



QUARTERLY BYTES

FEES & BURGESS, P.C.



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2009 Alabama Legislative Update

Fees & Burgess, P.C.,
Emphasizes:

A law passed that would add an additional judgeship for the Madison County Circuit Court. The Madison County Commission has pledged to fund the position for the fiscal year 2010 at a cost of about \$425,000. In the fiscal year 2011, Alabama Supreme Court Chief Justice Sue Bell Cobb will assume the cost in the state courts' budget.

A bill that strengthens penalties for those who flee from law enforcement officers was also signed into law. This law makes intentionally eluding an officer by any means punishable by up to one year in jail and a fine of up to \$2,000. If a person is harmed or killed during the chase, the crime becomes a felony punishable by up to ten years in prison and a fine of up to \$5,000. Additionally, those who attempt to elude officers will have their driver license suspended from six months to two years.

Another law that passed requires justices on the Alabama Supreme Court and judges on the Court of Civil Appeals and Court of Criminal Appeals be licensed lawyers for at least ten years. This law also requires that candidates have at least five years of experience as a licensed lawyer to be a circuit court judge, and at least three years of experience to be a district court judge. Previously, Alabama judges were only required to be licensed lawyers.

With the goal of recruiting new jobs to the state, a law passed that would permit industries other than manufacturing to be eligible for the state's economic incentives. At present, most of the incentives are limited to manufacturing jobs.

A bill that would have provided financial help to the Prepaid Affordable College Tuition Program (PACT) failed to pass. The bill would have allowed voters to decide whether to make the directors of the Alabama Trust Fund lend \$150 million dollars over five years to the PACT program. Another related PACT bill that would have required the legislature to provide enough money each year to ensure the financial health of PACT did not pass.

An NRA-supported bill prohibiting business and industry owners from establishing policies or rules restricting or prohibiting employees from storing firearms in vehicles while on business property likewise did not pass.



General Civil Litigation

Commercial Law & Litigation

Municipal Law & Litigation

Police Civil Liability Defense

Employment Law & Litigation

Construction Litigation

Corporate Law & Government Contracting

Insurance Defense

Railroad Law

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**LITIGATION SPOTLIGHT****United States Supreme Court Revisits
Search-Incident-To-Arrest Rule in Arizona v. Gant**

In Arizona v. Gant, No. 07-542 (U.S. April 21, 2009), the United States Supreme Court revisited the search-incident-to-arrest rule set forth in New York v. Belton, 453 U.S. 454 (1981). Courts and law enforcement agencies have long interpreted Belton to permit a blanket search of a vehicle's passenger compartment, including any container within the passenger compartment, in conjunction with an arrest, even after the arrestee is secured. This rule has been altered by Gant.

Gant was arrested for driving on a suspended license. He was handcuffed and locked in a patrol car before officers searched his car. During the search of the car, police officers found cocaine in the pocket of a jacket in the backseat. Gant was charged with two offenses – possession of a narcotic drug for sale and possession of drug paraphernalia. Gant argued that the evidence seized from his car should be suppressed because the search of his vehicle was unconstitutional. Particularly, Gant argued that Belton did not authorize the search of his vehicle because he posed no threat to the police officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle. The United States Supreme Court agreed with Gant.

In its analysis, the United States Supreme Court distinguished Belton from Gant. In Belton, a police officer had been confronted with four suspects in a vehicle that smelled of marijuana. The police officer was alone, had only one pair of handcuffs, and was unable to secure all of the suspects. A search of the passenger compartment yielded a baggie of marijuana and cocaine. The United States Supreme Court found the search of the passenger compartment incident to arrest constitutional under these facts.

Conversely, in Gant, the United States Supreme Court noted that Gant was arrested for driving without a license and was handcuffed in the back of a patrol car when the passenger compartment of his car was searched. Furthermore, the arrestees on the scene were outnumbered by police officers. Because there was no possibility of Gant accessing the passenger compartment of his car during the search, nor the likelihood of discovering offense-related evidence, the United States Supreme Court declared the search unconstitutional. Accordingly, the United States Supreme Court held that police officers may search the passenger compartment of a vehicle incident to a recent occupant's arrest, but only if it is reasonable to believe that (1) the arrestee might access the vehicle at the time of the search (that is, an unsecured arrestee is within reaching distance of the passenger compartment); or (2) the vehicle contains evidence of the offense of arrest.

Gant is significant because it changes the long-standing search-incident-to-arrest rule set forth in Belton, which has been followed by law enforcement agencies and courts across the United States for over twenty years. Thus, it is imperative that law enforcement agencies take the time to train their police officers on the nuances of the new rule promulgated by Gant. Failure to do so could lead to illegal vehicle searches by police officers, which in turn will result in lost criminal convictions due to the suppression of incriminating (yet improperly seized) evidence, as well as potential civil liability for the law enforcement officers and agencies involved.



HR CORNER

Supreme Court Enforces Arbitration Requirement in Union Contract

In an April decision, the U.S. Supreme Court upheld the mandatory arbitration provisions in a collective bargaining agreement (CBA) and overturned lower court decisions that deemed the arbitration provisions to be unenforceable. The case involved local security personnel employed by Temco Service Industries (Temco) at Penn Plaza in New York City. After the September 11, 2001, terrorist attacks, Penn Plaza decided to enhance security measures through an outsourced company. As a result, Temco transferred all of its in-house security personnel to other positions, many of which were lower-paid positions involving work unrelated to security. The affected employees sued Temco and Penn Plaza for employment discrimination under the Age Discrimination in Employment Act (ADEA), based on their transferred job positions. Service Employees International Union, Local 32BJ (Union), represented the security workers. The Union's CBA with Penn Plaza required binding arbitration for all grievances and disputes, including, specifically, any employee claims under the ADEA.

Despite the CBA, the employees filed suit in federal court, and Penn Plaza moved to compel arbitration pursuant to the terms of the CBA. The district court denied the motion and held that the CBA provision was unenforceable, despite its determination that the provision was clearly and unmistakably union-negotiated. The Second Circuit Court of Appeals affirmed, stating that a CBA cannot waive rights to a judicial forum and require arbitration for causes of action created by Congress (such as causes of action under the ADEA).

The Supreme Court reversed. In allowing arbitration and denying use of the judicial system, the Court held that unions may expressly waive their rights to a judicial forum. Of course, the waiver must be made in good faith and voluntarily negotiated. But, absent any coercion or other related issues, any binding arbitration requirements in a CBA should be upheld and the employees' only option will be use of the binding arbitration process for dispute resolution.

The Supreme Court specifically notes that the CBA's arbitration provision governed any employee ADEA claims. Previous Supreme Court case law has allowed employees to continue suits in federal court where the arbitration language did not reference the employees' specific statutory claims. As such, the precise language used in a CBA will be key in determining whether employee claims are subject to binding arbitration or whether they may be brought in the federal court system.

14 Penn Plaza, LLC, v. Pyett, 129 S. Ct. 1456 (2009).





Proposed Sick Leave Law

On Monday, May 18, 2009, U.S. Representative Rosa DeLauro officially introduced the Healthy Families Act (Act), which could mandate paid sick leave for certain employers. The Act, if enacted, would require all employers with at least fifteen employees to provide paid sick leave to employees. Employees would earn one hour of sick leave for every thirty hours worked. The sick leave would apply to the employee's own illness, or that of various family members including spouses and children. Although the Act was introduced recently, employers should track progress of this proposed Act as it may significantly affect its benefit plans for employees.

The bill is H.R. 2460.

PROTECTIVE MEASURES

It's Alive!

The Alabama Court of Civil Appeals issued a recent opinion discussing the Alabama Litigation Accountability Act (ALAA), which allows for an award of attorneys' fees if the other party has brought suit or argued a defense that is without substantial justification. Mahoney v. Loma Alta Property Owners Association, Inc., 2009 WL 793120 (Ala. Civ. App. March 27, 2009).

In Mahoney, a condominium association (LAPOA) sued Carol Mahoney for unpaid dues and assessments, even though it knew her husband was the actual owner. The trial court initially ruled in favor of the LAPOA, but that decision was reversed. The trial court then entered judgment in favor of Carol Mahoney, but denied her claim for attorneys' fees under the ALAA. On the second appeal, the court decided that it could only review the trial court's denial of attorneys' fees to determine if the original claim was undisputedly groundless in fact or in law – an extremely difficult standard to meet. In Mahoney, the court found that the record demonstrated that the LAPOA's claim was entirely groundless in law because it knew that Carol Mahoney was not the owner of the condominium and that its contract only provided for an action against the owner.

Although the opinion demonstrates that courts will enforce the ALAA when appropriate, it also demonstrates the difficulty of challenging a trial court's decision regarding the ALAA. Accordingly, a claim under the ALAA should be brought sparingly and only when clear circumstances supporting such a claim exist.





Fees & Burgess, P.C.—Calendar of Events

Fees & Burgess, P.C., is proud to present, or participate in the presentation of, the following upcoming seminars:

June 11, 2009 — National Contract Management Association Audio Seminar Series

Contracting under the UCC: A Basic Primer to Articles 1, 2, and 2A. This session provides a practical introduction to the foundations of domestic commercial contracting. The session will feature discussion of risk management in several areas key to those buying or selling under the Uniform Commercial Code (UCC), including formation of commercial agreements and determination of applicable contract terms; performance issues under those agreements or terms, including risk of loss and delivery, acceptance, repudiation, warranties, and disclaimers; and, of course, disputes, remedies, and dispute resolution.

September 9, 2009 — Birmingham, Alabama, *Wage & Hour Master Class*, presented for, and sponsored by M. Lee Smith Publishing, Inc. One day packed with updates, interaction, and answers to your payroll-policy concerns.

For more information on these and other seminars, please go to <http://www.feesburgess.com/category/events-seminars/> or contact Sylvia Taylor at staylor@feesburgess.com.





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SPEAKERS

Fees & Burgess, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program contact Sylvia Taylor at staylor@feesburgess.com

NEWSLETTERS

Fees & Burgess, P.C., also publishes *F&B HR Corner*, focusing on human resource issues; and *F&B SCM Memo*, focusing on the supply chain management industry. To receive any of these e-newsletters, please e-mail Sylvia Taylor at staylor@feesburgess.com with your contact information.

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“No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”

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