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PRACTICE TIP

MANDAMUS REVIEW

In addition to various exceptions to the final judgment rule, certain interlocutory orders of federal courts are subject to petitions for the writ of mandamus. Mandamus review in federal courts is available only where certain prerequisites are met. Our Appellate Focus Team recently published an article, [The Use of Mandamus in Federal Courts](#), in the ABA Appellate Practice Journal. This article describes the contours of mandamus review and the types of orders that generally are and are not subject to mandamus review in federal courts.

<http://www.balch.com/files/Publication/b047212e-3f55-4ff4-bf2b-0288b10b7e43/Presentation/PublicationAttachment/8f82b142-fddb-448d-8624-05e696063a0f/HadenThe%20Use%20of%20Mandamus%20in%20Federal%20Courts.pdf>

DECISIONS ISSUED ON AUGUST 21, 2009

SUPREME COURT OF ALABAMA

Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C., No. 1070296 [*Arbitration: "Procedural arbitrability," such as satisfaction of conditions precedent to an obligation to arbitrate, must generally be decided by the arbitrator, not a court.*] (Bolin, J., 5-0).

Ex parte Sellers, No. 1071716 [*Jury Demand: A jury demand must be served within 30 days of the last answer filed by any defendant.*] (Lyons, J., 5-0).

Lindsey v. Deep South Properties, LLC, No. 1080701 [*Arbitration: Failure to file a motion to vacate a judgment entered by a trial court clerk on an arbitration award within 30 days of the entry of judgment precludes appellate review of the judgment.*] (Stuart, J., 5-0).

McDermont v. Tabb, No. 1071536 [*Service of Process: Burden is on plaintiff to show that certified mail delivery was made to the named addressee defendant or his agent.*] (Stuart, J., 5-0).

Ex parte Progressive Specialty Ins. Co., No. 1080366 [*Procedure: A trial court has no jurisdiction to entertain a motion to amend pleadings to add new claims after a final judgment has been entered.*] (Shaw, J., 5-0).

Free v. Lasseter, No. 1080310 [*Legal Malpractice: There is only one cause of action against legal service providers and it is found in the Legal Services Liability Act.*] (Woodall, J., 5-0).

Ex parte Wallace, Jordan, Ratliff & Brandt, L.L.C., No. 1080716 [*Alabama Procedure: A trial court's order reinstating an action pursuant to Rule 60(b) must be vacated if none of the conditions listed in Rule 60(b) are satisfied.*] (Woodall, J., 5-0).

Hunter v. Mooring Tax Asset Group, LLC, No. 1080335 [*Malicious Prosecution: Summary judgment was improperly entered where there was a question of fact as to whether the defendant acted without probable cause and with malice in bringing suit against the plaintiffs.*] (Lyons, J., 5-0).

DECISION ISSUED ON AUGUST 25, 2009

Jefferson County Commission v. Edwards, No. 1080496 [*Political Question: Determining whether a bill receives a sufficient number of votes, pursuant to the Legislature's procedural rules, is a nonjusticiable political question. Any judicial decision declaring enactment of such bill unconstitutional is void.*] (Lyons, J., 5-0).

CASE SUMMARIES

SUPREME COURT OF ALABAMA

Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C., No. 1070296. Defendant contracted with plaintiff to construct two buildings. When a dispute arose concerning the amount owed to defendant under the parties' contract, defendant submitted a demand for arbitration to the American Arbitration Association. Plaintiff moved to dismiss the arbitration and filed an action to enjoin the arbitration proceeding. The trial court denied defendant's subsequent motion to compel arbitration for failure to satisfy the parties' contractual prerequisites to arbitration: (1) submission of claims to the architect; and (2) a written request for mediation. On appeal, the Alabama Supreme Court reversed. Questions of "substantive arbitrability" – validity of agreement, whether the dispute is covered – are decided by the court. The arbitrator, on the other hand, must decide questions of "procedural arbitrability". Relying upon [Howsam v. Dean Witter Reynolds, Inc.](#), 537 U.S. 79 (2002), the Court held that the satisfaction of conditions precedent to invoking arbitration are "procedural" matters for the arbitrator to decide. An exception exists where "a claim [i]s strictly procedural and it should operate as a complete bar to arbitration." However, the exception does not apply where, as here, a factual dispute exists as to whether a party failed to comply with the procedural requirements for arbitration.

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Ex parte Sellers, No. 1071716. Kenneth and Sharron Sellers filed a lawsuit for trespass against several individuals and businesses. Their complaint did not demand a jury trial. Shortly thereafter, counsel for each of the defendants filed notices of appearance, but none of the defendants answered the complaint at that time. Nearly four months later, but before all of the defendants had answered the complaint, the Sellers filed and served a demand for a jury trial. The remaining defendants quickly answered the complaint and moved to strike the Sellers' jury demand as untimely. After the trial court granted the motion to strike, the Sellers petitioned the Alabama Supreme Court for a writ of mandamus. On review, the Court noted that Rule 38 allows any party to demand a jury trial, provided that it makes that demand in writing at any time after the complaint is filed, and not later than 30 days after the service of the last pleading "directed to such issue." The Court explained that the complaint and answer are the only such pleadings; thus, a jury demand must be served within 30 days of the last answer filed by any defendant. Here, the Sellers served their jury demand *before* all of the defendants had answered their complaint. Accordingly, the Court issued the writ and directed the trial court to vacate its order striking the Sellers' jury demand.

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Lindsey v. Deep South Properties, LLC, No. 1080701. Plaintiff contracted with Defendant to construct a custom built home. The contract contained a provision requiring the parties to resolve any disputes that arose regarding the construction via arbitration proceedings. A dispute arose that eventually culminated in an arbitrator awarding a judgment in favor of Plaintiff and against Defendant. Plaintiff filed a copy of the arbitration award with the circuit court and moved the court to enter a judgment based upon that award. The circuit clerk entered a judgment on the arbitration award in favor of Plaintiff. Defendant did not move the court to vacate the judgment. Instead, Defendant filed a notice of appeal. The Supreme Court dismissed the appeal because Defendant failed to file a motion to vacate the judgment within 30 days of the entry of the judgment, which is a legal prerequisite to the right to appeal a judgment entered on an arbitration award.

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McDermont v. Tabb, No. 1071536. Plaintiff sued defendant alleging breach of a real-estate contract. Plaintiff served Defendant via certified mail at a Huntsville address. After defendant failed to respond within the statutory 30-day period, plaintiff moved for a default judgment. The trial court granted the motion. Thereafter, Defendant moved the trial court to vacate the judgment pursuant to Ala. R. Civ. 60(b) on the grounds that the third-party who signed the certified mail receipt was not authorized to accept service on behalf of the Defendant. The trial court denied Defendant's motion, and he appealed. On appeal, the Alabama Supreme Court, in reversing the trial court, held that Plaintiff failed to put forth evidence that Defendant was properly served by certified mail pursuant to Ala. R. Civ. P. 4(c)(1). The Court noted that, while the Plaintiff presented a signed certified mail receipt, the receipt merely demonstrated that the summons and complaint were mailed to a certain address and signed by the signor. It did not create a presumption that the signor was the Defendant's agent.

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Ex parte Progressive Specialty Ins. Co., No. 1080366. In 2006, Marvin Leatherwood was involved in a motor vehicle collision with a dump truck owned by Blakeney Company, LLC and sued Blakeney for negligent entrustment and negligent hiring, supervision and training. Blakeney maintained a commercial insurance policy with Progressive, which provided Blakeney with defense counsel. The case was tried to a jury verdict in 2008 with an award of \$200K in compensatory damages and \$225K in punitive damages. The trial court entered a final judgment on the jury verdict. Progressive tendered payment to Leatherwood for the compensatory damages portion of the verdict but refused to indemnify Blakeney for the punitive damages portion of the verdict. Blakeney subsequently filed a cross-claim against Progressive for bad faith and breach of contract. Blakeney also filed a third-party claim against Pritchett-Moore, the agency who sold it the Progressive policy, for failure to procure insurance. Progressive and Pritchett-Moore filed motions to dismiss the post-judgment claims, but the trial court denied these motions. Progressive and Pritchett-Moore thus filed the present petition for writ of mandamus, challenging the trial court's jurisdiction over the post-judgment claims. The crux of the petitioners' arguments is that a trial court lacks jurisdiction to accept an amendment to pleadings adding new claims after the trial court has entered a final judgment. The Supreme Court of Alabama agreed. Citing [Faith Properties, LLC v. First Commercial Bank](#), the Court held that a trial court has no jurisdiction to allow amendments to pleadings to add new parties or claims after a cause has been finally adjudicated unless the trial court's judgment is set aside or vacated. Accordingly, the Court determined that the trial court did not have jurisdiction to accept amended pleadings and that those pleadings were due to be stricken and dismissed.

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Free v. Lasseter, No. 1080310. Dorothy Free filed suit against her attorney, Alan Lasseter, and his law firm alleging various causes of action based on a contingency fee that she alleged was improper. Lasseter and the firm moved to dismiss each of Free's claims on grounds, among others, that Free's complaint was essentially one for legal malpractice and that there is only one cause of action against legal service providers, which is embodied in the Alabama Legal Services Liability Act (the "Act"). Following dismissal by the trial court and affirmation by the Court of Civil Appeals, the Alabama Supreme Court reversed and remanded. The Court agreed that Free alleged legal malpractice but determined that the complaint stated a claim under the Act. On remand, Lasseter and the firm moved for summary judgment arguing that Free's complaint was, in substance, one for fraud and that Free failed to establish the required element of reasonable reliance. The trial court entered summary judgment in favor of Lasseter and the firm, but nevertheless awarded to Free a portion of the attorneys' fees held by Lasseter and the firm. On appeal by Free and cross appeal by Lasseter and the firm, the Alabama Supreme Court reversed and remanded again, holding that the trial court erred in recasting Free's legal malpractice claim as one for fraud. Instead, the trial court should have recast the cause of action against legal service providers, found in the Act, and it embraces and supersedes every other form of action. Because Lasseter and the firm focused solely on the elements of fraud, offering no argument as to the allegations of legal malpractice and no evidence on the applicable standard of care, they failed to make a prima facie showing under the Act and summary judgment was therefore improper.

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Ex parte Wallace, Jordan, Ratliff & Brandt, L.L.C., No. 1080716. Petitioners in this mandamus action were defendants in an underlying lawsuit that was filed by the respondents in the Circuit Court of Jefferson County. Petitioners moved to dismiss the complaint on the grounds that several related cases were pending in Jefferson and Shelby counties. The trial court granted petitioners' motion to dismiss "without prejudice to the plaintiffs' ability to prosecute their claims in other [previously filed] actions... based on the same nucleus of facts." Fifty-seven days later, the respondents moved the trial court for an order reinstating the matter to the active trial docket. Petitioners objected to the motion, arguing that there were no grounds that would justify reinstatement of the case. The trial court granted respondents' motion and reinstated the case. Petitioners filed a petition for a writ of mandamus under the Supreme Court of Alabama asking the Court to direct the trial court to set aside its order reinstating the case. Specifically, petitioners argued that the trial court exceeded its discretion by reinstating the action because respondents did not allege any basis under Rule 60(b) which would entitle them to such relief. The Supreme Court agreed, holding that respondents had failed to cite or set forth any grounds under Rule 60(b) that would support reinstatement of the action. Accordingly, the Supreme Court issued a writ of mandamus ordering the trial court to set aside its order reinstating the underlying action.

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Hunter v. Mooring Tax Asset Group, LLC, No. 1080335. The Mobile County Revenue Commissioner sold the property identified as Parcel 70.02 to the defendant because the owner failed to pay taxes on the property. The Commissioner's records incorrectly identified Parcel 70.02 as being located at the same address as property owned by the plaintiffs. Defendant contacted plaintiffs to obtain possession of the property and on three different occasions plaintiffs informed defendant that the plaintiffs did not own Parcel 70.02. Defendant sued plaintiffs seeking to quiet title and to obtain possession of Parcel 70.02. As the litigation progressed, defendant discovered that plaintiffs did not in fact own Parcel 70.02 and moved to dismiss the action with prejudice. The trial court granted the defendant's motion for summary judgment and the plaintiffs appealed to the Alabama Supreme Court. The Court found that there was a question of fact as to whether the defendant acted without probable cause and with malice in bringing the suit against the plaintiffs. The Court therefore reversed and remanded the case back to the trial court.

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Jefferson County Commission v. Edwards, No. 1080496. Plaintiff taxpayers filed class action against defendant county commission and several county officials challenging county's occupational tax. The trial court certified a class and subsequently entered summary judgment in favor of taxpayers. The Supreme Court affirmed. The county was originally given the authority to impose occupational taxes in 1967 by Act No. 67-406. In 1999, the Alabama legislature passed Act No. 99-406, which authorized the county to levy an occupational tax, but did not repeal the 1967 act. Act No. 99-406 was declared unconstitutional because the Alabama constitutional requirements for publication and proof of notice were not met. The Alabama legislature passed Act No. 99-669, which expressly repealed Act 67-406. Act No. 99-669 was declared unconstitutional, and its repeal of Act 406 void, for failure to receive sufficient votes in the legislature. The Alabama Supreme Court held that the circuit court lacked subject matter jurisdiction to interpret the meaning of a two-thirds majority vote in the legislature. That holding was retrospective. The determination whether a bill receives a sufficient number of votes pursuant to the Legislature's procedural rules is a nonjusticiable political question. Therefore, the holding that Act No. 99-669 was invalid was void. Act No. 99-669's clear statutory language provided that Act No. 67-406 "is repealed," and the Supreme Court refused to look beyond that conclusive statutory language. The Supreme Court rejected as moot the county's argument that Act No. 99-669's repeal of Act No. 67-406 violated the Contracts Clause because the county had made its last payment under the agreements at issue prior to the trial court's judgment. The Supreme Court refused to consider arguments the county raised for the first time in its appellate reply brief, and affirmed judgment in favor of the taxpayers.

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