

## **THE LAW OF UNFAIR COMPETITION**

### **A PLAINTIFF'S PERSPECTIVE**

Alabama has seen increased activity in the area of commercial litigation. This is in large part because more businesses see Alabama as fertile ground for beginning new enterprises. If Alabama is to successfully foster its growing business community, the legal profession must do its part to help. Several illegal methods exist to block a new business's entry into the community, impede a business's growth in the community or push a business out of the community. Certain Alabama laws prevent this illegal activity and ensure that fair competition may proceed. The following is a synopsis of some of the most common claims seen in commercial litigation and a discussion of the current state of the law in those areas.

#### **I. THE ALABAMA TRADE SECRETS ACT, ALA. CODE §8-27-2 (1993).**

The Alabama Trade Secrets Act (ATSA) was passed in 1987. ALA. CODE 8-27-1 (Rep. Vol. 1993). The purpose of that Act is to protect individual property rights in trade secrets and thus to foster the development of new products and technology in Alabama. *IMED Corp. v. Systems Engineering Associates Corp.*, 602 So.2d 344, 346 (Ala. 1992). In its preface to the proposed legislation, the Alabama Law Institute's committee on trade secrets law noted: "New technology cannot always rely on the patent laws because of the time and the expense involved in obtaining a patent. The state law of trade secrets has been vital in the development of new industry and new technology. Trade secrets law enables those who develop new ideas to call upon the law to help and protect their ideas from misappropriation through espionage and breach of faith."

Until 1983, it was not clear the trade secrets doctrine even existed in Alabama. Although the Alabama Supreme Court expressly recognized the common law doctrine of trade secrets in *Drill Parts & Service Co. v. Joy Manufacturing Co.*, 439 So.2d 43 (Ala. 1983), that decision left many questions about the scope and content of trade secret law in Alabama.

The ATSA is intended both to codify and to modify the common law of trade secrets in Alabama. It draws heavily on the common law, especially as expressed in the original Restatement of Torts (1939), but also is influenced heavily by the Uniform Trade Secrets Act and the trade secrets acts of other states. The Act provides significant protection to trade secret owners, while attempting to draw a distinct line between that which is a trade secret and that which is not. The goal is for users of ideas to be secure in protecting their trade secrets, while at the same time knowing what they may freely use without misappropriating the secrets of others. The Comments to the Act, while often persuasive to the courts in construing the meaning of the Act, are not necessarily binding on the issue of the Legislature's intent. *Compare, e.g., Public Systems, Inc. v. Towry*, 587 So.2d 969, 972 (Ala. 1991); *Allied Supply Co., Inc. v. Brown*, 585 So.2d 33, 36 (Ala. 1991), *with IMED Corp.*, 602 So.2d at 348 (comments not binding).

The ATSA defines a trade secret as information which: 1) is used or intended for use in a trade or business; 2) is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique or process; 3) is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret; 4) cannot be readily ascertained or derived from publicly available information; 5) is the subject of efforts that are reasonable under the circumstances to

maintain its secrecy; and 6) has significant economic value. ALA. CODE 8-27-2 (Rep. Vol. 1993). Continuous use of the information is not required for trade secret protection. In addition, the Act explicitly protects secrets not yet in use but intended to be used.

Generally, one who discloses or uses another's trade secret, without a privilege to do so, is liable for that misappropriation if that person discovered the trade secret by improper means. ALA. CODE 8-27-3 (Rep. Vol. 1993). The common law of trade secrets did not define "improper means," but the Act identifies several species specifically. Methods for the misappropriation of trade secrets include theft, bribery, misrepresentation, inducement of a breach of confidence, trespass, or other acts taken to gain access of another's information where the trade secret owner reasonably should be able to expect privacy. ALA. CODE 8-27-2 (Rep. Vol. 1993). Even if a person receives, uses and discloses a trade secret innocently, i.e., without notice of any alleged misappropriation by another, that person himself can be held liable for misappropriation if he *continued* to use or disclose that secret *after* being put on notice of information that the information was a trade secret and had been misappropriated by the third person. *IMED Corp.*, 602 So.2d at 346.

The burden is on the party asserting the trade secret to show that the information at issue is included or embodied in the categories listed in § 8-27-2. *Public Systems, Inc. v. Towry*, 587 So.2d 969, 971 (Ala. 1991). Common examples of matters that may be considered trade secrets include manufacturing processes, design technology, strategic business information, and customer lists. *E.g., id.* at 972; *Soap Co. v. Ecolab, Inc.*, 646 So.2d 1366 (Ala. 1994); *Drill Parts*, 439 So.2d at 47-49. Whether particular information

constitutes a trade secret is a question of fact. *Soap Co.*, 646 So.2d at 1372; *Public Systems*, 587 So.2d at 972.

The burden of showing that reasonable steps were taken to protect the secrecy of the information also rests on the party claiming the trade secret. *Allied Supply Co.*, 585 So.2d at 36. Once a party makes information public, it loses its claim to trade secret protection. *Public Systems*, 587 So.2d at 973. Whether reasonable steps were taken is likewise a question of fact for the jury. *E.g.*, *Soap Co.*, 646 So.2d at 1372.

Even apart from outright public disclosure of the information at issue, a party's failure to take reasonable steps to insure the confidentiality of the information may forfeit any trade secret protection that would otherwise accrue. For example, in *Allied Supply Co.*, the Alabama Supreme Court found no trade secret protection for plaintiff's customer and vendor lists which were taken by then-employee defendants who then established a competing company, where at least ten (10) employees had free access to the lists, the lists were not marked "confidential," the lists were taken home by employees, multiple copies of each list existed, and the information on the lists was in the receptionist's Rolodex file. 585 So.2d at 36. Similarly, in *Alagold Corp. v. Freeman*, the federal court was unpersuaded by plaintiff's evidence that information taken by defendant (a vice-president who then became a competitor) was confidential where the information was not freely accessible to all employees but instead was available only on a need-to-know basis; the information was maintained in designated files cabinets in the administrative offices, where only employees who require such information were permitted access; and those offices were locked after regular business hours. Focusing instead on evidence that (1) employees who need to know secret information have free access to it, (2) none

of the filing cabinets containing such information are locked, (3) none of the proprietary information was marked “confidential,” and (4) the company did not communicate to its employees that such proprietary information was to be kept confidential, the court found plaintiff failed to take reasonable steps as a matter of law. 20 F.Supp.2d 1305, 1315 (M.D.Ala. 1998). On the other hand, in *Soap Co.* the Alabama Supreme Court found the evidence sufficient to create a jury question on the reasonableness of steps plaintiff took to insure secrecy even where the individual defendant (a former employee of plaintiff who founded the corporate defendant as a competitor) and his wife were accused of making after-hour raids to steal unshredded documents from a common dumpster used by plaintiff and located outside in a parking lot next to the building where plaintiff leased space. 646 So.2d at 1368-69, 1372.

The ATSA provides a uniform two (2) year statute of limitations for trade secret cases regardless of the nature of the misappropriation. The cause of action accrues and the limitation period begins to run when the misappropriation is discovered or when, in the exercise of reasonable diligence, it should have been discovered. ALA. CODE 8-27-5.

The Alabama Supreme Court has held that the ATSA replaces common law tort remedies for the misappropriation of trade secrets, while leaving existing contract remedies or safeguards in place. *Allied Supply*, 585 So.2d at 37. The Supreme Court has left open the question whether a plaintiff can assert a trade secrets claim under the common law when it is unable to state an ATSA claim. *IMED Corp.*, 602 So.2d at 349. Because the Act supersedes the common law only to the extent the common law is

inconsistent with the Act, ALA. CODE 8-27-6 (Rep. Vol. 1993), common law claims and remedies should remain available where the Act does not apply.

The Act provides various remedies for actual or threatened misappropriation: 1) injunction; 2) recovery of profits or benefits attributable to the misappropriation; 3) actual damages; 4) reasonable attorney's fee to the prevailing party if the claim is made or resisted in bad faith; and 5) exemplary damages in an amount not to exceed the actual award, but not less than \$5,000.00 if willful and malicious appropriation exists. ALA. CODE 8-27-4 (Rep. Vol. 1993). These remedies are not necessarily alternative remedies, and the Court has broad discretion in fashioning equitable relief. For example, if actual damages do not cover all of the misappropriator's profits that are attributable to the misappropriation, then those profits may be awarded. Likewise, if profits of the misappropriator do not cover all the damage caused to the trade secret owner, then, to the extent they are not covered, damages may be awarded in addition to profits. The intent is to assure two (2) outcomes: that the Plaintiff is made whole, and that the misappropriator recognizes no profit from its wrongdoing. So long as double recovery is avoided, any combination of the various types of relief may be awarded as appropriate.

## **II. RESTRAINTS AGAINST TRADE**

For over 100 years, Alabama has had laws protecting competition and restricting restraints on trade. Alabama Code § 6-5-60 provides a civil cause of action for activities that restrain trade. Although §§ 8-10-1, 8-10-2, and 8-10-3 provide for criminal penalties, they should be construed *in pari materia* with § 6-5-60 as all of these statutes are part of a uniform system of regulation; all directed toward punishing or providing redress for activities in restraint of trade. Section 6-5-60 states in pertinent part:

(a) Any person, firm or corporation, injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may in each instance of such injury or damage, recover the sum of \$500.00 and all actual damages from any person, firm or corporation creating, operating, aiding or abetting such trust, combine or monopoly and may commence the action therefore against any one or more of the parties to the trust, combine or monopoly, or their attorneys, officers or agents, who aid or abet such trust, combine or monopoly ...

The relevant statutes do not define or explain what a monopoly is. The courts have applied the common law idea of monopoly when interpreting these statutes and the common law has substantially been set out in the Sherman and Clayton Acts. The two broad fundamental purposes of antitrust laws are to preserve competition and to protect consumers. Therefore, Alabama anti-trust actions are governed by the federal law relating to monopolization. *McCluney v. Zap Professional Photography, Inc.*, 663 So. 2d 922, 926 (Ala. 1995).

Two recent decisions from the Alabama Supreme Court have greatly narrowed the scope of the Alabama anti-trust statutes. *Abbott Laboratories v. Durrett*, 1999 WL 424338 (Ala. 1999) and *Archer Daniels Midland Co. v. Seven-Up Bottling Co. of Jasper, Inc.*, 1999 WL 424336 (Ala. 1999) were released on the same day and are virtually identical opinions. In those opinions, the court found that Alabama's anti-trust statutes only apply to intra-state commerce and do not provide a cause of action for damages resulting from price-fixing of goods in inter-state commerce. In coming to this holding, the court analyzed the legislative history of Alabama's anti-trust statutes along with the relevant case law and determined that, at the time of their creation, the legislature intended to pass legislation only affecting intra-state commerce as the Sherman Act had already been passed nationally to control inter-state commerce.

These rulings leave plaintiffs who have been harmed by price-fixing, monopolies or predatory pricing, with little option other than to seek redress through the federal anti-trust statutes. This is true as the commerce clause has been so broadly construed that virtually all commerce will be of an “inter” rather than an “intra” state nature. However, it is important for the practitioner to carefully evaluate the nature of their client’s business and that of the unfair competitor to see if the activity complained of is of a purely intra-state nature.

The Sherman and Clayton Acts cover a wide range of conduct that restrains trade. Agreements among competitors such as price-fixing, bid-rigging and group boycotts are referred to as horizontal restraints. If firms are allowed to agree on price and output, they will behave much like a monopolist and industry output will be lower and prices will be higher. Such an agreement is commonly referred to as a cartel. An excellent example of this behavior can be seen in the dramatic gas price fluctuations of late caused by OPEC and its cartel pricing.

The federal anti-trust and trade regulation laws are enforced by the United States Department of Justice, the Federal Trade Commission (FTC), and private individuals or entities. Additionally, states’ attorney generals have authority under the Clayton Act to bring federal anti-trust suits on behalf of natural persons residing within the state. Any person, whether an individual, business entity or government, who has been injured in its business or property by reason of conduct which is in violation of anti-trust laws, may sue to recover treble damages, cost of the suit and attorneys’ fees. No discretion is given to the trial judge or jury in awarding treble damages, costs or attorneys’ fees where there is a finding that a violation has causally damaged the plaintiff. *Pollock and Riley, Inc. v.*



*Pearl Brewing Co.*, 498 F. 2d 1240 (5<sup>th</sup> Cir. 1974). Section 16 of the Clayton Act also allows for injunctive relief and the issuance of attorney's fees to a prevailing plaintiff.

Congress's authority to regulate commercial transactions under the anti-trust laws is derived from the commerce clause of the Constitution. Therefore, the plaintiff must plead a statement invoking commerce clause jurisdiction for an alleged anti-trust violation. Even activities that are quite local in nature may be reached under the Sherman Act if they have a substantial affect on inter-state commerce or a substantial affect is perceived. See *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980).

In order to maintain a private anti-trust action, a Plaintiff must demonstrate a causal connection among the following: (1) injuries suffered (2) to business or property by (3) the violation of an anti-trust law. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In *Brunswick*, the Supreme Court held that in order to recover damages, plaintiffs must prove more than injury causally linked to an illegal course of conduct. Plaintiffs must prove 'anti-trust injury' by making "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981).

Generally, whether or not acts restrain trade should be determined under a rule of reason. However, certain conduct, by its nature or character, is unreasonable because it is inherently anti-competitive. Price-fixing and group boycotts are both per se illegal activities. It is important to note that not even a per se anti-trust violation automatically equates to anti-trust injury. The injury must be to a "necessary and foreseeable" victim and of the type the anti-trust laws were intended to prevent. *Blue Shield of VA v. McCready*, 457 U.S. 465 (1982); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S.

328 (1990). The McCready Court also made clear that individuals or a class of individuals who are not competitors or consumers may still file suit so long as they are among the class of foreseeable and necessary victims.

Private treble damages suits must be brought within four years after the claim for relief accrues. The statute of limitations does not begin to run until damage or injury has been sustained. When injury is sustained depends on the nature of the anti-trust violation alleged. In *Zenith Radio Corp. v. Hazelton Research, Inc.*, 401 U.S. 321 (1971), the court held that the action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. When there is a continuing conspiracy to violate the anti-trust laws, this has been understood to mean that each time a plaintiff is injured by the defendant, a cause of action accrues. Each separate cause of action that so accrues, entitles the plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which will be suffered in the future from that particular invasion. The statute of limitations may also be tolled or suspended when there is fraudulent concealment of the claim in which case the statute will not begin to run until the fraud is discovered.

### **III. INTENTIONAL INTERFERENCE WITH BUSINESS OR CONTRACTUAL RELATIONSHIPS**

In 1986, following the release of the Supreme Court of Alabama's decision in *Gross v. Lowder Realty Better Homes & Gardens*, 494 So. 2d 590 (Ala. 1986), Alabama courts more openly recognized the individual tort of interference with business or contractual relationships. Prior to *Gross*, Alabama courts would not recognize interference complaints filed against third parties unless the alleged tortfeasor had interfered with an employer-employee relationship or had fraudulently induced a party to

a lease to breach an existing contract. *See, e.g., James S. Kemper & Co. Southeast, Inc. v. Cox & Associates, Inc.*, 434 So. 2d 1380 (Ala. 1983). In addition, Alabama trial courts prior to *Gross* had difficulty distinguishing between the separate causes of action of “intentional interference with business relations” and “intentional interference with contractual relations.” *Gross*, 494 So. 2d at 596, 597.

The Court’s opinion in *Gross* ushered in welcome relief for Alabama businesses by combining the “business relations” claim with the “contractual relations” claim and by adopting the general rule that “one who, without justification to do so, induces a third person not to perform a contract with another is liable to the other for the harm caused thereby.” *Id.* Since *Gross*, the Court has continued to acknowledge that in order for an aggrieved party to succeed on a claim of intentional interference with business or contractual relations that party must demonstrate: 1) existence of a contract or business relation; 2) defendant’s knowledge of the contract or business relation; 3) intentional interference by the defendant with the contract or business relation; and 4) damage to the plaintiff as a result of the defendant’s interference. *Mutual Sav. Life Ins. Co. v. James River Corp. of Virginia*, 716 So. 2d 1172, 1180 (Ala. 1998).

Although the present Court has demonstrated a desire to restrict aggrieved parties from pursuing claims based upon the likely occurrence of a future event in consumer cases such as *Williamson v. Indianapolis Life Ins. Co.*, 741 So. 2d 1057 (Ala. 1999) and *Stringfellow v. State Farm Life Ins. Co.*, \_\_\_ So. 2d \_\_\_ [Ms. 1980533, Sept. 17, 1999] (Ala. 1999), the present Court, on the other hand, has ignored the supposed logic of *Williamson* and *Stringfellow* in the area of business interference by recently acknowledging that “[d]efining this cause of action to apply to a ‘business relation’ as

well as a ‘contractual relation’ allows a plaintiff a remedy in the situation where a defendant has intentionally interfered with a prospective contract as well when he has interfered with an existing contract. *Ex parte Alabama Dept. of Transportation*, \_\_\_ So. 2d \_\_\_ [Ms. 1981916, Feb. 25, 2000] (Ala. 2000). In addition, the Court further opined that “[t]his rule has always been justified by the policy that ‘protection is appropriate against improper interference with reasonable expectancies of commercial relations even when an existing contract is lacking.’” *Id.* at \_\_\_.

Even though the present Court is apparently willing to distinguish between consumers and businesses with regard to the above, the Court’s position is less clear with regard to the compulsion of binding non-appealable arbitration in relation to interference claims. In particular, previous Courts considering arbitration issues have been willing to differentiate between controversies that stem from the parties contractual dealings and separate and distinct acts committed by pro-arbitration tortfeasors. *See, e.g., Ex parte Discount Foods, Inc.*, 711 So. 2d 992, (Ala. 1998). The Court’s opinion in *Discount Foods*, *supra.*, though currently being eroded by the present Court, demonstrated particular concern for Alabama’s business community by noting the following:

“the parties” arbitration provision, although broad, cannot be construed to encompass intentional torts of the parties that are separate and distinct from the dealings that gave rise to the signing of the document containing the arbitration provision in the first place. To hold otherwise would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside the scope of their contemplated dealings, without concern that they might have to answer for their actions before a jury of their peers.”

*Id.* at 994. Nevertheless, the present Court appears less willing to make such a distinction in lieu of compelling arbitration without regard to the remoteness of the act complained of. *See, e.g., Green Tree Financial Corp. of Alabama v. Vintson*, \_\_\_ So. 2d \_\_\_ [Ms. 1972191, October 1, 1999] (Ala. 1999).

Without regard to the foregoing, even if the aggrieved party is able to demonstrate the existence of the previously discussed elements of a claim of interference, the alleged tortfeasor may be able to affirmatively avoid liability by demonstrating that its actions were justified. *Gross* 494 So. 2d at 597. To determine whether the defendant's acts are justified, the importance of the defendant's objective is balanced against the importance of the interest interfered with, taking into account the surrounding circumstances. *Id.* Nevertheless, the existence of justification is generally determined by a jury. *Polytech, Inc. v. Utah Foam Products, Inc.*, 439 So. 2d 683 (Ala. 1983).

Of particular importance to the success of an interference claim is the degree of damage resulting from the alleged tortfeasor's conduct. Common types of damages sought include compensatory damages to compensate for, among other things, lost profits, lost expenditures and mental anguish and punitive damages designed to punish the tortfeasor for their conduct. *Southern States Ford, Inc. v. Proctor*, 541 So. 2d 1081, 1088 (Ala. 1989).

In conclusion, the following are a couple of examples of scenarios from which these claims arise: A real estate management company sued a homeowners' association when its interference with the company's customer relationships and contracts caused a substantial loss of income. Plaintiff was a relatively new owner of the company. Shortly after the change in ownership, differences arose between the new owner and the

association. As a result, officers and friends of the association approached several of the company's customers and encouraged them to rent from or through an alternate management company. In another case, plaintiff and defendant were engaged in the wholesale grocery business. Plaintiff competed with defendant to purchase a particularly profitable division of another business. When plaintiff secured the purchase, defendant surreptitiously contacted the employees of the recently purchased division. After holding secret meetings with the employees, defendant convinced the employees of the entire division to "walk out" on plaintiff on a designated day and begin working for defendants.

#### **IV. FRAUD AND BREACH OF CONTRACT**

Fraud and breach of contract often go hand in hand in business-related claims. A contract is established by showing an agreement, consideration, a legal object and two or more contracting parties with capacity. *Gonzalez v. Blue Cross Blue Shield*, 689 So.2d 812, 819 (Ala. 1997). Whether ambiguity exists in any contractual term is a question of law determined by the trial Court. *Underwood v. South Central Bell Telephone Co.*, 590 So.2d 170, 175 (Ala. 1991). If the court finds any ambiguity, the true meaning of the contract is a question of fact, resolved only by a jury. *Sealing Equipment Products Co. v. Velarde*. 644 So.2d 904, 908 (Ala. 1994). Whether the parties have performed under the contract is also a jury question.

Generally, damages are awarded to the extent that they return the injured party to the position in which it would have been had the contract been performed. *Pate v. Rollinson Logging Equipment, Inc.* 628 So.2d 337 (Ala. 1993). Plaintiff may recover damages which were the natural and proximate consequence of the breach. *Pate v. Rollinson Logging Equipment, Inc.*, 628 So.2d 345 (Ala. 1993). A jury need not achieve

“mathematical precision” when calculating damages since a plaintiff will not be denied a substantial recovery if he has produced the best evidence available, and it is sufficient to afford a reasonable basis for estimated loss. *Mannington Floor Woods, Inv. V. Port Epes Transport, Inc.*, 669 So.2d 817, 822 (Ala. 1995); quoting *United Bonding Insurance Co. v. W.S. Newall Inc.*, 285 Ala. 371, 380, 232 So.2d 616, 624 (1969).

Fraud is committed by: 1) a false representation; 2) of a material fact; 3) relied upon by the plaintiff; 4) who is damaged as a proximate result of the misrepresentation, *Underwood v. So. Central Bell Tel. Co.*, 590 So.2d 170, 173 (Ala. 1991). An action for fraud may arise if the misrepresentation is made willfully to deceive, recklessly, or by mistake. ALA. CODE § 6-5-101 (1993).

The plaintiff’s reliance on the misrepresentation must have been reasonable; a standard which the Alabama Supreme Court has held is more practical, allowing “the fact finder greater flexibility in determining the issue of reliance based upon all of the circumstances surrounding the transaction, including mental capacity, education, background, relative sophistication and bargaining powers of the parties.” *Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 421 (Ala. 1997).

When drafting a fraud complaint, one must be mindful not to unnecessarily allege promissory fraud which is more difficult to prove. In addition to the elements discussed above, promissory fraud requires a showing that at that the time the representation was made, defendant had no intention of performing and that the defendant made the promise with an intent to deceive. *Bethel v. Thorn*, 1999 WL 985149, at 4 (Ala. Oct. 29, 1999). Though a plaintiff may have no intention of alleging promissory fraud, the Court may

interpret it as such if the evidence shows a future promise or a future act was the subject of the misrepresentation. *Id* at 4.

Compensatory damages may be awarded as well as punitive damages if the plaintiff shows the fraud was gross, malicious, oppressive, and that the fraudulent statement was made with knowledge of its falseness, or so recklessly made that it amounts to intentional fraud. *Underwood*, 590 So.2d at 174. Several tips on discovery and how to work up a fraud case include the following:

1. Study the applicable industry regulations.
2. Try to find ex-employees of the defendant to testify about the company's practices. This can be invaluable. Depositions are useful in obtaining that information.
3. Find similar occurrence information. Do this by getting the customer list of the defendant, contacting the customers and asking if they have had a similar action perpetrated on them. Hopefully, they will agree to be witnesses for you. See the cases of *Ex Parte Asher, Inc.* 569 So.2d 733 (Ala. 1990); *Ex Parte State Farm*, 452 So.2d 861 (Ala. 1984) which allow this discovery.
4. Also, if you are hooked into the Administrative Office of the Courts (AOC) computer, you can find other similar lawsuits against the defendant. If you are not hooked in, you can use the AOC network by going to any circuit clerk.
5. Do a Westlaw search to see if the company has been sued for other similar occurrences.
6. Contact the American Trial Lawyers Association. They have a database which may have some information regarding the companies.



7. Check with the Attorney General's Consumer Division to see if there has ever been any investigation of the company.
8. Check with the Better Business Bureau to see if there have ever been any complaints regarding the company.
9. Additionally, the Internet is a great resource for endless information of a wide variety.

In the majority of cases, companies conduct business with each other under an oral or written contract. When the contract is breached, whether the wrongdoer's intent to perform the conduct was in good faith or fraudulent is almost immediately called into question. Thus, these claims are alleged together and arise in innumerable contexts.

The poultry industry has recently seen substantial business tort litigation of this nature. As discussed below, farmers who raise chickens for large integrators have alleged that they are being taken advantage of by the company for which they grow. Contracts to grow contain provisions which require farmers to raise chickens by the stringent standards of the company without any input from the farmer. The large companies dictate when the birds are fed, watered, medicated and delivered. The farmers allege that the companies force farmers to incur huge amounts of debt to finance the "latest technological advantages" in poultry farming. Oftentimes, however, serious questions exist regarding the benefits of the latest equipment requirements. The end result is that the farmer foots the bill for the companies' capital investment, while the companies reap the profits.

Poultry companies rarely enter into lasting contractual relationships with growers. Most contracts exist for one grow out for each flock. Generally, the companies will not

guarantee the next flock will be delivered for growth but the farmer maintains huge debt services arrangements with local lending institutions to accommodate the demands for updates by the company. Farmers fear being “cut-off” if they refuse to upgrade their farms. Although companies do not usually cutoff growers for failure to upgrade, the farmers allege that the companies find ways to pay the farmer less for the same amount of work.

Oftentimes, the companies catch a farmer’s flock for immediate deliver to the plant to be weighted, only to have the company leave the birds on the trucks for hours losing weight from dehydration and, eventually, death. This costs the individual farmer thousands of dollars which he needs to finance the upgrades required by the company.

There are numerous remedies available to the farmer, including: breach of contract, fraud, negligence, intentional interference, conversion, antitrust, RICO, and more. Success with these types of cases depends on the credibility of the witnesses, the documentation available from the plaintiff, the documentation produced by the integrator and any particularly dramatic facts that may lead to an award of punitive damages for intentional conduct.

Other common cases deal with the plight of new business owners. Many people are looking to fulfill their dream of owning and operating a small business. Oftentimes, salespeople lead them to a small business that is not yet on the market for sale. When asked for the business’s financial performance information, the defendants’ agents produce financial statements which are inaccurate and misleading. Relying on the information, the plaintiff purchases the business. After quitting their jobs, mortgaging their homes and personally guaranteeing the financing, the new business owners set out

to fulfill their dream. Shortly after the purchase, many plaintiffs have learned that the business did not generate the revenue that had been claimed.

Of course, discovery is the most important part of these cases. Typically, there are other small businesses which have been misled in similar transactions. Obtaining the defendant's customer list is vital in developing a pattern and practice of conduct. Any documentation that reveals the commissions on such a sale are also important to show the defendants' motive for misrepresenting the truth.

As one last example, the timber industry has also seen a rise in litigation, regarding breach of contract and fraud. Large companies, owning thousands of acres of timberland, contract with numerous timber companies for the cutting and hauling of timber. In what appears to be a common practice, the company contracts with more timber companies than is necessary to satisfy the company's needs by the year's end.

In a pending case, a timber company spent several hundred thousand dollars in purchasing equipment to handle the large contract and invested practically one hundred percent of its resources in the venture, respecting the size of the operation. When the defendant later determined the timber company's services were not needed, the contract was blatantly breached. Several hundred thousand dollars in debt, the timber company now faces bankruptcy. Cases involving breach of contract and fraud abound. The aforementioned ones are only a small sample of common ones pending.

## **CONCLUSION**

Increased business activity is great for Alabama's economic vitality. To maintain a business-friendly environment, however, Alabama, its judiciary and legal profession

must be prepared to serve business needs in the legal arena. If we are successful in maintaining an environment for fair competition, Alabama will be set to lead the nation in start up business in the new millennium.