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What ⁱⁿ
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World ^{is}
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“Business Tort?”

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The Trouble With Labels

People often ask the lawyer, "What do you do for a living?" The lawyer might answer, "I'm a lawyer." They follow up, "What kind of lawyer?" That is a tough one. If the answer is "business litigator" or "business trial lawyer" or "commercial litigator" or anything similar, the response is usually a befuddled look. And then a lengthy explanation is required, which may or may not give the listener some clarity. This often is true whether speaking with another lawyer or with a layman.

The trouble with labels is that they often mean very different things to different people. To some people they may mean nothing at all. Just as beauty is in the eye of the beholder, so too can be the meaning of "business litigation" or "business tort." These are not areas of the law that are frequently in the public eye.

The purpose of this writing is to provide an overview and brief explanation of what the author believes to fall within the "business tort" practice area. It is hoped that, with this guidance, the practicing attorney will be able to keep watch for—and hopefully catch—"business tort" cases. If handled correctly, this can be a very productive area of practice.

The reader should be aware that "business torts" are just one form of "business litigation." Other areas might be said to include contract litigation, securities litigation, insurance litigation, trust and estate litigation, real estate litigation, professional negligence (excluding medical malpractice), and certain equitable claims (like an "accounting"). Those other areas are beyond the scope of this article and are not intended to be addressed.

What Causes of Action May Be "Business Torts"?

Alabama law provides no clear definition to the general term "business tort." One workable definition, however, is this:

Business tort. A tort that impairs some aspect of an economic interest or business relationship and causes economic loss rather than property damage or bodily harm.¹

The term may include "tortious interference with contractual relations, intentional interference with prospective economic advantage, unfair business practices, misappropriation of trade secrets, and product disparagement,"² though those examples are not exclusive.

While the category of "business torts" is broad, it is important to remember that "improper motives cannot transform lawful actions into actionable torts."³ "Whatever a man has a legal right to do, he may do with impunity, regardless of motive, and if in exercising his legal right in a legal way damage results to another, no cause of action arises against him because of a bad motive in exercising the right."⁴ Thus, the "business tort" lawyer must be prepared to show a legal wrong and not mere "bad motive."

Interference with Business/Contract Relations

Alabama law has long recognized the tort of "intentional interference with business or contractual relations." Proof of the tort requires:

- (1) The existence of a protectable business relationship;
- (2) Of which the defendant knew;
- (3) To which the defendant was a stranger;
- (4) With which the defendant intentionally interfered; and
- (5) Damage.⁵

The elements do not require a showing of fraud, force, or coercion.⁶ Furthermore, the tort may be available even when an existing contract is lacking.⁷ It is not necessary that the prospective

relation be expected to be reduced to a formal, binding contract.⁸ It is the right to do business in a fair setting that is protected.⁹

As a matter of law, a party to the contract or business relationship cannot be liable for interference.¹⁰ A defendant is a party in interest to a relationship if the defendant has any beneficial or economic interest in, or control over, that relationship.¹¹ The term "participant" is used to describe an individual or entity who is not a party, but who is essential, to the allegedly injured relationship and who cannot be described as a stranger.¹² If the defendant is a "participant," then the defendant cannot be guilty of interference.¹³

As an affirmative defense, a defendant may plead and prove "justification."¹⁴ A defendant may be "justified" in interfering with a competitor's business based on "legitimate economic motives" and "bona fide business competition."¹⁵ The question of justification is generally one for the jury to decide.¹⁶

One form of interference may be advertising which is "intentionally false" and causes damage.¹⁷ Mere "comparative advertising" which denotes the disadvantages in dealing with a competitor is not enough.¹⁸ Similarly, intense competition for at-will accounts alone, even to the point of attempting to ruin a rival and even when the interferer acts dishonorably, is insufficient.¹⁹

If the defendant is found liable for wrongful interference, damages are available for (1) the pecuniary loss of the benefits of the relation; (2) consequential losses for which the interference is a legal cause; (3) emotional distress or actual harm to reputation if either is reasonably to be expected to result from the interference; and (4) punitive damages.²⁰ The damage resulting from interference can occur regardless of the fact that the plaintiff would not have been awarded the contract, and it can also take other forms.²¹

Shareholder Disputes²²

In the closely held business, the majority owner(s) have a duty to act fairly to the minority owner(s).²³ The majority has the right to control, but when it does so, it occupies a fiduciary relation toward the minority.²⁴ Violation of this duty may be called the tort of minority shareholder "oppression." Common examples include the majority's self-dealing, waste or theft of corporate opportunities, usurpation of corporate opportunities, and "squeeze out" of the minority.²⁵

Generally speaking, Alabama law follows the "business judgment rule" and is reluctant to interfere with the internal operations of a business.²⁶ The rule is thus stated:

If in the course of management, directors arrive at a decision, within the corporation's powers, for which there is a reasonable basis, and they act in good faith, as the result of their independent discretion and judgment, and uninfluenced by any consideration other than what they honestly believe to be the best interest of the corporation, a court will not interfere with internal management and substitute its judgment for that of the directors to enjoin or set aside the transaction or to surcharge the directors for any resulting loss.²⁷

In circumstances where the business judgment rule may be overcome, a shareholder may be able to bring either a "direct" or a "derivative" action, or possibly both. A "direct" claim has been described as a "personal claim for damages."²⁸ If, however, a shareholder's individual damages are incidental to his or her status as a stockholder, then the claim may be held to be a "derivative" one.²⁹

A derivative claim must be brought on behalf of the corpora-

tion, and is subject to certain pleading formalities.³⁰ In analyzing whether a claim is derivative or direct, the Alabama courts look to the nature of the alleged wrong rather than the designation used by the plaintiff in the complaint.³¹ "It is only when a stockholder alleges that certain wrongs have been committed by the corporation as a direct fraud upon him, and such wrongs do not affect other stockholders, that one can maintain a direct action in his individual name."³²

Breach of Fiduciary Duty

A claim for "breach of fiduciary duty" may often be made in the shareholder dispute cases discussed above. This is because the corporate officers and directors owe a fiduciary duty to the corporation.³³ The claim also arises in probate matters, where an executor or trustee owes a fiduciary duty.³⁴ Another common area is in claims against "investment advisors," who may be held by securities laws to be under a fiduciary duty to their clients.

While certain contexts may be more common than others, the claim may be made under any circumstances under which a "fiduciary duty" arises. A "fiduciary" is defined as:

1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor <the corporate officer is a fiduciary to the corporation>.
2. One who must exercise a high standard of care in managing another's money or property <the beneficiary sued the fiduciary for investing in speculative securities>.³⁵

A "fiduciary duty" is defined as

A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).³⁶

In Alabama, a claim alleging breach of fiduciary duty sounds in tort.³⁷ It is recognized that an agent is under a duty "to act, in all circumstances, with due regard for the interests of his principal and to act with the utmost good faith and loyalty."³⁸ A necessary element of any breach of fiduciary duty claim is "damages."³⁹

Fraud/Suppression

The elements of fraud are (1) a false representation (2) of a material existing fact (3) reasonably relied upon by the plaintiff (4) who suffered damage as a proximate consequence of the misrepresentation.⁴⁰ A fraudulent misrepresentation may be willful, reckless, mistaken, or innocent.⁴¹ To be awarded punitive damages, a party must prove that the fraud was "intentional."⁴²

Fraudulent suppression occurs when a party suppresses or conceals "a material fact which the party is under an obligation to communicate."⁴³ The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.⁴⁴ Case law provides these elements: "(1) a duty to disclose the facts, (2) concealment or nondisclosure of material facts by the defendant, (3) inducement of the plaintiff to act, and (4) action by the plaintiff to his injury."⁴⁵ Whether there is a duty to speak depends upon the fiduciary, or other, relationship of the parties, the value of the particular fact, the relative knowledge of the parties, and other circumstances of the case.⁴⁶ When the parties to a transaction deal with each other at arm's

length, with no confidential relationship, no obligation to disclose arises when information is not requested.⁴⁷

One other form of fraud is "promissory fraud," which involves a representation regarding the performance of a future act. Such a claim requires the plaintiff to prove the defendant's "intent to deceive" at the time the promise was made.⁴⁸ The plaintiff must show more than merely that the promise was not kept.⁴⁹ Otherwise, any breach of contract would constitute a fraud.⁵⁰ Proof of the intent to deceive may be made through circumstantial evidence.⁵¹ Intent is ordinarily a question for the trier of fact.⁵²

In issues of fraud, Alabama employs a "reasonable reliance" standard, which includes "a general duty to read the documents received in connection with a particular transaction, together with a duty to inquire and investigate."⁵³ The Alabama Supreme Court "has consistently held that a plaintiff who is capable of reading documents, but who does not read them or investigate facts that should provoke inquiry, has not reasonably relied upon a defendant's oral representations that contradict the written terms in the documents."⁵⁴ "A person cannot blindly rely on an agent's oral representations to the exclusion of written disclosures in a contract."⁵⁵ Under a very narrow exception, however, this rule may not apply if there is a "special relationship" between the parties.⁵⁶ Furthermore, Alabama attorneys should be aware of a very recent case that may soften this rule.⁵⁷

Generally a mere statement of "opinion" cannot support a fraud claim.⁵⁸ However, this rule may be overcome if a party is able to show that an opinion was stated with an intent to deceive, that reliance on said opinion was reasonable, that the facts were not equally known to both sides, and that the statement of opinion was made by the one who knew the facts better.⁵⁹

If a party relies on a misrepresentation to do nothing more than he was already contractually obligated to do, Alabama law holds that the representation is not "material."⁶⁰ Therefore, there is no viable fraud action.⁶¹

Unlawful Restraint of Trade

Subject to certain exceptions, a contract restraining a party from exercising a lawful profession, trade, or business of any kind is void.⁶² The notable exceptions are non-compete/non-solicitation agreements if certain criteria are met.⁶³ Alabama courts disfavor non-compete agreements "because they tend not only to deprive the public of efficient service, but [also] to impoverish the individual."⁶⁴ "Generally, restrictive covenants not to compete are prohibited in Alabama."⁶⁵ Nevertheless, courts can enforce the terms of a covenant not to compete if and only if the party seeking to enforce the agreement proves the following:

1. the employer has a protectable interest;
2. the restriction is reasonably related to that interest;
3. the restriction is reasonable in time and place;
4. the restriction imposes no undue hardship on the employee.⁶⁶

Generally speaking, in the author's experience this issue arises only in the context of non-compete agreements. However, it raises the fair question of whether a business that seeks to impose void restraints on its employees may be liable in tort. The author is not aware of any Alabama case law on this point, but it is a potential cause of action worth considering.⁶⁷ Perhaps this theory can be developed in the right case.

Securities / Blue Sky Laws⁶⁸

"Securities" are a complex and highly regulated area of the law, subject to numerous federal and state statutes and regulations.⁶⁹ The website of the U.S. Securities and Exchange Commission ("SEC") is a helpful resource for learning about this area.⁷⁰

Alabama statutory law offers two definitions of "security."⁷¹ Alabama law also provides rules for determining whether certain obligations or interests are "securities" or "financial assets."⁷² Perhaps the most simple explanation is this, "A share or similar equity interest issued by a corporation, business trust, joint stock company, or similar entity is a security."⁷³ This includes shares of stock of a closely held corporation.⁷⁴

There are many different kinds of claims that may arise in the "securities" context. One common one is that any person who sells a security in violation of Alabama's securities laws may be liable to the person buying the security.⁷⁵ "The sale of an unregistered security causes a 'tortious injury.'⁷⁶ A violation of the Alabama Securities Act, Ala. Code § 8-6-1 et seq., provides a civil remedy only for the purchasers of a security.⁷⁷ In contrast, violation of federal securities law may provide a remedy for both the sellers and the purchasers of a security.⁷⁸

Trade Secret Act

Alabama first recognized the common law "trade secrets doctrine" in 1983.⁷⁹ Since that seminal case, the Alabama Legislature has enacted the Alabama Trade Secrets Act.⁸⁰ The Act replaced the common law remedy, to the extent the Act is inconsistent with the common law.⁸¹

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.⁸²

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.⁸³

"Improper means" are means such as:

- a. Theft;
- b. Bribery;
- c. Misrepresentation;
- 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.⁸⁴

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. Each act committed under this subsection shall constitute a separate offense.⁸⁵

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."⁸⁶

What constitutes a "trade secret" is a question of fact for the trial court.⁸⁷ Information may be a "trade secret" even if it could be easily duplicated by others competent in the given field.⁸⁸

Unfair Trade Practices / Intellectual Property

The touchstone of liability for trademark and trade name infringement and for unfair competition is the likelihood of cus-

tomers confusion about the source of products or services.⁸⁹ Alabama provides a statutory remedy for trademark infringement.⁹⁰ Also by statute, Alabama has a "Deceptive Trade Practices Act."⁹¹ The purpose of the Act is to "protect the interest of both the consuming public and the legitimate businessperson."⁹² The Act declares numerous "deceptive acts or practices" to be unlawful.⁹³ The Act provides a private right of action for an injured party, including actual damages, statutory damages, treble damages, and attorney fees.⁹⁴

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 business of one person as and for the goods or business of another.⁹⁵ The Alabama courts may also enforce the federal Lanham Act, 15 U.S.C. § 1051 et seq.⁹⁶ 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.⁹⁷

Lender Liability

"Lender liability" is a broad and amorphous topic, itself the subject of various treatises. Many times a lender's "liability" may simply be because the lender has a contractual obligation. For example, the lender may have failed to honor a written loan commitment or loan agreement. In Alabama, at least, attempts to establish extra-contractual (or "tort") liability against a lender often fail.⁹⁸ As a party to the contract with its customer, a bank cannot be liable for tortious interference with that contract or business relationship.⁹⁹

The general rule is that the relationship between a bank and its customer is a "creditor-debtor relationship" which does not impose a fiduciary duty on the bank.¹⁰⁰ However, a fiduciary duty may nevertheless arise when the customer reposes trust in a bank and relies on the bank for financial advice, or in other special circumstances.¹⁰¹ It has more recently been held that "advice alone is not enough to impose a fiduciary duty."¹⁰² The Alabama Supreme Court has declined to recognize a claim for a bank's "wrongful control and domination" of a borrower.¹⁰³

Generally, a bank is under no duty to help a borrower obtain a loan.¹⁰⁴ But, once it voluntarily agrees to assist the customer, it is required to act with due care.¹⁰⁵

Any lawyer evaluating a "lender liability" case should be aware that certain common-law claims may be preempted and/or governed by the Uniform Commercial Code.¹⁰⁶ The lawyer's evaluation should start with determining whether any UCC section applies.

Bad Faith

Every contract implies a duty of good faith and fair dealing.¹⁰⁷ Certain statutes also impose a duty of good faith.¹⁰⁸ However, the Alabama courts have only recognized a cause of action for the tort of "bad faith" in the context of insurance policy cases.¹⁰⁹ It is not "bad faith" for a party to enforce whatever legal rights he possesses, and he cannot be required to surrender a right in the name of "good faith."¹¹⁰

In the insurance context (where "bad faith" is recognized as a cause of action), Alabama statutory law holds, "No insurer shall, without just cause, refuse to pay or settle claims under coverages

provided by its policies in this state and with such frequency as to indicate a general business practice in this state."¹¹¹

Under Alabama law, there are two methods by which a party¹¹² can establish a bad-faith refusal to pay an insurance claim.¹¹³ An insurance company may be liable for either "normal" bad faith or "abnormal" bad faith.¹¹⁴ It has recently been explained that these are alternate methods of proving the singular tort of "bad faith."¹¹⁵

If asserting the "normal" bad faith claim, the insured has the burden of proving:

- (1) A breach of the insurance contract;
- (2) An intentional refusal to pay the insured's claim;
- (3) The absence of any reasonably legitimate or arguable reason for that refusal; and
- (4) The insurer's actual knowledge of the absence of any legitimate or arguable reason.¹¹⁶

In order to have his bad faith claim submitted to the jury, the plaintiff/insured must show that he is entitled to a directed verdict (now known as a "judgment as a matter of law") on the breach of contract claim.¹¹⁷

If asserting the "abnormal" bad faith claim, the insured has the burden of proving the above elements, except that "if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim."¹¹⁸ The insured may prove this "abnormal" element by showing that the insurer:

- (1) Intentionally or recklessly failed to investigate the plaintiff's claim;
- (2) Intentionally or recklessly failed to properly subject the plaintiff's claim to a cognitive evaluation or review;
- (3) Created its own debatable reason for denying the plaintiff's claim; or
- (4) Relied on an ambiguous portion of the policy as a lawful basis to deny the plaintiff's claim.¹¹⁹

In the "abnormal" case, "The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review."¹²⁰ The insured must still prove that a proper investigation would have revealed that the insured's loss was covered under the terms of the policy.¹²¹

Civil Conspiracy

By statute, Alabama law defines a conspiracy to interfere with or hinder business as, "Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporation or association of persons from carrying on any lawful business."¹²² It is a criminal misdemeanor.¹²³

Case law defines "civil conspiracy" as being "a combination between two or more persons to accomplish by concert an unlawful purpose or to accomplish a lawful purpose by unlawful means."¹²⁴ Stated differently, a "civil conspiracy is a combination of two or more persons to do: (a) something that is unlawful; (b) something that is lawful by unlawful means."¹²⁵ Alabama recognizes "civil conspiracy" as a substantive tort.¹²⁶

Although "civil conspiracy" is recognized as a tort, the conspiracy itself furnishes no cause of action.¹²⁷ The gist of the action is not the conspiracy alleged, but the wrong committed.¹²⁸ The

conspiracy is actionable only if the plaintiff can prove a wrong committed through the conspiracy.¹²⁹ Speculations of misconduct fall short of proof.¹³⁰

A party may prove a conspiracy claim through circumstantial evidence. "The existence of a conspiracy must often be inferentially and circumstantially derived from the character of the acts done, the relation of the parties, and other facts and circumstances suggestive of concerted action."¹³¹

Damages must also be proved.¹³² The damage must appear to have been the natural and probably result of the defendants' acts.¹³³

Antitrust

Alabama has a state "antitrust" statute.¹³⁴ 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.¹³⁵

In addition, there is a statutory scheme addressing a trust to regulate or fix the price of any article or commodity within this state.¹³⁶ These statutes have been held to apply only to intrastate activities.¹³⁷ For interstate activities, a party must rely on federal law.¹³⁸

Trade Libel

False communications which damage or tend to damage the reputation as to quality of goods or services are variously described as "disparagement," "product disparagement," "trade libel," or "slander of goods."¹³⁹ "Trade libel," also called "injurious falsehood," consists of the publication of a disparaging statement concerning the business of another.¹⁴⁰ A false statement that plaintiff has gone out of business may constitute "trade libel."¹⁴¹ In Alabama, it has been held that such a claim of trade libel or disparagement is subsumed within our tort of interference with business relations.¹⁴² More recently, however, the Deceptive Trade Practices Act may provide such a cause of action.¹⁴³

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."¹⁴⁴ 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.¹⁴⁵

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.¹⁴⁶ Special damages may be demonstrated by proof that defendant's disparagement of plaintiff's title to the slandered realty "interrupted, or injuriously affected, some dealing of the plaintiff with his property."¹⁴⁷

Private Nuisance

A "private nuisance" gives a right of action to the person injured.¹⁴⁸ A private nuisance is one limited in its injurious effects to one or a few individuals.¹⁴⁹ A private nuisance may injure either the person or property, or both, and in either case a right of action accrues.¹⁵⁰

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 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.¹⁵¹

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.¹⁵²

Conversion

"Conversion" is a wrongful taking, detention, or interference or illegal use or misuse of another's property.¹⁵³ Stated differently, it is the "wrongful exercise of dominion over the property of another."¹⁵⁴ A conversion claim may be stated related to nearly any form of property. However, typically an action will not be recognized for the conversion of money unless the money at issue is "earmarked" or otherwise capable of identification or directly traceable to a specific account.¹⁵⁵

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. Some examples are:

- "The Motor Vehicle Franchise Act." Ala. Code § 8-20-1.
- "The Tractor, Lawn and Garden and Light Industrial Equipment Franchise Act." Ala. Code § 8-21A-1.
- "The Alabama Heavy Equipment Dealer Act." Ala. Code § 8-21B-1.
- "Health Studio Services." Ala. Code § 8-23-1.
- "Sales Representative's Commission Contracts." Ala. Code § 8-24-1.
- "Timely Payments to Contractors and Subcontractors" (a/k/a the "Miller Act"). Ala. Code § 8-29-1.

Conclusion

Armed with the foregoing, the reader should now at least be able to answer, "What in the world is a business tort?" Beyond that, it is hoped that the reader will be ready to watch for and catch potential "business tort" cases. Doing so can open a large and productive area of practice beyond the realm of the personal injury tort, if handled correctly.

ENDNOTES

- 1 Black's Law Dictionary (9th ed. 2009), tort
- 2 Id.
- 3 BellSouth Mobility, Inc. v. Cellulink, Inc., 814 So.2d 203, 215 (Ala. 2001).
- 4 Id.
- 5 White Sands Group, LLC v. PRS II, LLC, 32 So.3d 5, 14 (Ala. 2009).
- 6 Id.
- 7 Id.
- 8 White Sands at 15.
- 9 Id.
- 10 Government Street Lumber Co., Inc. v. AmSouth Bank, NA, 553 So.2d 68, 74 (Ala. 1989).
- 11 Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So.2d 1143, 1154 (Ala. 2003).
- 12 Id. at 1157.
- 13 Id.
- 14 Bridgeway Communications, Inc. v. Trio Broadcasting, Inc., 562 So.2d 222, 223 (Ala. 1990).
- 15 Id.
- 16 Polytec, Inc. v. Utah Foam Products, Inc., 439 So.2d 683, 689 (Ala. 1983).
- 17 City Ambulance of Alabama, Inc. v. Haynes Ambulance of Alabama, Inc., 431 So.2d 537, 540 (Ala. 1983).
- 18 Id.
- 19 Tom's Foods, Inc. v. Carn, 896 So.2d 443, 459 (Ala. 2004).
- 20 White Sands, 32 So.3d at 17.
- 21 Id.
- 22 Required reading in this area should be the works of my partner, Andy Campbell; see Andrew P. Campbell, Shareholder Rights, the Tort of Oppression and Derivative Actions Revisited: a Time for Mature Development?, *The Alabama Lawyer*, 63 Ala. Law. 315 (2002); Andrew P. Campbell, Litigating Minority Shareholder Rights and the New Tort of Oppression, *The Alabama Lawyer*, 53 Ala. Law. 108 (1992).
- 23 Burt v. Burt Boiler Works, Inc., 360 So. 2d 327 (Ala. 1978).
- 24 Id.
- 25 See *Ex parte Brown*, 562 So. 2d 485 (Ala. 1990).
- 26 Hensley v. Poole, 910 So.2d 96, 104 (Ala. 2005).
- 27 Id.
- 28 Pegram v. Hebding, 667 So.2d 696, 702 (Ala. 1995).
- 29 Id.
- 30 Id.; see Ala. R. Civ. P. 23.1.
- 31 Altrust Fin. Servs., Inc. v. Adams, 76 So. 3d 228, 238 (Ala. 2011).
- 32 Id. at 241 (quoting *Green v. Bradley Constr., Inc.*, 431 So.2d 1226, 1229 (Ala. 1983)).
- 33 See, e.g., Ala. Code §§ 10A-2-8.30, 10A-2-8.42.
- 34 Ala. Code §§ 19-3B-802; 43-2-840.
- 35 Black's Law Dictionary (9th ed. 2009), fiduciary
- 36 Black's Law Dictionary (9th ed. 2009), duty
- 37 Jones v. Hamilton, 53 So.3d 134, 142-43 (Ala. Civ. App. 2010).
- 38 Systrends, Inc. v. Group 8760, LLC, 959 So.2d 1052, 1078 (Ala. 2006).
- 39 Hensley v. Poole, 910 So.2d 96, 106 (Ala. 2005).
- 40 Exxon Mobil Corp. v. Alabama Dep't of Conservation & Natural Res., 986 So. 2d 1093, 1114 (Ala. 2007).
- 41 Ala. Code § 6-5-101.
- 42 Ala. Code § 6-11-20(b)(1).
- 43 Ala. Code § 6-5-102.
- 44 Id.
- 45 Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc., 611 So.2d 238, 245 (Ala. 1992).
- 46 Id. at 245-46.
- 47 Id. at 246.
- 48 *Strange v. Davis*, 44 So.3d 1109, 1115-16 (Ala. Civ. App. 2010).
- 49 Id. at 1116.
- 50 Id.
- 51 Id.
- 52 Purcell Co., Inc. v. Spriggs Enterprises, Inc., 431 So.2d 515, 519 (Ala. 1983).
- 53 AmerUS Life Ins. Co. v. Smith, 5 S.3d 1200, 1208 (Ala. 2008).
- 54 Id.
- 55 Harold Allen's Mobile Home Factory Outlet, Inc. v. Early, 776 So.2d 777, 784 (Ala. 2000).
- 56 See *Potter v. First Real Estate Co.*, 844 So.2d 540 (Ala. 2002).
- 57 Target Media Partners Operating Co., LLC v. Specialty Mktg. Corp., 2013 WL 4767022 (Ala. Sept. 6, 2013) (quoting favorably from California case, "A party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract. No rational party would enter into a contract anticipating that they are or will be lied to....Parties should not be expected to anticipate fraud and dishonesty in every transaction.").
- 58 See *Reynolds v. Mitchell*, 529 So.2d 227, 231 (Ala. 1988).
- 59 Id.
- 60 Bama Budweiser, 611 So.2d at 244.
- 61 Id.
- 62 Ala. Code § 8-1-1.
- 63 Id.
- 64 *Clark v. Liberty Nat. Life Ins. Co.*, 592 So. 2d 564, 656 (Ala. 1992) (quoting *James S. Kemper & Co. v. Cox & Associates, Inc.*, 434 So. 2d 1380, 1384 (Ala. 1983)).
- 65 *Birmingham Television Corp. v. DeRamus*, 502 So. 2d 761, 763 (Ala. 1986).
- 66 *Ex parte Caribe, U.S.A., Inc.*, 702 So. 2d 1234, 1239 (Ala. 1997).
- 67 It has been held that a corporate officer or co-employee may individually be liable for interference with an employee's employment contract in certain circumstances. See *Hickman v. Winston County Hospital Board*, 508 So.2d 237, 238-39 (Ala. 1987).
- 68 The term "blue sky laws" originated with an early description of the purpose of state security laws as protecting investors against "speculative schemes which have no more basis than so many feet of blue sky." *Gilford Partners v. Pizitz*, 630 So. 2d 404, 407 n.3 (Ala. 1993) (quoting *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480 (1917)).
- 69 See, e.g., Ala. Code § 7-8-101, et seq.; Ala. Code § 8-6-1, et seq.; Securities Act of 1933; Securities Exchange Act of 1934; Trust Indenture Act of 1939; Investment Company Act of 1940; Investment Advisers Act of 1940; Securities Investor Protection Act of 1970; The Insider Trading Sanctions Act of 1984; the Insider Trading and Securities Fraud Enforcement Act of 1988; the Dodd-Frank Act; the Private Securities Litigation Reform Act; the Sarbanes-Oxley Act; and the Jumpstart Our Business Startups Act.
- 70 See "Researching the Federal Securities Laws Through the SEC Website" [<http://www.sec.gov/investor/pubs/securitieslaws.htm>].
- 71 Ala. Code §§ 7-8-102(a)(15), 8-6-2(10).
- 72 Ala. Code § 7-8-103.
- 73 Ala. Code § 7-8-103(a).
- 74 *Hughes Developers, Inc. v. Montgomery*, 903 So. 2d 94, 99 (Ala. 2004).
- 75 Ala. Code § 8-6-19.
- 76 *Pizitz*, 630 So.2d at 406.
- 77 Altrust Financial Services, Inc. v. Adams, 76 So.3d 228, 237 (Ala. 2011) (discussing Ala. Code § 8-16-19(a)).
- 78 Id. (discussing SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1981)).
- 79 *Drill Parts & Service Co., Inc. v. Joy Mfg. Co.*, 439 So.2d 43 (Ala. 1983).
- 80 Ala. Code § 8-27-1, et seq.
- 81 *Allied Supply Co., Inc. v. Brown*, 585 So.2d 33, 36 (Ala. 1991); Ala. Code § 8-27-6.
- 82 Ala. Code § 8-27-2.
- 83 Ala. Code § 8-27-3.
- 84 Ala. Code § 8-27-2.
- 85 Ala. Code § 8-27-4.
- 86 *IMED Corp. v. Systems Engineering Associates Corp.*, 602 So.2d 344, 346 (Ala. 1992) (quoting the Preface to the Act).
- 87 *Public Systems, Inc. v. Towry*, 587 So.2d 969, 972 (Ala. 1991).
- 88 *Mason v. Jack Daniel Distillery*, 518 So.2d 130, 133 (Ala. 1987).
- 89 ABA Model Jury Instructions: Business Torts Litigation, 154 (4th ed. 2005).
- 90 Ala. Code § 8-12-6, et seq.
- 91 Ala. Code § 8-19-1, et seq.
- 92 Ala. Code § 8-19-2.
- 93 Ala. Code § 8-19-5.
- 94 Ala. Code § 8-19-10; *Sam v. Beaird*, 685 So.2d 742, 744 (Ala. Civ. App. 1996).
- 95 *Jefferson Home Furniture Co., Inc. v. Jefferson Furniture Co., Inc.*, 349 So.2d 5, 8 (Ala. 1977).
- 96 *Classroomdirect.com, LLC v. Draphix, LLC*, 992 So.2d 692, 716 (Ala. 2008).
- 97 ABA Model Jury Instructions: Business Torts Litigation, 160-62 (4th ed. 2005).
- 98 See, e.g., *Southland Bank v. A&A Drywall Supply Co., Inc.*, 21 So.3d 1196 (Ala. 2008); *Armstrong Business Services, Inc. v. AmSouth Bank*, 817 So.2d 665 (Ala. 2001).
- 99 *Gov't St. Lumber Co., Inc. v. AmSouth Bank, N.A.*, 553 So. 2d 68, 74 (Ala. 1989).
- 100 *Hackney v. First Alabama Bank*, 555 So. 2d 97, 100 (Ala. 1989).
- 101 *Bank of Red Bay v. King*, 482 So. 2d 274, 285 (Ala. 1985).
- 102 *Flying J Fish Farm v. Peoples Bank of Greensboro*, 12 So. 3d 1185, 1191 (Ala. 2008).
- 103 *Gov't Street*, 553 So. 2d at 74.
- 104 *Williamson v. Realty Champion*, 551 So. 2d 1000, 1002 (Ala. 1989).
- 105 *First Fed. Sav. & Loan Ass'n of Hamilton v. Caudle*, 425 So. 2d 1050, 1052 (Ala. 1982); *Rudolph v. First S. Fed. Sav. & Loan Ass'n*, 414 So. 2d 64, 67 (Ala. 1982).
- 106 See, e.g., Ala. Code § 7-3-101, et seq (Negotiable Instruments); Ala. Code § 7-4-101, et seq (Deposits and Collections); Ala. Code § 7-4a-101, et seq. (Funds Transfers); Ala. Code § 7-5-101, et seq. (Letters of Credit); Ala. Code § 7-9a-101, et seq (Secured Transactions).
- 107 *Peninsular Life Ins. Co. v. Blackmon*, 476 So.2d 87, 89 (Ala. 1985).
- 108 See, e.g., Ala. Code § 7-1-203.
- 109 See *Tanner v. Church's Fried Chicken, Inc.*, 582 So.2d 449, 451 (Ala. 1991); *Government Street Lumber Co., Inc. v. AmSouth Bank, N.A.*, 553 So.2d 68, 72 (Ala. 1989); *Peninsular*, 476 So.2d at 89;
- 110 *Government Street*, 553 So.2d at 73.
- 111 Ala. Code § 27-12-24 (1975).

112 To pursue a bad faith claim, the party must have a direct contractual relationship with the insurance company. See *Williams v. State Farm Mut. Auto Ins. Co.*, 886 So.2d 72, 75-76 (Ala. 2003). It has been held that a bad faith claim is a "personal tort" and cannot be assigned to another party. See *Cash v. State Farm Fire & Cas. Co.*, 125 F.Supp.2d 474, 477 (M.D. Ala. 2000).
113 See *Mutual Service Cas. Ins. Co. v. Henderson*, 368 F.3d 1309, 1314 (11th Cir. 2004).
114 Id.
115 See *State Farm Fire and Cas. Co. v. Brechbill*, 2013 WL 5394444 (Ala. September 27, 2013) application for rehearing pending.
116 Id.
117 Id.
118 *Brechbill*, 2013 WL 5394444 *8 (quoting *National Sec. Fire & Cas. Co. v. Bowen*, 417 So.2d 179, 183 (Ala. 1982)).
119 *State Farm Fire & Cas. Co. v. Slade*, 747 So.2d 293, 306-07 (Ala. 1999).
120 *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916 (Ala. 1981).
121 *Employees' Benefit Ass'n v. Grissett*, 732 So.2d 968, 977 (Ala. 1998).
122 Ala. Code § 13A-11-122.
123 Id.
124 *Battles v. San Ann Service, Inc.*, 441 So.2d 925, 927 (Ala. 1983).
125 *Purcell Co., Inc. v. Spriggs Enterprises, Inc.*, 431 So.2d 515, 522 (Ala. 1983).
126 Id.
127 Id.
128 Id.
129 *Keller v. Security Federal Sav. and Loan Ass'n*, 555 So.2d 151, 155 (Ala. 1989).
130 Id.
131 *Fossett v. Davis*, 531 So.2d 849, 851 (Ala. 1988).
132 *Purcell* at 523.
133 Id.
134 Ala. Code § 6-5-60.
135 Id.
136 Ala. Code § 8-10-1, et seq.
137 *Archer Daniels Midland Co. v. Seven Up Bottling Co. of Jasper, Inc.*, 746 So.2d 966, 989-90 (Ala. 1999).
138 Id.
139 2 Law of Defamation § 11:37 (2d ed.).
140 21 Causes of Action 245 (Originally published in 1990).
141 Id.
142 *City Ambulance of Alabama, Inc. v. Haynes Ambulance of Alabama, Inc.*, 431 So.2d 537, 539 (Ala. 1983).
143 See Ala. Code § 8-19-5(8).
144 Ala. Code § 6-5-211.
145 *Harrison v. Mitchell*, 391 So.2d 1038, 1041 (Ala. Civ. App. 1980).

146 Id.
147 Id. at 1041-42.
148 Ala. Code § 6-5-121.
149 Id.
150 Ala. Code § 6-5-124.
151 *K-Mart, Inc. v. Stewart*, 29 So.3d 887, 893 (Ala. Civ. App. 2009).
152 Id. (citing *Tipler v. McKenzie Tank Lines*, 547 So.2d 438 (Ala. 1989)).
153 *Willingham v. United Ins. Co. of Am.*, 628 So.2d 328, 333 (Ala. 1993).
154 *Goolesby v. Koch Farms, LLC*, 955 So.2d 422, 429 (Ala. 2006).
155 *Hensley v. Poole*, 910 So.2d 96, 101 (Ala. 2005).



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