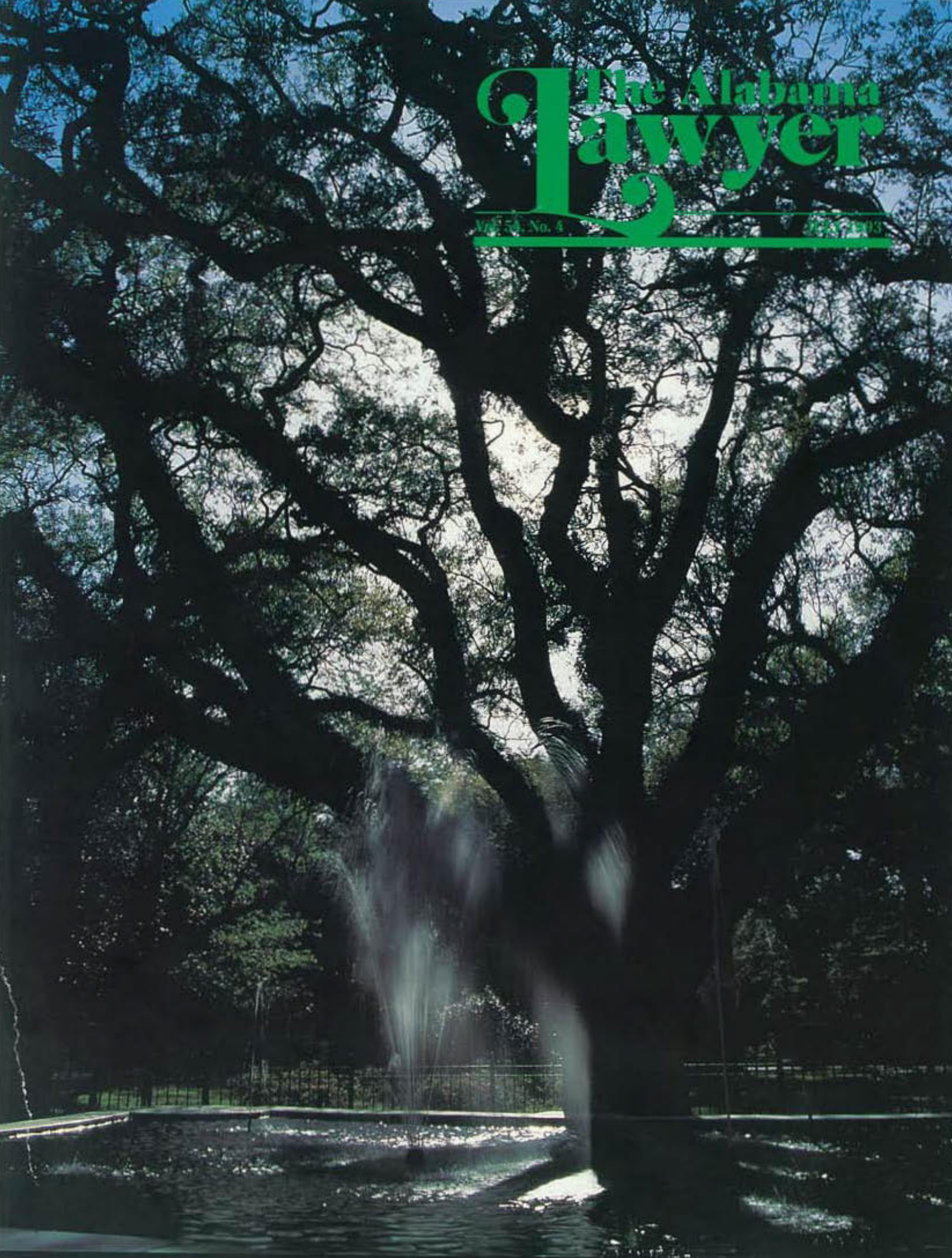

The Alabama Lawyer

Vol. 54, No. 4 JULY 1993

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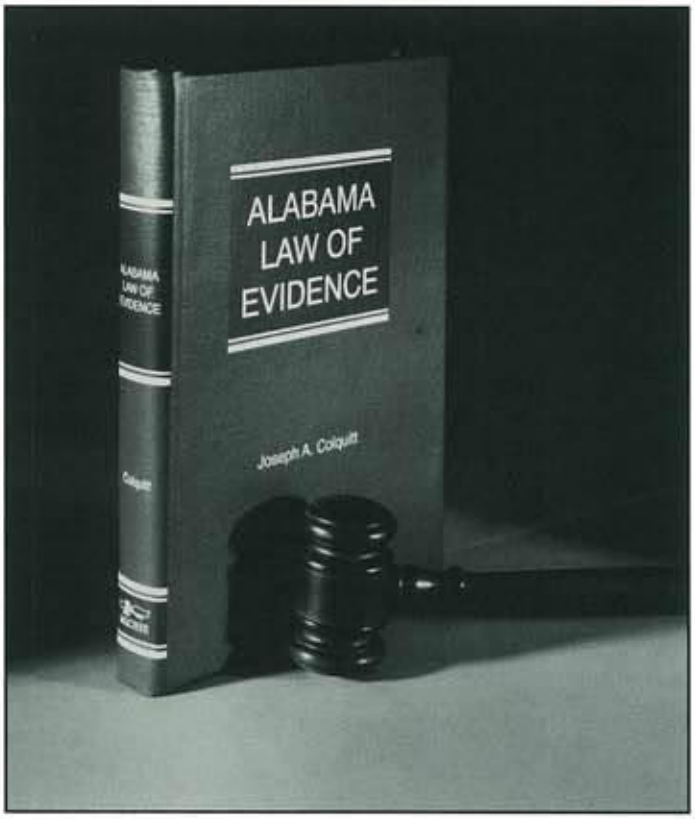
ALABAMA LAW OF EVIDENCE

Joseph A. Colquitt



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IN BRIEF

July 1993 Volume 54, Number 4

ON THE COVER:

Historic live oaks shade Washington Square in Mobile, site of the 1993 Alabama State Bar Annual Meeting, July 15-17.

INSIDE THIS ISSUE:

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The Alabama Lawyer

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Robert A. Huffaker ..... Editor
Susan Shirock DePaola ..... Associate Editor
Margaret Murphy ..... Managing Editor

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PRESIDENT'S PAGE

LETTER TO THE GOVERNOR

Clarence M. Small, Jr.

June 1, 1993

The Honorable James E. Folsom, Jr.
Governor of Alabama
State Capitol Building
Montgomery, Alabama 36130

Dear Governor Folsom:

Your father was elected Governor of Alabama in 1946 on a platform of education reform. Subsequently, his vision of a well-educated constituency was frustrated by political favoritism. Despite the levy of a tobacco tax, increases in the sales tax and a two-cent beer tax, all earmarked for education, Alabama still ended up with an underfunded education system driven by political, rather than qualitative, educational considerations.

Legislators without college degrees have been appointed presidents of our colleges, a barber teaching prisoners his tonsorial skills is paid $17,000 more a year than a physics professor at Jefferson State, and needless duplication of services abound as politicians reward their unqualified but influential friends with jobs.

While such squandering takes place, a sixth-grade science teacher in south Alabama shows her students a picture of a microscope because she does not have a real one. The science students in Choctaw County line up to use one of the only two Bunsen burners in the entire system. The kids at Alberta Elementary School pretend to swing on a set that has no seats or chains, and a classroom table in Wilcox County is propped up by milk cartons. Today, Alabama has schools without science labs, libraries without librarians and books that are infested with termites.

Had your father's vision in 1945 become reality, the special legislative session on education and tax reform which you have vowed to call almost a half century later would be unnecessary. His wish never became reality and the implementation of that goal has fallen to you.

Today, a half million of the citizens of our state are unable to read and write. One in three Alabama children lives in poverty—the second highest in the nation. The 1991 census ranked us 47th among 50 states in family income. We are 50th in percentage of adults who finish high school.

It should be a "given" that each citizen in Alabama is entitled to be taught the lessons of history so he or she will not repeat its mistakes. It is difficult, if not impossible, to relieve the burdens of poverty if we have never been taught the methods of self-improvement that a sound education can reveal. All our lives are made easier when we are given the tools which enable us to make wise decisions—to exercise good judgment—about our health, our work and our general welfare. To live fruitful lives, though, we must have the opportunity to be productive.

We are told by the experts in industrial recruitment that the education level of the available work force is a central consideration in site selection. In today's world of complex technology and global markets, to rely on cheap but ignorant labor to attract business is senseless. Production of structurally complex products requires a skilled and intelligent labor pool. Concomitantly, those higher skills result in higher pay for the employee and his or her family. Alabama will never close the per capita income gap behind other states until all of our people have the opportunity to be well-educated.

No more studies are necessary to implement the plans to achieve this goal. The expertise is available to guide you and the Legislature in this critical endeavor. To understand the problem, one need only read Judge Gene Reese's opinion holding that the funding of Alabama schools is unconstitutional and has resulted in an inadequate and inequitable system. Ask Auburn's distinguished professor, Wayne Flynt, about the relationship between the quality of our schools and our economy. To find the solution, study *Alabama Gap Analysis* produced by Bill Smith and his A Plus Coalition. That document tells you where we need to take our schools and how to get there. Call on Bo Torbert and Tom Carruthers, who headed tax reform commissions, to show us how the funding must be generated.

Through meaningful education and tax reform, Alabama can move to the forefront among progressive southern states. The Alabama State Bar wants to help you take us there.

Respectfully,
Clarence M. Small, Jr.
President, Alabama State Bar

• ALABAMA STATE BAR •

At a Glance

Keep In Touch!

- Need an updated CLE Calendar? Need to know if a seminar has been approved for CLE credit? Want a CLE seminar at a particular location or on a particular subject matter? Call Diane at 1-800-354-6154 for a calendar and information.
- If you attended or will be attending a CLE seminar that has not been approved for CLE credit, call Diane at 1-800-354-6154 for application information.
- To reserve a meeting room for a deposition, call Kim at 1-800-354-6154.
- Questions regarding the purchase of your occupation license or payment of dues? Call Alice Jo at 1-800-354-6154 or (205) 269-1515.
- Want to join the Lawyer Referral Service? Call Katherine at 1-800-392-5660.
- The state bar's fax number, main office, is (205) 261-6310.
- To fax something to the Center for Professional Responsibility, the number is (205) 261-6311.
- The telephone number to reach either office is (205) 269-1515, Monday through Friday, 8 a.m. to 5 p.m.

Member Services

- Bar directories for 1992-93 now cost $25 for ASB members and $40 for non-members. Send check or money order to Alabama Bar Directory, P.O. Box 4156, Montgomery, Alabama 36101.
- To change your name, address or telephone number, send it IN WRITING, to Alice Jo Hendrix, Membership Services, P.O. Box 671, Montgomery, Alabama 36101.
- To get a classified notice, an announcement in "About Members, Among Firms", or a letter to the editor in the July 1993 issue of *The Alabama Lawyer*, the deadline was Friday, May 28, 1993 for the information to be RECEIVED at the state bar. To get something in the September 1993 issue, it has to be RECEIVED at the state bar by Friday, July 30, 1993.

Let's Get Together!

- ✓ The next meeting of the Alabama State Bar Board of Commissioners is July 14, 1993 in Mobile.
- ✓ Mark your calendar—Alabama State Bar Annual Meeting—July 15-17, 1993, Riverview Plaza, Mobile.

Exam Deadlines!

- All bar exam applicants shall have their completed applications filed no later than November 1 preceding the February examination, and no later than March 1 preceding the July examination for which they wish to sit. (Rule II, C, Rules Governing Admission to the Alabama State Bar) Attorneys submitting affidavits for prospective applicants should be mindful of these deadlines.

ALABAMA HOSTS 1993 SCBP

The Alabama State Bar will be the host for the Silver Anniversary meeting of the Southern Conference of Bar Presidents. The SCBP annual meeting was instituted in 1969 and first met in Biloxi, Mississippi. In addition to an annual meeting each October, the conference meets at each annual and mid-year meeting of the American Bar Association for one afternoon session preceding the meeting of the National Conference of Bar Presidents.

Twenty bar associations, within 17 states, comprise the SCBP since there are both unified and voluntary bar associations in North Carolina, Virginia and West Virginia. Other states represented in the conference are Alabama, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Oklahoma, South Carolina, Tennessee, and Texas.

There are five additional regional conferences covering other geographic areas of the country. These are the Mid-Atlantic, New England, Mid-West, The Jack Rabbit (Association of the Bars of the Western Plains and Mountains), and Western States. Several states hold memberships in two different regional conferences.

The conferences usually include as conferees a minimum of four delegates for each state. These are the president, president-elect, immediate past president and executive director. Several conferences invite all former presidents. This is the policy of the Southern Conference; however, the former presidents attend with less frequency the further away they are from their incumbency.

Alabama hosted the 1974 SCBP meeting at Point Clear. The Grand Hotel again has been selected as the 1993 location. The date will be October 21-24, 1993. Our conference will begin Thursday evening and conclude with a farewell brunch on Sunday.

It is anticipated at least a minimum of 100 conferees with spouses will come to Alabama's Eastern Shore. These conferences are self-sustaining and are supported with a registration fee paid by each attendee. The Silver Anniversary program will be a retrospective of the last 25 years of law practice and bar activities in the conference region. United States Circuit Judge Frank M. Johnson, Jr., who keynoted Alabama's 1974 meeting, has been invited to keynote the 1993 gathering. It is anticipated that several former ABA presidents, who were earlier presidents of the state bars, will be active participants on the program.

Reginald T. Hamner

James R. Seale of Montgomery is the president of the SCBP as a conference tradition by virtue of Alabama's host role. "Spud" will preside at the New York annual meeting, as well as the 1994 mid-year meeting in Kansas City. The presidency then will pass to Kentucky, which will host the 1994 SCBP meeting.

This meeting will afford us an opportunity to showcase our Eastern Shore. Having attended the 1974 meeting, when the late Alto Lee of Dothan was SCBP leader, I know the positives that come to our bar association from the association's leadership role. I am excited that we again have this opportunity. It is particularly meaningful that past Presidents Stone, Harris and Greaves, as well as President-elect Broox Holmes, will be able to host their colleagues from other states in their local area. ■

BAR BRIEFS

Richard C. Keller of Northport, Alabama is the recipient of the 1992-93 **Burr & Forman** law scholarship. The award, which covers full tuition, is given annually to an outstanding second- or third-year law student.

Keller is a third-year law student at the University of Alabama School of Law in Tuscaloosa. Burr & Forman's offices are located in Birmingham and Huntsville.

According to **Henry T. Henzel**, president of **Attorneys Insurance Mutual of Alabama, Inc.**, as of May 6, 1993, AIM had exceeded 1,000 insureds, with an exact count of 1,004.

AIM is the Alabama State Bar-related malpractice insurance company.

Robert G. Tate, a senior partner with **Burr & Forman**, has been appointed to a special panel formed by the American Arbitration Association. Called "The Large, Complex Case Program", the panel was established to provide an alternative method of resolution for large, complex business disputes. The American Arbitration Association selected 36 approved arbitration attorneys, five of whom are from Alabama, to serve on the Georgia/Alabama panel.

Tate is a member of the American College of Trial Lawyers, the Alabama Defense Lawyers Association, and the Litigation Section of the American Bar Association.

Uniform Commercial Code filers confused by UCC procedures can find help in a new handbook produced by the Secretary of State's office. *Alabama's Uniform Commercial Code Filing Procedures & Forms* takes UCC customers through the what, where, when and how of filings under Part 3 and Part 4 of the UCC.

In addition to helping customers with correct filing procedures, the book outlines the filing system in the Secretary of State's office and how public information requests on UCC matters, including requests for copies, are handled.

The book is free to the public. Supplies are limited so only one book per person or business will be sent. However, those who receive the book may reprint or copy the book for further distribution. Requests for the book should be sent to: Business Division, Alabama Secretary of State, P.O. Box 5616, Montgomery, Alabama 36103. Phone (205) 242-7200.

David M. Olive of Fort Smith, Arkansas was appointed to the Arkansas Bar Association's In-House Corporate Counsel Committee recently. The committee consists of attorneys with special interest in this area who provide a forum for lawyers employed by corporations and other business organizations to examine common problems and develop

NOTICE

ALABAMA SUPREME COURT

The Supreme Court of Alabama presently has before it a set of proposed rules of evidence. Those proposed rules have been published for notice purposes in the Southern Reporter (2d) advance sheet dated May 13, 1993. A supreme court order of April 27, 1993 published in the same advance sheet allows interested persons to file comments regarding those proposed rules. Such comments should be filed with Robert G. Esdale, clerk, Supreme Court of Alabama, Judicial Building, 445 Dexter Avenue, Montgomery, Alabama 36104. Comments must be filed no later than August 27, 1993.

The court has scheduled a hearing on those proposed rules, at 9 a.m., Thursday, October 7, 1993 in the supreme court's courtroom. Anyone desiring to appear before the court at that hearing should file an appropriate request with the clerk no later than August 27, 1993.

George Earl Smith
Reporter of Decisions
Alabama Supreme Court

educational programs of particular interest to lawyers working for businesses.

Olive is a 1975 admittee to the Alabama State Bar and works with Donrey Media Group.

Robert McDavid Smith recently received the 1993 Sam Pipes Award given by the Farrah Law Society. The Pipes Award is presented annually to the University of Alabama School of Law alumnus who makes the greatest contribution toward making the law school a national leader in legal education.

Smith is the senior partner in the Birmingham firm of Lange, Simpson, Robinson & Somerville. He is a 1942 graduate of the University of North Carolina. He received his LL.B. from the University of Alabama School of Law in 1948 and his LL.M. from Harvard University in 1949. Smith was admitted to the Alabama State Bar in 1949, and has practiced with Lange Simpson since then. He is a member of the American Judicature Society and a fellow of the American College of Trial Lawyers.

M. Louis Salmon has committed a deferred gift of $100,000 to create the M. Louis Salmon Professorship of Law at the University of Alabama School of Law. Salmon is a member of Lange Simpson at the firm's Huntsville office. He is a 1948 graduate of the University of Alabama School of Law, and currently serves on the law school's Capital Campaign Steering Committee. He is a member of the board of directors and past president of the University of Alabama School of Law Foundation and was instrumental in the law school completion campaign. He served as president of the Huntsville-Madison County Bar Association. ■

AFFORDABLE COMPUTERIZED LEGAL RESEARCH

Ask a small firm attorney or sole practitioner why they have not yet subscribed to a computerized legal research service and you will probably get a four-letter word in response: cost.

There is an alternative. A new program called **Maximum Value Products** offers a different twist on traditional computerized research subscriptions as well as CD ROM. Now, small firms and solos can conduct unlimited LEXIS® research in all of the Alabama materials, for one flat, low monthly rate.

A law office can have a LEXIS® subscription for $135 a month, plus applicable subscription fees ($25 per month through the Alabama State Bar), for up to three attorneys. The LEXIS® MVP program costs $45 a month for each additional attorney.

An MVP subscriber can search Alabama caselaw, annoted statutes and the advanced legislative service, as well as several top law reviews as much as they want under the monthly fixed rate. Online materials are continuously updated as information becomes available, so users will have unlimited access to the most current materials at all times.

Authors Barry D. Bayer and Benjamin H. Cohen reviewed Mead Data Central's new MVP program in *Legal Times* and concluded that, "Lawyers with primarily state law concerns or those practicing alone or in small groups should find MVP almost irresistable."

In addition, MVP subscribers will be able to choose a $45-a-month option for up to three attorneys for unlimited online printing of MVP documents. Another option available is a $30-a-month flat rate for up to three attorneys to search United States District Court and applicable U.S. Circuit Court of Appeals cases.

For a limited time only, an introductory offer of $50 for one month's unlimited use is available to all new subscribers, through the Alabama State Bar.

Mead Data Central, the provider of the LEXIS® service, said the MVP program contains the materials most needed by smaller law offices, as confirmed in a recent survey it conducted.

The survey found that, overall, a typical attorney in a firm of five or fewer lawyers conducts more than six hours of legal research a week, almost 90 percent of it in state materials.

"These research patterns were uppermost in our minds when we developed the MVP program," said G.M. McGill, vice-president of sales and marketing for legal information services at Mead Data Central.

McGill said the MVP program provides a more efficient, cost-effective way to conduct legal research by giving equal access to extensive state law materials.

Complete and current state statutes and codes are the most important legal resource, said the attorneys surveyed.

Currentness is a key attribute of online research and was considered very important to those surveyed when they were asked what types of materials they research.

Although it varies by state, 75 to 90 percent of those questioned said they have access to a personal computer, most often in their office. That means the online service should save a trip to the law library.

To find out more about the MVP program, contact Teresa Normand at (800) 356-6548. ■

ABOUT MEMBERS, AMONG FIRMS

ABOUT MEMBERS

Harold T. Ackerman has moved his offices to 1821 Center Point Road, Birmingham, Alabama 35215. Phone (205) 853-6896.

Frank H. Hawthorne, Jr. announces he has left the firm of McPhillips, Hawthorne, Shinbaum & Gill and his new office is located at 207 Montgomery Street, Suite 1100, Montgomery, Alabama 36104. Phone (205) 269-5010.

Sharon D. Hindman announces the opening of her office at 111 Jackson Avenue, South, Russellville, Alabama 35653. The mailing address is P.O. Box 339, Russellville 35653. Phone (205) 332-7002.

Eileen R. Malcom announces the opening of her office at 209 S. Market Street, Suite 215, Scottsboro, Alabama. The mailing address is P.O. Box 924, Scottsboro 35768. Phone (205) 259-3500.

Milton E. Yarbrough, Jr. announces that he has formed the **Yarbrough Law Firm** with offices in the Great Oaks Office Building, 4956 Broad Street, Mooresville, Alabama 35649. Phone (205) 350-2252.

Douglas W. Ingram announces the relocation of his office to 2244 Center Point Road, Suite 101, Birmingham, Alabama 35215. Phone (205) 853-8081.

Thomas Ryan, Jr. announces the relocation of his offices to 221 East Side Square, Suite 1-A, Huntsville, Alabama 35801. The mailing address is P.O. Box 18654, Huntsville 35804. Phone (205) 533-1103.

Clayton T. Sweeney announces the opening of his office at Mountain Brook Center, 2700 Highway 280 East, Suite 150E, Birmingham, Alabama 35223. Phone (205) 871-8855.

Mark D. Mullins announces the opening of his office at 880 S. Lawrence Street, Montgomery, Alabama 36104. The mailing address is P.O. Box 141, Montgomery 36101. Phone (205) 834-8070.

Anne R. Strickland announces the relocation of her office to 3021 Lorna Road, Suite 100, Birmingham, Alabama 35216. Phone (205) 979-7529.

Larry R. Mann, formerly of Aldridge & Hawkins, announces the opening of his office at 1305 Brown Marx Tower, 2000 First Avenue, North, Birmingham, Alabama 35203. Phone (205) 326-6500.

Reggie Stephens announces the relocation of his office from 1110 Montlimar Drive, Suite 530, to Suite 810, Mobile, Alabama 36609. Phone (205) 344-6822.

John C. Calhoun announces the relocation of his offices to 505 20th Street, North, Suite 950, Financial Center, Birmingham, Alabama 35203. Phone (205) 251-4300.

William E. Case announces the relocation of his office to One Office Park, Suite 413, Mobile, Alabama 36609.

Vickie E. House, formerly with Veigas & Cox, announces the opening of her office at 100 W. College Street, Columbiana, Alabama. The mailing address is P.O. Box 1871, Columbiana 35051. Phone (205) 669-1000.

Lateefah Muhammad announces the opening of her office at 204A S. Elm Street, Russell Plaza, Tuskegee, Alabama 36083. Phone (205) 727-1997.

AMONG FIRMS

Boyd & Fernambucq announces that **Randall W. Nichols** has become a partner and the firm name has been changed to **Boyd, Fernambucq & Nichols.** Offices are located at 2801 University Boulevard, Suite 302, Birmingham, Alabama 35233. Phone (205) 930-9000.

Clark, Scott & Sullivan announces that **Jeffrey L. Luther** has become a partner in the firm. The firm has offices in Mobile and Birmingham, Alabama and Jackson, Mississippi.

Hensley, Bradley & Robertson announces that **Ralph K. Strawn, Jr.** has become a member of the firm, and that **Kimberly H. Skipper** has become an associate with the firm, with offices at 754 Chestnut Street, Gadsden, Alabama 35901. Phone (205) 543-9790.

Bond & Botes announces that **John C. Larsen** has become associated with the firm. He previously served on active duty with the U.S. Army Judge Advocate General's Corps at Redstone Arsenal, Alabama. He is joining the firm's Huntsville office.

Kaffer & Pond announces that **William E. Pipkin, Jr.**, formerly an associate with Sintz, Campbell, Duke & Taylor, has joined the firm. The firm's name has been changed to **Kaffer, Pond & Pipkin**. Offices are located at 150 Government Street, Suite 3003, Mobile, Alabama 36602. The firm's mailing address is P.O. Box 2104, Mobile 36652. Phone (205) 438-1308.

Thaxton & Daniels announces that **Carl J. Roncaglione, Jr.** has become an associate of the firm, with offices at 1115 Virginia Street, East, P.O. Box 313, Charleston, West Virginia 25321. He is a 1992 admittee to the Alabama State Bar.

Verner, Liipfert, Bernhard, McPherson & Hand announces that **Kathy D. Smith** has become associated with the firm in the Washington, D.C. office. The firm also has offices in McLean, Virginia and Houston, Texas. She is a 1987 admittee to the Alabama State Bar.

Central Bank of the South announces that **Daniel B. Graves** has been promoted to associate general counsel for the bank and its affiliates. Graves joined Central Bank in 1991 as senior legal counsel.

Wilson, Pumroy & Turner announces that **George D. Robinson** has become a partner. Offices are located at 1431 Leighton Avenue, Anniston, Alabama 36201. Phone (205) 236-4222.

Parnell, Crum & Anderson announces that **Robert J. Russell, Jr.**, former prosecutor for the Montgomery County District Attorney's Office, has become associated with the firm. Offices are located at 641 S. Lawrence Street, Montgomery, Alabama 36104.

Cherry, Givens, Peters, Lockett & Diaz announces that **Jay D. Williams, Jr.** has become a member of the firm.

He will practice in the Mobile office, located at 401 Church Street, Mobile, Alabama 36633. Phone (205) 432-3700.

Burr & Forman announces that **John T. Mooresmith** has joined the firm. He previously served as general counsel for the Medical Association of the State of Alabama.

Martin, Drummond, Woosley & Palmer announces that **H.E. Rawson, Jr.** has joined the firm, and that the firm has relocated to 2204 Lakeshore Drive, Suite 130, Lakeshore Park Plaza, Birmingham, Alabama 35209. Phone (205) 802-1100.

Bryant, Blacksher & Lester announces that **W. Eugene Howard, III** has joined the firm. Offices are located at Riverview Plaza Office Tower, 63 S. Royal Street, Suite 1107, Mobile, Alabama 36602. Phone (205) 432-4671.

Robert B. Crumpton, Jr., Thomas C. McGregor, James E. Davis, Jr. and John T. Alley, Jr. announce the formation of **Crumpton, McGregor, Davis & Alley**, with offices located at Interstate Park Center, 2000 Interstate Park Drive, Suite 100, Montgomery, Alabama 36109. The mailing address is P.O. Box 231208, Montgomery 36123-1208. Phone (205) 270-3176.

Williams & Ledbetter announces the relocation of its offices to 2140 Eleventh Avenue, South, Suite 410, The Park Building, Birmingham, Alabama 35205.

Golden & Golden announces the relocation of its offices to 317 20th Street, North, Birmingham, Alabama 35203. Phone (205) 322-8684.

Morris, Smith, Cloud, Fees & Conchin announces that **Maureen G. Kelley** has become associated with the firm. Offices are located at 521 Madison Street, Second Floor, Huntsville, Alabama 35801. Phone (205) 534-0065.

Carraway Hospitals of Alabama announce that **William D. Wise**, former associate counsel with Carraway since 1978, has been promoted to general counsel and appointed vice-president of legal affairs. Offices are located in Carraway Methodist Medical Center, 1600 N. 26th Street, Birmingham, Alabama 35234. Phone (205) 226-6298.

Richard I. Lehr, David J. Middlebrooks, R. David Proctor, Albert L. Vreeland, II and Brent L. Crumpton announce the formation of **Lehr, Middlebrooks & Proctor**. Offices are located at 2021 Third Avenue, North, Suite 300, Birmingham, Alabama 35203. Phone (205) 326-3002.

Najjar Denaburg announces that **Hub Harrington** has joined the firm. Offices are located at 2125 Morris Avenue, Birmingham, Alabama 35203. Phone (205) 250-8400.

C. Knox McLaney, III announces that **T. Eric Ponder**, formerly of Williams, Hammon & Hardegree, has become associated with the firm. Offices remain at 622 S. Hull Street, Montgomery, Alabama 36103. Phone (205) 265-1282.

Capell, Howard, Knabe & Cobbs announces that **Clement Clay Torbert, III** has become an associate with the firm. Offices are located at 57 Adams Avenue, Montgomery, Alabama 36104-4045. Phone (205) 241-8000.

William A. Catoe, Jr. announces the association of **Vera Smith Hollingsworth**, with offices at 211 Lee Street, N.E., Suite B, Decatur, Alabama 35601. Phone (205) 351-0777.

Berkowitz, Lefkovits, Isom & Kushner announces that **Thomas O. Kolb** has become a member. Offices are located at 1600 SouthTrust Tower, Birmingham, Alabama 35203. Phone (205) 328-0480.

Barnett, Noble & Hanes announces that **Frederick M. Garfield** has become a member. Offices are located at 1600 City Federal Building, Birmingham, Alabama 35203. Phone (205) 322-0471.

Balch & Bingham announces that **C. Paige Williams** has become associated with the firm, in the Birmingham office. She is a graduate of Vanderbilt University and Georgetown University Law Center.

Sandra K. Meadows and **Alice M. Meadows** of **Meadows & Meadows** announce the relocation of their offices to 60 S. Conception Street, Mobile, Alabama 36602. The mailing address is P.O. Box 985, Mobile 36601. Phone (205) 432-2808.

Hamilton, Butler, Riddick, Tarlton & Sullivan announces that **Richard E. Corrigan** has become a member of the firm. Offices are located at 10th Floor, First National Bank Building, Mobile, Alabama. The mailing address is P.O. Box 1743, Mobile 36633. Phone (205) 432-7517. ■

YOUNG LAWYERS' SECTION

By SIDNEY W. JACKSON, III, president

SANDESTIN SEMINAR A SUCCESS

The annual YLS Seminar on the Gulf at Sandestin was a resounding success. Over 230 attendees enjoyed one of the finest programs assembled. The attendees also included lawyers from Tennessee, Georgia and Florida. We were very fortunate to have perfect weather all three days and the golf, tennis, beach activities and cocktail parties were superb. Frank Woodson, Judson Wells and Gordon Armstrong of Mobile, along with Barry Ragsdale and Hal West of Birmingham, put a tremendous amount of work, effort and expertise into this seminar. Watch upcoming issues of *The Alabama Lawyer* for details on next year's seminar.

Spring bar admissions ceremony

Andy Birchfield of Montgomery was in charge of the spring bar admissions ceremony held May 25. Attorney General Jimmy Evans addressed the attendees at the luncheon. One hundred fifty-seven persons were admitted to practice.

"Sink the Battleship" party planned July 15, 1993

The YLS will co-sponsor a "Sink the Battleship" party on the USS Alabama July 15 during the state bar's annual meeting in Mobile. The party will last from 8 p.m. until midnight. Tickets are $10 each and may be purchased through the state bar registration or at the door. Refreshments will be included in the price of admission. "The Tip Tops" will provide musical entertainment, compliments of Jackson, Taylor & Martino.

Dealing with stress

I once heard a state bar official explain stress as follows:

"The concepts of incredible numbers of hours of workweek after workweek, profit center productivity, and increasing demand for excellence in work produce and producing a result at any cost has precipitated incalculable mental and physiological stress on otherwise normal and healthy individuals who were never created to handle such unrelenting demands and pressures. In too many instances, individuals have sought refuge and escape from these oppressive and consuming pressures by overindulgence in alcoholic beverages or the more destructive alternative of drugs."

Sidney W. Jackson, III

Obviously, stress and its demands on young lawyers do not have to lead to alcohol or drug abuse. In reality, the statistics indicate that more and more lawyers are, in fact, heading in that direction.

According to American Bar Association statistics, 20 percent of the lawyers in this country are affected in some manner and to some degree by substance abuse. If these figures are accurate (they are probably low), then the individuals who are affected and the public to whom they owe their services must deal more effectively with the stress.

Those who study the matter say that coping problems do not manifest themselves overnight. In fact, the over-extended lawyer begins to exhibit small signs of non-coping behavior, such as tardiness, frequent or unexpected absences, or wide mood swings, over a period of time. Then, after a more extended time period, acute problems develop. These include inappropriate dress, failure to keep appointments or return phone calls, and a sense of isolation from other lawyers and peers.

How do you deal with stress without crawling into a bottle or doing drugs? One way that has been suggested is to develop a regular exercise program. Studies show that a regular exercise program will help reduce stress and help a person cope with the effects of stress. Some law firms give their lawyers memberships in health clubs or provide workout areas. Other firms promote social events which involve physical exercise for their employees.

At a meeting I attended in Florida, I learned of several programs that have appeared nationwide to help the professional deal with stress. One program is known as LAP, Lawyer Assistance Programs. Traditionally, law firms have been reluctant to get into the human resources area. Once an attorney started off the deep end, the normal procedure was to cover up the problems, put him in a corner and hope he would quit. This is changing through LAP programs.

Another program is the LCL or Lawyers' Concern for Lawyers. This group is composed entirely of lawyers in alcohol or drug recovery. It is similar to AA which supposedly works because nobody can help an alcoholic like another alcoholic who has been there. Applying this to lawyers, who would better understand the problems of an impaired lawyer burned out and under stress than another lawyer who has been through the same thing?

Concerned lawyers and law firms should get involved with promoting programs such as those discussed above for the betterment of our profession. ■

Cumberland School of Law

The Cumberland School of Law of Samford University is indebted to the many Alabama attorneys and judges who contributed their time and expertise to planning and speaking at our continuing legal

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Continuing Legal Education

education seminars during the 1992-93 academic year. We gratefully acknowledge the contributions of the following individuals to the success of our CLE programs.

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BUILDING ALABAMA'S COURTHOUSES

MOBILE COUNTY COURTHOUSE

By SAMUEL A. RUMORE, JR.

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

Present Mobile County Courthouse, 1959

MOBILE COUNTY

The history of Mobile County is the richest of any county in Alabama, predating the existence of the state by at least 300 years. The first documented explorers, the Spanish sailors under Alonso Alvarez Pineda, visited the area in 1519, more than 100 years before the Pilgrims landed at Plymouth Rock. Legend suggests that a Welsh prince, Madoc, may have entered Mobile Bay as early as the 12th Century. Since Madoc may be only a myth, most historians credit the Spanish as the first Europeans to explore the area.

Pineda and his men did not attempt a settlement, but only visited Indian villages and mapped out the coastline. Other Spanish expeditions arrived over the years. In 1528, Panfilo de Narvaez sought gold. In 1540, DeSoto's army marched through Alabama and probably came within 75 miles of Mobile. In 1558, Guido de Las Bazares explored Mobile Bay and historians believe that another conquistador, Tristan de Luna, sailed into the bay in 1559.

Despite the early Spanish explorations, the first permanent settlement at Mobile was French. The Gulf Coast was opened to French colonization by the exploits of LaSalle, who claimed the Mississippi River and the surrounding territory for France in 1682.

The first French governors were the LeMoyne brothers, Pierre, known as Iberville, and Jean Baptiste, known as Bienville. They established their first capital at Fort Maurepas in Old Biloxi, present-day Ocean Springs, Mississippi, in 1699. Later, in 1702, they moved the capital of French Louisiana to Fort Louis de la Mobile, on the west bank of the Mobile River, approximately 27 miles north of the river's mouth. This location is known today as 27 Mile Bluff.

The fort was named in honor of King Louis XIV of France. The site was near the territory of the Mobile Indians. Due to flooding and poor defenses, the French abandoned the site of Old Mobile in 1711 and removed the fort to what is now the location of present-day Mobile. Today's Mobile County Courthouse sits on the exact site of that relocated fort. The fort remained the French capital until 1719 when it was transferred back to Biloxi and then three years later moved to New Orleans.

In 1763, following the Peace Treaty of Paris, which ended the French and Indian War, Mobile came under British rule. On October 20, 1763, the French surrendered the fort, then called Fort Conde, to the British who renamed it Fort Charlotte in honor of their young queen.

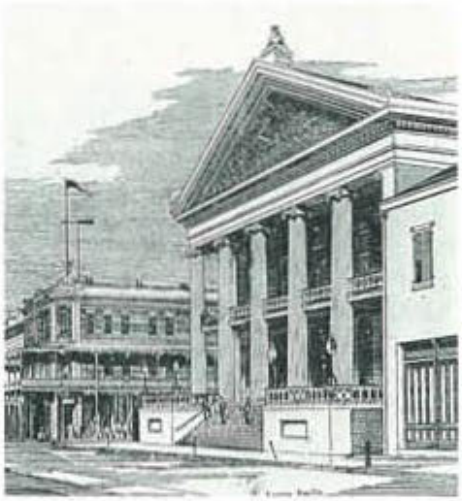
The British occupation was very brief. During the American Revolution, a Spanish force allied to the Colonials captured Fort Charlotte on March 14, 1780. In the Peace Treaty of Paris of 1783, Spain received all British lands east of the Mississippi River and south of the 31st parallel of latitude, including Mobile. Thus, the home country of the first explorers in the area now held sovereignty.

At first, the Spanish encouraged American immigration. Americans moved into the Spanish territory in increasing numbers. Soon, however, the Spanish recognized the American threat to Mobile and sought to limit American incursions.

In 1800, Spain was forced by Napoleon to reconvey the Province of Louisiana to France. In 1803, Napoleon sold Louisiana to the United States. Following the Louisiana Purchase, a question arose over title to the Gulf Coast territories. Spain contended that Louisiana was only the territory west of the Mississippi River. The U.S. insisted that the traditional designation of Louisiana extended to the Perdido River, the present-day boundary between Baldwin County, Alabama and Florida. The terms of conveyance were vague so the U.S. did not formally press the issue at that time.

By 1812, the U.S. was again at war with Britain. The Spanish allowed the British to use their gulf ports in expeditions against the Americans. On December 18, 1812, the Mississippi Territorial Legislature created Mobile County even though the land was still claimed by Spain. In February 1813, President Madison ordered General James Wilkinson to capture Mobile and prevent the British from using it as a port. The city surrendered on April 13, 1813, and Mobile came under American control. At the war's end, the U.S. gained all the gulf coast lands of present-day Mississippi and Alabama, the only territory it acquired during the War of 1812.

Mobile gradually became an American frontier town in the years before statehood, and soon needed a courthouse and a jail. Early records indicate that a jail was constructed, but no courthouse. Courts were held at various times at Mr. Childer's Coffee Room, the United States Hotel and the Globe Tavern. A territorial law passed in 1818 authorizing the construction of a new jail and courthouse for costs not to exceed $15,000. Although plans were made, no construction took place for a number of years.



Third county courthouse, 1873
Source: Mobile: The New South, 1887-88
University of South Alabama Archives

Fourth county courthouse, 1895
T.E. Armitstead Collection
University of South Alabama Archives

Fourth county courthouse , ca. 1930
Erik Overbey Collection
University of South Alabama Archives

In the meantime, courts continued to be held in rented locations, such as the houses owned by Richard Tankersley and Catalina Mottus. A receipt in the county archives states that Catalina Mottus was paid $260 for use of a house located on Government Street for the holding of court during 1822 and 1823.

Ultimately, Mobile County entered into a contract for its first formal courthouse facility. The contract price was $13,000. The architect and builder was Peter Hobart. This contract still exists and provides a detailed description of the structure. It was a two-story rectangular brick building constructed in the Neoclassical style. The building had a portico supported by large two-story columns. The main floor contained a central room that was 42 feet long. Various offices flanked either side of the room. The principal courtroom was located on the second floor. It was 58 feet long. The courthouse was erected on the southwest corner of Royal and Government streets, the location of the old fort which had been torn down years before.

Historians are not certain of the exact completion date for this courthouse, but the building was not occupied until 1829. A fire destroyed this courthouse in 1851. Thereafter, the court moved temporarily to the Alhambra Hall, also located on Royal Street.

A contract for the second courthouse building was let April 16, 1853. James Barnes was the builder and William S. Alderson served as architect and superintendent of construction. This courthouse was built on the same site as the previous one. The county had to purchase additional land for the project and a parcel 60 feet by 30 feet was acquired for $3,810. The total construction cost for this courthouse was $70,289.08.

The new courthouse was a three-story brick structure covered with rough stucco. It had classic columns and pilasters. Windows and doors were trimmed in white granite. Capitals and bases of the columns were made of blue marble. The courthouse contained several innovations, including arched ceil-

ings, groined vaults in the courtroom and vestibules, and a hot air furnace with cast iron conductors set in the double-brick walls. This beautiful and well-built structure fell victim to the same fate as its predecessor. On January 31, 1864 it was destroyed by a fire due to a defective chimney flue. Fortunately, the county records were saved.

Because of financial problems during the Reconstruction Period after the Civil War, a third courthouse could not be built for many years. In this interim period, the courts were moved to the 1842 Hagan Building located on the north side of Conti between Royal and Water streets.

In March 1869, an additional lot behind the original courthouse property was purchased for future use. And in April 1869, the county approved a contract to remove the remaining rubble from the property where the courthouse had burned five years previously.

In July 1872, advertisements announced that bids would be received for a new courthouse building. In September, bonds were approved for construction. On October 1, 1872, the county entered into a contract with W.O. Pond for the design and specifications of a new courthouse. Charles Fricke received the construction contract for $101,000. The contract called for completion of the courthouse by October 1, 1873.

The new courthouse was built on the site of its two predecessors, and many of the architectural elements in the former courthouses were maintained. The structure was Neoclassical and measured 81 feet by 146 feet. The front portico was 13 feet deep, and the structure was supported by six fluted Ionic columns. It contained a second-story balcony. On top of its brick-filled pediment sat a stone statue of Justice. All of the windows had rounded tops and stone sills.

This structure was soundly built and should have served Mobile for a long time. Whether due to a lack of funds or as an added precaution against fire, no furnace was installed in this building. However, it did contain fireplaces. Unfortunately, tragedy struck the Mobile County Courthouse again. Just as in 1851 and 1864, this courthouse burned on January 20, 1888. Seven fire companies responded to the morning alarm but the flames spread quickly across the second floor ceiling and soon the roof collapsed. The statue of Justice crashed onto Government Street. Luckily, the first floor records were saved, but the law library on the second floor was largely lost.

Within a week, county officials met with the insurors, and the loss was settled. In the meantime, the courts moved to the Royal Street Hotel on the west side of Royal, between Government and Church streets, behind the courthouse site. Within 60 days, plans were submitted for another courthouse. On March 26, 1888, the county signed a contract with architect Rudolph Benz. On July 2, 1888, contractor Louis Monin won the right to re-build the courthouse for $60,763.

Work progressed rapidly on this fourth official courthouse and the building was completed July 9, 1889. The structure was built on the existing foundation, and it retained a basic temple plan. However, the facade was substantially changed. Instead of central steps, this courthouse had two side stairways. The balcony was removed. The six columns were reduced to four. The bricked-in pediment now contained a relief sculpture of two eagles and the coat of arms of the State of Alabama.

Though the building remained of classical design, the roof was clearly Victorian. Statuary abounded. Above

Architect's drawing of present Mobile County Courthouse

Mobile County Courthouse Annex 1978. Built around the historic Levert House

The historic Levert House, home of Mobile Bar Association

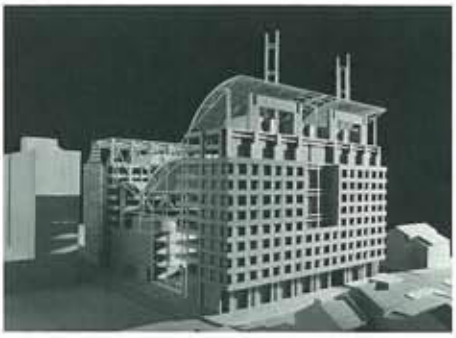
the pediment were three allegorical figures representing Law, Unity and Wisdom. Winged griffins graced either end of the pediment. Other statues and finials surrounded the roof itself. Corner towers of elaborate Victorian design and a central clock tower soared above the structure. The smaller corner towers were 94 feet high, and the larger central tower climbed to 186 feet above the city street.

The hotel to the rear of the fourth courthouse, which itself had been used as a temporary courthouse, was torn down in later years. A rear addition on the former site of the hotel was attached and extended the courthouse to Church Street on the south. The exterior of the enlarged courthouse was finished in stone at this time. Benz & Sons, Architects designed the addition and renovation.

Then, in September 1906, a powerful hurricane struck Mobile. The courthouse survived wind and rain damage, but its rooftop statuary and towers did not. The courthouse was repaired in 1907, but the roof no longer had statues and the rebuilt clock tower was greatly reduced in size. The smaller corner towers were permanently removed.

The Benz-designed courthouse served Mobile for almost 70 years. In the 1950s, the county built a fifth courthouse on the same site. It was completed in 1959. The architect was Cooper Van Antwerp, and the contractor was Daniel Construction Company of Birmingham and Dallas. The total cost of the building was $4,717,413. Unlike the prior courthouse, most of the significant ornamentation for this building was located on the interior rather than the exterior. Courtrooms contain symbolic works of art and the building is replete with murals, quotations and sculptures.

In 1977-78, a courthouse annex was added. Laraway & Grider, Architects prepared the plans and supervised construction while Ray Sumlin Construction Company, Inc. served as builder. Total cost was $1.6 million. It is significant that the annex was built around the historic Levert House at 151 Government Street which today houses the Mobile Bar Association.



Architect's model, Mobile County/City Building
Courtesy of the Mobile County Commission

The sixth structure built to serve as a courthouse was authorized in 1971 and completed in 1973. This separate courthouse serves as the Mobile County Youth Center and Juvenile Court. This facility is located at 2315 Costarides Street. The firm of Wood, Phelps & Steber served as architects. Ben M. Radcliff was the contractor. The total cost for this project was $3.5 million.

Presently, a new Mobile County-City government complex is under construction. A ceremony marking the start of construction on the 585,000-square-foot Government Plaza took place in December 1991. The location of the courthouse will be the site of the former Greyhound Bus terminal, one block west of the present courthouse on Government Street.

The design of the new structure was chosen in a national design competition conducted under AIA standards (American Institute of Architects). There were 195 entries. The jury consisted of seven architects from throughout the country. The winning design came from Harry Golemon and Mario Bolullo of Houston, Texas, in association with Frederick Woods of Mobile. Construction manager for the $58 million project is the Hardin/Haston Joint Venture.

This building is one of the most exciting and futuristic public buildings ever constructed in the State of Alabama. The designers have created a post-Modernistic 21st Century architectural style. The two government buildings will be connected by a ten-story cascading atrium. Bold geometric shapes will be used, and the mechanical and structural systems will be exposed for emphasis.

The complex was originally planned to contain 22 circuit, district, domestic, municipal, and ceremonial courtrooms. Modifications may change that number. The County of Mobile will be owner and landlord of the structure while the City of Mobile will be a tenant and pay rent.

During the excavation for the project, several historic sites were uncovered. More than 150,000 artifacts dating from French and even Indian times were discovered. Archaeologists found coins minted in France as early as the 1720s. A permanent museum highlighting the archeological finds will be housed on the lower level of the county building.

Security will be one of the key features of the complex. There will be private entrances for court and support personnel. Prisoners will not be seen by the public except in the respective courtrooms.

The complex is expected to be completed in the fall of 1994. It should be the subject of an updated article at that time.

The author acknowledges the following printed sources: *Mobile—The Life and Times of a Great Southern City*, by Melton McLaurin and Michael Thomason; *From Fort to Port—An Architectural History of Mobile, Alabama*, 1711-1918, by Elizabeth Barrett Gould; and "Mobile County Courthouses", by Ralph G. Holberg, Jr., *The Alabama Lawyer*, October 1979, p. 518-26.

The author further acknowledges the assistance of Judge Douglas Johnstone, courthouse project administrator Clifton Lambert, Mobile Bar Association Executive Director Barbara Rhodes, archeologist Greg Spies, the University of South Alabama Archives, and Mobile attorney Lionel Williams. ■

Samuel A. Rumore, Jr.
Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore serves as the bar commissioner for the 10th Circuit, place number four.

The Alabama Limited Liability Company Act:

A New Entity Choice

by BRADLEY J. SKLAR

On May 17, 1993, Alabama's version of the Limited Liability Company Act, Senate Bill No. 549, (hereinafter the "Act") passed the Alabama Senate and House.[1] As of the submission of this article, the act was awaiting the signature of the Governor. Assuming that the act is signed into law, it has an effective date of October 1, 1993. Alabama would become the 27th state to join the growing number of states authorizing use of this new type of entity.

Introduction

A limited liability company is a hybrid form of entity that provides the possible combination of the beneficial tax status of a partnership with the limited liability offered by a corporate structure. The entity is treated like a corporation for liability purposes, but, if properly structured, the entity will be treated as a partnership for federal income tax purposes. This means that the "best of both worlds" is possible: pass-through taxation and no liability exposure to the owners.

Passage of the act means that Alabama practitioners must become familiar with the terminology associated with this new business entity. An LLC is owned by "members" instead of shareholders or partners. An LLC is created by filing "articles of organization," resembling a certificate of limited partnership, with the appropriate state authority. Under the act, the Articles of Organization are to be filed with the local judge of probate's office similarly to the way corporations and limited partnerships are filed.[2] The internal operations of an LLC can be governed by an "Operating Agreement" that would typically contain the same type of provisions as bylaws or a partnership agreement. Additionally, the LLC may be managed by designated "managers" or by the members.

History/Background

The first state permitting organization of an LLC was Wyoming in 1977 in special interest legislation for an oil company.[3] A similar statute was enacted in Florida not long thereafter.[4]

In November 1980, the Internal Revenue Service issued a private letter ruling classifying the LLC formed under the Wyoming Act as a partnership for federal tax purposes. The Service, however, also issued proposed regulations under Section 7701 of the Internal Revenue Code of 1986, as amended ("IRC" or "Code") that would have denied partnership classification to any entity in which no member had personal liability for the entity's debts. After quite a bit of negative commentary from practitioners, the regulations were withdrawn and the IRS instituted a study project to address the issue.

After six years of consideration, the study project culminated in the release of Rev. Rul. 88-76.[5] This key ruling held that an entity formed under Wyoming law that had both limited liability and centralized management would be treated as a partnership for federal income tax purposes. Several months later, an LLC formed under the Florida statute received a private letter ruling to the same effect.[6]

The significance is that the IRS has and continues to rule that meeting only two of the four factors under the IRC Section 7701 classification regulations (centralized management, limited liability, free transferability of inter-ests, continuity of life) will result in partnership tax treatment. The Service recently issued three additional revenue rulings holding that Virginia,[7] Colorado[8] and Nevada[9] LLCs would be classified as partnerships for federal tax purposes.

Recent statutory activity

In 1990, as a result of Rev. Rul. 88-76, Colorado[10] and Kansas[11] became the third and fourth states to enact LLC legislation. In 1991, four states, Utah,[12] Virginia,[13] Texas,[14] and Nevada[15], enacted statutes, and last year, Arizona,[16] Delaware,[17] Illinois,[18] Iowa,[19] Louisiana,[20] Maryland,[21] Minnesota,[22] Oklahoma,[23] Rhode Island[24] and West Virginia[25] all enacted statutes

allowing the organization of LLCs. Thus far, in 1993, Arkansas,[26] Georgia,[27] Idaho,[28] Michigan,[29] Montana,[30] New Mexico,[31] North Dakota[32], and South Dakota[33] have passed legislation and two states, Indiana[34] and Mississippi,[35] have enacted statutes allowing the registration of foreign LLCs. Twenty-eight states presently recognize the LLC form with most of the other states currently studying enactment of LLC legislation.

Locally, the Alabama Law Institute requested that the Revised Limited Partnership Act Project Advisory Committee reconvene. The group began meeting formally in early 1991 and completed a working draft for submission to ALI in February 1993. Bills were introduced into the state Senate[36] and House[37] on March 18, 1993 and March 25, 1993, respectively, and final approval was achieved in the House May 17, 1993, the last day of the regular legislative session.

Basic LLC terminology

Although there exists a draft form of a prototype LLC act and a version from the Commissioners on Uniform State Laws, each state has adopted its own unique statute, many of which differ materially from the model acts. All of the statutes combine characteristics of partnerships and corporations. The acts draw upon the Revised Uniform Limited Partnership Act with provisions borrowed from the Revised Model Business Corporation Act added to deal with issues that result from the absence of a general partner. Our act is no different. We have tried to pull the favorable components from a number of existing and proposed statutes as well as coming up with provisions that are unique to Alabama.

To have an understanding of how LLCs operate, one must first grasp the new terms being used nationwide. The terminology, like the statutory drafting issues, also differs somewhat from state to state. In Alabama, we have chosen the more commonly used terms in drafting our statute. Some of the basic terms and their definitions are set forth below:

A. Members

An LLC is formed by two or more "members." In some states, the statute permits one-member LLCs, but, because of the detrimental affect on partnership tax status, our statute requires formation by at least two members and will not presently permit one-member LLCs.[38]

B. Articles

The LLC is formed by filing "articles of organization" with the probate judge's office containing certain basic information (including, but not limited to, the name of the entity, the period of duration, the purpose, the names and addresses of the initial members, and the managers, if any).[39] The analogous partnership document would be the certificate of limited partnership.

C. Operating agreement

The members may enter into an agreement, referred to as an "operating agreement," which sets forth greater detail regarding operation of the LLC and the relationship of the members to each other.[40] This type of agreement is analogous to a partnership agreement and can be a very important component in providing the desired flexibility in an LLC formation.

D. Interests

Members have "interests" in an LLC, just as partners have "interests" in a partnership. Shares of stock are not ordinarily issued but the new statute provides that certificates representing the interests can be issued, if desired.[41]

E. Management

The Act provides that the members can either designate "managers" or reserve management to themselves.[42]

F. Purposes and powers

LLCs may generally be organized for any lawful purpose, although most statutes, including ours, provide a list of standard powers of the LLC similar to our corporate powers provisions.[43]

G. Governance and finance

An LLC may be organized in ways that permit almost any economic and management relationship that the members wish. There may be preferred interests and rights, special allocations or other forms of participation in the ownership of the entity. These items would be set forth in an operating agreement.[44] Depending upon how the entity is structured, either the members or managers elected by the members have the power to bind the entity.

Advantages over other entities

A. Advantages of LLC over S Corporation

An LLC offers significant advantages over an S corporation. Unlike S corporations that limit the number of shareholders to 35, there is no limit on the number of members of an LLC.[45] Similarly, there is no restriction on the type or character of members of an LLC. Nonresident aliens, corporations, partnerships and trusts may all own LLC interests. This relaxation of ownership criteria is probably the single most important difference which causes a preference for LLCs over S corporations and has sparked heavy interest in LLCs for use by foreign investors and corporate joint venturers. In addition, an LLC can own 100 percent of the stock of another corporation, whereas an S corporation cannot be a member of an affiliated group.[46] Ownership ofsub-sidiaries by LLCs is particularly useful if the LLC will be operating in a state that does not currently recognize LLCs.

Because LLCs may be treated as partnerships for tax purposes, the members of an LLC enjoy a variety of tax advantages not available to S corporation shareholders. The transfer of appreciated assets to the LLC in exchange for an interest in the LLC can be nontaxable under IRC Section 721 unless liabilities associated with the transferred property exceed basis. In addition, the subsequent gain on the appreciated property contributed, attributable to appreciation before the transfer, may be allocated back to the transferor. Contrast this treatment with that of an S corporation. Unless the transferor owns 80 percent of an S corporation, under IRC Section 351, the gain on the appreciation will be recognized upon transfer and the S corporation will allocate the gain on the subsequent sale of the appreciated property proportionately, thus creating a disproportionate allocation of taxable income.

A member's basis in his LLC interest includes a share of the LLCs debts. In contrast, a shareholder in an S corporation may not include in stock basis any share of the S corporation's debt. LLCs, because they may be treated as partnerships, can also take advantage of the ben-

efits of an IRC Section 754 election. When an LLC interest is transferred, the transferee may step up the basis of his share of the LLC's property (the inside basis) to fair market value. Similarly, when an LLC makes a distribution of property to a member, the LLC may step up the adjusted basis of its property by the amount of gain recognized by the distributee-member. There is no counterpart to the IRC Section 754 election under subchapter S. When the S corporation subsequently sells or distributes appreciated property, the transferee S shareholder will recognize his share of the gain and will further increase his basis in stock only recognizing the loss as a capital loss upon liquidation.

LLCs also can specially allocate items of income, gain, loss, deduction, and credit among its members provided the allocation meets the definitions for "substantial economic effect" under the IRC Section 704(b) regulations. In contrast, if subchapter S corporations attempt provisions similar to special allocations, they may violate the "one class of stock" rule under IRC Section 1361.

Finally, the rules for S corporations have become extraordinarily complex and contain many traps. LLCs present clients with an alternative that can give them the same limited liability and flow-through taxation, but which will not require the application of the S corporation rules. This will likely create demand for LLCs.

B. Advantages of an LLC over a limited partnership

The key difference between partnerships and LLCs is that an LLC offers absolute limited liability to its members whereas, in a partnership, even a limited partnership, one partner (the general partner) has liability exposure. Although this can be mitigated by using a corporate general partner, issues are always raised regarding the net worth or capitalization of the general partner, the general partner's minimum interest in the partnership, and possible loss of pass-through taxation to the extent of the corporate general partner's interest. In contrast, barring guarantees or other special arrangements, no member of an LLC has personal liability for the debts of the entity.

Because it provides limited liability to all owners, an LLC that is classified as a partnership can also offer more desirable basis allocations than a limited partnership. In a limited partnership, all liabilities are allocated entirely to the general partners except (a) those for which the limited partners are at risk due to a personal guaranty and (b) those that under state law allow recourse only to partnership property, since general partners alone are personally liable. Contrast this with LLCs in which all members have limited liability and so all liabilities not personally guaranteed can be allocated to all the members, thus more effectively spreading the allocation for purposes of basis.

In addition, LLC members can participate in management of the LLC without risking their limited liability status. A limited partner participating in the day-to-day management of the partnership who may lose his status as a limited partner.

This may also mean that LLC members can participate in management for purposes of the material participation tests of the passive loss rules without losing their liability protection. Taxpayers are still seeking clarity on this issue because IRC Section 469(h)(2) states that, "except as provided in regulations, limited partners do not materially participate." The general belief is that it is inappropriate to apply the limited partner "per se" rule to LLC members, because LLCs are designed to permit active involvement by members in the management of the business and any assumption that LLC members are likely to be merely passive investors is incorrect. If IRC Section 469(h)(2) is based on an assumption that those having limited liability do not participate in the management of the business, it would clearly be a mistake to apply this same rationale to LLCs.

Tax issues relating to LLC classification as partnership

The definitions of the terms "corporation" and "partnership" are contained in IRC Section 7701. The term "corporation" is defined to include associations, joint stock companies, and insurance companies. In contrast, the term "partnership" is largely defined in terms of what it is not. IRC Section 7701(a)(2) states that a partnership includes a syndicate, group, pool, joint venture or other unincorporated venture which is not, for purposes of the Code, a trust, estate or corporation.

Because the definitions in IRC Section 7701 are too broad to be of use to practitioners, the Treasury Regulations under IRC Section 7701 provide the main tests for classification of an entity.[47] The regulations list six characteristics ordinarily found in pure corporations, two of which (associates and an objective to carry on business and divide the gains therefrom) are common to both corporations and partnerships and are ignored for purposes of the LLC analysis.

The classification of an entity as a corporation depends on the presence or absence of the four corporate characteristics of (a) limited liability, (b) continuity of life, (c) free transferability of interests, and (d) centralization of management. In Rev. Rul. 88-76, the IRS ruled that an entity organized under the Wyoming Act would be classified as a partnership for tax purposes because the entity possessed:

1) limited liability and
2) centralized management,

but it *lacked:*

1) continuity of life and
2) free transferability of interests.

(Continued on page 236)

•MEMORIALS•

Paul W. Brunson
Mobile
Admitted: 1939
Died: October 6, 1992

Elizabeth Tacker Edwards
Wetumpka
Admitted: 1962
Died: March 21, 1993

Alfred K. Hagedorn
West Point, Georgia
Admitted: 1936
Died: March 2, 1993

James A. Johnston
Pensacola, Florida
Admitted: 1964
Died: July 6, 1992

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The Alabama Limited Liability Company Act: A New Entity Choice

(Continued from page 234)

Because of the necessity of maintaining partnership treatment for tax purposes, the classification issue is the most important consideration in forming LLCs. Therefore, tax practitioners drafting LLCs should focus on the issues concerning each of these characteristics as follow:

A. Limited liability

1. Generally Lacking-Because of the nature of the LLC statutes, which limit each member's liability for the LLC's debts to the amount of the member's contribution to the LLC capital, it is generally assumed that an LLC will possess the corporate characteristic of limited liability.

2. Effect of Personal Assumption of Liability-In some instances it might be preferable to provide general liability for at least one member, such as a corporate member, if two of the other corporate characteristics are considered more essential to the enterprise but federal tax classification as a partnership is still desired. It is unclear whether the IRS will take the view that such a personal assumption causes the LLC to lack limited liability. If the service were to view personal assumptions this way, practitioners would have greater flexibility in structuring an LLC to qualify as a partnership.

B. Continuity of life

1. Approved Provisions-Rev. Rul. 88-76 held that an LLC formed under the Wyoming statute lacked continuity of life because the statute provided that the LLC would be dissolved upon the occurrence of any of the following events: (a) when the period fixed for the duration of the company expired, (b) by the unanimous written consent of all the members, or (c) by the death, retirement, resignation, expulsion, bankruptcy, dissolution of a member, or the occurrence of any other event that terminates the continued membership of a member, unless the business of the company was continued by the consent of all the remaining members. The contingency for continuation was great enough such that the entity was found to lack continuity of life.

2. Burdensome Nature-This type of provision has been followed in most of the LLC statutes enacted subsequent to Wyoming's. Practically speaking, it imposes a significant burden upon LLCs. If or when any of the enumerated events occur, a unanimous vote of the remaining members is necessary to continue the LLC. In LLCs with many members, the likelihood of the event's occurrence and the difficulty of obtaining unanimous consent to continue existence may not be acceptable. In comparison with limited partnerships, only the event's occurrence with respect to the last remaining general partner will trigger a dissolution.

3. Tie Dissolution to One Member's Status-As a planning alternative, it may be possible for an LLC to lack continuity of life even if only one of the listed events will cause a dissolution and even if the occurrence of such event is tied to only a specified one of the members. This would dramatically reduce the instances in which an agreement to continue is necessary. These issues are currently being discussed with the IRS, and it is expected that a Revenue Procedure similar to Rev. Proc. 89-12, which addresses similar issues in the partnership area, will be forthcoming.

4. Majority Consent to Continue-Another way to potentially reduce the burden of this restriction would be to lower the consent requirement for continuation from unanimity to majority. By comparison, with limited partnerships, majority consent to the election of a new general partner is accepted.

5. Pre-Agreement to Continue-The Florida statute contains a provision that would permit the members to "pre-agree" to continue upon the occurrence of an event of dissolution. The IRS' view seems to be that such pre-agreement would cause an LLC still to possess continuity of life.

6. Fixed Term Provisions- The Wyoming, Florida and Colorado statutes limit the life of all LLCs to 30 years. No

ruling has addressed whether such a provision is a necessary element of a statute in order for LLCs formed under it to lack continuity of life. IRS representatives have informally indicated that although an LLC statue should follow RULPA in requiring that one event of dissolution will be the expiration of a defined term of years, the term need not be limited to thirty years. Most of the recently enacted statutes do not include fixed term provisions and neither does the Alabama Statute.[48]

C. Free transferability

1. Standard Provision-The IRS regulations provide that an organization possesses the corporate characteristic of free transferability if a member is able to substitute another person for themselves "without the consent of other members." The regulations provide that in order for the power of substitution to exist in the corporate sense, the members must be able, without the consent of the other members, to confer upon a substitute member all of the attributes of his interest in the organization. In Rev. Rul. 88-76, the IRS held that the Wyoming LLC lacked the corporate characteristic of free transferability because the consent of all members was required for an assignee of an interest to become a substitute member in the LLC.

2. Flexibility-Unanimous consent of all members to substitution of new members is another restriction which could be burdensome to all but very closely-held LLCs. Some state statutes give LLCs the right to reduce this requirement by a provision in the articles of organization or the operating agreement.

3. Majority Consent-Similar to continuity of life, one way to make this requirement less burdensome would be to provide for a mere majority to consent to substitute a new member. It is unclear whether the IRS would consider this level of consent sufficient to cause the LLC to lack free transferability of interest. However, precedent with respect to certain other types of entities is encouraging. For example, the requirement of consent of the general partner to substitution of a new limited partner has been considered a sufficient restriction to cause transferability to be lacking for limited partnerships.

4. Tie Substitution to One Member's Consent-Another way to make the restriction less burdensome would be to provide that transfer is subject to the consent of a particular member, rather than a majority or all of the other members. This would be similar to the typical limited partnership in which the general partner must approve transfers.

D. Centralized management

1. Regulatory Test-The classification regulations hold that an organization has centralized management if any person or group has continuing, exclusive authority to make management decisions.[49]

2. Application to LLCs-In Rev. Rul. 88-76, the Wyoming LLC was held to have the corporate characteristic of centralized management because only three out of 25 members were designated as managers. Where management has been reserved to all the members, the IRS has held that the LLC lacked centralized management.[50] Apart from these two extreme situations, the proper analysis and result of other management situations is unclear. In the limited partnership context, the IRS takes the view that management is centralized if the general partner has less than a 20 percent interest in the venture.[51]

E. Procedural issues related to classification

1. Application of Rev. Proc. 89-12-In Rev. Proc. 89-12, the IRS set forth its standards for issuance of a ruling that a limited partnership will be treated as a partnership for federal income tax purposes. It is currently unclear whether these ruling standards are being applied to LLCs. Many of the standards are difficult or inappropriate to apply to LLCs. After recent conversations with the IRS, it is expected that the Service will issue a parallel revenue procedure applicable to LLCs.

2. "Bulletproof" Statutes-The Wyoming statute is referred to as a bulletproof statute because it did not permit the members to vary by agreement from the restrictions on transferability of interests and continuity of life. Thus, any LLC formed under Wyoming law will lack these characteristics and will definitely be treated as a partnership for federal income tax purposes.

3. Flexible Statutes-More recently enacted statutes in other states apply the same restrictions to LLCs, "unless provided otherwise in the Articles of Organization or the Operating Agreement." In these states, practitioners who vary from the general or "default" rule, will assume the risk that their variation will not cause the LLC to fall on the wrong side of the classification test. In view of IRS movement on some rules, the Alabama Drafting Committee opted for a somewhat flexible approach.

a. *Free Transferability*-Section 33(a) of the act provides the following language: "Except as otherwise provided in writing in an operating agreement, an assignee of an interest in an LLC may become a member only if the other members unanimously consent."

b. *Continuity of Life*-Section 37 of the act provides the following language: "An LLC is dissolved . . . upon . . . an event of dissociation of a member unless . . . the legal existence and business of the LLC is continued by the written consent of all the remaining members within 90 days after the event of dissociation or as otherwise stated in the articles of organization."

Other issues

A. State taxation

1. State Income Tax-Most states are following the federal example and are treating LLCs as partnerships for state income tax purposes. Wyoming and Colorado[52] treat LLCs as partnerships for state income tax purposes, as does

Virginia,[53] Maryland[54] and North Carolina.[55] Similar state tax results (no tax at the entity level and income passes through to the owners) can usually be attained by using a limited partnership with a corporate general partner, an S corporation or a C corporation (if it passes all of its income through to its owners as salary or other deductible payments). The exception to the general rule is Florida, which treats LLCs as corporations for purposes of applying the Florida corporate income tax. Florida, however, has no state individual income tax.

2. Franchise Tax-If the analogy to partnerships applies, no franchise tax should apply to LLCs. At the time of this article, this issue was still being discussed with the Alabama Department of Revenue.

B. Transaction of business in states not having limited liability company statutes

The ability of LLCs to transact beyond their state of organization is still an open question. While several statutes provide that other states should recognize LLCs,[56] there is still uncertainty as to how readily states without LLC statutes will recognize the entity. In 1990, Indiana enacted a provision requiring foreign LLCs to register with the secretary of state prior to transacting business in the state.[57] Even if the limitations on the personal liability of the members are established under the law of the state in which an LLC is organized, a question remains as to their liability under the laws of states that do not yet have LLC legislation.

A state that has not adopted an LLC statute may treat an LLC as a general partnership, may treat it as a foreign incorporated entity, or may refuse to recognize it at all. The treatment selected by each state will determine the rights of the entity and its members. Unfortunately, courts have had a tendency to characterize unincorporated entities as general partnerships when no other provision of state law seemed applicable.

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Professionals

A. In general

Professionals long have practiced as partnerships, partly in order to obtain tax benefits. Despite the risk of individual liability for the firms debts, professionals have cherished the financial reward and status of making partner. Beginning in the early 1960s, in response to demands by professionals, many state and regulatory bodies developed rules for professional associations and corporations. By 1970, virtually all states had adopted statutes or rules permitting professional corporations or associations.

Although they are permitted to practice in professional corporations or associations, and although there may be benefits to operating a service business as a C corporation under the appropriate circumstances, many professionals continue to practice as general partnerships. One reason is that use of a C corporation subjects the entity to a second level of taxation, and potentially to a higher tax rate. This problem is not necessarily resolved by paying large salaries and bonuses, which reduce the income of the firm to zero because of issues concerning the reasonableness of compensation.

The risk of choosing partnerships has become increasingly clear to professionals. Therefore attorneys, accountants and other professionals have actively sought to use the LLC form in order to limit their liability for the negligence and malfeasance of others in the firm while avoiding the tax problems of C corporations.

Because both accounting and legal professionals often have financial arrangements among the owners which may not be satisfied by the simplicity of an S corporation, many have been constrained to use a C corporation if they wanted to limit personal liability. This then subjects the entity to double taxation. The LLC may allow professionals to attain the limitations on liability, while avoiding the tax problems of C corporations.

Most, if not all, of the recent LLC enactments, including Arizona, Iowa, Utah, Kansas, Texas and Virginia, allow professionals to use LLCs. Although in some states use of LLCs by professionals appeared to be difficult on first consideration, upon reflection shortly after enactment, they have reversed express prohibitions on the practice of professionals.

B. Alabama statute

The Alabama statute followed the same logic used when addressing practice as a professional corporation. If the State conditions the use of a professional corporation on certain requirements, then the use of LLCs should be likewise conditioned.[58] In the powers provisions in our statute, the LLC is permitted to render professional services but the entity is made subject to the same restrictions as contained in the Professional Corporation Act.[59]

Conclusion

The information contained in this article is intended to be merely introductory to this new entity that, by the time this article is published, should be part of the Alabama Code with an effective date of October 1, 1993. There can be no question that limited liability companies fill an important gap in the alternate business forms available. To the extent these entities provide the flexibility and integrated taxation of partnerships, combined with the business benefits of limited personal liability, they will likely be useful as a met-hod of conducting many forms of business. Necessary to the further development of LLCs is a general recognition of the limited liability company as a business entity in more states, which will provide certainty with respect to the liability of members. With current recognition by 29 states and many more in various stages of enactment, it appears likely that businesses throughout the country will be looking with increasing interest on the limited liability company as a form for operation in the 90s. ■

Endnotes

1. 1993 AL S.B. 549 (SN); 1993 AL H.B. 769 (SN).
2. 1993 Ala. Limited Liability Company Act § 9 (S.B. 549).
3. Wyo. Stat. § 17-15-101 (1977).
4. Fla. Stat. Ann. § 608.401 (West)
5. Rev. Rul. 88-76, 1988-2 C.B. 360.
6. Priv. Ltr. Rul. 8937010.
7. Rev. Rul. 93-5, 1993-3 I.R.B. 6.
8. Rev. Rul. 93-6, 1993-3 I.R.B. 8.
9. Rev. Rul. 93-30, 1993-16 I.R.B. 7.
10. Colo. Rev. Stat. Ann. §§ 7-80-101 to-913 (West 1990).
11. Kan. Stat. Ann. §§17-7601 to -7651 (1990).
12. Utah Code Ann. §§48-2b-101 to -156 (1991).
13. Va. Code Ann. § 13.1-1002 (Michie 1991).
14. Tex Rev. Civ. Stat. Ann. art. 1528n(West).
15. Nev. Rev. Stat. § 86.276 (1991).
16. Ariz. Rev. Stat. Ann. § 29-601.
17. Del. Code Ann. tit. 6, § 18-101.
18. 1992 Ill. Legis. Serv. P.A. 87-1062 (S.B. 2163) (West).
19. 1992 Iowa Legis. Serv. H.F. 2369 (West).
20. 1992 La. Sess. Law Serv. 780 (H.B.1262) (West).
21. Md. Corps. & Ass'ns Code Ann. § 4A-101.
22. Minn. Stat. Ann. § 322B.01 (West).
23. Okla. Stat. Ann. tit. 18 § 2000 (West).
24. R.I. Gen. Laws § 7-16-1 (1992).
25. W. Va. Code § 31-1A-1 (1966).
26. 1993 Ark. H.B. No. 1419, 79th Gen. Sess.
27. Ga. Code Ann. § 14-11-12 (Michie).
28. 1993 Idaho H.B. No. 381, 52nd Leg.,1st Sess.
29. 1993 Mich. H.B. No. 4023, 87th Leg., Reg. Sess.
30. 1993 Mont. S.B. No. 146, 53rd Leg., 1st Sess.
31. 1993 N.M. S.B. No. 351, 41st Leg., 1st Sess.
32. 1993 N.D. S.B. No. 2222, 53rd Leg., 1st Sess.
33. 1993 S.D. S.B. No. 139, 67th Leg., Reg. Sess.
34. Ind. Code Ann. § 23-16-10.1-1 (West 1990).
35. 1993 Miss. H.B. No. 743, 162nd Leg., Reg. Sess.
36. 1993 AL S.B. 549 (SN).
37. 1993 AL H.B. 769 (SN).
38. 1993 Ala. Limited Liability Company Act § 9 (S.B. 549). pard
39. 1993 Ala. Limited Liability Company Act § 9 (S.B. 549).
40. 1993 Ala. Limited Liability Company Act § 24 (S.B. 549).
41. 1993 Ala. Limited Liability Company Act § 32(b) (S.B. 549).
42. 1993 Ala. Limited Liability Company Act § 21 (S.B. 549).
43. 1993 Ala. Limited Liability Company Act § 4 (S.B. 549).
44. The principal non-public governing document in all states other than Florida and Texas is referred to as an *operating agreement*, in those two states this document is referred to as *regulations*. The operating agreement is clearly the equivalent of a partnership agreement.
45. S Corporations are limited to 35 shareholders. I.R.C. § 1361 (b)(1)(A). They may only have certain trusts and estates and natural persons other than non-resident aliens as shareholders. I.R.C. § 1361 (b)(1(B) and (C). S Corporations cannot have more than one class of stock. I.R.C. § 1361 (b)(1)(D). In addition, S Corporations must affirmatively elect to be treated as such. I.R.C. § 1362. None of these limitations are applicable to limited liability companies.
46. I.R.C. § 1361(b)(2).
47. Treas. Reg. § 301.7701-1.
48. 1993 Ala. Limited Liability Company Act § 10(a)(2) (S.B. 549).
49. Treas. Reg. §301.7701-2(c).
50. Priv. Ltr. Rul. 90-10-027 (December 7, 1989).
51. Rev. Proc. 89-12, § 4.06.
52. Colo. Rev. Stat. § 39-22-201.5 (1991).
53. It has been suggested that Va. Code Ann. 58.1-301(A) [the Virginia tax conformity provision] should apply to cause a limited liability company to be treated as a partnership for state purposes.
54. Letter dated May 21, 1991, from George H. Spriggs, Jr. Director, Income Tax Division of the Maryland Comptroller of the Treasury to Stu-art Levine ("... if an entity, whatever its organizational form, is classified as a partnership fr federal income tax purposes, it is also classified as a partnership for Maryland income tax purposes.")
55. Letter dated September 20, 1991, from Myron C. Banks Deputy Secretary, North Carolina Department of Revenue, to Dorothy Cramer.
56. *See, e.g.*, Colo. Rev. Stat. § 7-80-104(1)(h) (conduct business in any state), § 7-80-106 (reflecting legislative intent that the legal existence o limited liability companies be recognized beyond the limits of the state under the full faith credit clause); Fla. Stat. § 608.404(7) (1982) (transact business within or without the state); Kan. Stat. Ann. § 17-7604(2)(g) (1991) (conduct business within and without the state); Nev. Rev. Stat. § 86.86.301.8 (1991) (conduct business in any state or territory); Tex. Rev. Civ. Stat. Ann. tit. 32 art. 1528n, art. 8.09 (Vernon 1991) (the application of this act shall apply to commerce with foreign nations and among the several states only insofar as the same may be permitted under the United States Constitution); Utah Code Ann. § 48-2b-105(1)(h) (1991) (conduct business within or without the state); Va. Code Ann. § 13.1-1009.7.9 (1991) (to conduct business within or without the commonwealth); Wyo. Stat. § 17-15-104(a)(viii) (1977) (conduct its business in any state).
57. IC §§ 23-16-10.1-1 to -4, added by P.L. 75-1990 (1990).
58. 1993 Ala. Limited Liability Company Act § 45 (S.B. 549).
59. 1993 Ala. Limited Liability Company Act § 4(s) (S.B. 49).

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Business Phone Number _____ Race _____ Sex _____ Birthdate _____

Year of Admission _____

Firm _____

Office Mailing Address _____

City _____ State _____ ZIP Code _____ County _____

Office Street Address (if different from mailing address) _____

_____

City _____ State _____ ZIP Code _____ County _____

COPYRIGHT LAW SURPRISES FOR NON-COPYRIGHT LAWYERS

By Benjamin B. Spratling III and Beall D. Gary, Jr.

Copyright law is "tremendously counterintuitive," "hard to grasp" and a "mind-numbing collection of inconsistent, indeed incoherent, complexities."[1] Perhaps that is why most lawyers and laymen alike are surprised by many of the provisions of copyright law. This article seeks to alert the non-copyright lawyer to some of the little known or misunderstood provisions of the federal Copyright Act of 1976 (the "Copyright Act").

COPYRIGHT MYTH

According to a leading copyright scholar, most people, including most lawyers, have a rather concrete idea of how copyright law works, although it has little to do with actual copyright law. Professor Jessica Litman describes this popular idea or myth as follows:

> A creative person creates something — a book, or a song, or a painting. If that person is especially protective of his rights, he can acquire a copyright. To do this, he sends his creation to the Copyright Office in Washington, which examines it to ascertain whether it is good enough. If the people in the Copyright Office decide that it is sufficiently imaginative, and not duplicative of works that have been copyrighted in the past, they will send him back a copyright. He will then have 'copyrighted' his work and will own a copyright in it. If, however, he doesn't feel like going to the bother of copyrighting his work, he can instead offer it, as yet uncopyrighted, to a publisher. The publisher will decide whether it is good enough to publish, and if so, the publisher will take care of sending it off to the Copyright Office to get it copyrighted. In that event, of course, the publisher will own the copyright. Once one has been granted a copyright by the federal government, one is entitled to put a copyright notice on one's work, and to invoke the law's protection against plagiarism.[2]

This popular myth is probably derived in part from old copyright statutes and from a fallacious merging of copyright, trademark and patent doctrines.

THE SUBJECT MATTER OF COPYRIGHT

Actual copyright law is quite different from the copyright myth quoted above. Section 102 of the Copyright Act addresses the subject matter of copyright, and provides in pertinent part as follows:

> (a) Copyright protection subsists...in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) patomimes and choreographic works;
> (5) pictorial, graphic and sculp tural works;
> (6) motion pictures and other audiovisual works;
> (7) sound recordings; and
> (8) architectural works.[3]

Since the Copyright Act covers "original works of authorship," does this mean that letters and memos written by lawyers are automatically copyrighted? In other words, are the typical attorney's file cabinets full of unregistered but valid copyrights? "Of course not," the attorney says, "because my letters and memos are not creative like books, songs or paintings." He remembers reading that facts, ideas, names and titles cannot be copyrighted. True, but he may not have heard of copyright

law's "scintilla rule" (although Alabama lawyers are generally considered national experts on another "scintilla rule"). Originality requires only a very small amount — a "scintilla" — of creativity.

Even a work which consists entirely of facts (which are not copyrightable) can be copyrighted if the facts are arranged with a "scintilla" of creativity. The amount of creativity required is so small that it was not until 1991 that the United States Supreme Court in *Feist Publications v. Rural Telephone Service Co., Inc.* finally settled an old question when it determined that the arrangement of facts in the white pages of a telephone book did not contain enough creativity to be copyrighted.[4] Three months after the decision in *Feist*, the Eleventh Circuit in *BellSouth Advertising & Pub. v. Donnelley Inf. Pub.* determined that rearranging the same facts found in the white pages (names, addresses and phone numbers) under categories such as Accountants, Attorneys and Physicians required enough creativity to qualify the yellow pages as a copyrightable compilation; however, the opinion in *BellSouth* was vacated 15 months after it was originally issued.[5] A rehearing *en banc* was held February 17, 1993 but as of the deadline for publication of this article, no new opinion had been issued in *BellSouth*.

The drafting of a letter or a memo by a lawyer, even if it contains nothing but facts, normally involves a "scintilla" of creativity and at least qualifies such a letter or memo as a *copyrightable compilation*. Yet, a copyrighted compilation "receives only limited protection ... . [C]opyright protects only the elements that owe their origin to the compiler — the selection, coordination, andarrangement of facts."[6] As the Supreme Court in *Feist* said, "[n]otwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication...so long as the competing work does not feature the same selection and arrangement."[7] "[T]he raw facts may be copied at will."[8] Nevertheless, some lawyers may be surprised to learn that it is difficult, if not impossible, to "surgically remove" only the "raw facts" from many compilations without also copying the selection and arrangement of those facts. For example, according to the now–vacated *BellSouth* opinion, the defendant in that case was unsuccessful in "extracting" raw facts from the yellow pages without also copying their selection and arrangement.

CREATION AND OWNERSHIP OF COPYRIGHT

Perhaps most surprising to many lawyers is how a copyright is now obtained. A copyright is automatically created by federal law when a work is created.[9] It is not necessary to register a copyright to preserve it.[10] It will continue to exist, normally for the author's life plus 50 years, whether or not the work is published. Even a copyright notice such as "©1993 John Doe" is no longer required to preserve a copyright for a work published on or after March 1, 1989.[11] Nevertheless, registration of a copyright and use of a copyright notice are both still advisable to obtain maximum copyright protection.

Section 202 of the Copyright Act makes it clear that ownership of a copyright is the ownership of an intangible right, because it distinguishes such ownership from ownership of the material object in which the work is embodied.[12] In other words, rights of ownership to a compact disk, videotape or book are different from rights of ownership of the expression of ideas contained therein. The transfer of ownership of any of those physical objects does not automatically transfer ownership to the copyrighted materials which they contain.

Section 201(a) of the Copyright Act states that "copyright and the work protected under this title vests initially in the author or authors of the work."[13] Ownership of copyright embodies the ownership of a variety of separate rights. Section 106 of the Copyright Act provides that, subject to various qualifications, the copyright owner has exclusive rights to reproduce the work, to prepare derivative works, to distribute copies of the work to the public, and to display or perform certain works publicly.[14]

One of the exceptions to the initial copyright ownership provisions set forth above concerns works made for hire. The work made for hire doctrine frequently arises in a situation where an employer seeks to have prepared and published a book or manual about its procedures, processes or services, and wishes to own copyright in the work. It is generally desirable to be the owner of a copyright in order to have absolute assurance of control of the use of the work, to ensure being able to employ it in any medium which may offer an economic opportunity in the future, to obtain greater certainty as to the period of duration of copyright, and to eliminate an author's statutory right to terminate grants and licenses.[15] The work made for hire doctrine provides that if the work is prepared by an employee for the employer, then in the absence of an express written agreement otherwise the employer will be considered the author for purposes of copyright ownership, and therefore the owner of all the rights comprised in a copyright.[16] The work made for hire doctrine can also vest initial ownership in the employer even when the work is prepared by an independent contractor, but only under certain circumstances involving specified types of works.[17] Accordingly, it is often desirable to establish an employer-employee relationship prior to beginning preparation of the work if it is important to ensure the employer's ownership of copyright.[18]

COPYRIGHT AFFECTS THE PRACTICING LAWYER

The attorney who is involved in owner-architect contract negotiations will encounter several copyright issues relating to the Sections of the Copyright Act referred to above. Included in the Copyright Act's enumeration of copyrightable matters are "pictorial, graphic, and sculptural works"[19] (which are now defined to include "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs,... charts, diagrams, models, and technical drawings, including architectural plans"[20]), along with a recently added subsection covering architectural works. Section 102 of the Copyright Act reflects recent amendments whose effect, in conjunction with the adoption of the Architectural Works Copyright Protection Act of 1990[21] (the "1990 Act") is to provide copyright protection for the original design elements of three-dimensional buildings, in addition to copyright protection for plans, drawings and models for such buildings. The American Institute of Architects' Standard Form of Agreement Between Owner and Architect reflects that copyright protection vests in the creator of architectural plans only, providing only that drawings and specifications shall remain the property of the architect, although the owner may retain copies for information and reference in connection with use and occupancy of the building. Accordingly, it may be helpful, if you represent an architect in negotiating an owner-architect agreement, to identify expressly that copyright on building design also should remain the property of the architect.[22] If you represent the owner, you may wish to expand the scope of the license granted with respect to use of drawings and specifications.

Copyright protection with respect to drawings is not limited to buildings; for example, the designer who prepares plans for a golf course owns copyright in those plans at the time that they are created, and many of the same issues with respect to the use of such plans by the owner would apply to construction, additions to or completion of a golf

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Notice

SUPREME COURT OF ALABAMA

Recently, the supreme court issued an opinion in *Ex parte Tuck* [Ms. 1920134, May 14, 1993] ____So. 2d _____ (Ala. 1993), affirming an earlier opinion by the Alabama Court of Civil Appeals in *McKay v. Tuck*, [Ms. 2910394, October 16, 1992] _____So. 2d_____ (Ala.Civ.App. 1992). These opinions addressed the propriety of facsimile filings under the Alabama Rules of Civil Procedure. The Alabama Supreme Court held that "other filings attempted by facsimile transmission in reliance on the opinion of the Court of Civil Appeals will be taken as proper on the same basis through the period ending July 31, 1993. After that date we will not recognize facsimile transmissions as filings, within the meaning of our rules of court or the statutes of this state, except as statutes or rules may specifically authorize 'filing' by facsimile transmission." *Ex Parte Tuck*, _____So. 2d at _____. After due consideration, the Supreme Court Standing Committee on the Rules of Civil Procedure has recommended to the supreme court that the Rules of Civil Procedure not be amended to provide for filing by facsimile transmission after July 31, 1993.

Robert G. Esdale, clerk

Supreme Court of Alabama

Cumberland School of Law
Continuing Legal Education
Fall, 1993 Seminar Schedule

September 10	**A Seminar on Damages** - Birmingham
September 17	**ERISA** - Birmingham
September 24	**Depositions: Technique, Strategy and Control with Paul M. Lisnek, J.D., Ph.D.** - Birmingham
September 24	**Auburn University Bar Association Bench and Bar Conference** - Auburn [co-sponsored by Cumberland School of Law]
October 1	**Annual Bankruptcy Law Seminar** - Birmingham
October 8	**Professional Responsibility: Advertising/ Specialization** - Birmingham
October 15	**Representing Small Businesses in Alabama** - Birmingham
October 22	**Recent Developments in Criminal Law and Procedure** - Birmingham
October 29	**Alternative Dispute Resolution** - Birmingham
November 5	**Annual Workers' Compensation Seminar** - Birmingham
November 12	**Elder Law** - Birmingham
November 12	**Annual Business Torts and Antitrust Law Seminar** - Birmingham [co-sponsored by the Business Torts and Antitrust Law Section]
November 19	**Issues in Employment Law** - Birmingham
December 3	**Appellate Practice** - Birmingham
December 10	**Recent Developments for the Civil Litigator** - Mobile
December 10	**Product Liability** - Birmingham
December 17	**Recent Developments for the Civil Litigator** - Birmingham

Brochures specifically describing the topics to be addressed and speakers for each of the seminars will be mailed approximately six weeks prior to the seminar. If for any reason you do not receive a brochure for a particular seminar, write Cumberland CLE at 800 Lakeshore Drive, Birmingham, AL 35229-2275, or call 870-2865 in Birmingham or 1-800-888-7454. Additional programs and sites may be added to the schedule.

(Continued from page 242)

course just as they would to a building.

The applicability of the Copyright Act often extends well beyond the realms of literature, architecture and entertainment. It can directly affect the practicing attorney as well. Take for example the use of photographs in civil litigation. If counsel engages an independent photographer to photograph matters relevant to litigation, such as the scene of an accident or a defective product, those photographs are subject to the Copyright Act, and ownership of the copyright arises in the photographer as soon as the photographs are taken. It is not necessary for the photographer to register the copyright in order to protect the bundle of rights arising under copyright law. The photographer delivers the photograph to counsel upon payment, which constitutes the grant of a license for that attorney to use the copies provided. Opposing counsel may also pay for a license to use copies. If, however, opposing counsel does not wish to incur the expense of paying for copies, he might attempt to obtain them by noticing the photographer's deposition and including with the notice a subpoena duces tecum covering the negatives and photo graphs, to be provided for copying. If opposing counsel were to obtain the photographs in such fashion and then take them for photocopying, however, he could be violating federal copyright laws, as the procurement of photographs pursuant to the subpoena duces tecum in no way causes the photographer to relinquish his ownership of copyright with respect to those materials.[23]

COPYRIGHT INFRINGEMENT

Copyright infringement occurs by virtue of the violation of any of the exclusive rights vested in a copyright owner, as identified in Section 106 of the Copyright Act.[24] An increasingly common problem, as computers proliferate in law offices throughout Alabama, is the unauthorized use of software programs such as "Word Perfect," "Lotus" and "Windows". All such programs are protected by copyright, and therefore may not be used without a license. Terms of the agreement with the software supplier dictate the extent of the permitted use of any program. Typically, the agreement requires that a license be purchased for each copy of a program used, and simply copying one purchased program to use on ten different computers constitutes copyright infringement. Section 504 of the Copyright Act provides civil penalties which can include, at a court's discretion, awards of up to $20,000 per violation, and of up to $100,000 for "willful" violations. This Section of the Copyright Act also provides for the award of costs and attorney's fees.[25]

Approximately 800 software manufacturers have established a trade organization known as the Software Publishing Agency, one of the functions of which is to identify and prosecute software copyright infringers. The Software Publishing Agency has brought many enforcement proceedings, typically in multi-count complaints addressing unauthorized use of any of the multitude of programs that most law office computers now employ. As the scope of the Software Publishing Agency's enforcement efforts expands, it will become increasingly evident that users of computer software programs should avoid unauthorized duplication of programs that they purchase. Most sellers of computer software programs will permit the purchaser to copy the installation disk and store the original for safekeeping. Copyright law allows the use of backup or archival copies, and modifications to a program to fit an intended use, but the use of additional copies for other computers will expose the user to potential copyright infringement or license agreement breach claims.[26]

A major exception to the rights granted pursuant to Section 106 of the Copyright Act, and therefore a defense to a claim of infringement, lies in the doctrine of "fair use." The Copyright Act embodies the concept that certain uses of material otherwise protected by copyright are to be permitted, "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research...."[27] Section 107 of the Copyright Act, which sets forth the fair use doctrine, also identifies four factors

to be considered in determining whether a use constitutes a fair use. Those factors are as follows:

(a) The purpose and character of the use, including whether such uses of a commercial nature or as for nonprofit educational purposes;

(b) The nature of the copyrighted work;

(c) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(d) The effect of the use upon the potential market for or value of the copyrighted work.[28]

The purpose of the doctrine of fair use is to balance "the exclusive rights of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science and industry."[29]

REMEDIES

As identified previously with respect to infringement of computer software programs, damages are available for infringement under the Copyright Act.[30] Statutory damages can also include the award of costs and attorney's fees.[31] The Copyright Act also provides for impoundment and destruction of infringing items as well as injunctive relief.[32] Criminal penal-ties are also available under Section 506 of the Copyright Act, and can range up to a fine of $250,000 or imprisonment for not more than five years, or both.[33]

SUMMARY

The provisions of copyright law probably affect most practitioners or their clients more frequently than they might expect. Because the scheme of the Copyright Act is often substantially different from what most people expect, it is important to be alert to fundamental copyright issues and to take care to avoid infringement. ■

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Endnotes

1. Litman, *Copyright as Myth*, 53 U.Pitt.L.Rev.235(1991).
2. *Id.*, p.2.
3. 17 U.S.C. § 102(a).
4. 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) ("*Feist*").
5. 933 F.2d 952, 957 (11th Cir. 1991) opinion vacated 977 F.2nd 1435 (11th Cir. 1992) ("*BellSouth*").
6. *Feist*, 111 S.Ct. at 1294.
7. *Id.*, 111 S.Ct. at 1289.
8. *Id.*, 111 S.Ct. at 1290.
9. 17 U.S.C. § 201.
10. *See* 17 U.S.C. § 408.
11. *See* 17 U.S.C. § 401.
12. *See* 17 U.S.C. § 202.
13. 17 U.S.C. § 201(a).
14. 17 U.S.C. § 106.
15. *See* JAY DRATLER, JR., INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE AND INDUSTRIAL PROPERTY §-6.02(3)(iv) (1991).
16. 17 U.S.C. § 201(b).
17. 17 U.S.C. § 101.
18. The United States Supreme Court looked to the general common law of agency to determine the meaning of the term "employee" for these purposes in *Community for Creative Nonviolence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166 (1989).
19. 17 U.S.C. § 102(a).
20. 17 U.S.C. § 101.
21. Title VII of Pub. L. No. 101-650, 104 Stat. 5089 (Dec. 1, 190).
22. *See* Altman, *Copyright on Architectural Works*, 33 Idea 1 (1992).
23. *See* Mugerian, *Are You Violating the Copyright Laws?*, 17 Mich. B.J. 422 (1992).
24. 17 U.S.C. § 106.
25. *See* 17 U.S.C. § 504.
26. *See* Meyer, *Lawyer Software Copyright Infringers "Flee, All is Discovered!"*, 64 N.Y.S.B.J. 18-19, September-October 1992.
27. 17 U.S.C. § 107.
28. *Id.*
29. *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied* 434 U.S. 1014, 98 S. Ct. 730 (1978).
30. *See* 17 U.S.C. §§ 504.
31. *See* 17 U.S.C. §§ 504-5.
32. 17 U.S.C. §§ 502-3.
33. 17 U.S.C. § 506.

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Lawyers in the family

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John Grow, II (1993), John Grow (1962) and Winston Grow (1992) (admittee, father and brother)

Robert T. Gardner (1993) and William F. Gardner (1959) (admittee and father)

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Spring 1993 Bar Exam Statistics of Interest

Number sitting for exam 222
Number certified to Alabama Supreme Court 137
Certification rate ..... 62 percent
Certification percentages:
- University of Alabama ..... 79 percent
- Cumberland School of Law ..... 78 percent
- Birmingham School of Law ..... 38 percent
- Jones School of Law ..... 62 percent
- Miles College of Law ..... 0 percent

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Spring 1993

C·L·E OPPORTUNITIES

The following programs have been approved by the Alabama Mandatory Continuing Legal Education Commission for CLE credit. For information regarding other available approved programs, contact Diane Weldon, administrative assistant for programs, at (205) 269-1515, and a complete CLE calendar will be mailed to you.

JULY

14 Wednesday
A PRACTICAL GUIDE TO ESTATE ADMINISTRATION IN ALABAMA
Mobile
National Business Institute, Inc.
Credits: 6.5 Cost: $128
(715) 835-8525

15 Thursday
ALTERNATIVE DISPUTE RESOLUTION
Mobile
Lorman Business Center, Inc.
Credits: 3.5 Cost: $135
(715) 833-3940

A PRACTICAL GUIDE TO ESTATE ADMINISTRATION IN ALABAMA
Montgomery
National Business Institute, Inc.
Credits: 6.5 Cost: $128
(715) 835-8525

15-17
ANNUAL MEETING
Stouffer Riverview Plaza Hotel, Mobile
Alabama State Bar
(205) 269-1515

21 Wednesday
BOUNDARY LAW IN ALABAMA
Birmingham, Holiday Inn Redmont
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

23 Friday
INSURANCE LAW
Birmingham
Lorman Business Center, Inc.
Credits: 5.7 Cost: $135
(715) 833-3940

AUGUST

3 Tuesday
SUCCESSFUL JUDGMENT COLLECTIONS IN ALABAMA
Mobile
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Credits: 6.0 Cost: $128
(715) 835-8525

4 Wednesday
SUCCESSFUL JUDGMENT COLLECTIONS IN ALABAMA
Montgomery
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Credits: 6.0 Cost: $128
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24 Tuesday
FAMILY LAW LITIGATION IN ALABAMA
Birmingham
National Business Institute, Inc.
Credits: 6.0 Cost: $128
(715) 835-8525

27-28
FAMILY LAW RETREAT
Orange Beach
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

SEPTEMBER

10 Friday
DAMAGES
Birmingham
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

SMALL ESTATES
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

17 Friday
ERISA
Birmingham
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

DEPOSITIONS
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

22-23
PERSONNEL LAW UPDATE
Birmingham, Radisson Hotel
Council on Education in Management
Credits: 11.0
(415) 934-8333

23 Thursday
REAL ESTATE LAW
Montgomery
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

24 Friday
DEPOSITIONS: TECHNIQUE, STRATEGY & CONTROL
Birmingham
Cumberland Institute for CLE
Credits: 6.0
(800) 888-7454

BENCH & BAR CONFERENCE
Auburn
Auburn University Bar Association/Cumberland Institute for CLE
Credits: 4.0
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REAL ESTATE LAW
Birmingham
Alabama Bar Institute for CLE
Credits: 6.0
(800) 627-6514

30 Thursday
AUTOMOBILE COLLISION CASES
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OPINIONS OF THE GENERAL COUNSEL

By ROBERT W. NORRIS, general counsel

Question:

"I am writing you at the request of James D. Smith, the acting chief administrative law judge for the Mobile office of Hearings and Appeals. Our office is part of the Social Security Administration. We are responsible for adjudicating Social Security disability, retirement and survivors' claims appealed from adverse determinations made by lower level components of the administration. The Administrative Procedure Act, Social Security Act, the Code of Federal Regulations, and formal rulings issued by the administration provide the basic legal framework that governs how hearings are held and decisions made in our office.

"We need the state bar's input to clarify the applicability of Rule 3.3 of the Alabama Rules of Professional Conduct in Social Security proceedings at the hearing level. Specifically, is a hearing held by an administrative law judge in any of the four OHA offices located in Alabama an 'ex parte proceeding' within the meaning of Rule 3.3(d)?

"The issue is quite troubling to the judges and attorneys in our office. Certain well-recognized Social Security attorneys have lectured at CLE seminars and even made videotape presentations during the past few years suggesting that they have no duty to submit any evidence, medical or otherwise, potentially adverse to their client. However, since the Federal Rules of Evidence do not, per se, apply in the administrative proceedings we conduct and because the adjudication process we follow is non-adversarial in nature, a real potential exists for decisions being made based on an incomplete record. Therefore, a potential for abuse is created strictly by differing interpretations of various applicable legal principles. It has been my experience that some advocates view themselves as more of an officer of the court, while others, as mentioned above, adopt a more zealous approach to representation with respect to disclosure of facts adverse to their client.

"I think the resolution of this issue is important. As I understand it, Rule 3.3(d) did not extend under the Alabama Rules of Professional Conduct prior to January 1, 1991. Therefore, it represents a new ethical standard of which many attorneys may not even be aware. With the huge growth of the workload within OHA, the same rule potentially applies to legal representation in up to 9,000 claims currently in the process of adjudication within the four OHA offices in Alabama (2,500 in Mobile). Just as important, the above provision is part of the ABA Model Rules of Professional Conduct. As a result, many other states have also chosen to adopt the same, or a similar, provision. To my knowledge, no formal opinion has ever been issued by a state bar covering the applicability of the same model rule language in Social Security proceedings.

"All of the judges and attorneys in our office would greatly appreciate your consideration of this question for a formal opinion."

Answer:

It is the opinion of the Disciplinary Commission that Rule 3.3(d) of the Rules of Professional Conduct of the Alabama State Bar applies to lawyers participating in hearings before a Social Security Administrative Law Judge adjudicating Social Security disability, retirement and survivor claims. The term "tribunal" as used in this rule includes both courts and administrative proceedings. Rule 3.3 is applicable to adjudicative hearings while Rule 3.9 concerns non-adjudicative proceedings. The only difference between Rules 3.3 and 3.9 is that a lawyer representing a client before a non-adjudicative administrative proceeding or a legislature is not required to inform the legislative or administrative tribunal of all material facts known to the lawyer.

Rule 3.3 of the Rules of Professional Conduct is a "fairness rule" designed to protect the integrity of the decision-making process. Professors Hazard and Hodes, in their handbook, *The Modern Rules of Professional Conduct*, second edition, section 3.3:101, provide the following overview of the rule:

"When the adversary system is operating smoothly, opposing counsel police each other. They can generally be relied upon to expose false and misleading representations made by the other side, and to present legal argumentation in a sharp dialectic that will help the court come to a sound decision. But opposing counsel may not always discover the truth or the law, either through lack of diligence or because the truth has been effectively concealed. Without rules assuring that lawyers will police themselves, therefore, courts would occasionally make decisions on the basis of evidence that one of the professional participants knows is false, or apply legal concepts that one of the professional participants knows has already been rejected by a higher court.

The situation treated in Rule 3.3 entails the most severe tension between duties to a client and duties to the tribunal. According to this rule, where there is danger that the tribunal will be mislead, a litigating lawyer must forsake his client's immediate and narrow interests in favor of the interests of the administration of justice itself. In these situations, the conception of lawyer as 'officer of the court' achieves its maximum force."

Rule 3.3(d) expands the lawyer's duties in an ex parte proceeding requiring the lawyer to inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. Professors Hazard and Hodes provide this explanation of subsection (d):

"Normally, the principal duty of an advocate in any proceeding is to present the best possible case for his client. However, since opposing counsel will not be present in ex parte proceedings, and will not be available to expose deficiencies in the proofs or to present countervailing considerations, the tribunal

must be protected from making wrong decisions that it would not have made in an adversary proceeding. In subsection (d), therefore, the special duty of candor to the tribunal (and the public interest in the integrity of the process) once again outweighs the advantage to an individual client."

By deliberately using the term "tribunal", the rule is applicable to adjudications before administrative bodies, as well as courts. In *Charles Pfizer and Co., Inc. v. Federal Trade Commission*, 401 Fe. 2d 572 and 579, (6th Cir. 1968), the Court held that a patent lawyer must present adverse facts to a U.S. Patent Office hearing officer even if that might cause the patent to be denied.

If the proceedings are non-adjudicative, the lawyer does not have a duty to reveal all material facts but Rule 3.9 requires that the lawyer disclose that he is appearing in a representative capacity and that he abide by the special duties of candor contained in Rule 3.3(a), (b) and (c), as well as Rule 3.4, Fairness to Opposing Parties and Counsel, and Rule 3.5, Maintaining the Impartiality and Decorum of a Tribunal.

(RO-93-06) ■

University of Alabama School of Law Career Services Offers Help for Employers

By Segail Friedman

"I heard it through the grapevine."

That is how Marvin Gaye found out about a lost love. However, the grapevine is also where most Alabama attorneys find out about job opportunities or job candidates.

Most attorneys would say they found out about jobs at local bar meetings or when conducting business with other lawyers. While that method has served its purpose over the years, the University of Alabama School of Law offers a service that is much more efficient.

The law school's Career Services Office serves employers, students and alumni as an information clearing house for job opportunities and prospective employees. CSO has a long record of successfully matching the needs of employers with the skills and goals of new and experienced lawyers trained at UA.

"We are trying to meet the problems with the current hiring situation head on and help our students, as well as employers, cope with it," said Segail Friedman, director of CSO.

"We're trying to let all the lawyers in the state of Alabama know that there is a career services office here at the UA School of Law," she said.

CSO offers three popular services to assist attorneys with the hiring process: on-campus interviewing, résumé-forwarding for off-campus interviewing, and alumni placement.

On-campus interviewing

CSO arranges on-campus interviews each semester to offer employers an efficient, convenient and cost-effective means of interviewing students. "Large firms can project from year to year how many employees they need, so they participate in on-campus interviewing for hiring the following fall," Friedman said.

Résumé forwarding

This service provides employers who are unable to interview on-campus a vehicle for announcing position openings. CSO announces to students, as well as alumni, the positions the employer is offering and then collects résumés of interested applicants and forwards them to the employer. "This service seems to work well for small firms in particular because they normally don't hire until a real need arises," she explained.

Alumni placement

CSO maintains a registry of alumni seeking relocation and publishes position announcements in regular and special alumni bulletins. "When you need an experienced attorney, CSO offers you a link to a large network of practicing professionals: our alumni," Friedman said.

According to Friedman, current law students and graduates participate in these services, seeking employment in law firms of all sizes and all locations, public interest organizations, government agencies, corporations, and businesses, and as judicial clerks in federal and state courts.

CSO will have an exhibition booth at the Alabama State Bar Annual Meeting in July at the Stouffer Riverview Plaza Hotel in Mobile. Interested employers are encouraged to stop by and talk with Friedman and other CSO staff about their services.

If you are unable to attend the July meeting, write for a CSO brochure at Box 870382, Tuscaloosa, Alabama 35487-0382, or phone (205) 348-6479. ■

Segail Friedman

Segail Friedman has been with the University of Alabama for the past 19 years – serving from 1974-1986 as the director of special events and scholarships for the University's National Alumni Association and recently as the director of the law school's Career Services Office. A native of Birmingham, Friedman earned her B.S. degree in management from the University of Alabama's College of Commerce and Business Administration.

The Uninvited Guest?

By James G. Stevens

For years the Bankruptcy Court has been the exclusive domain of creditor and debtor lawyers. These lawyers developed a language that no one on the "outside" could understand. "Prepetition", "post-petition", "adversary proceeding", "fresh start" and other phrases kept them protected from invasion from other lawyers. However, in the last ten years or so the Bankruptcy Court has been invaded by an "outsider".

The environmental lawyer from the government has become the uninvited guest to the party. This article is about the blurring of the lines of the traditional concepts of the bankruptcy laws as they come in contact with the environmental laws.

The fundamental idea of a bankruptcy is that bygones should not prevent the best current deployment of assets. Sunk costs and their associated promises to creditors create problems of allocation when the debtor cannot pay its debts as they come due. But assets that cannot generate enough revenue to pay all claims may still produce net profits from current operations. So bankruptcy cleaves the debtor in two. The existing claims must be satisfied exclusively from existing assets, while the "new debtor" created as of the date that the petition is filed carries on to the extent current revenues allow. However, having been a debtor in bankruptcy does not authorize the debtor to operate a nuisance today or otherwise excuse it from complying with laws of general application.

The fundamental idea of environmental law is that a violation of an environmental statute is in the nature of a tort and is usually one of strict liability, whereas, the traditional concept of a claim is one that generally arises out of a breach of contract.

It would make no sense under either the Bankruptcy Code or environmental laws to say that as long as a property remains in the hands of either the debtor or a future third party that either may discharge toxic or hazardous material without possibility of redress, but that as soon as they sell or transfer the property to a new owner, the new owner is saddled with the clean-up obligations. Bankruptcy is designed to sever the link between debts for bygones and current operations.

Just as a security interest or other lien passes through a bankruptcy unaffected and sticks with the assets on transfer to any new buyer, so a statutory obligation attached to current ownership of the land survives bankruptcy.

Several environmental laws that are the subject of most bankruptcy cases and an overview of them is provided.

The Comprehensive Environmental Response Compensation and Liability Act 42 U.S.C. §9601 *et seq.*, (CERCLA), known as "Superfund", involves cleanup liability for releases of hazardous substances at "facilities". Liability is strict, retroactive and joint and several. CERCLA places liability on current "owners and operators" of a facility as well as those who owned or operated the property at the time of disposal or who arranged for the disposal of hazardous substances (known as "potentially responsible parties" [PRP's]). CERCLA contains limited exemptions for secured parties and "innocent purchasers and under some circumstances pays for cleanups. The U.S. Environmental Protection Agency ("EPA") has jurisdiction over CERCLA administrative actions that may impose liability for "response costs" on PRPs. §9607. Section 9606 allows EPA to act or order an owner/operator to take action where the contamination poses imminent hazards to public health or the

James G. Stevens
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environment. Both sections figure in claims by EPA in bankruptcy settings.

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 *et seq.* regulates the disposal, treatment, storage and transportation of hazardous waste. RCRA also contains the subtitle D landfill rules and covers underground storage tanks [UST]. The Alabama Department of Environmental Management ("ADEM") administers a federally approved hazardous waste program and the UST program. RCRA is a cradle-to-grave statute design to work hand in hand with CERCLA.

The Clean Water Act (33 U.S.C. §1251 *et seq.*[CWA] regulates discharges of pollutants into navigable waters of the United States. CWA regulates National Pollutant Discharge Elimination System [NPDES] permits and it provides for citizen suits for violation of permit requirements. In Alabama, ADEM is authorized a federally approved state program in lieu of the federal program.

The Clean Air Act (42 U.S.C. §7401 *et seq.*[CAA] was amended in 1990 regulates air pollution and includes emission standards for such hazardous air pollutants as asbestos and benzene. ADEM is authorized to administer a federally approved state air quality program in lieu of the federal program in Alabama.

INTRODUCTION

Generally, a discharge of debts obtained in bankruptcy in both a Chapter 7 and a Chapter 11 case extinguishes prepetition debts of the debtor which are allowed as valid claims against the debtor in the bankruptcy proceeding. There are several exceptions to this general statement, some of which will be discussed in this article.

A discharge voids any judgment to the extent that it relates to an allowed claim in the bankruptcy case. A discharge also operates as an injunction against the commencement or continuation of any act to collect, recover or offset any such debt. §524(a) ("Code" & "§524" refer to the Bankruptcy Code).

In a Chapter 7 case, a discharge is granted by the Court only under certain conditions, including: the debtor is an individual; the debtor has not defrauded a creditor or the bankruptcy estate by the transferral; destruction or concealment of any property of the estate; the debtor has not falsified or destroyed any of the financial records; the debtor has not refused to obey any lawful order of the Court. §727(a).

Under §523 of the Code, a discharge in either a Chapter 7 case or a Chapter 11 case does not discharge the debtor from certain prepetition taxes owing to governmental bodies; debts relating to money or property obtained by false representation or actual fraud; debts that are neither listed nor scheduled in the debtor's schedule of assets and liabilities; debts relating to fraud or defalcation while acting in a fiduciary capacity; debts for alimony and support of a former spouse and child of the debtor; debts for a fine or penalty payable to the benefit of a governmental unit that is not compensation for actual pecuniary loss; and debts relating to death or personal injury caused by the Debtor's operation of a motor vehicle while intoxicated from alcohol, drugs, or other substances. §523(a).

The confirmation of a plan discharges the debtor from any debt that arose prepetition, excluding, an individual debtor from any debt excepted from discharge under §523 of the Code; a debtor if the plan provides for liquidation of all or substantially all of the property of the debtor's estate and the debtor does not engage in business after consummation of the plan and the Debtor would be denied a discharge under §727(a) of the Code. §1141(d).

In the event the Chapter 11 plan is not consummated and the case is either dismissed or converted to a Chapter 7 case, the Court upon request of a party in interest can revoke the order of confirmation and revoke the discharge of the Debtor of the various debts treated under the plan. §1144.

Corporations are not discharged and the drafters of the Code apparently felt that it was not necessary for a discharge to be given to the debts of a corporation. While these debts may forever "remain uncollectible", they nevertheless are not discharged under the Code.

AUTOMATIC STAY PROVISION

The filing of a bankruptcy petition does not operate as a stay of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. §362(b)(4) The filing of a bankruptcy petition does not operate as a stay of the enforcement of a judgment (other than a money judgment) obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. §362(b)(5).

Code sections 362(b)(4)-(5) concerning the exceptions to the automatic stay provisions of the Code present the issue of whether the State is violating the "stay" provisions when attempting to enforce environmental laws. The issue is whether or not the State is operating under the aegis of its police and regulatory power or seeking to collect a money judgment.

Section 362(b)(5) allows for the enforcement of a judgment as long as the enforcement is not for the collection of "money judgment". This term is not defined in the Code.

The case of *Penn Terra Ltd. v. Department of Environmental Resources,* 733 F.2d 267 (3d Cir. 1984) held that an action to compel a debtor corporation to comply with an agreement to clean up hazardous wastes was exempt from the "stay". The *Penn Terra* court established a test to define "money judgment".

The "commonly accepted usage" test has two prongs: (1) an identification of the parties for and against whom the judgment is entered and (2) a definite and *certain* designation of the

amount which is owed to the plaintiff by the defendant.

The Fifth Circuit Court of Appeals agreed with the *Penn Terra* rationale in *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175 (5th Circuit 1986) where an action to enforce compliance with RCRA was not stayed because the action was not an attempt to enforce a "money judgment" "notwithstanding the fact that the debtor will be forced to expend funds in order to comply".

Ohio v. Kovacs, 469 U.S. 274 (1985) presents contra conclusion. The *Kovacs* court turned its rationale on the fact that the State of Ohio had taken possession of Kovacs' property prior to the filing of bankruptcy, and, therefore, the state was seeking to enforce a money judgment.

In *United States v. Nicolet*, Inc., 857 F2d 202 (3d Circuit 1988) the Third Circuit again addressed the issue stating that the automatic stay did not apply to the EPA even though the action sought money judgment for prepetition costs. The court noted that the mere entry of a money judgment is not affected by the stay provisions.

The latest case to deal with the stay provision is *The City of New York v. Exxon Corporation*, 932 F2d 1020 (2d Circuit 1991). This was a case of first impression in the Second Circuit and the *Exxon* court held:

The question of whether governmental suits for recovery of costs incurred in responding to completed violations of environmental statutes fall under the police power exemption to the automatic stay is new to this circuit. In addressing it, we find the legislative history to the automatic stay provision to clearly support the view that Congress meant to except damage action for completed violations of environmental laws from the action of the stay. Paragraph (4) excepts commencement or continuation of:

> action and proceedings by the government to enforce police or regulatory powers. Thus, where a government unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violations of such a law, the action or proceeding is not stayed under the automatic stay.

It is interesting to note that the *Exxon* court did not rely on any of the above cases in its opinion and relied only on the legislative intent of Congress in deciding the case.

In *In re Commerce Oil Co.*, 847 F.2d 291 (6th Cir. 1988) the Tennessee state environmental agency was not stayed from proceedings to assess fines and penalties for water quality violations against a debtor who filed a Chapter 11 petition after the state agency initiated enforcement action. Punishing wrongdoers, deterring illegal activity, and recovering remedial costs of damage to the environment are all exercises of state regulatory power.

ABANDONMENT OF CONTAMINATED PROPERTY BY DEBTORS

Section 554(a) of the Code provides that after notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

Arguably, when the costs of cleaning up contamination exceed the value of the property, then the property is of inconsequential value and benefit to the estate.

Prior to 1986, debtors and trustees frequently argued that under the circumstances as set forth above, the debtor's estate should not be required to clean up any contamination and the Court should allow abandonment.

In 1986, the United States Supreme Court (in a five-to-four decision) held in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S.Ct. 755 (1986), that a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.

The debtor in *Midlantic* processed waste oil at two locations, one in New York and one in New Jersey, and had violated its operating permit by accepting more contaminated waste oil than it could handle. The debtor filed a voluntary Chapter 11 petition, and the next day the New Jersey Department of Environmental Protection issued an administrative order requiring the debtor to clean up the waste oil sites. Several months later, the debtor converted its Chapter 11 case to a Chapter 7 liquidation case. A trustee was appointed in the Chapter 7 case and quickly moved for an abandonment of both sites. The mortgages on the debtor's sites exceeded the property value and the estimated cost of disposing of the waste plainly caused the property to be a burden to the estate. The State Department of Environmental Protection argued, however, that abandonment of the sites would threaten the public's health and safety and would violate not only state environmental law, but federal environmental law as well.

The bankruptcy court approved the abandonment as requested by the Trustee. Thereafter, the U.S. District Court and the U.S. Court of Appeals for the Third Circuit affirmed. The U.S. Supreme Court, however, reversed.

The rationale of the U.S. Supreme Court in reversing the lower court opinion was that when Congress enacted §554 of the Code, the majority of the Justices felt that there were well recognized restrictions on a trustee's abandonment power. Also, neither the U.S. Supreme Court nor the U.S. Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect the public health and safety. Twenty-eight U.S.C. §959(b) commands the trustee to manage and operate the property in the trustee's possession according to the requirements of the valid laws of the state. Accordingly, the majority of the Justices felt that this section provided evidence that Congress did not intend for the bankruptcy code to preempt all state laws.

Additional evidence that Congress did not intend for the abandonment power to restrict certain state and local laws is found in the emphasis of the U.S. Congress to protect the environment against toxic pollution. For example, Congress enacted the Resource, Conservation and Recovery Act, 42†U.S.C.† §6901-6987, to regulate the treatment, storage and disposal of hazardous waste. Also, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act to establish a time to finance the cleanup of some sites and to require certain responsible parties to reimburse either the federal government or the party to pay for the cleanup.

The majority pointed out that the exception to the abandon-

ment power does not, however, encompass a speculative or indeterminate future violation of environmental laws that may stem from abandonment, and that the abandonment power is not to be diminished by laws or regulations not reasonably calculated to protect the public health or safety from eminent or identifiable harm.

The four dissenting Justices expressed their dissatisfaction with the majority opinion by relying upon the legislative history that does not suggest that Congress intended to limit the trustee's authority to abandon burdensome property where abandonment might be opposed by those charged with the exercise of state police or regulatory power.

Since it was not disputed that the properties in question were burdensome and of inconsequential value to the estate, forcing the trustee to spend estate assets to clean up the sites was plainly contrary to the purposes of the Code.

By barring abandonment and forcing a cleanup, *Midlantic* effectively places the environment and the public ahead of the claims of other creditors, and Congress did not intend that §554 abandonment hearings should be used to establish the priority of particular claims in bankruptcy.

PRIORITY OF ENVIRONMENTAL CLAIMS IN BANKRUPTCY

The legal contentions concerning the trustee's right to abandon contaminated property pursuant to section 554 of the Code frequently includes (whether or not stated) the debate as to whether the debtor's estate must bear the expense of clean-up, and if so, whether such expense should be classified as a prepetition unsecured claim or a post-petition administrative expense (which is given a first priority status as an administrative expense pursuant to §507(a)(1) of the Code) or a mixture of prepetition unsecured claim and a post-petition administrative expense, or a super-priority which transcends all claims, both secured and unsecured and which has no statutory basis. For example, if a debtor must comply with a court order requiring the debtor's estate to spend money to clean up contamination, both secured and unsecured creditors of the debtor's estate may be adversely affected by such requirement.

Under Code section 1129(a)(9), all post-petition administrative claims under §507(a)(1) must be paid in full and in cash upon the effective date of the plan. Accordingly, the holder of an allowed post-petition administrative claim has the power to veto any such plan proposed by the debtor if the requirement of section 1129(a)(9) is not met.

The environmental law concept that ownership of contaminated property constitutes an ongoing violation of the law conflicts with the Code's design of distinguishing between prepetition and post-petition claims, and also raises several questions. Are prepetition clean-up costs entitled to administrative expense status? [See, Code §§507(a)(1) and 503(b)]. Are post-petition acts that cause new contamination or irritate prepetition contamination entitled to post-petition administrative priority? [See: *In re Commonwealth Oil Refining Company,* 805 F.2d 1175 (5th Cir. 1986)], [cert. denied at 483 U.S. 1005 (1987)]. Are post-petition costs incurred in order to clean up a prepetition environmental problem entitled to post-petition administrative priority status? In the case of *In re Chateaugay Corporation,* 944 F.2d 997 (2d Cir. 1991), the United States Court of Appeals for the Second Circuit held that all cleanup costs assessed post-petition as a result of a prepetition release or threatened release of hazardous substances are entitled to administrative priority in the Chapter 11 reorganization of the debtor.

The *Chateaugay* court also dealt with the more compelling issue that of "injunctive remedies as 'claims'". A "claim" includes "(B) right to an equitable remedy for the breach of performance if such breach gives right to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. . ." Code §101(4)(B).

Thus, an order to remove waste that is not currently causing pollution and the state incurred the cost of removal and then sued for those costs, such order is a "claim" under the Code and as such would be dischargeable. On the other hand, if the order requires action to ameliorate current pollution, such order is not a "claim".

The question arises—"What if the order is both?" If the order has the dual objectives of removal of waste and the amelioration of current pollution, then such order is not a "claim" and is therefore not dischargeable.

MIDLANTIC

Support for allowing as an administrative priority the cost of post-petition cleanup may be drawn from *Midlantic*. If property on which hazardous materials pose a significant hazard to the public health cannot be abandoned, it must follow that expenses to remove the threat posed by such hazardous substances are necessary to preserve an estate in bankruptcy. To some extent *Kovacs* and *Chateaugay* present the same dilemma in determining what aspects of an environmental injunction give rise to the right of payment. The order in *Kovacs* enjoined the defendants from causing further pollution of the air and public waters and required the defendants to remove specified waste from the property. Most environmental decrees contained "a negative order to cease polluting" and "an affirmative order to clean up the site." In *Kovacs*, the Court was spared the need to determine precisely which obligations of the order could be said to constitute "a claim" because of the State of Ohio's actions, ("the clean up order had been converted into an obligation to pay money.")

It is important to note that, as in *Kovacs,* a person or firm in possession of a site with environmental degradation may not maintain a nuisance or pollute the environment of the state or refuse to remove the source of such pollution. This is true in Alabama because the environmental statutes make it a nuisance per se to inject a pollutant into the environment without the appropriate permit. (See *In Re: CMC Heartland Partners* 35 ERC 1001.)

It is consistent with *Midlantic* and *Kovacs* to place all injunctions that seek to remedy the ongoing pollution on the non-"claim" side. It is difficult to understand how any injunction directing a property owner to remedy ongoing pollution could be conceived as a dischargeable claim if the owner may not maintain a nuisance in violation of environmental laws. In addition, it is consistent with *Midlantic's* holding that the

bankruptcy code does not entitle the debtor/trustee to abandon property in violation of an environmental regulation that is reasonably designed to protect the public from identified hazards.

TRUSTEE'S POTENTIAL LIABILITY

The courts will probably protect trustees against personal liability for honest mistakes in business judgment. However, a trustee can be held personally liable for misconduct which is willful or intentional and for negligent misconduct, and for the consequences for such misconduct. [See, *Mosser v. Darrow*, 341 U.S. 267 (1951)]; Also, in *In re Chicago Pacific Corporation*. 773 F.2d 909 (7th Cir. 1985), the U.S. Court of Appeals held that a trustee may be held personally liable only for willful and deliberate violations of his fiduciary duties and *Ford Motor Credit Company v. Weaver*, 680 F.2d 451 (6th Cir. 1982) where the U.S. Court of Appeals for the Sixth Circuit held that a trustee is personally liable only for willful deliberate acts in violation of his fiduciary duties.

The courts have held that a trustee is personally liable for the negligent violations of duties imposed upon him by law. [See, *In re Cochise College Park. Inc.* 703 F.2d 1339 (9th Cir. 1983); *Bennett v. Williams*, 892 F.2d 822 (9th Cir. 1989); and *In re Gorski*, 766 F.2d 723 (2d Cir. 1985)]. Negligence was defined to as the measure of care and diligence that an ordinarily prudent person would exercise under similar circumstances. See, *In re Cochise College Park. Inc.*, supra.

In addition, a trustee is required to manage and operate the property in his possession according to the requirements of the valid laws of the state in which such property is situated and in the same manner that the owner would be bound to do if the owner were in possession of the property. §959(b)].

The U.S. Court of Appeals for the Eighth Circuit in *State of Missouri v. U.S. Bankruptcy Court for the Eastern District of Arkansas*, 647 F.2d 768 (8th Cir. 1981), held that although the bankruptcy court had jurisdiction over the debtor's property, the trustee nevertheless was required to operate certain grain warehouses in accordance with state law pursuant to 28 U.S.C. §959(b). Also, in *Wisconsin v. Better Brite Plate Inc.*, Wis. Ct. App. No.90-0280, a trustee was held personally liable by the trial court for failing to obtain a state license to store hazardous waste upon the debtor's property, and for costs involved in removing such waste. On appeal to the Wisconsin Appellate Court, the trial court's ruling was reversed and the case remanded for further hearings to determine whether the trustee's conduct was willful or intentional.

CONCLUSION

Environmental laws are colliding with the Bankruptcy Code at an ever-increasing rate and the consequence of such a collision may forever change the role of the bankruptcy court. Government lawyers are being faced with the decision of whether or not to file the government's "claim" in the bankruptcy court or litigate its "claim" in another forum. The conflicts between bankruptcy laws and environmental laws are compounding the many complex issues dealt with in the bankruptcy court and thereby placing an additional level of expertise on the lawyers practicing in that court. ■

DISCIPLINARY REPORT

Suspensions

• Birmingham attorney **Chester L. Brown** has been suspended from the practice of law by the Disciplinary Commission of the Alabama State Bar, pursuant to Rule 25(a), Rules of Disciplinary Procedure (Interim). This suspension is a result of reciprocal discipline set by the California State Bar, being retroactive to November 17, 1988, for a period of seven years, suspension being stayed on the condition that the respondent serve five years actual suspension. The respondent must also make restitution and retake the ethics portion of the California State Bar and the Alabama State Bar examinations. [Rule 25(a) Pet. #92-04]

• The Supreme Court of Alabama, effective April 19, 1993, suspended **Robert W. Graham** from the practice of law in the courts of the State of Alabama. Graham's suspension was based on an order of the Disciplinary Commission of the Alabama State Bar, suspending Graham from the practice of law. [Rule 20(a) Pet. #93-01]

• The Supreme Court of Alabama, effective April 9, 1993, suspended **James Edmund Odum, Jr.** from the practice of law in the courts of the State of Alabama. Odum's suspension was based on an order of the Disciplinary Commission of the Alabama State Bar suspending him from the practice of law. [Rule 20(a) Pet. #93-02]

• The Supreme Court of Alabama, in an order dated April 17, 1993, suspended Talladega attorney **Jack E. Swinford** from the practice of law in the state of Alabama. The suspension is to be for a period beginning April 27, 1993 and ending 90 days following Swinford's release from incarceration he is presently serving for criminal convictions of criminally negligent homicide while in violation of *Code of Alabama,* 1975, §32-5A-191(2), and assault in the third degree. Swinford's suspension is based upon an order of the Disciplinary Commission of the Alabama State Bar suspending him for said convictions, pursuant to Rule 22(a)(2), Alabama Rules of Disciplinary Procedure (Interim). [Rule 22(a)(2) Pet. #93-02]

Public Reprimands

• On March 26, 1993, Alabama lawyer **Edward Lewis Hohn** was publicly reprimanded, *in absentia,* by the Alabama State Bar. Said reprimand was administered pursuant to Rule 25(a), Alabama Rules of Disciplinary Procedure (Interim), which provides reciprocal discipline for Alabama lawyers disciplined in other jurisdictions.

By order of the Supreme Court of Arizona, dated July 15, 1992, Hohn was publicly censured by that body for violating certain disciplinary rules. The violations arose out of Hohn's wrongfully filing a *lis pendens* and sending a claim letter to an Alaskan insurance title company in a wrongful attempt to freeze assets of another party. [Rule 25(a) Pet. #92-03]

• Gadsden attorney **John S. Morgan** was publicly reprimanded May 21, 1993 for violation of Rule 8.4(d) of the Rules of Professional Conduct which provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on his fitness to practice law, and Rule 8.4(g) which provides that it is professional misconduct for a lawyer to engage in conduct that adversely reflects on his fitness to practice law. On August 5, 1992, Morgan entered a plea of guilty in the circuit court of Etowah County to unlawful possession of marijuana in the second degree and assault in the third degree. [ASB No. 92-263]

• On May 21, 1993, Dothan attorney **Charles B. Adams** received a public reprimand in two consolidated cases. Adams was appointed to represent two individuals in conjunction with their criminal appeals. Adams failed to file briefs in those cases even though the court of criminal appeals advised him that this failure constituted presumptive ineffective assistance of counsel under Alabama case law. One appeal ended up being dismissed and new counsel was appointed in the other case. In one instance, Adams cited his wife's illness and trial preparation in other cases. He offered no excuse in the second case. The Disciplinary Commission found that Adams had violated Rules 1.1, 1.2 and 1.3 of the Rules of Professional Conduct. [ASB Nos. 91-391 and 92-529]

• Birmingham attorney **Mark D. McKnight** was publicly reprimanded May 21, 1993 on his plea of guilty of violating the Rules of Professional Conduct in three separate cases.

In ASB No. 90-400, a client deposited $32,500 in McKnight's trust account which was to be used to satisfy a lien on the client's residence. On the date of closing, another attorney in McKnight's office discovered that McKnight's trust account did not contain $32,500, but, in fact, contained less than $3,200. Despite this fact, McKnight proceeded with the case and delivered to the financial institution a check drawn on his trust account in the amount of $32,500. This check was subsequently returned for insufficient funds. Thereafter, McKnight borrowed money in order to make this check good. The Disciplinary Board determined that McKnight's conduct violated DR 9-102(B)(4) which provides that a lawyer shall not misappropriate the funds of his client.

In ASB No. 90-933(A), McKnight was contacted by the Grievance Committee of the Birmingham Bar Association in connection with its investigation of possible misuse of trust funds by McKnight. After repeated requests from the Grievance Committee, McKnight ultimately produced his trust account records which showed negative balances for the months of January, February and March 1990. The Disciplinary Board determined that McKnight's conduct violated DR 9-102(B)(3) which provides that a lawyer shall maintain complete records of all funds, securities and other properties of a client.

In ASB No. 91-189(A), McKnight was employed to represent clients in an uncontested divorce proceeding. He prepared the necessary papers which the clients signed but he failed to file the papers with the court. Thereafter, McKnight represented to his clients that the divorce papers had been filed and that they were legally divorced. Subsequently, the clients went to the

courthouse and discovered that the divorce had never been filed and they were not divorced from each other. The Disciplinary Board determined that McKnight's conduct constituted a violation of DR 6-101 which provides that a lawyer shall not willfully neglect a legal matter entrusted to him.

In addition to the public reprimand, the Disciplinary Board further determined that McKnight should be placed on probation for a period of two years, beginning January 1, 1993. During the probationary period, McKnight is to submit monthly reports from his accountant, his psychiatrist and his Alcoholic's Anonymous sponsor. [ASB Nos. 90-400, 90-933(A) & 91-189(A)]

• Montgomery attorney **James R. Cooper, Jr.** was publicly reprimanded May 21, 1993. Cooper had represented a female client in a child custody proceeding against her first husband. Very shortly thereafter, he withdrew from further representation of her and later sued her for divorce on behalf of her second husband. When the parties came to Cooper saying they wanted to reconcile, he had the wife sign an affidavit holding him harmless from "any and all causes of action conceivable" and further stating that she felt there was no conflict of interest in his filing the divorce action. Cooper entered a guilty plea to violating Rule 1.8(h) which proscribes a lawyer's prospectively limiting his liability to a client. [ASB No. 92-268]

• Montgomery attorney **J. Richard Piel** was given a public reprimand May 21, 1993. Piel was found to have willfully neglected a legal matter and, in so doing, also failed to communicate with his clients. Piel handled a real estate closing and recorded the documents in the wrong county. The clients' copies of the closing documents were sent to an incorrect address and, thus, were never received by them. It took the clients nine months to straighten out the situation. This occurred only after the clients hired another lawyer to assist them. Piel defended himself on the grounds that his secretaries never made him aware of the problem. Also, Rule 5.3 makes a lawyer responsible for supervised employees' conduct if it would be unethical if committed by the lawyer. [ASB No. 92-385]

• On May 21, 1993 Birmingham attorney **Gregory D. Jones** was publicly reprimanded by the Alabama State Bar for willfully neglecting a legal matter entrusted to him, for failing to carry out a contract of employment entered into with a client for professional services, and for prejudicing or damaging his client during the course of the professional relationship.

Jones agreed to represent a client in a personal injury matter. He was advanced a filing fee to process the lawsuit on behalf of the client. However, Jones allowed the statute of limitations to run on any claim that the client had for negligence. The client then filed a complaint against Jones. During the investigation of this matter, it was discovered that Jones was not aware that the statute of limitations for a wantonness claim on behalf of the client had not expired, but he had still failed to pursue a civil lawsuit on behalf of the client. The investigation further disclosed that Jones attempted to have the client sign a release releasing Jones from any and all liability concerning his representation of the client, in consideration of $1. The Disciplinary Commission ordered that Jones receive a public reprimand without general publication. [ASB No. 92-457] ■

PRODUCTS LIABILITY AND CONTRIBUTORY NEGLIGENCE

In the Wake of *Williams v. Delta International Machinery Corp.*

On March of this year, the Alabama Supreme Court released the long-anticipated decision in *Williams v. Delta International Machinery Corp.*, No. CV-8804573, slip op. (Ala. March 12, 1993). *Williams* had previously been released, withdrawn and the court had all but announced that it would adopt some form of comparative negligence. It did not. The final decision, with no grounds assigned, declined to adopt comparative negligence and retained contributory negligence under Alabama products liability law. The decision not to change contributory negligence also avoided the necessity of addressing the question of joint and several liability. While the decision not to adopt comparative negligence captured the headlines, the most important additional issue decided by the court in *Williams* was the reaffirmation of the defense of contributory negligence in products liability cases under Alabama substantive law.

The confused status of Alabama's law on contributory negligence as a proper defense arose as a result of language used in the court's 1991 decision of *Dennis v. American Honda*, 585 So. 2d 1336 (Ala. 1991). In *Dennis*, the court held that it was error to charge the jury on contributory negligence of a plaintiff in the use of one product (a Yamaha motorcycle) while a separate product (motorcycle helmet being worn by the plaintiff) was the product alleged to be defective. The court overturned a defense verdict on behalf of Honda, choosing to release that opinion even though the case had previously been settled.

As a result of the *Dennis* decision, two years of apparent confusion occurred with both the bench and the bar. The plaintiff's bar argued "contributory negligence in products liability is dead" and immediately moved to strike the defense of contributory negligence in many products liability cases. The uncertainty created by *Dennis* was reflected by Justice Houston, writing for the court in *Williams*, when he stated:

"... [B]ecause there appears to be some confusion as to the proper interpretation of *Dennis v. American Honda Motor Co.*, we direct the attention of the Bench and Bar to the specific holding in *Dennis*...."

"The reports of my death are greatly exaggerated"

—Mark Twain

By D. Alan Thomas and Nancy S. Akel

Williams, slip op. at 4. Justice Houston went on to explain the factual situation of the accident made the basis of that case, that the plaintiff was alleged to have negligently used a Yamaha motorcycle while the products liability claim concerned a Honda helmet he was wearing at the time of the accident. The court stated:

"If the contributory negligence instruction had been limited to the plaintiff's failure to exercise reasonable care in his wearing of the helmet (i.e., could have been related to an alleged product misuse), then such an instruction would have been proper under this Court's previous interpretations of the AEMLD."

Id. at 5. Justice Houston pointed out that:

"The trial error in *Dennis* was in not limiting the *contributory negligence* charge to the plaintiff's use of the helmet as opposed to the plaintiff's alleged negligent operation of his motorcycle."

Although contributory negligence has been recognized generally as a defense to AEMLD actions, in *Atkins v. American Motors,* 335 So.2d 134 (Ala. 1976), this Court seemed to indicate that the defense is available only under certain defensive theories, e.g., 'plaintiff's misuse of product'."

Id. (citations omitted) (emphasis added)

In this language, the Alabama Supreme Court has reaffirmed the existence of contributory negligence in products cases stemming back to the adoption of the Alabama Extended Manufacturer's Liability Doctrine.

Historical background

In 1976, the Alabama Supreme Court decided the twin cases of *Atkins v. American Motors Corp.,* 335 So.2d 134 (Ala. 1976), and *Casrell v. Altec Industries, Inc.,* 335 So.2d 128 (Ala. 1976). The supreme court at that time had been urged to adopt "strict liability" under RESTATEMENT (SECOND) OF TORTS §-402A (1964). In deciding those cases, the court declined to adopt strict liability due to long-standing Alabama history of the "fault concept" ingrained in Alabama substantive law and in Alabama products liability law prior to 1976. In fashioning what was termed the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), the court specifically retained this "fault concept" as a prerequisite for the finding of liability on the part of a defendant manufacturer. While the court stated that fault or "scienter" would be supplied as a matter of law if a product was sold in a defective condition/unreasonably dangerous and if that defective condition was a proximate result of the plaintiff's injuries, allowing Alabama to retain the fault-based affirmative defenses, including contributory negligence.

From *Casrell* and *Atkins,* this concept of fault permeated the Alabama decisions which followed. The basic premise was that a plaintiff who contributed to his/her own injury (fault) could not recover damages even if the defendant was also at fault. "The injury may be imputed as much to the negligence of the plaintiff, as of the defendant; and, if so, the defendant was not liable, and so should the law have been stated to the jury." *Bethea v. Taylor,* 3 Stew. 482 (Ala. 1831). Alabama cases decided subsequent to the adoption of the AEMLD consistently held the concept of fault (negligence) of the plaintiff to be fatal to a plaintiff's product liability case, following long-standing Alabama law. E.g., *Johnson v. Niagra Mach. & Tool Works,* 555 So.2d 88 (Ala. 1989) ("[T]he conduct of the plaintiff in certain cases may be so lacking in reasonable care for his own safety that reasonable minds may not differ on the issue of the plaintiff's own negligence"); *Harley-Davidson, Inc. v. Toomey,* 521 So.2d 971, 974-75 (Ala. 1988) ("Upon raising the affirmative defense of contributory negligence, defendant has the burden of proving that (1) plaintiff failed to use due care for his own, or ... his property's safety, and (2) that such a failure was a proximate cause of the injury," quoting *American Furniture Galleries, Inc. v. McWane, Inc.,* 477 So.2d 369, 372 (Ala. 1985)); *General Motors Corp. v. Edwards,* 482 So.2d 1176, 1192 (Ala. 1985) (Alabama Supreme Court specifically retained contributory negligence as an affirmative defense in automobile "crashworthiness" cases.); *Caterpillar*

Tractor Co. v. Ford, 406 So.2d 854, 856 (Ala. 1981) ("In addition to the general denial defense, the defendant may also affirmatively raise the negligent conduct of the plaintiff in using the product, ..."). See also *Fenley v. Rouselle Corp.*, 531 So. 2d 304 (Ala. 1988); *Sears, Roebuck & Co. v. Haven Hills Farm, Inc.*, 395 So. 2d 991 (Ala. 1981). Cf. *Wallace v. Doege*, 484 So.2d 404 (Ala. 1986) (plaintiff found to be contributorily negligent after failing to turn off the power supply to a fish saw before attempting to clean it).

In addition, contributory negligence usually was accompanied by terminology regarding the plaintiff's "usage of the product". As Justice Houston pointed out in *Williams*, the *Casrell* decision discussed contributory negligence in the context of the plaintiff's use of the product. This terminology was adopted in the Alabama Pattern Jury Charge synonymously using the terms contributory negligence and misuse in the products liability context.

APJI 32.19
Contributory Negligence Defense
The defendant charges that the (user)(consumer) (was contributorily negligent in the use of the product) (misused the product).

The notes regarding the jury charge additionally state that misuse has not been specifically defined in Alabama and that the Alabama Supreme Court had not made a distinction between "intended use" and "misuse" or whether there was any difference between "misuse" and "contributory negligence".

Misuse was also advocated in the small number of products liability cases brought solely under implied warranty theories where traditional "fault-based" defenses such as contributory negligence would not be available. This obviously blurred the distinction between the contract-based warranty actions and negligence-based AEMLD actions.

The court's "misuse" versus "contributory negligence" distinction apparently existed in name only. Semantics aside, the standard/burden of proof for the defendant was *plaintiff's failure to exercise reasonable care for his own safety*, whether called contributory negligence or misuse. That standard, outlined in the Alabama Pattern Jury Instructions, was universally accepted and applied based on the fundamental concept that a plaintiff could not recover for an injury which he either caused or contributed to cause. Throughout the decisions released from *Casrell* to *Dennis*, the contributory negligence defense was "contributory negligence in the use of the product", an inescapable common thread.

Dennis v. American Honda

In *Dennis*, a solely unique fact situation existed. The trial jury was charged as to contributory negligence. The only contributory negligence alleged by the defendant was the plaintiff's use of the Yamaha motorcycle. The problem was that the Yamaha motorcycle was *not* the product alleged to be defective. There was no claim made that the plaintiff was negligent in his use of the Honda helmet, although assumption of the risk was a viable and affirmatively pled defense.

In reversing American Honda's verdict against the brain-damaged plaintiff, the court distinguished between contributory negligence in the use of the product and contributory negligence *not* associated with plaintiff's use of the product alleged to be defective. The court's holding was *not* a change from the prior 14 years of AEMLD decisions on contributory negligence, but rather a limited distinction made in that unique factual situation. The court, however, did cite from a number of "strict liability" jurisdictions in its discussion of product "misuse" versus ordinary contributory negligence, while assumingly ignoring the "fault"-based concepts ingrained throughout the history of Alabama product liability law. Justice Maddox clearly pointed out the confusion in his dissent in *Dennis*.

The language used in *Dennis* regarding the plaintiff's negligence in the "causation" of the accident, unexpectedly proved to be somewhat unfortunate, setting off a plethora of motions in the trial courts to strike the defense of contributory negligence in products liability cases. The apparent confusion which resulted was limited to the local bench and bar, but did not rise to the appellate court level.

Decisions released after *Dennis* clearly held that contributory negligence of the plaintiff *in the use of the product* was a valid defense to products liability actions. For example: In *Gore v. Ford Motor Co.*, 601 So.2d 953 (Ala. 1992), the plaintiff decedent was not wearing his seatbelt and died when his vehicle was involved in a one-car accident, rolled and landed on its roof. In defense of plaintiff's crashworthiness claim, the defendant asserted plaintiff's contributory negligence in failing to wear a seatbelt. Although the only issue on appeal was whether the State of Alabama should abandon contributory negligence in favor of comparative negligence, the defense verdict was affirmed and in doing so, the court, in dicta, acknowledged that the plaintiff's failure to wear his seatbelt is properly considered in the contributory negligence defense.

This issue, the contributory negligence defense, was preirously considered by the Eleventh Circuit in *Ferguson v. Bayerische Motoren Werke*, A.G., 880 F.2d 360 (11th Cir. 1989). The plaintiff received personal injuries in a one-car accident and brought suit under AEMLD alleging that the vehicle was not "crashworthy". One of the defenses asserted was that plaintiff was contributorily negligent in her failure to use the safety restraint system provided in the vehicle under Alabama law. The Eleventh Circuit affirmed the jury verdict in favor of the defendants and thus affirmed the District Court's jury charge on contributory negligence which included discussion of the plaintiff's failure to wear her seatbelt. See also *Gulledge v. Brown & Root, Inc.*, 598 So.2d 1325 (Ala. 1992) (Court defined contributory negligence as plaintiff's "fail[ure] to exercise ordinary care to discover and avoid the danger and the injury". *Id.* at 1327. (Citation and emphasis omitted)).

MISUSE, AND (NOT INSTEAD OF) CONTRIBUTORY NEGLIGENCE IN THE USE OF A PRODUCT

Unfortunately, after *Dennis*, a pattern jury charge was adopted which employed (apparently with *no* specific case authority) a different definition and burden of proof for the defense of "product misuse". APJI 32.19 (Revised) and 32.19.1. Product misuse was defined in that jury

charge as a use that was *not foreseeable by the defendant manufacturer*. While before, the distinction between misuse and contributory negligence in the use of the product was primarily semantic, the "new" definition ignored the long-held definition of contributory negligence based upon the relative fault of the parties. The traditional standard of contributory negligence was that the plaintiff failed to exercise reasonable care in disregard for his own safety which was a proximate cause (even if not the only cause) of his injury.

If the product misuse definition is in fact Alabama law, then there is now a new defense: product misuse. The test of "product misuse" is the manufacturer's subjective *foreseeable* use of the product as opposed to the *reasonable care* of the *plaintiff* in *his use* of that product. This is in addition to the plaintiff's burden to prove that the product was being used for its "intended use" at the time of the accident.

... [T]he gravamen of the action is that the defendant manufactured or designed or [illegible] defective product which, because of its unreasonable, unsafe condition, injured plaintiff or damaged his property when such property, substantially unaltered, was put *to its intended use*. *Atkins*, 335 So.2d at 139. This concept of a separate defense of "misuse" was also noted in the 1992 case of *Kelly v. M. Trigg Enterprises, Inc.*, 605 So.2d 1185 (Ala. 1992). In *Kelly*, the court stated that it was affirming the principal that misuse is a defense under the AEMLD citing *Banner Welders, Inc. v. Knighton*, 425 So.2d 441 (Ala. 1982). As the authority for this defense the court did not cite from any previous Alabama decision, but rather from a law review article which stated:

"[w]hen asserting misuse as a defense under AEMLD, the defendant must establish that the plaintiff used the product in some manner different from that intended by the manufacturer. Stated differently, plaintiff's misuse of the product must not have been 'reasonably foreseeable by the seller or manufacturer'". Edward C. Martin, *Alabama Extended Manufacturer's Liability Doctrine (AEMLD)*, 13 Am. J. Trial Advoc. 983, 1040 (1990).

The Alabama Supreme Court noted in 1977 that misuse could be a defense to an AEMLD action in the case of *McCaleb v. Mackey Paint Mfg. Co., Inc.*, 343 So.2d 511 (Ala. 1977). The court noted that the plaintiff in *McCaleb* had used the product involved in a manner not intended by the manufacturer. The insinuation was that while misuse could be considered as a defense, its origin was in the original elements of the plaintiff's prima facie case under the AEMLD. If the standard by which misuse is to be judged is the intended use contemplated by the manufacturer, it appears there are now two different defenses, misuse and contributory negligence, with two totally separate standards of proof.

MISUSE VERSUS CONTRIBUTORY NEGLIGENCE

Many factual situations involve both contributory negligence (failure to exercise reasonable care in the use of the

product in question) and misuse (an unintended use). For example, our plaintiff-to-be is "Bubba Joe," the driver of a tractor-trailer truck on the ill-fated day of his accident. Prior to the accident, he consumed a fifth of Jack Daniels which may or may not have been the reason Bubba Joe failed to connect the air brakes to the trailer he was using. In the ensuing accident Bubba Joe was injured. Bubba Joe's alcoholic consumption while attempting to operate a 80,000 pound truck and trailer clearly may have been one of the proximate causes of his injury. In a product liability action against the truck manufacturer, Bubba may have been contributorily negligent when he was unable to stop the truck at a "T" intersection while traveling 85 MPH (failure to exercise reasonable care for his own safety in the use of the truck). Bubba's actions may have also been a product misuse (very few tractor-trailer manufacturers *intend* to have their products operated at speeds greatly exceeding the legal posted limits by an intoxicated person. They certainly do not *intend* to have the truck operated with the air brakes disconnected.)

In most situations, both contributory negligence and misuse may be present. However, many accidents occur when the plaintiff is using a product in a manner intended by the manufacturer, but in his or her use of the product the plaintiff fails to exercise reasonable care and is injured. For example, our fictitious Bubba Joe recovers from his truck-trailer accident and goes to work as an operator of a table saw with a dado cutting blade. On the day of the accident-to-be, Bubba Joe is cutting woodstock with the table saw (a use intended by the saw manufacturer). Unfortunately, Bubba Joe is preoccupied in discussing an upcoming wrestling match with another worker and while his head is turned, Bubba Joe suffers an injury to his dominant bowling hand. While Bubba Joe may not have been misusing the table saw, he clearly failed to exercise reasonable care in the use of the saw and was contributorily negligent.

Can a product be misused (thereby supplying a defense to a product manufacturer) without the plaintiff being contributorily negligent? Let's assume our fictitious Bubba Joe comes home from work and attempts to trim his hedge with his Yazoo lawnmower. In this familiar example of stupidity, Bubba Joe not only is injured, but is guilty of negligence and a misuse of the product. But let's assume that instead of Bubba Joe dropping the Yazoo lawnmower on himself, he dropped it on his lovely wife, Sallie Jo, who was sunbathing on the other side of the hedge. Sallie Jo was completely innocent of any negligence on her part (other than marrying Bubba). However, there is still a misuse of the product. While the result may seem somewhat harsh, the misuse of the lawnmower would prevent Sallie Jo from recovering in a case against the manufacturer. The critical test of "product misuse" is *not* necessarily the conduct of the plaintiff. The test, whether couched in terms of the plaintiff's burden of proof or as the defendant's affirmative defense, is the *reasonably intended use of the product*.

The Alabama Supreme Court recently affirmed that type analysis in the *Kelly* case. In *Kelly* a products liability claim was advanced against the manufacturer of an air freshener which was being used as an inhalant by the driver of an automobile. That vehicle was then involved in an accident with the plaintiff's automobile. In that case, the alleged misuse of the air freshener/ inhalant was not by the plaintiff but rather by a third party. The court held "[a]lthough under the present circumstances, the alleged misuse of the [product] was by one other than the plaintiffs, the above principles ['when asserting misuse as a defense under AEMLD, the defendant must establish that the plaintiff used the product in some manner different from that intended by the manufacturer'] are equally applicable." *Kelly*, 605 So.2d at 1192.

Theoretically, it might be possible to have misuse without contributory negligence when the user of the product is also the plaintiff. There are not any reported Alabama cases on the subject. As a practical matter, however, a plaintiff's use of the product in an unintended manner probably also would carry with it by implication a failure to exercise due care in the use of that product.

THE *WILLIAMS* CASE

The Alabama Supreme Court in that unanimous portion of *Williams v. Delta International Machinery Corp.* specifically put to rest the apparent confusion created by *Dennis*. Justice Houston writing for the court clarified precisely the very limited holding of "the rule of *Dennis*". As Justice Houston wrote, the trial court erred in *Dennis* by failing to limit the contributory negligence charge to the use of the product alleged to be defective. Clearly, had a contributory negligence charge been related to the use of the Honda helmet, it would have also been proper. On the other hand, had the plaintiff's case been against the manufacturer of the motorcycle he negligently operated, a contributory negligence charge regarding the operation of the motorcycle (specifically having to do with the causation of the accident) would have been proper. This would be the case in the vast majority of the products liability litigation pending in Alabama.

For the purposes of distinguishing between misuse and contributory negligence in products cases, the language of *Williams* is clear (discussing the *Dennis* case):

If the contributory negligence instructions had been limited to the plaintiff's failure to *exercise reasonable care* in his wearing of the helmet, (i.e. if it had related to an alleged product misuse), then such instruction would have been proper under this court's previous interpretation of the AEMLD.

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Nancy S. Akel

Nancy S. Akel is a graduate of the University of North Florida and Cumberland School of Law, Samford University. She is an associate with Huie, Fernambucq & Stewart.

Williams, slip op. at 5. (emphasis added)

Two important issues are resolved in the court's language. First, it is proper to charge a jury regarding *contributory negligence* in the use of the product alleged to be defective. Second, the proper standard for contributory negligence in a Alabama products liability case is whether the *plaintiff exercised reasonable care* in his or her use or operation of the product. The standard for contributory negligence is not whether the product was used in the manner intended by the manufacturer (misuse) or whether the user knew, understood and appreciated a danger (assumption of the risk), but rather a test of the plaintiff's conduct, based on his fault or negligence, which determines his ability to recover under Alabama law.

The most obvious example of contributory negligence in the products liability context is found in the facts of *Williams* itself. The specific question in that case was *not* whether the table saw and dado blade were being used in the manner for which Delta Machinery intended. There was absolutely no issue raised that the plaintiff used the table saw in an unintended manner. The *sole* question was whether the plaintiff exercised due care for his own safety while using the saw. In *Williams*, the plaintiffs' conduct which was the basis for the reaffirmation of contributory negligence was specifically related to the causation of the accident, not some type of improper use of the product. That is the test of contributory negligence under Alabama product liability law.

The campaign insisting that contributory negligence was executed by *Dennis v. America Honda* has been strong. A unanimous court in *Williams* has put those rumors to rest. One hundred and sixty-two years of Alabama law regarding contributory negligence, including seventeen years with contributory negligence in products liability cases is a strong foundation for the defense of contributory negligence. The defense of contributory negligence should not be dismissed so easily, as a result of confusing language found in one unique case.

Contributory negligence is very much alive under the AEMLD, as is the separate and distinct affirmative defense of product misuse. Alabama continues to retain a "fault-based concept" of liability in product liability claims. The baseline proposition underlying Alabama's concept of "fault" is founded upon the concept that any party, whether defendant or plaintiff, should be responsible for his or her own actions and any resulting consequences. Even today, responsibility for one's own actions makes not only good, judicial sense, but common sense as well. ■

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SUPREME COURT OF ALABAMA

Right to counsel and proof of waiver thereto

Ex parte Reese, 27 ABR 2072 (March 19, 1993). Reese pleaded guilty to possession of marijuana "for his personal use only after having been previously convicted of unlawful possession of marijuana for his personal use only", a violation of §13A-12-215, *Code of Alabama* (1975). As evidence of Reese's prior conviction, the State introduced a certified record of Reese's conviction in Dothan Municipal Court. The docket sheet bore a stamped notation indicating that Reese had waived his right to counsel prior to pleading guilty.

On appeal, Reese challenged the use of his prior conviction for enhancement purposes, contending that the State had failed to prove that his prior guilty plea was not obtained in violation of his right to counsel. The court of criminal appeals affirmed his conviction by memorandum opinion.

The supreme court disagreed and reversed Reese's conviction. In doing so, the court followed the general rule that unless it is shown that the accused was represented by counsel, or waived counsel, at the time of the prior conviction, the conviction is not available for consideration under the Habitual Felony Offender Act. The court then acknowledged the application of this rule in Reese's case by stating, "Nor is an uncounseled conviction available for consideration under §13A-12-213". The court disagreed with the State's argument that the stamped notation on the docket sheet was sufficient evidence that Reese made a valid waiver of his right to counsel, holding that:

The record of Reese's previous conviction, though not completely silent, does not sufficiently show that Reese was offered counsel and that he knowingly and intelligently rejected that offer.

"A defendant may waive his or her right to counsel in writing or on the record, *after the court has ascertained that the defendant knowingly, intelligently, and voluntarily desires to forego that right.*" Rule 6.1(b), A.R.Crim.P. There is no evidence that the judge in the municipal court engaged in the colloquy necessary to ascertain that Reese knowingly, intelligently, and voluntarily desired to forego his right to counsel.

State's failure to produce exculpatory evidence

Ex parte Williams, 27 ABR 2421 (April 16, 1993). Williams was convicted of first degree robbery, arising out of an incident wherein Joe Tolbert was robbed outside his place of employment by four men. At trial, the victim testified that one of the men wore a white shirt and jeans, and that this man placed a gun to his head and demanded the victim's money. He stated that another man wearing a black raincoat and black hat placed a knife at his throat. At trial, the victim identified this man as Williams. Another man stood in the background and brandished a brick or cinder block. After the men had taken his wallet and run away, the victim summoned the police. A young man identified by the victim as the brick welder was captured near the scene. The victim's supervisor also recovered a black hat and turned it over to the police.

This hat had the name "Joe Bean" written inside it. This was the street name of Derrick Williams, brother of the defendant, Barry Williams. For this reason, Derrick Williams' photograph was included in a photographic lineup shown to the victim. At the photo lineup, the victim identified Derrick Williams as one of the individuals who robbed him.

Derrick Williams was arrested. Thereafter, Eva Mae Williams, the mother of Derrick and Barry, came to the police station and informed police that it was Barry, and not Derrick, who taken part in the robbery. Barry Williams was then arrested and charged with first degree robbery.

Prior to trial, defense counsel filed a motion seeking disclosure of exculpatory and other material evidence. The court entered a mandatory discovery order. When defense counsel went to the police station to view the evidence, he was shown a black raincoat that had been recovered from Williams. He was also shown some photographs, but not the ones used in the lineup. Defense couns was not shown the black hat, nor was he provided with a copy of the victim's statement made shortly after the robbery, wherein the victim described the man with the knife as wearing "camouflage" coveralls and made no mention of a black raincoat.

At trial, Williams moved to exclude the black hat and certain other State exhibits that had not been produced pursuant to the discovery order, and this motion was initially granted. The black hat, however, was admitted into evidence after defense counsel questioned a witness about it. Counsel also sought

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the production of the photographic lineup to show the physical disparity between himself and his brother. This lineup was produced only after defense counsel had cross-examined the victim regarding his misidentification at the lineup.

In reversing Williams' conviction, the supreme court disagreed with the State's argument that Williams was not harmed by its violation of the discovery order because Williams knew prior to trial that his brother had been arrested; accordingly, he was not prejudiced by the delayed disclosure of the photographs, the black hat and the statement.

Citing *Brady v. Maryland,* 373 U.S. 83 (1963), the court stated that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution. In order to show a *Brady* violation, some prejudice to the defendant must have resulted from the nondisclosure of potentially exculpatory evidence. In *Ex parte Kennedy,* 472 So.2d 1106 (Ala.), *cert. denied,* 474 U.S. 975 (1985), the proper test for determining whether the State's conduct constituted reversible error was set out: The defendant must demonstrate that (1) the State suppressed the evidence; (2) the evidence suppressed was favorable to the defendant or was exculpatory; and (3) the evidence was material. The court determined that the materiality of the photographs and black hat was beyond question and that the State's failure to disclose this evidence totally prevented defense counsel from preparing portions of the defense, especially with respect to the inconsistencies between the victim's statement and his trial testimony. "Counsel should not be forced to improvise at trial simply because the State has failed to comply with a mandatory court order." The court specifically rejected the argument that "a defendant who has engaged in 'thorough and sifting' cross-examination with respect to items not disclosed has suffered no prejudice."

Fifth Amendment—right to remain silent after request for counsel is made

Ex parte Johnson, 27 ABR 2643 (April 23, 1993). Johnson was convicted of burglary in the first degree with the intent to rape. Prior to his arrest, Johnson was questioned by the police as a suspect in the burglary. The questioning occurred after one of the investigating officers had given Johnson a standardized *Miranda* warning. At trial, the officer testified about his questioning of Johnson:

"I asked him about the burglary—I asked him if he knew anything about it. He said that he had heard about the burglary across from the church where he lived. And he said that he had heard that from the news...I asked him about—I showed him a picture of the knife that had been recovered from the scene and asked him if that was his knife. And he would not tell me if it was his knife. I asked him to tell me—"

At this point, defense counsel objected and moved for a mistrial on the grounds that any comment on Johnson's silence was a violation of his constitutional right to remain silent. Counsel's request for a mistrial was denied. Thereafter, the officer continued his testimony as follows:

"I asked him to tell me it wasn't his knife, and he wouldn't tell me it wasn't either.

I talked to him a little bit after that. I talked to him about the incident again and tried to get him to talk to me about the incident. He wouldn't talk about the incident, and he later asked if he could have legal help. I considered that him asking for an attorney, and no further questioning was done at that time."

No objection was made to this testi-

mony. On appeal, the court of criminal appeals affirmed Johnson's conviction, holding that "[a]ny improper comment on the appellant's exercise of his *Miranda* right to remain silent in reference to his failure to answer a question about the knife was cured when the officer testified without objection that subsequently the appellant 'wouldn't talk about the incident, and...asked if he could have legal help.'"

The supreme court disagreed and reversed Johnson's conviction, holding that it is fundamentally unfair and in violation of due process of law to inform a person under arrest that he has a right to remain silent and then permit an inference of guilt from that silence. The court went on to hold that "virtually any description of a defendant's silence following arrest and a *Miranda* warning" is sufficient to constitute a violation of *Doyle v. Ohio,* 426 U.S. 610 (1976).

Fourth Amendment—suppression of evidence obtained as result of uncorroborated anonymous tip

Ex parte Barnette, 27 ABR 2643 (April 23, 1993). Barnette was arrested for possession of cocaine. He moved to suppress the evidence against him, alleging that his stop by the police was improper because a "reasonable suspicion" of criminal activity could not be based on what he termed an "uncorroborated anonymous tip". The trial court denied Barnette's motion, and he was subsequently convicted. The court of criminal appeals affirmed without opinion.

Barnette petitioned for certiorari, citing *Alabama v. White,* 496 U.S. 325 (1990), as authority for his claim that "the stop violated the Constitution and the motion to suppress should have been granted," because the "anonymous tip...lacked significant details that could be independently corroborated by police to provide 'sufficient indica of reliability to justify the investigatory stop.'" The supreme court agreed, and reversed Barnette's conviction.

The court based its decision on *Alabama v. White,* stating that just as veracity, reliability and basis of knowledge are relevant in the probable cause context, these critical factors are also relevant in the reasonable suspicion context, although allowance must be made in applying them for the lesser showing required to meet the reasonable suspicion standard. Nonetheless, the court held, "an anonymous tip can provide the reasonable suspicion necessary for an investigatory stop, if the tip is sufficiently corroborated by independent police investigation."

In this case, however, the court held that the anonymous tip contained merely a range of details relating to easily obtained facts and conditions existing at the time of the tip, *i.e.*, that two black males dressed in a particular manner were at a specific location. Anyone could have predicted the location of the black males, their race and a general description of their clothes, because that was a condition presumably existing at the time of the call. The anonymous tip did not contain facts which are ordinarily not easily predicted, but which would have demonstrated a familiarity with Barnette's behavior. Additionally, when the officers stopped Barnette, they had not corroborated the tip by independent investigation sufficient to furnish reasonable suspicion that Barnette was engaged in criminal activity.

One discriminatory strike sufficient to establish *Batson* violation

Ex parte Bankhead, 27 ABR 2571 (April 16, 1993), Ex parte Carter, 27 ABR 2597 (April 23, 1993). In two cases with varying results, the supreme court once again acknowledged a single instance of racial discrimination, *i.e.*, the prosecution's use of one peremptory strike in a racially discriminatory manner, is sufficient to establish a *Batson* violation.

In *Bankhead,* the court held that the prosecutor's removal of a black juror based on an "unexplainable gut reaction that he was bad" was not sufficiently race neutral so as to rebut Bankhead's prima facie showing of racially discriminatory jury strikes and ordered that Bankhead's capital murder conviction and death sentence be reversed. The court acknowledged that a trial court's rulings with regard to Batson violations were entitled to great deference, but in this instance, the trial court's determination that no Batson violation occurred was "clearly erroneous".

In *Carter,* the court noted that although the trial judge had erroneously concluded that a single instance of racial discrimination was insufficient to establish a *Batson* violation, the trial court's finding that the prosecutor had not engaged in any "purposeful discrimination" was not clearly erroneous and upheld Carter's convictions for first degree robbery and attempted murder.

BANKRUPTCY

Supreme Court rules on "excusable neglect" with reference to late filed claims

Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership, 61 U.S.L.W. 4263 (1993 W.L. 79640—S.Ct.), March 24, 1993. Although this case has already been reported extensively in bankruptcy publications, it may be very useful to the non-bankruptcy practitioner who may fail to file a claim prior to the claim's bar date (or by analogy misses any other deadline established by the Bankruptcy Code or Rules).

In *Pioneer,* an experienced bankruptcy lawyer overlooked the bar date for filing a proof of claim for a substantial creditor. The attorney was moving from one firm to another, and missed noting the bar date which was set out on the notice of the §341 creditors meeting.

David B. Byrne, Jr.

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

Wilbur G. Silberman

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

Although Bankruptcy Rule 9006(b)(3) limits the bankruptcy court's authority to extend the claims bar date and precluded any extension in this case, the attorney attempted a late filing on the theory of "excusable neglect" as provided in Bankruptcy Rule 9006(b)(1). The case went through the various steps of the court system from the bankruptcy court to the district court to the Sixth Circuit. The Sixth Circuit held that in determining whether to grant an extension of time to allow a claim filed late, certain guidelines or factors must be considered, to wit:

Prejudice to the debtor;

An impact on efficient court administration;

Delay beyond the reasonable control of the person who had the duty to perform;

Good faith by the creditor; and

That the failure resulted from negligence, indifference, or culpable conduct either from the counsel to the creditor or the creditor itself.

The Supreme Court adopted the first four, but said that the last was not acceptable as creditors are accountable for the actions of their attorneys. The Court ruled that the proper focus is upon whether the neglect was excusable. The Court examined the notice which was sent to all creditors and decided that it was faulty since the bar date had been placed in a peculiar and inconspicuous place in the notice, and the wording did not indicate the significance of the bar date. The Court also found that no prejudice had been caused to the debtor and that the creditor had not acted in bad faith. Thus, in a five-four decision, the Court held that the neglect was excusable.

The dissent from Justice O'Connor was quite strong. She stated that the issue of excusable neglect depends upon cause and fault, that if the failure is not blameless the consequences are irrelevant.

In footnote four of the majority opinion, the Court states that the excusable neglect standard of Bankruptcy Rule 9006(b)(1) concerns Chapter 11 cases only. This escape valve does not apply to Chapter 7 cases, and probably not to cases under Chapter 12 or 13. Although this case will allow much litigation for a court to determine excusable neglect, the law has not greatly changed.

Unsecured creditors committee circumvents priority creditors

In re SPM Manufacturing Corp., 984 F.2d 1305 (First Cir. 1993). The creditors' committee, representing over $5 million of unsecured debt, made an agreement with the primary secured creditor whereby such creditor and the committee could take action to replace the CEO of the debtor, jointly agree upon a plan of reorganization, and work together to reach agreements on other details of the plan. In return, the secured lender would allow the unsecured creditors class certain percentages of its recovery, to-wit: 10 percent on the first $3 million, 20 percent on the next $3 million, 30 percent on the next $3 million, 40 percent on the next $3 million, and 100 percent on anything additional. The agreement primed the IRS and potential insider creditors. After conversion of the Chapter 11 case, the Chapter 7 trustee sought to set aside the proposed distribution. The bankruptcy judge held in favor of the trustee, stating that the parties could not agree on a distribution contrary to the priority section of the bankruptcy code, and the district court affirmed. On further appeal, the First Circuit reversed, stating that the secured creditor could deal with the proceeds as it wished since they belonged to it and, thus, were not subject to the control of the bankruptcy court. The circuit court also stated that the creditors' committee is not a fiduciary for the entire estate but only for the unsecured creditors. In response to the argument that the agreement between the committee and the creditor was in conflict with general bankruptcy law and policy, the Court ruled that a committee must act in good faith and without ulterior motives, such as aiding competing businesses, acting out of malice, and forcing higher payments from the estate. The Court upheld the agreement in this instance because the committee was only obtaining a share of what otherwise was going to the secured party and did not hurt anyone else.

U.S. Supreme Court allows counterclaim in freight undercharge suits

Reiter v. Cooper, 113 S.Ct. 1213 (1993). For attorneys who have been victims of the trustees of bankrupt freight companies suing for undercharges, if you paid without a fight you should be sorry. The Supreme Court now has ruled that in such action brought by the trustee, the shipper may file a counterclaim on the basis that the data on file with the FCC was not reasonable. Prior cases,principally Maislin Industries v. Primary Steel, 497 U.S. 116 (1990), had held that a ship-per could not claim a defense of "an unreasonable practice" in an action based upon the freight undercharge. The Interstate Commerce Act requires that carriers publish and file tariff rates with the Commission. After the deregulation of the industry, it became common practice for the carriers to negotiate with the shippers, then upon the carrier bankrupting, the trustee or debtor-in-possession under Chap-ter 11 filed for the difference between the actual charge and the established rate.

In the instant case, the shipper claimed not that the practice was unreasonable, but, rather, that the filed tariff rates were unreasonable. The Interstate Commerce Act requires that such rates be reasonable, and it allows shippers a cause of action for repara-tion damages of the differences between what is filed and what is reasonable. Here, the Fourth Circuit, following Maislin, held that the "filed rate" doctrine militated against this shipper seeking relief for reparation damages in the same action as a claim against the shipper on the freight under-charge. This ruling was reversed by the Supreme Court which allowed the reparations claim as a counterclaim to the trustee's freight undercharge claim. It also said that Rule 54(b) F.R.C.P., as to a separate judgment, was within the discretion of the Court, and would be appropriate for a solvent carrier but not for an insolvent one, or one in bankruptcy. The Court stated that the doctrine relative to the filed rate embodies the principle that a shipper is not able to avoid payment of the tariff rate, by using the common law defenses of prior agreement as to a different rate, or estoppel, but that such doctrine does not prohibit using the statutory reparations claimas an affirmative defense or counterclaim. ■

LEGISLATIVE WRAP-UP

By ROBERT L. McCURLEY, JR.

The Alabama Legislature adjourned May 17, 1993 after passing Law Institute bills to amend the Administrative Procedure Act, revise the Probate Procedure Law and enact a new Limited Liability Act.

Failing to receive final passage were reapportionment of the Legislature and tort reform bills. Dying in the Senate were bills to set the percentage of contingency fees attorneys can receive; limiting punitive damages to five times compensatory damages, not to exceed $250,000; limiting contributions to judges; limiting a manufacturer's extended liability; and limiting time periods for suits against architects and engineers.

Administrative Procedure Act (H-93) (Act 93-627)

The act, effective July 1, 1993, amends §§41-22-5, 41-22-6, 41-22-12, 41-22-20, and 41-22-22. The clarifying amendments relate to the comment period for proposed rules, completion of notice and effective date of rules, judicial review, and time for taking appeals. New provisions were included to allow for subpoenas, discovery and protective orders. Further, new proposed rules must be accompanied by a fiscal note, a note on the effect the regulation will have on competition, and the effect the regulation will have on the environment and public health.

This bill was sponsored by Representative Jim Campbell of Anniston and Senators Frank Ellis of Columbiana, Ryan deGraffenried, Jr. of Tuscaloosa, John Amari of Birmingham and Walter Owens of Centerville.

Probate Procedure (H-193) (Act 93-722)

This act is effective January 1, 1993. It codifies the present law that upon death the deceased person's real property passes to the heirs while personal property passes to the personal representative to be distributed to the heirs. Unless a will provides otherwise, the personal representative will usually have to file an inventory within two months and execute a bond or give collateral generally equal to the amount under the personal representative's control, less the value of property that only can be sold or conveyed with court authority. Even though the bond is waived in a will, it may, nevertheless, be required under limited circumstances, such as the likelihood of waste occurring otherwise.

The act parallels the conservatorship law in that it enumerates actions that the personal representative may take

without prior court approval unless the will or court specifically otherwise restricts the action. It further enumerates action that may only be taken with prior court approval when not expressly authorized in the will. There is a specific requirement for the court to approve the sale of real estate.

Another major change by this act is to provide that a personal representative is entitled to a reasonable compensation for services. The court must approve fees using specified factors similar to those enumerated by the Alabama Supreme Court by Rules of Professional Conduct, Rule 1.5 for reasonable attorney's fees.

The probate bill was sponsored by Representative Marcel Black of Tuscumbia, Representative Jim Campbell of Anniston, Senator Doug Ghee of Anniston, Senator Don Hale of Cullman, and Senator Michael Figures of Mobile.

Limited Liability Company Act (S-549) (Act 93-724)

The Limited Liability Company Act will become effective October 1, 1993. It is a hybrid entity that combines the beneficial tax status of a partnership with the limited liability afforded by corporate structures. Under the current federal taxing structure, a limited liability company can be treated as a partnership rather than as a corporation. Thus, the double taxation of members of a limited liability company is avoided.

A limited liability company is formed when two or more persons file articles of organization. Articles of organization are very similar to articles of incorporation that are filed under the Alabama Business Corporation Act. Filing of documents is very similar to that of the business corporation act in that they are initially filed with the local probate judge's office.

Generally, the management of a limited liability company is vested in its members. However, the articles of organization may vest management of the company in one or more managers who then have the power to manage the business of the company.

Similar to a business corporation, the liability of a member of a limited liability company is limited to his or her contribution. However, if the LLC involves performing professional services, the individual who performs the services will still be liable for any negligence or wrongful act or omission in the same manner as if that individual rendered the services as a sole practitioner.

The bill further provides that foreign limited liability companies may be registered in Alabama provided they pay certain fees and meet certain requirements.

Furthermore, the bill provides that a limited liability company may merge or consolidate with other limited liability companies or other business entities.

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This bill was sponsored by Senator Steve Windom of Mobile and Representative Hugh Holladay of Pell City.

Courts

The Legislature passed two acts affecting the appellate courts. Senate Bill 303 (Act 93-346) created two additional judgeships on the court of civil appeals and provides the first judges to fill the judgeships be elected. The second bill, S-304 (Act 93-345), amends §12-2-7 to authorize the supreme court to transfer to the court of civil appeals certain civil cases appealed to the supreme court.

Child support

House bill 280 (Act 93-321) amends §30-3-61 relating to income withholding order for child support. House bill 419 (Act 93-325) makes the willful violation of any provision of a temporary or permanent protection order or restraining order involving domestic relations or family violence will be a Class A Misdemeanor with additional mandatory minimum penalties.

Crime bills

House bill 3 (Act 93-327) and House bill 4 (Act 93-719) provides new crimes for offenses relating to animals used in research and unlawful killing of livestock. House bill 14 (Act 93-720) requires motorists to use lights on motor vehicles when windshield wipers are in use as a result of rain, sleet or snow. House bill 508 (Act 93-352) provides for the suspension of the driver's license of anyone convicted of violating drug crimes. House bill 322 (Act 93-323) imposes an additional $100 assessment on persons convicted of driving under the influence to be deposited in the Impaired Drivers' Trust Fund. Senate bill 94 (Act 93-672) requires parents to insure that a child enrolls in and attends school. Senate bill 100 (Act 93-676) provides that a person who is guilty of shoplifting must pay the full retail value of the merchandise if it is not recovered in its full retail merchantable condition, pay additional damages to the retailer of $200, and pay an attorney's fee. Parents of shoplifting children are civilly liable for their children's shoplifting up to $750. Senate bill 219 (Act 93-606) provides for a new offense of sexual torture and makes the offense a Class A Felony. Senate bill 422 (Act 93-677) revises the present bail system for bail bondsmen. Senate bill 503 (Act 93-203) amends §8-19-5 relating to the deceptive trade practice law.

Annual meeting

The Alabama Law Institute's annual meeting will be held at 4 p.m., Thursday, July 15, 1993, at the Stouffer Riverview Plaza Hotel in Mobile during the state bar's annual meeting.

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

	Senate	House
General Bills		
Introduced	513	665
(passed)	(64)	(116)
Local Bills		
Introduced	83	255
(passed)	(27)	(156)
Appropriation Bills		
Introduced	80	87
(passed)	(8)	(61)
Total Bills		
Introduced	676	1,007
(passed)	(99)	(333)

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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Walker County Bar Association

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Notice

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Rules Governing Attorney Discipline in the United States Court of Appeals for the Eleventh Circuit (Addendum Eight) took effect October 1, 1992, following public notice and opportunity for comment pursuant to 28 U.S.C. @2071(b). Pursuant to Rule 2.A. of the rules, the nine persons named below have been appointed to the Committee on Lawyer Qualifications and Conduct. On referral by the Chief Judge, this committee investigates alleged misconduct by members of the 11th Circuit bar and recommends to the Court appropriate disciplinary action to be taken. Membership on this committee will change from time to time.

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