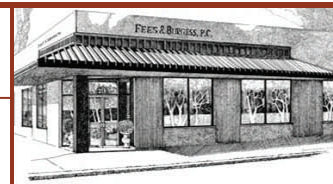




QUARTERLY BYTES

FEES & BURGESS, P.C.



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Statute of Frauds Bars Claims Against Regions Bank

Fees & Burgess, P.C.,
Emphasizes:

In July 2010, the Alabama Court of Civil Appeals decided a case where the Statute of Frauds was raised in an attempt to bar collection on a bank's promise to pay a supplier for materials bought on credit. Builders Supply and Salvage Co., Inc. v. Regions Bank, 2010 WL 2712688 (Ala. Civ. App. July 9, 2010) (not yet released for publication).

The facts are as follows: A homeowner contracted with Daryl Cosby to construct a house using loan proceeds from Regions Bank. In turn, Cosby purchased brick and mortar from Builders Supply and Salvage Company, Inc. (Builders Supply). Prior to completion of the house, Cosby quit after only paying for part of the materials from Builders Supply. The remainder of the materials had been purchased on credit for a total of \$16,994.42. Attempting to recover some of the materials, Builders Supply notified the homeowner of its intent to retrieve any unused materials from the house. A loan officer from Regions Bank contacted Builders Supply, via telephone, to request that the remaining materials not be removed, promising that Builders Supply would be paid. After that conversation, Builders Supply suspended its attempts to retrieve the materials.

When it became clear that Regions Bank was not going to honor its promise to pay, Builders Supply filed suit against the homeowner, Cosby, and Regions Bank, seeking the amount of the outstanding debt. Builders Supply asserted claims for breach of contract and fraud against Regions Bank. Ultimately, the trial court entered judgment for Builders Supply on the fraud claim, but not the remaining claims.

On appeal, Regions Bank raised the Statute of Frauds as a defense, maintaining that any alleged promise by it amounted to a collateral agreement to answer for the debt of another and so must be in writing to be enforceable. Affirming the trial court's determination that the promise constituted a *collateral* agreement to pay Cosby's debt, the appellate court found no evidence to support Builders Supply's argument that the promise promoted an independent purpose of Regions Bank, which would render the promise an *original* agreement. Since the collateral promise was not reduced to writing as required by the Statute of Frauds, it was void and Builders Supply was unable to recover against Regions Bank for breach of contract.

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Commercial Law & Litigation

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Likewise, the appellate court concluded the Statute of Frauds also barred Builders Supply's fraud claim. Alabama law recognizes "an oral promise that is void by operation of the Statute of Frauds will not support an action against the promisor for promissory fraud." Bruce v. Cole, 854 So. 2d 47, 58 (Ala. 2003). Thus, the Statute of Frauds barred any recovery against Regions Bank.

LITIGATION SPOTLIGHT

Responsible Reporting Entities under the Medicare Secondary Payer Act

To negotiate successful settlements, litigators often face numerous challenges. Due to recent legislation, however, those challenges may also include navigating the murky depths of the Medicare Secondary Payer Act (MSPA) and its mandatory reporting requirement. Enacted in 1980, the MSPA provides a right to subrogation and reimbursement against a primary plan or primary payer. In other words, the MSPA relegated Medicare to a secondary payer status whenever another entity could possibly be considered as a primary payer. If Medicare makes a conditional payment on behalf of an individual, it is entitled to reimbursement from the primary payer or other party responsible for the payment. A primary payer's responsibility may be demonstrated by a judgment or settlement agreement. Litigators need to pay close attention to whether a settlement involves conditional payments under the MSPA, and whether they need to begin complying with the MSPA's mandatory reporting requirement at the onset of litigation.

The mandatory reporting requirement was added, by Congress, in 2007 with respect to Medicare beneficiaries who receive settlements, judgments, awards, or other payment from liability insurance (including self-insurance), no-fault insurance, or workers' compensation. Often referred to as "Section 111," the mandatory reporting requirement assists Medicare in recovering these conditional payments. Section 111 provides that liability insurance, no-fault insurance, and workers' compensation carriers must provide the following information for all Medicare beneficiaries when the *possibility* exists that another insurer may be a primary payer: (1) the identity of the claimant; (2) the claimant's Medicare Health Insurance Claim Number or social security number; (3) date of the accident or incident; (4) a description of the illness or injury; (5) name and address of the other insurance (e.g., liability insurance or workers' compensation carrier); (6) name and address of legal representative; (7) name of insured; and (8) policy and claim number.

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Responsible Reporting Entities under the Medicare Secondary Payer Act *continued from page 2...*

The entities required to report claims to Medicare are called “Responsible Reporting Entities” (RRE). So who qualifies as an RRE? According to the MSPA, the insurer is generally responsible for reporting. An RRE may contract with another entity to submit files for reporting purposes, but that entity remains an agent of the RRE who retains the ultimate responsibility for reporting. When an entity is self-insured, *i.e.*, carries its own risk, that entity is an RRE. For a self-insurance pool, unless it is statutorily regulated in the same manner as liability insurance, the following three requirements must be met for the self-insurance pool itself to qualify as an RRE: the self-insurance pool (1) is a separate legal entity; (2) has full responsibility to resolve and pay claims using pool funds; and (3) resolves and pays claims without review or approval authority by the participating self-insured entity.

Where multiple defendants are involved in a settlement, all RREs are responsible for their own reporting. In such settlement, where there is joint and several liability, each RRE must report the *total* settlement amount, not just its share. In addition, Medicare has directed information to attorneys for claimants on how to report, implying that an obligation may exist for the *claimant’s attorney* to notify Medicare under Section 111.

Full implementation for Section 111 has not occurred yet. After several postponements, the current date set for full implementation (and enforcement) of section 111 is early 2011. For more information, litigators can visit <http://www.cms.gov/home/medicare.asp>, a website maintained by the Centers for Medicare and Medicaid Services.

HR CORNER

Policy Manual Updates

Because of the many recent changes to applicable laws governing human resources issues, employers should make a special effort to review their current employee handbooks for any needed updates and revisions. While any company’s handbook must be tailored to the particular needs of the company’s business, there are several common policies that likely need adjustment. Primary examples include:

- EEO policy – does your policy protect against discrimination based on use of genetic information? Does your policy provide for multiple avenues of reporting complaints? Have you updated your record retention and storage policies in light of the Genetic Information Non-Discrimination Act?

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Policy Manual Updates *continued from page 3...*

- FMLA policies – does your policy still list twelve weeks as the maximum amount of leave? What about the new military leaves? Have you revised any policies regarding calculations of leave and have you taken advantage of the updated notice allowances in the new regulations?
- ADA policy – have you updated any definitions listed in your manual to comply with recent legislation?
- General updates – is your company actually doing everything it claims in the policies?
- FLSA policy – do you have a safe harbor policy in place to help protect the company in light of increasing governmental investigations?

When did you last review the policies in light of current company practices? Regular review of policy manuals is the best way to protect your company from liability. Not only must you review the policies for compliance with current laws, but you must also ensure that the policies are practiced and enforced.

PROTECTIVE MEASURES

Unanticipated Consequences

Employers may pay a monthly allowance for fuel as part of an employee's benefits. Unfortunately, doing so may leave the employer liable for an automobile accident, even if the employee is on personal errand at the time. See Cheshire v. Putman, 2010 WL 2885951 (Ala. Jul. 23, 2010). In Cheshire, Allstate Electric Co., Inc. (Allstate), paid its employee, Gene Cheshire (Cheshire), an allowance for fuel for his personal vehicle, which he regularly used for work. After leaving work one day, Cheshire pulled a trailer (not owned by Allstate); stopped at a building goods store and made personal purchases; and headed home. On the way, he was involved in a serious accident when he misjudged the distance he needed to stop. Plaintiffs sued him and Allstate. At trial and on appeal, Allstate unsuccessfully argued that it should not be liable for Cheshire's accident because he was on a personal errand and not working when it occurred. According to Allstate, the accident took place while Cheshire was on his way from work, and not "in the course of employment." The Court disagreed. Instead, the Court noted that, because Allstate paid a gasoline allowance and did not limit Cheshire's use of the vehicle to work only, Allstate could be vicariously liable for Cheshire's accident, at any time. Employers need to be aware that, if they provide a fuel allowance instead of a vehicle, they might be liable for "personal" accidents in vehicles regularly used for work.



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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:

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

September 22, 2010–Huntsville, AL Von Braun Center North Hall Upper Level

[4th Annual 2010 Rocket City Contracting Conference](#) . Jeff Roth has been invited to present a discussion on Service Contract Act Applicability. He will address issues such as: general requirements, wage and fringe benefit payment requirements, predecessor contractor issues, problems and penalties.

If you are a government contractor, small business owner, a controller or accountant working for a government contractor or a CPA, [YOU NEED TO BE HERE!](#)

8 hours of CPE credit available



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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.

Michael L. Fees
mfees@feesburgess.com

C. Gregory Burgess
gburgess@feesburgess.com

Allen L. Anderson
anderson@feesburgess.com

Jeffrey L. Roth
jroth@feesburgess.com

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

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

www.feesburgess.com

Stacy L. Moon
smoon@feesburgess.com

Leah M. Green
lgreen@feesburgess.com

Ryan G. Blount
rblount@feesburgess.com

Lauren A. Smith
lsmith@feesburgess.com

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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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