "the state to have significant contact or sufficient aggregation of contacts to the claims asserted by each plaintiff to insure that the choice of law was not arbitrary or unfair to the defendant").
 42. *University Federal Credit Union*, 878 So.2d 280 (filing fee in loan documents); *General Motors General Acceptance Corporation v. Dubose*, 834 So. 2d 67 (Ala. 2002), (taxes in lease agreement; testimony that many lessees do not read their agreements); *Reynolds Metals Company v. Hill*, 825 So. 2d 100, 107 (Ala. 2002) (court noted that it had previously rejected class certifications and breach of contract actions "where the terms of the contract were not clear or where individual testimony would be necessary on the contract claims," "moreover we do not here deal with the contract where a party's acceptance is easily manifest from the presence of a signature on a document. The alleged promise required conduct—staying on as an employee—to manifest acceptance. Because the act of staying on could have been coincidental rather than the result of the alleged promise . . . individual evidence from each class member will be necessary."); *Snow*, 823 So. 2d 667 (Ala. 2001) (check posting order); *Lackey v. Central Bank of the South*, 710 So. 2d 419 (Ala. 1998) (CD).



Gregory C. Cook

Gregory C. Cook is a partner with Balch & Bingham LLP in Birmingham. He received his law degree, magna cum laude, from Harvard Law School and his B.A. from Duke University.

About Members, Among Firms

The Alabama Lawyer no longer publishes addresses and telephone numbers unless the announcement relates to the opening of a new firm or solo practice.

About Members

Philip A. Barr announces the opening of his office at 1025 23rd Street South, Suite 300, Birmingham 35205. Phone (205) 250-8205.

Lisa E. Boone announces the formation of **Boone Law Offices, PC**, located at 1434 Opelika Road, Suite C, Auburn 36830. Phone (334) 821-9810.

Gene M. Bowman announces the opening of the **G. M. Bowman Law Firm, LLC**, at 200 Randolph Avenue, Suite 203, Huntsville 35801. Phone (256) 539-9850.

Jason E. Knowles announces the opening of **Knowles Law Firm, LLC** at 1136 Forest Avenue, Gadsden 35901. Phone (256) 543-7752.

JoAnn M. Perez announces the opening of her office in the AmSouth Bank Building, 2204 Whitesburg Drive, Suite 225, Huntsville 35801. Phone (256) 536-3890.

James E. Robertson announces the formation of **James E. Robertson, Jr. LLC**, with offices at 301 St. Louis Street, Mobile 36602. Phone (251) 432-4224.

Among Firms

The **Alabama Department of Insurance** announces that **Reyn Norman** has been named general counsel.

David B. Hall has joined **Baker, Donelson, Bearman, Caldwell & Berlowitz PC**, as a shareholder in its Birmingham office. He is a 1992 graduate of the Cumberland School of Law with honors.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **Benjamin L. Locklar** and **Leigh O'Dell** have become *of counsel* with the firm.

Bradley, Arant, Rose & White LLP announces that **Kay K. Bains, Shannon Barnhill Lisenby, Julia Boaz Cooper** and **Dawn Helms Sharff** have joined the firm as partners in the Birmingham office.

John P. Browning announces that he is no longer with Killion & Associates PC and has joined the firm of **Bowron, Latta & Wasden PC** as an associate.

Cervera, Ralph & Butts of Troy announces that **Clifton F. Hastings** has become associated with the firm.

Clark, Dolan, Morse, Oncale & Hair PC announces that **Cynthia Norman Williams** has become an associate. Williams is a 2004 graduate of the University of Alabama School of Law where she was managing editor of the *Law and Psychology Review*.

Tyler L. Cox and **Brent T. Day** announce the opening of **Cox & Day PC** with offices in Montgomery and Mobile.

Fees & Burgess PC announces that **Stacy Linn Moon**, formerly with Ferguson, Frost & Dodson LLP, has become associated with the firm.

Gordon & Associates LLC announces that **John G. Dana** has joined the firm.

Hobbs & Hain PC announces that former **Fourth Circuit District Attorney Edgar W. Greene, Jr.** and **John W. Ryan, Jr.** have joined the firm.

David E. Hudgens and **Mark P. Eiland** announce the formation of **Hughes & Eiland LLP**, with offices at 28311 N. Main Street, Daphne 36526. **John M. Teague** has joined the firm as an associate.

Huie, Fernambucq & Stewart of Birmingham announces that **Paul F. Malek, H. Cannon Lawley** and **Anna-Katherine Graves Bowman** have been made partners in the firm.

Lightfoot Franklin & White LLC announces that **W. Larkin Radney, IV** and **James F. Hughey, III** have become members of the firm.

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(Continued on page 300)

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McCallum & Methvin PC announces that **James M. Terrell** has become a shareholder, and the firm name has changed to **McCallum, Methvin & Terrell PC**.

John T. Natter, Timothy M. Fulmer, Joseph P. Schilleci, Jr., David D. Schoel, and retired **Jefferson County District Court Judge Gerald S. Topazi**, formerly of Emond Vines Gorham & Waldrep PC, announce the formation of **Natter & Fulmer PC**. Offices are located at 3800 Colonnade Parkway, Suite 450, Birmingham 35243. Phone (205) 968-5300.

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LLC with offices at 162 Saint Emanuel Street, Mobile. Phone (251) 434-5700.

Richardson & Callahan LLP announces that **Brad English** has become a partner in the firm. English is a 2001 graduate of the University of Alabama School of Law.

Stockham, Stockham & Carroll PC announces that **James M. Smith** has become a shareholder in the firm, and the firm name is now **Stockham, Carroll & Smith PC**.

The United States Attorney's Office for the Northern District of Alabama announces that **W. Sander Callahan** and **Melissa K. Atwood** have joined the office as Assistant United States attorneys.

Michael Allen has been appointed as **Special Assistant to the President of the United States** and **Senior Director for Legislative Affairs at the White House** and in the Bureau of Legislative Affairs at the U.S. Department of State. In addition to other positions, he previously worked for Senator Jeff Sessions of Alabama. **Allen** received his J. D. from the University of Alabama School of Law.

Marc Dawsey announces the opening of **Vernis & Bowling of Birmingham LLC** at 2100 SouthBridge Parkway, Suite 650, Birmingham. Phone (205) 445-1026.

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By Robert L. McCurley, Jr.

2005 Regular Session

The legislature adjourned at midnight on the last day of the 2005 Regular Session. They passed only five bills of statewide application and one constitutional amendment. The two major acts, "Open Meetings Law," Act 2005-40 (SB. 101), and "Deregulation of the Telephone Company," Act 2005-110 (SB. 114), passed earlier in the session. Bills passed on the last night included: HB. 152, regulating the sale of ephedrine and pseudoephedrine to behind-the-counter sales; SB. 18, amending Section

18-1A-276, requiring the setting of eminent domain proceedings within 45 days (previously 30 days); and SB. 42, requiring revenue officials to notify new property owners regarding the application for current use valuation for ad valorem tax purposes. In addition, the legislature has passed a constitutional amendment banning same-sex marriages that will be on the ballot in June 2006. The legislature also passed 20 sunset bills and approximately 120 local bills or special appropriations.

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The house of representatives introduced 809 bills. Of these, 120 have passed both houses. The senate introduced 420 bills but only 19 became law.

On the last day of the regular session, Monday, May 16, the senate failed to pass a general fund bill, however both houses of the legislature overrode the Governor's veto of the education budget and the teachers' pay raise.

The bill raising the most questions by lawyers has been the Open Meetings Law. Here are my "20 Questions" about the Open Meetings Law Act 2005-40 (SB. 101). These are not a substitute for reviewing the law but give lawyers a point of beginning for understanding this new act.

20 Questions About "Open Meetings Law" Act 2005-40 (SB. 101)

- 1. What "governmental bodies" does the law cover?**
 - Boards and commissions:
 - Executive and legislative bodies,
 - State,
 - County,
 - Municipalities, and
 - Multi-member agencies of state, county and municipalities.
- 2. What does the law not include?**
 - Legislative party caucus;
 - Court system; or
 - Voluntary membership organizations, not agencies.
- 3. What is a "meeting"?**
 - Pre-arranged gathering;
 - Where a quorum is present, of a governmental body, agency or committee; or
 - Any gathering (whether pre-arranged or not) where specific matters are discussed which are to come before the body.
- 4. What is "not a meeting"?**
 - Social gatherings, conventions, training programs, etc., where the body does not deliberate specific matters that will be before the body later; or
 - Informational or support meetings.
- 5. How does the body give notice of meetings?**
 - Notice must be posted seven calendar days prior to meeting;
 - The legislature, however, may provide notice of meetings by rule;
 - Statewide bodies:
 - Submit notices to Secretary of State to post on Internet, or
 - Any governmental body with less than statewide jurisdiction may submit notice to Secretary of State;
 - Municipalities:
 - Post notice in a convenient place, or
 - In city hall;
 - Local school boards:
 - Post notice in central administrative office;
 - Any other governmental body:
 - At a reasonable location convenient to public changes must also be posted;
 - Municipalities and counties must also give direct notice to:
 - Any member of public or news media that requests notice,
 - Those who register to receive notice, or
 - Notice may be by e-mail, telephone, fax, mail.
- 6. What is the minimum advance notice for specially-called meetings?**
 - As soon as practicable after the meeting is called, but no event less than 24 hours.
- 7. What are the exceptions to giving a 24-hour notice?**
 - Circumstances require immediate action to avoid physical injury to person or property or to accept resignation of an employee. In these events, a one-hour notice must be given; and
 - Notice is not required of quasi-judicial or contested case hearings which could be conducted as an executive session.
- 8. What must be in the notice?**
 - Time, date and place of the meeting; and
 - Preliminary agenda (as soon as practicable).
- 9. How must a county commission give notice?**
 - As provided in § 11-3-8 and as amended in 2004
 - Commission may set regular meeting days following election;
 - May alter by resolution;
 - Regular meeting days are posted at courthouse;
 - Forwarded to local news media and to any person who files a request of notice;
 - Special meeting must be posted with five days' notice; or
 - Emergency meetings:
 - Agenda posted;

- Meeting days on holidays:
 - May be re-scheduled, or
 - Posted with five days' notice.
- County committees must comply with the procedure.

10. What records are required of the meeting?

- Accurate records must be kept;
- Date, time, place, members present, and action taken; and
- Records become public records.

11. What meeting procedure is required?

- Body must adopt Rules of Parliamentary Procedure.

12. How are votes taken?

- All votes must be made in open meeting;
- Voice votes are allowed;
- No votes may be made in "executive" session; and
- No votes may be made by a secret ballot.

13. May the meetings be recorded?

Any person in attendance may:

- Audiotape,
- Photograph or
- Videotape.

(provided the recording does not disrupt proceeding)

14. For what purposes may an "executive session" be held?

- To discuss the general reputation and character, physical condition, professional competence or mental health of individuals.
- What cannot be discussed in "executive session"?
 - General job performance, and
 - Salary and benefits;
- Discipline or dismissal of an employee or to hear formal written complaints against a public employee or students at a public school or college when expressly allowed by federal or state law;
- Discussions with an attorney concerning the legal ramifications of and legal options to pending or likely litigation. Prior to convening an executive session for this exception, an attorney must provide a written legal opinion the executive session falls within the exception. The opinion must be entered in the minutes. The attorney-client privilege remains in effect;
- Discuss security plans, procedures and systems;
- Discuss information that would disclose the identity of an undercover law enforcement official or discuss a criminal investigation, provided law enforcement, the district attorney or attorney general has entered in the minutes that disclosure would impair law enforcement;
- Discuss the price to offer or accept to buy real property. Must, however, disclose material terms of the contract. This real property exception does not apply if:
 - A member of the body has a personal interest, or
 - Condemnation action has been filed to acquire property;
- Discuss preliminary negotiations involving trade or commerce;
- Discuss strategy in preparation for negotiations between the governmental body and groups of employees, provided, however, the minutes disclose the person representing the governmental body have entered in the minutes that disclosure would have a detrimental effect on the government's position;
- Deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon

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the outcome of the hearing if acting as a quasi-judicial body. Votes must be appealable.

15. What is the procedure for convening an executive session other than for a quasi-judicial hearing?

- Quorum must first convene a meeting;
- Majority of members present must adopt by recorded vote a motion calling for executive session;
- Vote must be recorded in minutes; and
- Must state whether body will reconvene after the executive session;

16. Does the act provide immunity?

- Members and employees who participate in a meeting have absolute privilege and immunity from suit;
- Meeting is conducted in accordance with the Act; and
- The statement is made during the meeting relating to a pending action.

17. How does one enforce the open meetings law?

- Civil action brought within 60 days of discovery of meeting not to exceed two years;
- Filed in county where primary office is located;
- No member of governing body may be a plaintiff;
- Defendant members have seven business days to respond; and
- A preliminary hearing must be held no later than ten days after the response is filed or 17 days after the complaint is filed.

18. What must the plaintiff prove to make out a case?

(One or more of the following)

- Defendants disregarded the requirements for notice;
- Defendants disregarded the act during the meeting;
- Went into executive session and discussed non-covered items; or
- Defendants intentionally violated act.

19. What happens if the plaintiff makes out a *prima facie* case?

- Discovery is scheduled;
- Hearing is set on the merits;
- Court may conduct an in camera proceeding; and
- Court may order appropriate final order including:
 - Injunction,
 - Invalidate the body's action taken in violation,

- Civil penalty up to \$1,000 or one-half defendant's monthly salary,
- Paid by defendant (not government), or
- Government may provide legal expenses to defendants;

20. When is the Act effective?

- October 1, 2005.

For more information about the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa 35486-0013, fax (205) 348-8411, phone (205) 348-7411, or visit our Web site at www.ali.state.al.us. ■

Robert L. McCurley, Jr.

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

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By J. Anthony McLain

Confidentiality— Can You Keep a Secret?

(This article originally appeared in the September 2001 issue of *The Alabama Lawyer*.)

The cornerstone of the attorney-client relationship continues to be loyalty. The fiduciary relationship created when the client retains the attorney requires absolute commitment by the attorney to the client, and zealous representation by the attorney in pursuit of the interests and rights of the client.

Inherent in such a relationship is the need for the attorney to maintain confidentiality as it relates to any and all information gained by the attorney during the representation of the client. However, many attorneys continue to confuse or mix the concepts of confidentiality and privilege.

Confidentiality is governed by Rule 1.6, *Alabama Rules of Professional Conduct*, which states as follows:

“Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.”

As the Comment points out, information governed by Rule 1.6 is more expansive than that generally recognized by the legal principle or concept of privilege. The Comment to Rule 1.6 states as follows:

“The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

While the concept of privileged communications appears to be more restrictive, as a matter of law, than the term confidentiality, as a matter of ethics, consider the opinion of the Supreme Court of Alabama in the case of *Richards v. Lennox Industries, Inc.*, 574 So.2d 736 (Ala. 1990). Therein, homeowners filed a products liability action against the manufacturer and distributor of a gas furnace that exploded and injured the homeowner. At trial, the former law clerk of the homeowners' attorney testified, over objection, that he had observed a test conducted on the valve assembly in question prior to its removal from the home, that he had removed the valve assembly from the furnace at the homeowners' residence with no assistance from anyone, and that to his knowledge there were no "parts broken off of [the valve assembly]" at the time he removed it, and that he had returned the valve assembly to his former employer's [homeowners' attorney] office.

On appeal, the Supreme Court of Alabama considered *Code of Alabama* 1975, §12-21-161, which states that an attorney or his law clerk is not competent to testify against a client as to information concerning any matter which may have been acquired during the representation of that client.

The objection to the law clerk's testimony was grounded in this statutory provision, with the homeowners contending that the former law clerk had gained this information during his employ by their attorney, and during that representation.

The supreme court, in reviewing significant case law on the matter of privi-

leged communications, determined that the "acts" performed by the former law clerk were privileged communications, knowledge of which was obtained from a confidential attorney-client relationship, and the trial court's admission of that evidence, over the objection of the homeowners, violated §12-21-161.

Dissecting Rule 1.6, there are exceptions to the absoluteness of confidentiality, as well as recognition of authorized disclosure of information which would otherwise be deemed confidential.

The first and most obvious exception to the attorney's requirement to maintain confidentiality of information occurs when the client consents, "after consultation," to disclosure of confidential information. However, the attorney should exercise extreme caution when consulting with a client about waiver of confidentiality, since once the waiver occurs, in all probability, it cannot be revoked. Further, the waiver could lead third parties to discover information which otherwise would not be subject to disclosure pursuant to the rules of applicable criminal or civil procedure.

Rule 1.6 also *allows* the attorney to reveal confidential information if the attorney reasonably believes such is necessary to prevent the client from committing a criminal act that the attorney believes is likely to result in imminent death or substantial bodily harm. As noted by the italicized language of the previous sentence, disclosure in this instance is permissive, not mandatory.

The former Permanent Code Commission of the Alabama State Bar, in considering possible drafts to be submitted to the Alabama Supreme Court for

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adoption, weighed the possibility of making this provision mandatory, i.e., the attorney had to disclose this information if such became known to him. However, the eventual proposed rule, as adopted by the Supreme Court of Alabama, effective January 1, 1991, contains the permissive language of "may," concerning revelation of such information by the attorney.

An attorney also may disclose confidential information otherwise protected by Rule 1.6 to establish a claim or a defense on behalf of the attorney in a controversy between the attorney and the client, to establish a defense to a criminal charge or civil claim against the attorney based upon conduct in which the client was involved, or to respond to allegations

in any proceeding concerning the attorney's representation of the client.

Interpreting subsection (2) of paragraph (b), the Office of General Counsel and the Disciplinary Commission have generally determined that where an attorney's conduct is called into question with regard to claims of malpractice, ineffective assistance of counsel or ethical misconduct, confidentiality is waived by the client asserting same to the extent reasonably necessary to allow the attorney to establish a defense to said claims.

However, the rule allows disclosure of only that information which is reasonably necessary to respond to the specific allegations of malpractice, ineffective assistance of counsel or ethical misconduct. In certain instances, attorneys have exceeded this restriction, apparently in an effort to exact a toll upon the client alleging misconduct or malpractice against their attorney. The rule prohibits such, and an attorney's engaging in this type of conduct subjects him to disciplinary action, and possible civil liability.

Recent ethical inquiries disclose an increasing amount of activity in litigation where attorneys are subpoenaed to testify concerning their representation of a client, and are even requested to produce client files. The Office of General Counsel and the Disciplinary Commission consistently maintain the position that the attorney subjected to such a request for testimony or documents assert confidentiality and privilege, and resist disclosure of this information. The rule specifically allows the attorney to contest such attempts to require disclosure of confidential information, with disclosure only being permitted upon consent of the client after consultation, or by order of a tribunal.

If the tribunal orders disclosure of the information, the attorney is ethically protected from disciplinary action as to any violation of Rule 1.6. The attorney is not required to further appeal or contest the order of the court, and may comply with same without exposing himself to disciplinary action.

The public has heard horror stories as they relate to confidentiality and privileged information in the attorney-client relationship context. The classic example is where the attorney representing the criminal defendant accused of murdering the child victim cannot disclose to the parents of the victim the whereabouts of the child's body. The media spin given to this story generally places the legal profession in a bad light, and generally seeks no explanation as to why the attorney must withhold the information in question.

What the public fails to perceive, and the media refuses to acknowledge, is that but for the confidentiality concept of the fiduciary relationship between the attorney and client, the attorney would be handicapped in representing the client, by not receiving any and all information necessary to allow effective and zealous representation of the client. Likewise, the client may be chilled from disclosing certain information to the attorney for fear that the information would eventually be disclosed to a third party.

Attorneys should exercise the utmost care to protect confidential information obtained by them during the representation of their clients. The attorney should be aware that the confidentiality requirements of Rule 1.6 cover a much greater amount of information than that considered to be privileged information as a matter of law. The opinions of the Office of General Counsel and the Disciplinary Commission restrict themselves to an interpretation of the *Rules of Professional Conduct*, as a matter of ethics, and in no way attempt to interpret legal principles applicable to the concept of privilege.

In view of the fact that confidentiality does cover a more expansive area of information, attorneys are encouraged to err on the side of asserting confidentiality when disclosure of information is sought concerning representation of the client, to also seek counsel of the Office of General Counsel or the Disciplinary Commission if the circumstances of the representation dictate the need for further ethical guidance. ■

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Notice

- **Stephen Duane Fowler**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of July 15, 2005, or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 04-74 (A), 04-101(A) and 04-113(A) by the Disciplinary Board of the Alabama State Bar.

Suspensions

- Arab attorney **Johnny Lee Tidmore** was suspended from the practice of law in the State of Alabama for a period of 90 days, effective March 3, 2005, by order of the Alabama Supreme Court for violations of rules 8.4 (a), (d) and (g), A.R.P.C. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel V, of the Alabama State Bar. The Disciplinary Board accepted Tidmore's conditional guilty plea and ordered that he be suspended from practice of law in the State of Alabama for a period of 90 days, with credit to be given for time served since the imposition of his interim suspension on October 29, 2004.

Tidmore was interimly suspended from the practice of law in the State of Alabama pursuant to Rule 20(a), A.R.D.P., effective October 29, 2004. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Tidmore was intoxicated when he appeared on behalf of a client at a hearing in Marshall County District Court. [ASB No. 04-156(A)]

- On February 22, 2005, the Supreme Court of Alabama entered an order suspending former Andalusia attorney **James Harvey Tipler**, for a period of 120 days, effective December 30, 2004. Tipler is also licensed in the states of Florida and California. He maintains an office in Destin, Florida. Tipler was already suspended from the practice of law in Alabama, which suspension went into effect on June 18, 2003.

On June 9, 2000, Tipler was indicted by the Covington County, Alabama

grand jury for the crime of perjury I (13A-10-101(a)), a Class C Felony. On June 25, 2001, Tipler pled guilty to the charge of interfering with judicial proceedings (13A-10-130(a)(1)), a Class B misdemeanor.

Tipler represented the estate of Harold Rogers, deceased, in a malpractice suit against a physician. Tipler called the son of the deceased as a witness. Tipler held a videotape in his hand and asked the son questions designed to elicit whether the son had viewed the tape. Allegations later arose to the effect that unknown to the son, the tape shown by Tipler was not the original tape but an edited version which deleted portions of the original tape which were favorable to the defense, and some scenes had been moved to a different place on the tape. Therefore, the tape was disallowed. The trial judge instituted civil contempt proceedings against Tipler.

On January 9, 2002, Panel V of the Disciplinary Board of the Alabama State Bar determined that the crime for which Tipler was convicted was a "serious crime" within the meaning of Rule 22(a)(2), *Alabama Rules of Disciplinary Procedure*. On November 22, 2002, the Disciplinary Commission of the Alabama State Bar entered an order suspending Tipler for a period of 120 days. They also ordered that all costs and an administrative fee of \$750 be paid by Tipler in accordance with Rule 33 (d)(9), *Alabama Rules of Disciplinary Procedure*.

On February 3, 2003, Tipler filed an appeal with the Board of Disciplinary Appeals of the Alabama State Bar. On March 4, 2004, the Board of Disciplinary Appeals reversed the order entered by the Disciplinary Board. The

Board of Disciplinary Appeals found that Tipler's conduct, and subsequent plea, did not meet the requirements of Rule 8(c)(2)(C), and that it would expose other attorneys to suspension or disbarment, if during the trial they were found guilty of criminal contempt. The board also stated that although Tipler's acts resulted in some delay in the case and imposed additional work on the trial court, it did not have any impact upon the trial itself or outcome, and did not constitute "an interference with judicial proceedings."

On March 11, 2004, the Alabama State Bar filed a notice to appeal with the Supreme Court of Alabama. On December 30, 2004, the supreme court entered a certificate of judgment reversing the order of the Board of Disciplinary Appeals and remanding the matter to the Board of Disciplinary Appeals to determine if the "punishment was clearly excessive." The supreme court found that although the trial court had the inherent power to impose contempt, the court's imposition of civil or criminal contempt was not the equivalent of a conviction for a crime. The supreme court did conclude that a conviction under S 13A-10-130(a)(1), *Ala. Code* 1975, is a "serious crime" within the meaning of Rule 8(c)(2)(C), *Alabama Rules of Disciplinary Procedure*. The court stated that the Board of Disciplinary Appeals was not free to examine the degree of "seriousness" of a crime, but only whether the necessary elements of the offense fell within the definition provided by Rule 8(c)(2)(C), *Alabama Rules of Disciplinary Procedure*.

Pursuant to the remand from the supreme court, the Board of Disciplinary Appeals entered an order affirming the 120-day suspension. [Rule 22(a), Petition No. 0102]

Public Reprimand

- On February 1, 2005, the Disciplinary Board of Alabama State Bar accepted the conditional guilty plea of Selma attorney **Collins Pettaway, Jr.** in two

separate cases. Pettaway received a consolidated public reprimand without general publication.

In ASB No. 02-33(A), Pettaway represented his wife in connection with a vehicle accident she had with a ready-mix cement truck. The ready-mix company and driver were being represented by a Birmingham defense firm. A motion for partial summary judgment was filed on behalf of the defendants on May 21, 2001, and it was scheduled to be heard on December 5, 2001. On Sunday, December 2, 2001, Pettaway sent an investigator to the home of the defendant driver to take a statement. The investigator interviewed the driver and took notes. He then returned to Pettaway that same day, and Pettaway gave him a blank affidavit. Pettaway's office typed in the driver's statement from the investigator's notes. The affidavit was notarized by one of Pettaway's staff. The affidavit was then filed with the opposition to the motion for partial summary judgment. Defense counsel did not learn of this *ex parte* contact with the defendant driver until the December 5th hearing on the motion. Pettaway was guilty of a violation of Rule 4.2 *Alabama Rules of Professional Conduct*, in connection with this *ex parte* contact with a known represented party.

In ASB No. 04-112(A), a client paid Pettaway a partial retainer to appeal from an adverse ruling in a land title dispute. Pettaway's office agreed to take the case for a fee of \$4,500. It was also agreed that the fee could be paid in two installments. The appeal time was due to run on July 25, 2002. On July 16, 2002, the client made a payment of \$2,100. No appeal was filed with the allowable time. On March 20, 2003, Pettaway wrote the client and apologized for "...any misunderstanding regarding your case. The full retainer fee was needed." Pettaway refunded the \$2,100 with that letter. Pettaway's conduct in this matter violated Rule 1.4(b), *Alabama Rules of Professional Conduct*. [ASB Nos. 03-33(A) & 04-112(A)] ■

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