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QUARTERLY BYTES

FEES & BURGESS, P.C.

Volume 8, Issue 1 March 2010

Supreme Court Reduces Restrictions on Corporate Campaign Financing

In a 5-4 decision dated January 21, 2010, entitled Citizens United v. Federal Election Commission, the U.S. Supreme Court reversed its prior stance regarding the constitutionality of campaign finance laws which prohibit corporations from making expenditures for "electioneering communications." These Federal campaign finance laws prevent corporations from funding certain advertisements that support candidates for federal office. In 2003, the Supreme Court upheld these restrictions in McConnell v. Federal Election Commission. McConnell relied in large part on a previous Supreme Court case from 1990, entitled Austin v. Michigan Chamber of Commerce.

At the heart of the Citizen United ruling is the Court's analysis of the constitutionality of Austin. Austin held that the government could place free speech restrictions on particular groups, namely corporations. In Austin, the Court determined that political speech may be banned based on the speaker's corporate identity. Thus, while the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech," the Court upheld finance laws which created an outright ban on speech for corporations and carried the potential penalty of criminal sanctions for violations of the same.

The Citizens United Court begins its analysis by noting that laws which burden free speech rights must be reviewed under "strict scrutiny," meaning that the government must show that the restriction on free speech "furthers a compelling interest and is narrowly tailored to achieve that interest." In Austin, the Court stated that the government had a "compelling interest" in preventing the distorting effects of corporate wealth that have no relationship to the public's support of a particular issue or political ideas. In Citizens United, the government again argued that this anti-distortion rationale supported a continued ban on the electioneering communications at issue. The government further argued that unrestrained corporate expenditures will give rise to corruption or the appearance of corruption in federal government.

The Citizens United Court disagreed with the government's arguments. Instead, it held that First Amendment protections should not depend on the speaker's financial abilities. Furthermore, the Court noted that a corporation's financial access to, or influence over, elected officials does not mean those officials are corrupt. As such, the Court held that there was no compelling interest in limiting the political speech of corporations, whether for-profit or non-profit.

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Fees & Burgess, P.C., Emphasizes:

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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Thus, the Court's ruling overturns approximately 20 years of precedent case law that limited corporate rights to advertise and fund electioneering communications. While Congress will likely review new laws designed to counter this holding, corporations now have significantly greater freedom to lobby and otherwise fund political messages.

LITIGATION SPOTLIGHT

Filing Copy of Judgment is Not Sufficient to Create a Lien against Property

The Alabama Supreme Court recently held that filing a copy of a judgment in probate court is not sufficient to create a lien against property. Instead, a certificate of judgment must be filed.

In BMJA, LLC v. Murphy, Michael and Kelly Murphy had obtained a judgment against East Beach Development, LLC, and Seaside Title Company, LLC, in a prior lawsuit arising out of a breached real estate sales contract. The Murphys recorded this judgment in probate court on the same day it was issued, August 22, 2007. On May 14, 2008, East Beach Development transferred the subject property to BMJA, LLC. On October 1, 2008, BMJA filed an action against the Murphys requesting declaratory relief and seeking to quiet title to the subject property. During the course of this action, the Murphys obtained a certificate of judgment from the prior lawsuit against East Beach Development and Seaside Title Company and filed it in probate court on March 10, 2009. On May 18, 2009, the trial court entered final judgment in favor of the Murphys. BMJA appealed.

The issues on appeal were twofold: (1) whether the August 22, 2007, judgment that was recorded in probate court was sufficient under the Alabama Code to constitute a lien on the subject property acquired by BMJA; and (2) whether the March 10, 2009, certificate of judgment filed in probate court by the Murphys related back to the August 22, 2007, judgment so as to constitute a lien as of that date.

With respect to the first issue, BMJA argued that the judgment was insufficient to constitute a lien on the subject property because the Alabama Code, specifically section 6-9-210, mandates that a certificate of judgment, not the judgment itself, be recorded in probate court. The Alabama Supreme Court agreed with BMJA. The Alabama Supreme Court noted that, when a statutory pronouncement, here section 6-9-210, was clear and not susceptible to a different interpretation, it is a court's duty to abide by the pronouncement. Thus, the Alabama Supreme Court held that the filing of the judgment by the Murphys was insufficient to create a lien against the subject property on that date. Instead, the Alabama Supreme Court noted that the lien was established upon the filing of the certificate of judgment with probate court.

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With respect to the second issue, the Alabama Supreme Court found that the properly filed certificate of judgment would not take effect at any date earlier than the date it was recorded. Thus, in this situation, the certificate of judgment filed by the Murphys on March 10, 2009, would not relate back to the August 22, 2007, judgment. To hold otherwise would subject BMJA to a lien of which it had no notice. The Alabama Supreme Court reasoned that third parties like BMJA, seeking to secure real property, must be able to rely upon public records to furnish full and complete information of any conveyances, liens, or other encumbrances affecting real property. Consequently, the Alabama Supreme Court held that the lien attached to the property on March 10, 2009, after BMJA's purchase of the subject property.

BMJA, LLC v. Murphy, 2010 WL 152126 (Ala. Jan. 15, 2010)

HR CORNER

The Importance of Pro-Active Union Planning

A recent case from the Seventh Circuit Court of Appeals (covering Wisconsin, Indiana, and Illinois), provides employers a good reminder regarding the use of pro-active union planning tools. The Seventh Circuit upheld a trial court determination that the employer in this case violated the National Labor Relations Act (NLRA) for several reasons.

In this case, a manufacturing plant in Wisconsin, Loparex, acquired a new company with approximately 200 employees. This new company had previously undergone a union organizing campaign that had died-down a few months prior to the merger. After the merger, Loparex instituted new policies for the employees of the acquired company, which spawned renewed interest in the union organizing campaign. The first sign of this renewed interest came in the form of postings on company bulletin boards. After noticing the first pro-union postings, the company created a policy that information may only be posted on company bulletin boards with management approval. At trial, Loparex was unable to explain why it created the bulletin board policies, or, more importantly, why it chose to revise the bulletin board policies only after employees posted pro-union messages on the bulletin boards. As a result, the trial court determined that the bulletin board policies were unlawful because they were created in an attempt to stop the union organizing campaign.

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The Importance of Pro-Active Union Planning

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Other new Loparex policies led to similar results. After unions began placing fliers on employee cars in the parking lot, Loparex managers informed employees that this was against company policy. Loparex tried to argue that it limited this policy to fliers placed on windshields as opposed to all distributions in the parking lot. The Seventh Circuit, however, did not find this justification legally sufficient to relieve Loparex of liability. Even if the prohibition only applied to fliers on the employees' cars, Loparex did not present any legitimate rationale for the policy other than a desire to eliminate littering. The court held there was no evidence to support this justification. Most importantly, the court noted that, while companies can restrict union advertisement during working time, this restriction cannot extend to non-working hours.

Finally, Loparex informed its team leaders that they were "supervisors" under the National Labor Relations Act and as such, could not unionize. The Seventh Circuit, again, disagreed with Loparex, and determined that it interfered with the team leaders' rights to unionize. Similar to requirements for the administrative exemption from overtime under the Fair Labor Standards Act, the NLRA requires that "supervisors" maintain independent authority to make decisions of significant importance, and they must also perform one of twelve listed functions such as hiring, firing, disciplining, etc. Because these team leaders generally performed the same work as the employees who reported to them, and because these team leaders reported directly to a separate team manager, they did not maintain sufficient authority to the team managers for resolution.

This case provides a good reminder to employers to exercise pro-active initiatives against union campaigns. Once a union campaign begins, employers are extremely limited in their ability to counteract union organizing efforts. As demonstrated in this case, many employer actions taken after union activities begin may be construed by courts to be anti-union policies. As such, employers should review their existing policies and prepare for union campaigns now, before any such activity begins.

Loparex, L.L.C. v. N.L. R. B., 591 F.3d 540 (7th Cir. 2009)

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PROTECTIVE MEASURES

It's Not Wise to Fool the Federal Courts

When a plaintiff has filed Chapter 13 bankruptcy, she has a duty to supplement the bankruptcy schedule with any suit or claim that constitutes an asset while the bankruptcy remains pending.

In Robinson v. Tyson Foods, Inc., 2010 WL 396130 (11th Cir. Feb. 5, 2010), the court affirmed summary judgment against plaintiff because she did not tell the bankruptcy court about her discrimination claim against Tyson Foods. Tyson Foods argued that plaintiff's failure to disclose the suit as an asset was an inconsistent statement under oath. Interestingly, she also failed to disclose a workers' compensation suit she had against her late husband's employer.

Essentially, the Court looked at three factors to decide whether the omission of the claim was serious enough to dismiss the suit against Tyson Foods, and held it was. Plaintiff clearly had a duty to disclose the claims; knew about the claims; and her failure to do so was an inconsistent position under oath that made a mockery of the judicial system.

This case might indicate a shift in how the courts consider the failure to disclose a claim in bankruptcy. In some cases, courts have been reluctant to dismiss a claim that was not disclosed in bankruptcy for a number of reasons. Defendants to suits should ensure that, if a plaintiff has filed bankruptcy, the claim against it was disclosed, if appropriate. If not, summary judgment might be granted.

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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:

March 9, 2010—Huntsville, Alabama
North Alabama Society for Human Resource Management (NASHRM) Jeffrey Roth and Leah Green will be presenting the Legislative Update at the North Alabama Society for Human Resource Management (NASHRM) meeting held in Von Braun Center - Huntsville, Alabama. We will discuss:

- Military Leave under new FMLA regulations
- Genetic Information Nondiscrimination Act
- Employee Free Choice Act
- Healthy Families Act
- Employment Nondiscrimination Act (ENDA)
- Equal Remedies Act
- Federal Oversight, Reform, and Enforcement of the WARN Act
- Protecting Older Workers Against Discrimination Act
- Arbitration Fairness Act of 2009
- Firearms in Parking Lots
- New Notices for the Children's Health Insurance Program Reauthorization Act
- Recent Independent Contractor requirements
- Update on National Labor Relations Board
- Supreme Court changes to retaliation Laws

March 24, 2010 ~ April 21, 2010 ~ May 12, 2010—Huntsville, Alabama
International Commercial Contracting: Identifying, Avoiding, and Managing Risk Areas
This part two of a four-part course, presented by Allen L. Anderson; Jeffrey L. Roth; Leah M. Green; and Ryan G. Blount of Fees & Burgess, P.C., provides a practical introduction to international contracting, focusing particularly on risk identification and avoidance. Attendees will gain an understanding of the laws and provisions governing international agreements, and how international contractual relationships differ from domestic counterparts. The course will provide a solid grasp of the concepts, theories, and practical considerations necessary for drafting, interpreting, and negotiating international contracts.

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Fees & Burgess, P.C. — Calendar of Events *Continued from page 6...*

March 31, 2010—Webinar

Negotiation and Resolution of Federal Government Contractor Claims under the Contracts Disputes Act

Presented by Jeffrey Roth and Allen Anderson. Attendees of this program will learn how to prepare, negotiate, and submit contract disputes to the government for resolution under the Contract Disputes Act of 1978, as well as options for appealing claims denied by the government.

Included in this program will be a discussion of:
- the disputes process generally
- definition and elements of a claim under the Act
- drafting a claim and costs recoverable
- subcontractor pass through claims
- negotiation prior to requesting a Contracting Officer's final decision
- alternate methods of dispute resolution
- deemed denials of final decision requests
- appealing the final decision of the Contracting Officer

No matter what type of work you do for the government, this program will be great background for making contract claims and recovering funds due from the government as a result of out of scope work, constructive changes, delays, or other impacts.

This course is designed to meet the requirements of continuing education for the Institute for Supply Management (ISM) and the National Contract Management Association (NCMA)

April 9, 2010—Las Vegas, NV

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

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?

Registration fee is: $300 for IPC members; $400 for nonmembers; and $240 for attendees/graduates of the IPC EMS Program Manager Training and Certification program.

Visit www.IPC.org/EMS-Contracting to register. Be sure to check the box on your registration form to also register for free APEX EXPO Exhibit Hall registration.

To find out more about IPC APEX EXPO, go to www.IPCAPEXEXPO.org .

Fees & Burgess, P.C. — Calendar of Events *Continued from page 7...*

April 12, 2010—Florence , AL
Employment Law Survival Training for Managers: 10 Key Areas of Legal and Practical Knowledge
This day-long program presented for, and sponsored by the University of North Alabama, 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 human resources within 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 program is being offered as part of the University of North Alabama's Certificate in Human Resource Management. Click here to download brochure.

This program has been approved for 6.5 hours of CLE credit and .65 hours of CRM credit.

April 20, 2010—Birmingham, AL
FMLA Master Class for Alabama Employers: Overcoming Compliance and Employee Leave Challenges This program, presented for, and sponsored by M. Lee Smith, will help you become even more proficient in FMLA administration and handle top management's and your employees questions with even greater confidence.

Conference Details:
Cahaba Grand Conference Center , 8:30 a.m. - 4:30 p.m.

Continental breakfast and registration begin at 7:30 a.m. The program begins at 8:30 a.m. and concludes at 4:30 p.m. There will be morning and afternoon breaks and registrants will be on their own for lunch. The cost of the program is $347. Additional registrants from the same company can attend for $247.

This program has been approved for 6.25 recertification credit hours through the HR Certification Institute.

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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, please contact us at 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.

To remove your name from our mailing list, please contact us at newsletters@feesburgess.com**.**

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