

WHEN BUSINESS NEEDS A TRIAL LAWYER

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INTRODUCTION

Large corporations that control the business and political climate in Alabama spew venom regarding “trial lawyers” and the right to trial by jury. In fact, bashing trial lawyers will be their main platform in the Supreme Court elections this fall. The effect of this rhetoric is to give trial lawyers a bad name with many business people that hear this propaganda. Based on this, most business folks don’t think they could ever need a trial lawyer. To the contrary, in today’s competitive business climate, businesses need a trial lawyer to protect their interest.

We have an entire section in our firm, consisting of 10 lawyers and 20 support staff that handle exclusively business litigation on behalf of injured businesses. We represent all size businesses from multi-million dollar companies to “mom and pop” companies. Through our experience, we have learned that businesses do actually need a trial lawyer to protect their interest and to help them get their right to a trial by jury.

Thankfully, most business people do not believe the rhetoric of these large corporations. In fact, when businesses have been injured, they often tell us that they want to exercise their right to a trial by jury. They want to have their day in court. They specifically tell us that they do not believe in arbitration that takes away their rights. Of course, arbitration agreements are in the fine print of many documents that business people sign. These agreements require the business to give up their right to go to court in the event they have a dispute, and instead allow an arbitrator to decide the case. Many times the arbitrator has close ties to the wrongdoer who drafted the document to begin with. Also, the arbitrator is not required to follow the law, and there is no appeal from the arbitrator’s ruling. The cost of arbitration is very high and can be held in very faraway places. Businesses who have been wronged do not like arbitration.

There are many ways that an experienced business trial lawyer can help a business avoid arbitration and get it’s trial by jury so that it can get a fair hearing. There are also certain Alabama laws that prevent wrongful actions by other businesses and ensure fair competition. The following is a synopsis of some of the most common claims seen in business litigation and a discussion of the current state of the law in those areas.

THE ALABAMA TRADE SECRETS ACT

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). The Act also explicitly protects secrets not yet in use but intended to be used.

We have seen many cases involving a defendant stealing trade secrets from a business. If the way in which the trade secrets were taken meets the above criteria, then ATSA is an effective tool to compensate the business and to stop this type of conduct.

INTENTIONAL INTERFERENCE WITH BUSINESS OR CONTRACTUAL RELATIONSHIPS

In 1986, the Supreme Court of Alabama released *Gross v. Lowder Realty Better Homes & Gardens*, 494 So. 2d 590 (Ala. 1986). At that point, 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 a business to succeed on a claim of intentional interference with business or contractual relations that business must show: 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).

On many occasions, businesses have their contracts breached or relationships broken by third parties. If defendants’ actions fit the above pattern, then this cause of action can be used to protect the business’s interest.

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). The business may

recover damages that 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 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).

We see more claims of fraud by businesses than any other type. The elements are harder to prove than before, but viable causes of action still exist. This cause of action is very important to the protection of business interests.

CONCLUSION

As stated above, the large corporations that control Alabama’s political and business climate continually bash trial lawyers and the right to a trial by jury. However, most businesses will need a trial lawyer at some point in their corporate existence. Some trial lawyers are knowledgeable in the area of business litigation and are available to help businesses. Businesses need to know that when they are victims of wrongdoing, a trial lawyer may be the place to turn.