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The use of pattern and practice evidence before a jury may be the most effective evidence that the plaintiff can present in any case involving consumer fraud. The discovery of this type of evidence is relatively difficult without the assistance of the trial court ordering that a defendant produce a customer list of the defendant of the type of product that the plaintiff alleges to have been sold fraudulently. Because of the extreme burden placed on plaintiffs in proving their case, there is a most compelling argument that plaintiff is entitled to this evidence especially given the recent restrictions placed on the plaintiff in the consumer fraud cases by the courts.

Pattern and Practice evidence is admissible as prior similar acts of misconduct by the defendant particularly in cases where the plaintiff is alleging a fraudulent scheme to market a particular type of product. This type of pattern and practice evidence is most effective in proving that there is, in fact, a common scheme to defraud consumers. It is best to take a representative sample of the pattern and practice evidence that has been collected as a result of the customer list. Typically, five pattern and practice witnesses are allowed by most courts. This brings a cross-section of consumers to the jury testifying about the same or similar acts of misconduct by different agents in different of either a particular state or of the country .

The use of pattern and practice evidence in fraud and bad faith litigation is very likely the most effective evidence that the plaintiff can represent to the jury .Although, pattern and practice evidence by today's standard is an essential element in preparing the fraud or bad faith case for trial, prior to 1987, pattern and practice evidence in these areas of the law were the exception. Oddly enough, a statute designed to limit

punitive damages in fraud and bad faith litigation, § 6-11-21, Ala. Code (1975), (recently declared unconstitutional in Henderson v. Alabama Power Company, 627 So.2d 878 (Ala. 1993), actually established a new standard for plaintiffs counsel in preparation for trial in these type cases.

Prior to the enactment of Section 6-11-21, Alabama had the doctrine of *res inter alios acta* which generally operated to exclude as irrelevant, any evidence of acts and declarations of non-parties or dealings of parties with non-parties. However, the operation of that doctrine was limited in certain circumstances. See Dorcal. Inc. v. Xerox Corn., 398 So.2d 365 (Ala. 1981), and cases cited therein. For example, in cases involving issues of intent of the party, dealings of a party with a non-party is admissible evidence. See Roberson v. Arnmons, 477 So.2d 957 (Ala. 1985).

Despite rule 404(b), Alabama Rules of Evidence, the Alabama Supreme Court has historically made exceptions in cases involving fraud. The Court clearly acknowledged their broad view of pattern and practice evidence in the case of Kabel v. !!!:J!!!x, 519 So.2d 912 (Ala. 1987):

"In a fraud action, the' intent, knowledge, and scienter constitute essential elements of the offense, [and] evidence of similar frauds and similar misrepresentations [is] commonly admissible'. Dorcal. Inc., 398 So.2d at 671, citing Roan v. Smith, 272 Ala. 538, 133 So.2d 224 (1961); Johnson v. Day, 230 Ala. 165, 160 So. 340 (1935); and 37 Arn.Jur.2d Fraud & Deceit § 456 (1968)."

~, 519 So.2d at 918.

The ~ court cited with approval Jackson v. Lowe, 48 Ala. App. 633,266 So.2d 891 (1972), a case which involved automobile fraud where the trial court allowed the use of pattern and practice witnesses that had been similarly defrauded by the same salesman. The Jackson court held that the evidence was proper under Section 70.03(1) of McElroy's Alabama Evidence. C. Gamble, McElroy's Alabama Evidence, § 70.03(1) (3rd Ed. 1977).

made to Section 70.03(1) of McElroy's Alabama Evidence, which characterized the conduct as
Alabama Supreme Court cases of fraud. It is an issue of pattern and practice witnesses
in fraud cases. Section 70.03(1) provides in pertinent part the following:

In a case involving an unusual evidentiary question, Harris v. M & S Toyota, ~, 575
So.2d 74 (Ala. 1991), the court cautioned trial judges against limiting pattern
and practice evidence and stated that there is a "strong policy in our law permitting proof of
fraudulent acts against other persons about the same time which appear to be
prior bad acts going with common plan or scheme to defraud. The Alabama Courts
generally agree that evidence of other fraudulent transaction or deceit by the
pattern and practice evidence is admissible to show fraud, tortious behavior, or particular
strongly stated its view in favor of trial courts allowing pattern and

practice testimony in fraud cases. It appears quite clear that the plaintiff, may not prove that similar false
representations were made to others in the absence of evidence that the
representation to the plaintiff was indeed false. Another way of stating this
rule is that prior acts of the defendant, standing alone, cannot form the basis of
592 So.2d 191 (Ala. 1991) a judgment that he acted fraudulently in the present transaction. On the basis of
evidence that the representation to the plaintiff was false, the plaintiff may
the use of pattern and practice evidence in fraud cases. Health America v. Menton,
551 So.2d 235, 245 (Ala. 1989). ("in fraud actions, great latitude is allowed in the
the purpose of bolstering the conclusion that the representation to him was
false. Such is admissible even though there is no evidence warranting a
finding that the misrepresentations were a part of a common plan or scheme.

Even where there is issue of the defendant's intent to defraud, such intent may
be grounds for an award of punitive damages. When such damages are
claimed by the plaintiff, he may make proof of similar misrepresentations
tending to show such intent.

Proof of collateral acts in a fraud suit is often dependent upon access to other
clients or customers of the defendants. Courts are very generous, particularly
in fraud cases, in permitting the plaintiff unrestricted discovery of those
persons, names and addresses."

c. Gamble, McElroy's Alabama Evidence, § 70.03(1) (3rd Ed. 1977), (footnotes omitted)
(See annotations contained therein).

Even § 70.03(1) of McElroy's Alabama Evidence has been broadly construed by the
Alabama Supreme Court. In the case of Davis v. Davis, 474 So.2d 684 (Ala. 1985),
the Supreme Court allowed testimony of prior similar representations made by a defendant to
a third person some ten years after the alleged misrepresentation was

1 See Gamble's Alabama Rules of Evidence (1995)

scope of evidence introduced. ..questions of materiality , relevance, and remoteness of evidence are matters resting within the discretion of the trial court, whose exercise of that discretion will not be reversed unless it has been grossly abused. ") ; Georgia Cas. & Surety Co. v. White, 531 So.2d 838 (Ala. 1988), (the court held that evidence of similar fraudulent acts was admissible to prove an alleged fraudulent scheme. The court cited Great American Ins. Co. v. Dover, 221 Ala. 612,130 So. 335 (1930), for the proposition that "evidence of fraudulent transactions by the same party and substantially the same character, contemporaneous in point of time, or nearly so, is admissible to show fraud in respect to a matter wholly distinct from the previous transaction.") Nonetheless, the court in Barbour allowed an audit report conducted by a third party on the defendant to be admitted into evidence because it revealed a scheme, pattern, and practice by defendants.

The Alabama Supreme Court has taken a very liberal view on discovery in the fraud and bad faith type cases. In the case of Pugh v. Southern Life and Health Insurance, 544 So.2d 143 (Ala. 1988), the court considered a number of discovery issues related to the discoverability of information necessary to prove other similar

acts by Defendants. Ex parte Clarke, 582 So.2d 1064 (Ala. 1991), concerned a bad faith refusal to pay death benefits, and the plaintiff sought discovery of prior claims in the last five years in the State of Alabama, complaints, prior lawsuits, explanations of loss ratios, and general information about the financial stability of the company. The trial court denied the discovery and granted summary judgment to the defendant. The Supreme Court reversed the trial court's decision stating that all materials requested by the plaintiff were, in fact, discoverable. Ex parte Clarke, supra at 144-145.

The Supreme Court has taken a liberal view on discovery in two other cases, Ex parte Clarke, 582 So.2d 1064 (Ala. 1991), and Ex parte Asher, Inc., 569 So.2d 733 (Ala. 1990). In both these cases, the court stressed the importance of a broad range of discovery. These cases provide excellent arguments for obtaining discovery.

Another case offering an excellent explanation of pattern and practice evidentiary rules is that of Valentine v. World Omni Leasing, Inc., 601 So.2d 1006 (Ala. Civ. App. 1992). This was another automobile fraud case, an area where the court seems to be most liberal in its application of pattern and practice evidence.²

In 1987, the Alabama Legislature enacted section 6-11-21 as part of a "package of bills" collectively called the "Alabama Tort Reform Act". Act number 87-185, 2, 1987 Ala. Acts 251. This section provided:

"An award of punitive damages shall not exceed \$250,000.00, unless it is based upon one or more of the following:

- (1) A pattern and practice of intentional wrongful conduct, even though the damage or injury was inflicted only on the plaintiff; or,
- (2) Conduct involving actual malice other than fraud or bad faith not a part of a pattern or practice; or,

For additional cases concerning the use of pattern and practice witnesses, see the following: Shoals Ford, Inc. v. McKinnex, 605 So.2d 1197 (Ala. 1992); Massachusetts Mutual Life Insurance Company v. Collins, 575 So.2d 1005 (Ala. 1990); Southern States Ford, Inc. v. Proctor, 541 So.2d 1081 (Ala. 1989); Potomac Leasing Company v. Bulger, 531 So.2d 307 (Ala. 1988); Sessions Company, Inc. v. Turner, 493 So.2d 1387 (Ala. 1986); Ex parte State Farm Mutual Automobile Insurance Company, 452 So.2d 861 (Ala. 1984); Winn Dixie Montgomery, Inc. v. Henderson, 395 So.2d 475 (Ala. 1981); Roan v. ~, 272 Ala. 538, 133 So.2d 224 (Ala. 1961); Johnson v. Dax, 160 So. 340 (Ala. 1935); Cartwright v. fuill.Y, 117 So. 477 (Ala. 1928); Blackwood v. Standridge, 102 So. 108 (Ala. 1924); and Maxwell v. Brown Shoe Company, 21 So. 1009 (Ala. 1897).

(3) Liable, slander, or defamation."

Simply, punitive damage awards for fraud or bad faith cases which accrued after June 11, 1987, could not exceed \$250,000.00, unless exception 1 was satisfied. Sections 2 and 3 did not apply to fraud and bad faith cases.

Although the standard for allowing pattern and practice evidence in fraud cases seemed to have been relaxed somewhat under § 6-11-21(1), the stated law on the issue did not change the standard for admissibility of this evidence from that which existed prior to the enactment of the statute. .c.f. D. Marsh and S. Silvernail, The Tort of Bad Faith and Avoiding the \$250,000.00 Cap on Punitive Damages, 51 Ala. Law 114 (March 1990). Simply put, nothing changed in the law with regard to admissibility.

In more recent opinions, the Alabama Supreme Court has clearly stated its views on the use of pattern and practice evidence. (*See Ex parte Moebes*, 709 So.2d 477 (Ala. 1997) wherein the Court held that "... pattern and practice evidence is for one purpose only -determining the amount of punitive damages." (Ex parte Moebes at 479, citing Alabama Code 1975, §6-11-21.

In the insurance context, the Court's opinion in *Ex parte Horton*, 711 So.2d 979 (Ala. 1998), clearly explains pattern and practice evidence within the confines of Alabama's newly adopted rules of evidence, particularly rule 404(b). The Court held in part as follows:

This Court must determine whether the Hortons, in light of the nature of their claim, have demonstrated a particularized need for further discovery. The Hortons have alleged fraud. When a plaintiff has alleged fraud, discovery must necessarily be broader than in other cases; this is because of the heavy burden of proof imposed on one alleging fraud. *Ex parte Clarke*, 582 So.2d 1064 (Ala. 1991); *Pugh v. Southern Life & Health Ins. Co.*, 544 So.2d 143 (Ala. 1988). It is well settled in this state that at trial of a fraud case a plaintiff can present evidence of prior similar misconduct to show the existence of a plan or scheme, motive, or intent on the part of a defendant. Rule 404(b), Ala. R. Evid.; *Charles w. Gamble, McElroy's Alabama Evidence* §34.02(2) (5th Ed. 1996) (see the

discussion and cases cited therein). Thus, "evidence of similar misrepresentations made to others by the defendant is admissible in a fraud action." *Ex parte Allstate Ins. Co.*, 401 So.2d 749,751 (Ala. 1981). Because the kind of evidence the Hortons seek is relevant and admissible, it is discoverable.

But are the Hortons entitled to discovery from the Denson client list beyond the 25% limitation allowed by the trial court? We conclude that they are. In recent years this Court has held several times that a restriction on discovery similar to that imposed in this case is an abuse of discretion. *See Ex parte Howell*, *supra*; *Ex parte Stephens*, 676 So.2d 1307 (Ala. 1996); *Ex parte Clarke*, 582 So.2d 1064 (Ala. 1991). These cases stand for the proposition that a trial court, in attempting to control the discovery process, abuses its discretion when it imposes a limitation or creates a procedure that prevents meaningful discovery of relevant and admissible evidence in a fraud action. The Hortons' first request for discovery from Alfa called for information on all Alabama residents who had purchased Alfa life insurance policies over the last five years. The trial court denied that request, and the Hortons responded by voluntarily narrowing their request solely to the Denson client list. The trial court allowed discovery from only a quarter of that list. That restriction was an abuse of discretion. The discovery requested by the Hortons—contact with additional persons on the Denson client list—is closely tailored to the kind of fraud alleged by the Hortons. As noted previously, the Denson client list is a list of persons to whom, like the Hortons, Denson sold Alfa life insurance policies during the previous 10 years. The Hortons did not request discovery of client lists from other Alfa agents, or lists of persons to whom Denson sold other kinds of Alfa insurance policies.

When the discovery request of a plaintiff alleging fraud is closely tailored to the nature of the fraud alleged, the discovery should be allowed in full, as long as the party opposing discovery does not show that the requested discovery is oppressive or overly burdensome. We conclude that providing the additional discovery requested by the Hortons would not be burdensome or oppressive to Alfa. Also, we conclude that the initial contact to be made by the Hortons, through a court-approved letter from the Hortons' counsel, is not intrusive or annoying toward the persons on the list or oppressive toward Denson.

Moreover, we believe that the United States Supreme Court's opinion in *BMW of North America, Inc. v. Gore*,

517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), increased the necessity for a plaintiff alleging fraud and seeking misconduct by the defendant. The United States Supreme Court stated: "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 575, 116 S.Ct. at 1599. This Court has previously considered the reprehensibility of the defendant's conduct as one of several factors for a court to review under Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989), when considering whether a punitive damages award was excessive, but the United States Supreme Court in its BMW opinion gave that factor greater significance. On remand in the HMW case, we noted that the factor or reprehensibility of the defendant's misconduct includes a consideration of "the existence and frequency of similar past conduct." BMW of North America v. Gore, 701 So.2d 507, 512 (Ala. 1997) (quoting Green Oil, 539 So.2d at 223). Given this increased requirement that a plaintiff awarded punitive damages be able to demonstrate on a Green Oil review that the Defendant's conduct was reprehensible and, thus, that the award was not excessive, the plaintiff has concurrent need for broad pretrial discovery that might lead to evidence of similar misconduct by the defendant. To hold otherwise would be inconsistent.

In sum, we conclude that the Hortons have a legitimate and particularized need for further discovery from the Denson client list and that the trial court abused its discretion in denying their request. We grant the writ of mandamus.

CONCLUSION

Pattern and practice evidence is essential to a successful fraud case. There is no better way to strengthen and support the Plaintiffs testimony. As the Supreme Court has indicated through the above-referenced opinion, pattern and practice is also the gateway to punitive damages.

But remember, trial lawyers who desire to utilize pattern and practice evidence must do so from the onset of discovery. It takes a great deal of time and effort to obtain the requisite evidence and witnesses for use at trial. Start now!