

Statutory Actions:

Don't Forget the Code of Alabama When Filing Your Next Case

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On the task of rebuilding the House of Commons after German bombing raids, Winston Churchill was quoted as saying, “We shape our buildings and afterwards our buildings shape us.” Applying this to the trial lawyer, “We shape our lawsuits and afterwards our lawsuits shape us.” The trial lawyer, being human, perhaps cannot help but fall into familiar patterns. Maybe most of the lawyer’s practice involves similar cases. Maybe each complaint in each new case is drafted using the template of the one before. There is a brief recitation of facts, then maybe a count for simple negligence and a count for wantonness. Before long, the lawyer may be shaped by this pattern, forgetting that our statutory law provides a host of remedies for any number of civil wrongs. Perusing the Code of Alabama can shake us out of old patterns and help us find something new. Like a visit to the local buffet restaurant, we might find something new (yet tasty) if we push beyond the usual. Please consider this article a short menu of the smorgasbord of remedies¹ offered by Alabama’s statutory law.

¹ This article is directed to remedies for “business tort” or “economic” tort types of claims, rather than personal injury claims.

Trade Secret Act

Alabama first recognized the common law “trade secrets doctrine” in 1983.² Since that seminal case, the Alabama Legislature has enacted the Alabama Trade Secrets Act.³ The Act replaced the common law remedy, to the extent the Act is inconsistent with the common law.⁴

The Act defines a “trade secret” as information that:

- a. Is used or intended for use in a trade or business;
- b. Is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process;
- c. Is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret;
- d. Cannot be readily ascertained or derived from publicly available information;
- e. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and
- f. Has significant economic value.⁵

Under the Act, a person is liable if he discloses or uses the trade secret of another, without a privilege to do so, and

- (1) That person discovered the trade secret by improper means;
- (2) That person's disclosure or use constitutes a breach of confidence reposed in that person by the other;
- (3) That person learned the trade secret from a third person, and knew or should have known that (i) the information was a trade secret and (ii) that the trade secret had been appropriated under circumstances which violate the provisions of (1) or (2), above; or
- (4) That person learned the information and knew or should have known that it was a trade secret and that its disclosure was made to that person by mistake.⁶

“Improper means” are means such as:

- a. Theft;
- b. Bribery;
- c. Misrepresentation;

² *Drill Parts & Service Co., Inc. v. Joy Mfg. Co.*, 439 So.2d 43 (Ala. 1983).

³ Ala. Code § 8-27-1, *et seq.*

⁴ *Allied Supply Co., Inc. v. Brown*, 585 So.2d 33, 36 (Ala. 1991); Ala. Code § 8-27-6.

⁵ Ala. Code § 8-27-2.

⁶ Ala. Code § 8-27-3.

- d. Inducement of a breach of confidence;
- e. Trespass; or
- f. Other deliberate acts taken for the specific purpose of gaining access to the information of another by means such as electronic, photographic, telescopic or other aids to enhance normal human perception, where the trade secret owner reasonably should be able to expect privacy.⁷

Possible remedies include:

- (1) To the extent that they are not duplicative:
 - a. Such injunctive and other equitable relief as may be appropriate with respect to any actual or threatened misappropriation of a trade secret,
 - b. Recovery of any profits and other benefits conferred by the misappropriation that are attributable to the misappropriation (In establishing the misappropriator's profits, the complainant is required to present proof only of the misappropriator's gross revenue, and the misappropriator is required to present proof of his or her deductible expenses and the elements of profit attributable to factors other than the trade secret.), and
 - c. The actual damages suffered as a result of the misappropriation;
 - (2) Reasonable attorney's fees to the prevailing party if:
 - a. A claim of actual or threatened misappropriation is made or resisted in bad faith,
 - b. A motion to terminate an injunction is made or resisted in bad faith, or
 - c. Willful and malicious misappropriation exists; and
 - (3) Exemplary damages in an amount not to exceed the actual award made under subdivision (1), but not less than ten thousand dollars (\$10,000), if willful and malicious misappropriation exists.
- (b) In addition to the civil damages and penalties provided in subsection (a), a person who intentionally remunerates or recruits a third person for actual or threatened misappropriation of a trade secret and any person who misappropriates a trade secret shall be guilty of a Class C felony. In any criminal prosecution under this subsection against an employer based on misappropriation of a trade secret by its employee, the term intentionally shall mean that the employer remunerated an employee with the intent that the employee would misappropriate the trade secrets of another. The trade secret that was misappropriated shall be clearly identified. Mere acceptance or receipt by an employer of a trade secret of another, by itself, shall be insufficient to prove criminal liability.

⁷ Ala. Code § 8-27-2.

Each act committed under this subsection shall constitute a separate offense.⁸

Trade secret protection is recognized as an important public policy in Alabama. “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.”⁹

What constitutes a “trade secret” is a question of fact for the trial court.¹⁰ Information may be a “trade secret” even if it could be easily duplicated by others competent in the given field.¹¹

Unfair Trade Practices / Intellectual Property

The touchstone of liability for trademark and trade name infringement and for unfair competition is the likelihood of customer confusion about the source of products or services.¹² Alabama provides a statutory remedy for trademark infringement.¹³ Also by statute, Alabama has a “Deceptive Trade Practices Act.”¹⁴ The purpose of the Act is to “protect the interest of both the consuming public and the legitimate businessperson.”¹⁵ The Act declares numerous “deceptive acts or practices” to be unlawful.¹⁶ The Act provides a private right of action for an injured party, including actual damages, statutory damages, treble damages, and attorney fees.¹⁷

Alabama’s common law has long recognized certain claims to be “unfair competition.” It is stated that “unfair competition” generally consists of “palming off” on customers the goods or

⁸ Ala. Code § 8-27-4.

⁹ *IMED Corp. v. Systems Engineering Associates Corp.*, 602 So.2d 344, 346 (Ala. 1992)(quoting the Preface to the Act).

¹⁰ *Public Systems, Inc. v. Towry*, 587 So.2d 969, 972 (Ala. 1991).

¹¹ *Mason v. Jack Daniel Distillery*, 518 So.2d 130, 133 (Ala. 1987).

¹² ABA Model Jury Instructions: Business Torts Litigation, 154 (4th ed. 2005).

¹³ Ala. Code §§8-12-6, *et seq.*

¹⁴ Ala. Code § 8-19-1, *et seq.*

¹⁵ Ala. Code § 8-19-2.

¹⁶ Ala. Code § 8-19-5.

¹⁷ Ala. Code § 8-19-10; *Sam v. Beaird*, 685 So.2d 742, 744 (Ala. Civ. App. 1996).

business of one person as and for the goods or business of another.¹⁸ The Alabama courts may also enforce the federal Lanham Act, 15 U.S.C. § 1051 et seq.¹⁹ Other examples of “unfair competition” may include: the simulation of advertising methods; deceptive comparative advertising; the appearance of business facilities; a product’s shape or configuration; the use of similar corporate, business, and professional names; the use of similar “trade dress;” and the dilution of goodwill of a trademark.²⁰

Antitrust

Alabama has a state “antitrust” statute.²¹ The statute provides a private cause of action , as follows:

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 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 therefor 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. All such actions may be prosecuted to final judgment against any one or more of the defendants thereto, notwithstanding there may be a dismissal, acquittal, verdict, or judgment in favor of one or more of the defendants.²²

In addition, there is a statutory scheme addressing a trust to regulate or fix the price of any article or commodity within this state.²³ These statutes have been held to apply only to *intrastate* activities.²⁴ For *interstate* activities, a party must rely on federal law.²⁵

¹⁸ *Jefferson Home Furniture Co., Inc. v. Jefferson Furniture Co., Inc.*, 349 So.2d 5, 8 (Ala. 1977).

¹⁹ *Classroomdirect.com, LLC v. Draphix, LLC*, 992 So.2d 692, 716 (Ala. 2008).

²⁰ ABA Model Jury Instructions: Business Torts Litigation, 160-62 (4th ed. 2005).

²¹ Ala. Code § 6-5-60.

²² *Id.*

²³ Ala. Code § 8-10-1, *et seq.*

²⁴ *Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc.*, 746 So. 2d 966, 989-90 (Ala. 1999).

²⁵ *Id.*

Libel or Slander

In an action for libel or slander, the plaintiff must prove that defamatory matter was published or spoken to a third party.²⁶ If the defendant makes a retraction within 10 days of the publication, then the plaintiff may only recover actual damages.²⁷ But, punitive damages may be awarded where the defendant knew the matter was false (or acted with reckless disregard), and the defendant failed to make a retraction despite a written demand for retraction.²⁸

Slander of Title

By statute, a party with an interest in real property may commence an action for “slander of title,” defined as “libelous or slanderous words falsely and maliciously impugning his title.”²⁹

To recover for slander of title to realty a plaintiff must establish:

(1) his ownership of the property slandered; (2) publication by the defendant of a false statement concerning his title; (3) malice by the defendant in publishing his statement; (4) publication of the statement to someone other than the plaintiff; (5) publication of the statement by the defendant in disparagement of plaintiff's property or his title thereto; and (6) special damages proximately caused by the publication of the statement.³⁰

The defendant's malice may be established by proof that he intentionally disparaged plaintiff's title to the property slandered or recklessly disparaged same without information sufficient to support a bona fide belief that he, and not the plaintiff, had paramount title to the property.³¹ Special damages may be demonstrated by proof that defendant's disparagement of

²⁶ Ala. Code § 6-5-182; Burks v. Pickwick Hotel, 607 So.2d 187 (Ala. 1992).

²⁷ Ala. Code § 6-5-185.

²⁸ Ala. Code § 6-5-186.

²⁹ Ala. Code § 6-5-211.

³⁰ Harrison v. Mitchell, 391 So.2d 1038, 1041 (Ala. Civ. App. 1980).

³¹ *Id.*

plaintiff's title to the slandered realty "interrupted, or injuriously affected, some dealing of the plaintiff with his property."³²

Right of Publicity

Using a person's likeness for profit, without permission, may now provide a cause of action.³³ "Any person or entity who uses or causes the use of the indicia of identity of a person, or in products, goods, merchandise, or services entered into commerce in this state, or for purposes of advertising or selling, or soliciting purchases of, products, goods, merchandise, or services, or for purposes of fund-raising or solicitation of donations, or for false endorsement, without consent shall be liable...."³⁴ Liability may be found regardless of whether the use is for profit or not for profit.³⁵ There are exceptions for free speech and fair use.³⁶ A plaintiff may elect to receive statutory damages of \$5,000 per action, or compensatory damages, and may also seek punitive damages.³⁷ Injunctive relief is also available.³⁸

Private Nuisance

A "private nuisance" gives a right of action to the person injured.³⁹ A private nuisance is one limited in its injurious effects to one or a few individuals.⁴⁰ A private nuisance may injure either the person or property, or both, and in either case a right of action accrues.⁴¹

A "nuisance" is anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained

³² *Id.* at 1041-42.

³³ Ala. Code § 6-5-772.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ala. Code § 6-5-773.

³⁷ Ala. Code § 6-5-774.

³⁸ *Id.*

³⁹ Ala. Code § 6-5-121.

⁴⁰ *Id.*

⁴¹ Ala. Code § 6-5-124.

of must not be fanciful or such as would affect only one of fastidious taste, but it should be such as would affect an ordinary reasonable man.⁴²

The Alabama Supreme Court has recognized that even a lawful and careful activity, when combined with culpable acts, constitutes a nuisance if the activity hurts, inconveniences, or damages the complaining party.⁴³

Other Statutes

It is good to be aware of certain statutes that apply to specific industries or trades. While not widely applicable, these statutes are vital when dealing with a claim that falls within their scope. Title 8 of the Alabama Code contains 39 chapters, any one of which might be applicable to a given situation. Likewise, Title 34 contains 43 chapters all dealing with specific professions and businesses. When facing an unusual situation involving a business and wondering what the law might be, start by browsing Titles 8 and 34.

Conclusion

Every year, our Legislature meets for months and creates new laws. Every year, existing laws may be amended or repealed. The Code of Alabama is a living, breathing thing. Within it, the trial lawyer may find an answer and a remedy for any number of situations. Next time a client comes to your office with an unusual story, browse through the Code. Chances are good that the Code has an answer, or at least a tasty nugget.

⁴² *K-Mart, Inc. v. Stewart*, 29 So.3d 887, 893 (Ala. Civ. App. 2009).

⁴³ *Id.* (citing *Tipler v. McKenzie Tank Lines*, 547 So.2d 438 (Ala.1989)).