



# QUARTERLY BYTES

FEES & BURGESS, P.C.



Volume 9, Issue 4

December 2011

## 2011 Alabama Legislative Update

The Alabama Legislature ended its 2011 regular session in June, and it passed a number of laws that affect the court system. Most of these new laws are considered tort reform and are intended to encourage businesses to come to Alabama.

SB 187 changes the standard which applies to expert witnesses in litigation. Previously, Alabama courts applied the Frye standard, which admitted expert scientific testimony if the methodology used by the expert was “generally accepted” in the scientific community. The new legislation applies the more restrictive Daubert standard currently used by federal courts in admitting expert scientific evidence. Under Daubert, an expert may testify if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the expert has applied the principles and methods reliably to the facts of the case.

Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

SB 212 changes the rule governing venue for wrongful-death actions. Previously, the plaintiff in a wrongful-death action often had a choice of the county in which to file his claim. Such a claim could be filed in the county where the wrongful act causing the death occurred, or it could be filed in the county where the estate’s administrator resided. Now, a wrongful-death claim may be filed only in a county where the decedent could have filed suit for his injury had he lived.

SB 184 prohibits products liability claims against a distributor, wholesaler, dealer, retailer, or seller of a defective or dangerous product, except in certain limited circumstances. The distributor will be liable only if it assembled, manufactured, designed, or modified the product before it reached the consumer.

SB 207 reduces the interest rate on uncollected judgments. Previously, Alabama applied a 12% interest rate to uncollected judgments. This new legislation reduces the annual interest rate to 7.5%.

SB 59 decreases the statute of repose applicable to claims against architects, engineers, or builders. The new law reduces the statute of repose from thirteen years to seven years for claims of defect or deficiency in the design, planning, specifications, testing, supervision, administration, observation of the construction, or the actual construction of a building. The law also affects the timing of filing claims for damage to property, personal injury, or wrongful death caused by such defect or deficiency. Since the statute of limitations for such claims is two years, an injured party effectively now has nine years after the completion of the building in which to bring a cause of action against an architect, engineer, or builder for such a claim.

### Alabama Appellate Court Addresses Collateral Source Rule

At common law, the collateral-source rule determined that evidence that a plaintiff's insurance company paid for medical treatments or other bills was irrelevant, and thus, inadmissible at trial. In 1987, the Alabama Legislature enacted section 12-21-45 of the Alabama Code, which provided that evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence. Alabama courts interpreted this section as abrogating the collateral-source rule. They began permitting defendants to introduce evidence to show that a plaintiff's medical bills were satisfied through insurance, finding section 12-21-45 was a controlling rule of substantive law.

However, in 2009, a number of Alabama Circuit Court judges ruled that evidence regarding the amount of medical payments made by a plaintiff's insurance carrier was not, in fact, admissible. They concluded that section 12-21-45 is not a substantive rule of damages but simply an evidentiary rule governing procedure. The judges ruled that section 12-21-45 was superseded by the Legislature's adoption of the Alabama Rules of Evidence in 1996. The controlling rule would now be Rule of Evidence 402, under which all irrelevant evidence is inadmissible. Any evidence that plaintiff's medical bills had been paid by insurance or another collateral source was inadmissible since it was not relevant to the issue of damages.

The Alabama Court of Civil Appeals quickly resolved the issue following these rulings by circuit court judges. In Crocker v. Grammer, the trial court granted the plaintiff's motion to suppress any evidence regarding payment of his medical expenses by his insurance company. The jury awarded the plaintiff damages in the amount of \$36,500, and the court entered a judgment in that amount. The defendant filed a motion for new trial asserting that the trial court had improperly prohibited her from offering evidence indicating that the plaintiff's medical bills had been paid by a collateral source, but this post-judgment motion was denied.

The Alabama Court of Civil Appeals reversed the decision of the trial court. Rule 402 of the Alabama Rules of Evidence states that irrelevant evidence is not admissible. Rule 401 states that "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without evidence." The trial court reasoned that section 12-21-45 conflicts with Rule 401 and 402 because it makes evidence of third-party payments of certain medical and hospital expenses admissible even though such evidence is not relevant. Section 12-21-45 modified the collateral-source rule to permit a jury to consider the effect of third-party payments of medical and hospital payments on a plaintiff's recovery. However, a jury can still determine if such a payment should affect the amount to be recovered. The Court of Civil Appeals concluded that adoption of the Alabama Rules of Evidence did not in any way diminish the effect of section 12-21-45. Thus, defendants will be now able to introduce evidence that a plaintiff's medical expenses have been paid by an insurance company or other collateral source.

Crocker v. Grammer, 2011 WL 3963008 (Ala. Civ. App. 2011)

## HR CORNER

### EEOC and OFCCP Coordinate to Share Employer Information

For the first time in approximately 12 years, the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) have issued a revised Memorandum of Understanding (MOU) to define the relationship between the two entities. Pursuant to previous MOUs, last issued in 1999, the EEOC and OFCCP had coordinated a method by which to share information about U.S. employers. The new MOU further defines this coordination, and adds the following details to the entities' relationship:

- The entities will share the following information on employers who perform government contracting functions, in an effort to support the enforcement mandates of each agency, “affirmative action programs, annual employment reports, complaints, charges, investigative files, and compliance evaluation reports and files.”
- The entities will establish a Coordination Committee to meet at least twice a year to review “enforcement priorities, systemic investigations of mutual interest, compliance review schedules, potential Commissioner Charges, and potential litigation.”

While the MOU does not directly affect employers, the MOU shows an increased vigilance by both agencies. Evidence of data between the two agencies, when viewed together, may create the impression of systemic issues that do not appear when analyzing each agency's data separately. As such, employers should continue to work diligently to enforce their company's equal employment opportunity policies and to properly complete any applicable Affirmative Action Programs as directed by the OFCCP.

## PROTECTIVE MEASURES

### An “Occurrence” vs. “Your Work” vs. “Subcontractor Exception” When Is Faulty Workmanship Covered

The Alabama Supreme Court clarified when defective workmanship creates coverage under a Commercial General Liability policy in Town & Country Prop., L.L.C., v. Amerisure Ins. Co., 2011 WL 5009777 (Ala. Oct. 21, 2011). The main issue was whether defective workmanship constitutes an “occurrence,” giving rise to coverage. In Amerisure, plaintiff (a car dealership) sued to recover damages for improper construction by Amerisure's insured. Amerisure denied coverage because it contended the damage was not caused by an occurrence and received summary judgment. The Court affirmed the summary judgment in part. However, the Court ordered the circuit court to determine what portion, if any, of the damages related to damage to other property. If other property was damaged, that damage constituted an “occurrence.” The Court also discussed the exclusion for “Your Work,” but noted that an exception to the exclusion allows coverage of damages associated with a subcontractor's work.

Plaintiffs (and insureds) should be familiar with the definition of an “occurrence,” as well as with the “Your Work” exclusion and any exceptions, to ensure that they obtain the insurance coverage for which they (or the defendant) bargained.

## FEES & BURGESS, P.C. — Calendar of Events

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

### **Fair Labor Standards Act Compliance: Common Pitfalls and How to Avoid Them**

**Date: January 11, 2012; 11:30 a.m. – 12:45 p.m.**

**Location: Fees & Burgess, P.C.**

Jeff Roth and Leah Green, of Fees & Burgess, P.C., will be presenting a special lunch and learn focusing on Fair Labor Standards Act Compliance. This program will last approximately 75 minutes and will focus on likely areas for misclassification of non-exempt employees, common misunderstandings related to payment on a “salary” basis, overtime payment and payments overlooked in calculating the regular rate, independent contractor versus employee, and other joint employer issues, recordkeeping requirements, and recent enforcement activity, primary industry targets, and enforcement focus.

The cost of this lunch and learn will be \$49.00, and will include lunch. This program has been submitted for one hour of HRCI credit.

---

### **Employment Law Survival Training for Managers: 10 Key Areas of Legal and Practical Knowledge**

**Date: January 19, 2012; 8:00 a.m. - 5:00 p.m.**

**Location: Fees & Burgess, P.C.**

This day-long program, presented by Jeffrey Roth, Leah Green, and Ryan Blount, is a must for training managers and supervisors to recognize and deal with challenging employee issues that arise daily in the workplace. Attendees will learn key aspects of critical issues and how to work with existing company policies to address and resolve them.

The 10 key areas covered in the program will include:

- The Employment Relationship
- Company Policies/Handbook/Code of Conduct
- Equal Employment Opportunity
- Medical Issues in the Workplace
- Hiring/Promotion
- Wages/Hours/Compensation
- Labor Relations/Union Free
- Occupational Safety and Health Act of 1970
- Conflict Management/Grievances
- Discipline/Termination

This highly interactive program includes discussion of real-life scenarios encountered by supervisors, and how, and how not, to respond to each scenario or crisis. This program is designed to help managers and supervisors from small and large businesses recognize high risk situations and minimize, or eliminate, those risks.

This program has been approved for 6.5 (General) recertification credit hours toward PHR, SPHR and GPHR recertification through the HR Certification Institute.

**2012 FMLA Master Class**

**Date: January 25, 2012**

**Location: Birmingham Marriott; Birmingham, Alabama**

This all-day event, scheduled for January 25, 2012, at the Birmingham Marriott in Birmingham, Alabama, is sponsored by M. Lee Smith Publishing and will be presented by Jeffrey Roth, Allen Anderson, and Leah Green of Fees & Burgess, P.C. This program is designed to help human resource professionals become even more proficient in FMLA administration and learn the latest compliance tactics.

Several specific areas of discussion will be covered, including:

- Recent FMLA Developments
- Serious Health Conditions and Collecting Medical Information
- Military Family Leave
- Meeting Notification Deadlines, Curbing Abuse, and Preventing Claims
- Advanced FMLA Issues
- Coordinating FMLA with ADA, Worker's Compensation, and State Family Leave Laws
- What May Be Happening Next

Registration for the event will begin at 7:30 a.m. and will include a continental breakfast. The program will begin at 8:30 a.m. and end at 4:30 p.m. For more information, or to register, please click [here](#).

This program has been approved for 6.25 recertification credit hours through the HR Certification Institute. For more information about certification or recertification, please visit the HR Certification Institute website at [www.hrci.org](http://www.hrci.org). This program has also been approved for 6.25 hours of CLE.

---

**Special Session: Contracting with the Customer: What the EMS Executive Needs to Know**

**Date: March 1, 2012**

**Location: San Diego, California (In conjunction with IPC APEX EXPO)**

Without a doubt, negotiating with OEMs is one of the biggest challenges facing the EMS executive. What needs to be covered in the contract? Is your company protected? What should you do if there is a dispute? This industry-unique workshop presented by Jeffrey L. Roth and Allen L. Anderson, of Fees & Burgess, P.C., addresses the specific issues EMS companies face while contracting. Participants will be led through the contracting lifecycle between an electronic manufacturing services (EMS) provider and its customer, starting with the initial engagement and signing of a nondisclosure agreement, through the bid process and formal contract negotiation, to resolution of disputes under the applicable contract(s). In addition, discussions will include acknowledging customer purchase orders, methods of limiting financial risk, boilerplate warranties, ways to shed or limit product liability, and a checklist for determining and managing high-risk areas in EMS customer contracts. Through real EMS situations, attendees will develop an understanding of the contracting process and the questions that must be answered before entering into an agreement.

To register, or for more information about the 2012 IPC APEX Expo, please click [here](#).

---

For more information on these and other upcoming events, please visit us online at [www.feesburgess.com](http://www.feesburgess.com), or contact us by e-mail at [seminars@feesburgess.com](mailto:seminars@feesburgess.com).

## Seminars

During these rough economic times, it is important to get the most for your money. The lawyers of Fees & Burgess, P.C., combined, have many years experience working in various fields, as both in-house and private counsel, representing a diverse clientele. Our attorneys have extensive experience in many areas of law, including employment law; intellectual property; supply chain management; mergers and acquisitions; contract negotiation; dispute resolution; and various other fields.

This wide field of knowledge provides our attorneys with the insight and know-how to be able to provide quality training on various topics. Our programs can be customized to fit any business need while keeping the costs of our training competitive, without sacrificing quality.

Topics that Fees & Burgess, P.C., can provide training on include, but are not limited to:

A Recession Era Guide to Collecting on Construction Contracts	Managing Gender Identity Issues in the Workplace
Conducting Effective Workplace Investigations	Negotiation and Resolution of Federal Contract Claims
Construction Contracting	Privacy in the Workplace
Contingent Employees and Labor Outsourcing	Reducing Employee Benefits Costs for Alabama Businesses
Diversity Training	Reducing Risk in Purchasing Terms and Conditions
Elements of an Electrical Manufacturing Services Contract	Reduction in Workforce Strategies
Employment Law Survival Training for Managers	Retaliation and Whistleblowers
Family Medical Leave Act	Uniform Commercial Code: Primer to Articles 1, 2, and 2A
Hiring and Firing	Violence in the Workplace
Immigration Compliance	Wage and Hour Issues/Fair Labor Standards Act
Incoterms® 2010	Americans with Disabilities Act
Indemnity and Limitation of Liability Contract Clauses	Managing Employee Use of Internet and E-mail in the Workplace
International Contracting	Ethics, Business Conduct and Compliance in Government Contracting
Limiting Liability for Sexual Harassment	

For more information on these and other programs, please visit us online at [www.feesburgess.com](http://www.feesburgess.com); contact us by e-mail at [seminars@feesburgess.com](mailto:seminars@feesburgess.com); or by phone at (256) 536-0095.



**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, please contact us at [seminars@feesburgess.com](mailto:seminars@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 provide your contact information to [newsletters@feesburgess.com](mailto:newsletters@feesburgess.com).

To remove your name from our mailing list, please contact us at [newsletters@feesburgess.com](mailto:newsletters@feesburgess.com).

**Michael L. Fees**  
[mfees@feesburgess.com](mailto:mfees@feesburgess.com)

**C. Gregory Burgess**  
[gburgess@feesburgess.com](mailto:gburgess@feesburgess.com)

**Allen L. Anderson**  
[anderson@feesburgess.com](mailto:anderson@feesburgess.com)

**Jeffrey L. Roth**  
[jroth@feesburgess.com](mailto:jroth@feesburgess.com)

**Stacy L. Moon**  
[smoon@feesburgess.com](mailto:smoon@feesburgess.com)

**FEES& BURGESS, P.C.**  
213 Green Street  
Huntsville, Alabama 35801

Telephone (256) 536-0095  
Facsimile (256) 536-4440

[www.feesburgess.com](http://www.feesburgess.com)

**Leah M. Green**  
[lgreen@feesburgess.com](mailto:lgreen@feesburgess.com)

**Ryan G. Blount**  
[rblount@feesburgess.com](mailto:rblount@feesburgess.com)

**Lauren A. Smith**  
[lsmith@feesburgess.com](mailto:lsmith@feesburgess.com)

**Allison B. Chandler**  
[achandler@feesburgess.com](mailto:achandler@feesburgess.com)

*Quarterly Bytes* should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only. Anyone needing specific legal advice should consult an attorney.

“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.”

© 2011 FEES & BURGESS, P.C.