

October 20, 2009



**Crystal Holmes**  
Attorney at Law  
[cholmes@sirote.com](mailto:cholmes@sirote.com)

In this week's SWALU, we report on two cases from the Alabama Supreme Court, one reversing jury verdicts in favor of the State of Alabama in excess of \$274,000,000 and the other involving easement rights and the doctrine of res judicata. In addition, we report on an Eleventh Circuit Court of Appeals case in which a debt collector violated one section of the Fair Debt Collections Practices Act in an attempt not to violate another section of the Act, and is not entitled to a bona fide error defense.

**AstraZeneca LP, et al. v. State of Alabama, \_\_\_\_\_ So. 3d \_\_\_\_\_ (Ala. 2009) (State of Alabama could not have reasonably relied upon prices provided by drug companies when State had previously performed its own investigations to determine such prices).** The State of Alabama filed several suits against several drug companies (the Drug Companies) alleging fraud and that the nationwide pricing policies of the Drug Companies caused states to over-reimburse providers of prescription drugs under state Medicaid programs. The Alabama Medicaid Agency (AMA) reimburses providers based on either the amount actually paid by providers for each drug or on the basis of an estimated cost. For several years it was known that the pricing information given by the Drug Companies was higher (sometimes significantly) than the actual costs to the Drug Companies. AMA eventually conducted its own studies to determine what the reimbursement amounts should be. However, AMA did not change its method of calculating reimbursement amounts. At trial, the juries returned verdicts against the Drug Companies in excess of \$270,000,000. The Drug Companies appealed.

The Alabama Supreme Court reversed the holdings in the trial courts stating that the AMA could not have reasonably relied upon the pricing information given by the Drug Companies, because (i) the discrepancy in pricing was well known in the industry, (ii) the AMA even determined for itself the correct reimbursement methodology through its own studies and (iii) even after the AMA took issue with the reporting methods of the Drug Companies, the AMA had not changed its reimbursement methodology.

**Chiepalich v. Coale, \_\_\_\_\_ So. 3d \_\_\_\_\_ (Ala. 2009) (Action for determination of easement rights did not prohibit later separate action for tort claims though viability of later separate action depends upon the determination of the alleged easement rights).** Plaintiffs filed an action in the Clarke Circuit Court (Clarke Court) against Defendant seeking a determination that they possessed an easement to use a roadway that crossed a portion of Defendant's property for access to Plaintiffs' property. Approximately two years later, First American Title Insurance Company (FA) filed a declaratory judgment action in the Mobile Circuit Court (Mobile Court) seeking a determination that the title policy issued by FA covering title to the Plaintiffs' property did not insure loss or damages resulting from lack of access to their property. Plaintiffs then filed a counterclaim against FA and a "third-party complaint" against the Defendant in the action in the Mobile Court alleging various tort claims, including negligence, wantonness, and intentional interference with a business relationship, against Defendant relating to denial of access to and use of the road. Defendant moved the Mobile Court to dismiss the third party complaint arguing that the complaint was barred because an action "for the same cause" was pending against him in the Clarke Court. The Mobile Court agreed and dismissed the third party complaint. The Plaintiffs then appealed.

On appeal the Plaintiffs argued that the Mobile Court action was not based on the same cause of action as the Clarke Court action. The Supreme Court of Alabama agreed stating that the issues of fact and law in the Mobile Court action were substantially different from the issues of fact and law in the Clarke Court action and the evidence necessary to support or refute the claims in each action is substantially different as well. The Court further stated that the allegations in the Mobile Court action were based on events occurring after the filing of the Clarke Court action and potentially gave rise to new causes of action. Though the Court acknowledged that the Mobile Court action might be barred by a determination in the Clarke Court action that no easement existed, a finding in the Clarke Court action that an easement does exist would not bar the Mobile Court action.

**Edwards v. Niagra Credit Solutions, Inc., \_\_\_\_\_ F.3d \_\_\_\_\_ (11th Cir. 2009) (Debt collector not entitled to bona fide error defense when it intentionally violates one provision of the Fair Debt Collections Practices Act in order to avoid violating another provision of the Act).** Plaintiff owed a debt that was turned over to Defendant for collection. The Defendant contacted the Plaintiff via telephone on several occasions, leaving contact information for Defendant, a file number and a request that Plaintiff return the Defendant's telephone call. Defendant, however, did not leave its name or the fact that it was a debt collector on any of the messages, contrary to the requirements of the Fair Debt Collections Practices Act (the Act). Plaintiff filed an action against Defendant stating that the messages left on her answering machine by Defendant violated certain provisions of the Act. Defendant asserted the bona fide error defense found in the Act and argued that it had not given its name or any information indicating that it was a debt collector in order to avoid violating another provision of the act which prohibited Defendant from communicating about the debt with a third party. Defendant stated that it feared if it left the required information on the answering machine, a roommate or family member might hear the message and know that the Defendant was calling the Plaintiff. The trial court found that the messages violated the Act and that the bona fide error defense did not apply. Defendant appealed.

On appeal, Defendant conceded that the messages it had left for the Plaintiff violated the Act but argued that it was entitled to the bona fide error defense. Defendant also complained that if it was not permitted to omit the information, it would be unable to leave any answering machine messages in efforts to collect debts. The Court of Civil Appeals affirmed the trial court, stating that Defendant had failed to meet the first two of three requirements of the bona fide error defense, namely: (i) the action was not intentional and (ii) the action was a bona fide error. The Court also stated that the Act did not guarantee a right to a debt collector to leave such messages without deciding whether an answering machine message which included the omitted information violated the Act.



**The Answer Is Sirote.**

**To subscribe** to SWALU, simply e-mail the editor at [mshevin@sirote.com](mailto:mshevin@sirote.com) and list your name, e-mail address, and company or organization. To change the e-mail address at which you wish to receive the update, e-mail the editor with that request. To be removed from this or any of our other e-mail distribution lists, please reply to this e-mail and indicate "unsubscribe" in the subject line. This message may be considered an advertisement or solicitation. For more information about Sirote & Permutt's statewide law offices and mediation centers, please visit us on the web at [www.sirote.com](http://www.sirote.com).

This e-letter is a periodic publication of Sirote & Permutt, P.C. and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information only, and you are urged to consult an attorney concerning your own situation and any specific legal questions you may have.

*The Alabama State Bar requires the following disclosure: 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.*