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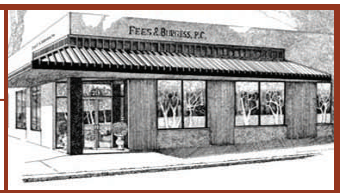

Volume 8, Issue 2 June 2010

Supreme Court Rules: You Must Speak Up to Remain Silent

In a 5-4 decision issued on June 1, 2010, entitled Berghuis, Warden v. Thompkins, 2010 WL2160784 (U.S. June 1, 2010), the U.S. Supreme Court made it more difficult for an accused to invoke his or her right to silence. No longer is silence enough – an accused must *clearly* state the intent to remain silent.

The facts of the case are fairly straight forward. Thompkins, after being thoroughly advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), refused to sign a statement that he understood those rights and remained silent during much of a three-hour interrogation in which officers questioned him about a fatal shooting. Although Thompkins did not express his intent to invoke his right to remain silent, he remained "largely silent" during the interrogation, only giving a few limited verbal responses and occasionally nodding his head. As the interrogation drew to an end, investigators asked Thompkins if he prayed for forgiveness for shooting the victim. Thompkins uttered a simple, "Yes."

Before trial, Thompkins moved to suppress his statements on the grounds that he had invoked his right to silence and so the investigators should have immediately stopped the interrogation. The trial court denied Thompkins' motion and, at his trial for first-degree murder, prosecutors used Thompkins' statements to establish his guilt, resulting in a conviction. Thompkins was sentenced to life without the possibility of parole.

On appeal, Thompkins argued that his silence "over a sufficient amount of time" invoked his right to remain silent, ending the interrogation long before he made any incriminating statements. Writing for the majority of the Court, Justice Anthony Kennedy found the argument unpersuasive, relying on the requirement that an accused make a clear and unambiguous invocation of a right to an attorney. The right to remain silent, Justice Kennedy argues, is no different. Both rights protect the privilege against compulsory self-incrimination. By failing to clearly state that he wanted to remain silent, Thompkins waived his right to do so. Once an accused is warned pursuant to Miranda and understands those rights, any uncoerced statement will be treated as a waiver.

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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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In the minority's dissent, Justice Sonia Sotomayor argues that the Court's opinion contravenes the purpose behind Miranda and states that the opinion requires "a suspect who wishes to guard his right to remain silent against such a finding of 'waiver' must, counter intuitively, speak – and must do so with sufficient precision to satisfy a clear statement rule that construes ambiguity in favor of the police."

LITIGATION SPOTLIGHT

The Collateral Source Rule: Alive and Well in Alabama?

Historically, the collateral source rule has characterized evidence that a plaintiff's insurance company paid for medical treatments or other bills as irrelevant and, thus, inadmissible at trial. A defendant was not permitted to introduce that type of evidence. The situation changed in 1987 when the Alabama Legislature enacted section 12-21-45 of the Alabama Code, which provides, in part: "In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed *shall be admissible* as competent evidence." After the adoption of section 12-21-45, defendants were allowed to introduce evidence to show that a plaintiff's medical bills were satisfied through insurance. Beginning in 1987, Alabama courts interpreted section 12-21-45 as abrogating the collateral source rule.

The Legislature did not end the discussion by enacting section 12-21-45. In 1996, the Alabama Rules of Evidence were adopted, codifying rules governing admissibility. Since the collateral source rule was not specifically addressed in the new rules, Alabama courts continued to treat section 12-21-45 as a controlling rule of substantive law and allowed defendants to introduce evidence that plaintiffs' medical bills were paid by insurance companies. The collateral source rule appeared to be a rule of the past. But the issue has not remained at rest. Recently, 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. For example, Judge Robert Vance of Jefferson County has rejected section 12-21-45 in a detailed order in which he discusses the underlying nature of the statute. After summarizing the history behind the collateral source rule, Judge Vance concludes that section 12-21-45 is not a substantive rule of damages but simply an evidentiary rule governing procedure.

As a procedural rule, section 12-21-45 may be superseded by the 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. Thus, with the adoption of the Rules of Evidence, the Legislature appeared to reinstate the common-law rule prohibiting evidence that a plaintiff's medical bills were satisfied by a collateral source since such evidence would not be relevant to the issue of damages, or so Judge Vance believes. His order, entered in December 2009, specifically finds that section 12-21-45 is not controlling law in Alabama and all but dares the appellate courts to review the issue.

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The Collateral Source Rule: Alive and Well in Alabama?

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While Alabama appellate courts have upheld the constitutionality and applicability of section 12-21-45, they have never specifically addressed whether the Alabama Rules of Evidence abrogated that particular statute. With the ongoing debate, litigants now pose an additional question: how long until the Alabama appellate courts resolves the issue?

HR CORNER

COBRA Subsidy Extension Considered

Proposed Congressional bill H.R. 4213 would extend COBRA premium subsidy coverage to eligible employees through the end of the 2010 calendar year. Currently, the premium subsidy, which lowers COBRA premium costs for involuntarily terminated employees, is set to expire on May 31, 2010. H.R. 4213 would extend the benefit to any employees who are involuntarily terminated through December 31, 2010. The House and Senate are expected to vote on the proposed bill in the next two weeks.

DOL Publishes Final Rules on E.O. 13496 (Union Organization):

On May 20, 2010, the Department of Labor (DOL) published its final rules regarding implementation of President Obama's Executive Order (E.O.) 13496. President Obama signed the E.O. at the beginning of his presidency in 2009. The E.O. requires federal contractors to post a notice in their workplace informing employees of their rights to unionize and other protections under the National Labor Relations Act (NLRA).

The regulations require federal contractors to "flow-down" the notice requirement to subcontractors. While the final regulations include a de minimus exception for contracts valued under $10,000.00, the new requirement will extend this liability to most federal subcontractors. The regulations may require that the notice be posted in multiple locations. Instead of requiring one notice per facility or one notice per contracting company, the DOL requires that contractors post the notice "in and about the contractor's plants and offices." Specifically, this means places where employees "perform work that contributes to or furthers the performance of the contract, or work whose omission would impede the contract's performance." The DOL provides several examples of the type of work described above, which includes employee work: "assuring quality control and security; storing the goods after production; delivering them to the government; hiring, paying, and providing personnel services for the employees engaged in contract-related work; keeping financial and accounting records; performing related office and clerical tasks; and supervising or managing the employees engaged in such tasks."

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DOL Publishes Final Rules on E.O. 13496 (Union Organization):

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The DOL revised the required notice language, and the current version includes a slightly more neutral tone. Specifically, the DOL added a list of illegal union activities in addition to the list of illegal employer activities. The notice directs employees with complaints or other issues to contact the National Labor Relations Board.

The final regulations become effective on June 21, 2010.

The final regulations are available at: http://edocket.access.gpo.gov/2010/pdf/2010-11639.pdf .

Final notice: http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster2page_Final.pdf.

PROTECTIVE MEASURES

The Nerves Control

The Supreme Court of the United States recently decided that, in deciding the principal place of business of a corporation, federal courts must apply the "nerve center" test. See Hertz Corp. v. Friend, 130 S. Ct. 1181 (2010). Who cares? Any multi-state corporation.

To determine if federal courts have jurisdiction over a case involving citizens of different states, the courts must address where corporations are "citizens." A corporation is a citizen in the state in which it is incorporated and in the state in which its principal place of business is located. However, courts have defined "principal place of business" differently.

In Hertz, plaintiffs sued for alleged violation of a state wage and labor law. Hertz removed the case to federal court, and plaintiffs convinced the district court to return the case to state court, arguing Hertz was a citizen of the same state as plaintiffs. Hertz disagreed, and argued its principal place of business was in New Jersey, the location of its corporate headquarters.

The Supreme Court recognized that districts applied differing tests to determine the location of a corporation's "principal place of business." However, it determined the best test was "the place where a corporation's officers direct, control, and coordinate the corporation's activities;" in other words, the "nerve center" of a corporation.

While this test may not completely solve the problem, multi-state corporations now have a more definite idea of the states in which they may be considered citizens for litigation purposes.

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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:

June 10-13, 2010-Sandestin Golf and Beach Resort; Destin, Florida
Annual Conference Alabama Veterinary Medical Association
Jeffrey Roth will be presenting several topics at the 103rd Annual Conference of the Alabama Veterinary Medical Association, including:

- Workplace Harassment and Violence
- Wage and Hour Law
- Hiring, Firing, and Promotions

For additional information, click here.

July 19, 11:15–12:30; July 19, 2:30–3:45; July 20, 11:15–12:30; July 20, 2:30–3:45-Fort Lauderdale, FL
NCMA 2010 World Congress
At the 2010 National Contract Management Association (NCMA) World Congress, Allen Anderson and Jeff Roth will be presenting *Logistically Speaking: Using Delivery Terms to Allocate Supply Chain Risks and Uniform Commercial Code, Parts 1 – 4.*

Uniform Commercial Code, Parts 1 – 4: The program, divided into four sections, covers an overview of the Uniform Commercial Code, Articles 1, 2, and 2A. This training is used as a fast track study session as preparation for the Certified Commercial Contracts Manager exam.

Part 1: July 19, 11:15 – 12:30 Part 2: July 19, 2:30 – 3:45

Part 3: July 20, 11:15 – 12:30 Part 4: July 20, 2:30 – 3:45

Logistically Speaking: Using Delivery Terms to Allocate Supply Chain Risks: Contract professionals grapple on a day-to-day basis with risk and responsibility for transportation, warehousing, domestic and international regulation, and overall logistics, often as both exporters and importers. A thorough understanding of delivery terms, and their use and impact, is the only method by which such contract professionals can effectively manage their supply chains and control the associated risk.

This session, presented July 21 from 9:30 – 10:45, helps to provide that understanding.

Click here for more information on the 2010 NCMA World Congress.

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This session, presented July 21 from 9:30 – 10:45, helps to provide that understanding.

Click here for more information on the 2010 NCMA World Congress.

September 1, 2010– Huntsville, Al Holiday Inn, Research Park
Employment Law Survival Training for Managers: 10 Key Areas of Legal and Practical Knowledge
This daylong program, presented by Jeffrey Roth, Allen Anderson, and Leah Green, 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.

*Ask about group discounts.

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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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