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Business Torts & Antitrust Section CLE

SUMMARIES OF SELECTED RECENT ALABAMA DECISIONS

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Employee confidentiality agreement; Tortious Interference Claim.

Engineered Cooling Servs. v. Star Serv., Inc., No. 2110178, 2012 Ala. Civ. App. LEXIS 146, (Ala. Civ. App. June 8, 2012).

Summary: Former employer brought tortuous interference claim against subsequent employer who knowingly used Plaintiff's confidential bid information to compete against Plaintiff.

Background: Star, a company specializing in commercial HVAC maintenance, hired Davis, who had no prior HVAC experience, as a salesman. Davis signed a written confidentiality agreement prohibiting him from removing Star's confidential information from its business and prohibiting him for a 1 year period after ending his employment from disclosing Star's confidential information to third parties. A few days after Davis left Star to go to work for ECS, a competitor, Star learned that Davis had breached the agreement by emailing 3 of Star's confidential documents. Star's counsel sent wrote a letter address to both Davis and ECS demanding a return of the purloined documents and warning ECS that it would be sued for tortuous interference in the event of further breaches. Davis returned 2 of the documents and deleted the third document. During the following months, Davis called on several of Star's customers whom Davis had met during the course of his employment at Star. One of the customers agreed to switch its business from Star to ECS. Star sued Davis for breach of contract and it sued ECS for tortuous interference. At trial, Star's representative testified that Star lost profits, but admitted that he was unable to quantify the amount of Star's damages. After a bench trial, the judge ruled in Star's favor and awarded it $1 actual and $30,001.00 of punitive damages. ECS filed a Rule 59 motion, arguing inter alia, that the punitive damages were excessive. The trial judge denied the motion without stating any reasons for the determination that the punitive damage award was not excessive.

Analysis: The Court of Civil Appeals upheld the award of nominal compensatory damages against ECS, on the grounds that ECS's knowledge of Star's pricing obtained in violation of Davis's confidentiality agreement gave ECS a competitive advantage over Star. The Court also found that ECS had used that confidential information to undercut Star's prices and take its customer. The Court of Appeals remanded the case to the Trial Court for a *Hammond* hearing to determine whether the punitive-damages award was excessive. See, e.g., *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986).

Employee non-compete agreement; Tortious Interference Claim.

Booth v. Newport TV, LLC, 2011 Ala. Civ. App. LEXIS 358, 2011 WL 6275695 (Ala. Civ. App. Dec.16, 2011).

Summary: Non-compete agreement unenforceable by purchaser of business since the asset sale agreement did not assign the seller's rights under the non-compete agreement. Employee's claim that she lost a job offer when prior employer had threatened to sue new prospective employer stated a claim for tortious interference.

Background: Booth signed a confidentiality, trade secrets and non-compete agreement with her employer, Clear Channel. Clear Channel sold the TV station where Booth worked to Defendant Newport in an asset sale transaction. Booth continued to work at the station after the sale. Booth notified Newport of her intent to quit her job when she was offered a job by a competitor. When Booth resigned, Newport informed the competitor that it intended to file a lawsuit to enforce Booth's non-compete agreement if the competitor hired Booth. The competing station withdrew its offer to Booth, who then filed suit against Newport seeking declaratory judgment that the non-compete contract was unenforceable. Booth also asserted a damages claim for tortious interference. The Trial Court found that the non-compete agreement was valid and it granted Newport a summary judgment on the tortious interference claim based on its finding that Newport's interference was justified.

Analysis: The Court of Appeals ruled that Newport could not enforce the non-compete because its asset-sale agreement did not expressly provide for the assignment of Clear Channel's non-compete agreements with its employees. The appellate court ruled that the Trial Court erred when it allowed parol evidence on the question whether Clear Channel and Newport had intended to assign the agreements. In light of the invalidity of non-compete agreement, the Court ruled that a genuine issue of material fact existed as to whether Newport was justified in interfering with Booth's relationship with the competing station. Reversed and remanded.

Fraud/Punitive Damages

GE Capital Aviation Servs. v. Pemco World Air Servs., 2012 Ala. LEXIS 36 (Ala. Sup. Ct. March 30, 2012).

Summary: Dispute between the owner of commercial aircraft and an aircraft maintenance company. Ala. Sup. Ct. reversed the Trial Court and ruled that alleged oral misrepresentations regarding the owner's intentions with regard to a contract could not form the basis of a fraud claim. It also ruled that the Trial Court erred by submitted to the jury an implied contract claim along with a claim for breach of an express contract.

Background: GE Capital owned two Boeing 737 passenger jets that had been taken out of service and parked in the Mojave desert. GE Capital entered into a contract with Pemco to perform maintenance services on the two aircraft and to convert the two passenger airplanes into cargo planes by removing seats, galley, lavatories, and overhead bins, cutting a hole in the sides of the aircraft and installing a cargo doors, among other tasks. The parties' agreement provided that GE Capital could have a representative on site at Pemco's facility to monitor and inspect Pemco's work as it was performed. There were disagreements between GE Capital's onsite representative and Pemco's employees throughout the time that the two airplanes were at Pemco's Dothan facility. Pemco alleged that the GE Capital representative was abusive and that he demanded work that was beyond the scope of the industry standards incorporated into the parties' agreement. The costs of Pemco's services exceeded the contract amount and both the work took longer than expected. Both GE and Pemco filed lawsuits claiming fraud and breach of contract. After a three-week jury trial, Pemco obtained a verdict on all of its claims and was awarded $2,147,129 in compensatory and $6,500,000 in punitive damages.

Analysis: Pemco's misrepresentation claims were based on its assertion that GE Capital had misrepresented that the scope of the work it was expecting pursuant to the contract. The suppression claim was based on Pemco's allegation that GE Capital had failed to disclose the filthy condition of the two airplanes. The Supreme Court noted that both parties are large corporations represented by competent counsel and that the scope of Pemco's work was specified in clear and unambiguous contract terms. The Ala. Sup. Ct. opined that if GE Capital's representative required Pemco to perform work outside the scope of the parties' agreement, there may have been a breach of contract. However, there was no evidence of a false representation. Consequently, the Court ruled as a matter of law that the Trial Court erred by sending the fraud claim to the jury. The Court also ruled that Pemco's fraudulent-misrepresentation claim should not have been submitted to the jury. The Court reasoned that if the condition of the airplanes had been material to Pemco's bid for the work, Pemco should have made inquiries about the condition of the airplanes or insisted on an inspection of the airplanes prior to submitting its bid. In addition to pursuing its breach of contract claim, Pemco also asserted a claim for breach of an implied contract for services that were outside the scope of the contract. The Court ruled that claims based on an express contract and claims based on an implied contract claims were "incompatible" because in cases where an express contract exists because the law will not imply a contract with respect to the same subject matter as the express agreement. The Court opined that sufficient evidence was presented to support the verdict on the breach of an express contract. However, since the trial submitted the implied contract claim to the jury along with the express contract claim and since verdict form did not differentiate between the valid claim and the invalid claims, the judgment was reversed and the case remanded for a new trial on the express contract count.

Promissory Fraud/Piercing the Corporate Veil

Mark Heisz & Aegis Strategic Inv. Corp. v. Galt Indus., 2012 Ala. LEXIS 2, 2012 WL 29190 (Ala. Sup. Ct. Jan. 6, 2012).

Summary: Plaintiff, who owned a company that was experiencing financial difficulties, entered into an asset sale agreement with a newly-formed subsidiary of a Canadian company. The Ala. Sup. Ct. ruled that alleged promissory fraud by owner of parent company was not actionable and that the Plaintiff was not entitled to pierce the corporate veil of the Alabama purchaser.

Background: Plaintiffs owned a manufacturing company that manufactured plastic parts for the automotive industry. When the company's revenue began to decline, Plaintiffs negotiated an asset sale of the company with the owner of a Canadian corporation that had subsidiary manufacturing companies located in other states. The purchaser of the assets was newly-formed Alabama corporation. Purchaser paid the Plaintiffs $10 and agreed to make specified post-closing payments and to assume certain debts that had been guaranteed by the Plaintiffs. The company's fortunes continued to decline after the sale. When the 2008 financial crisis occurred, revenues plunged and the company went out of business.
Plaintiffs sued the Canadian Corporation, its subsidiaries, and its individual owner, who had negotiated the agreement claiming that the Defendants had fraudulently represented that they intended to fulfill the terms of the asset purchase agreement. Plaintiffs also sought a declaration that the Defendants were third-party beneficiaries of the asset-purchase agreement and to pierce the corporate veil of the Alabama corporation that had purchased the assets. The Trial Court awarded the Plaintiffs $824,000 as compensatory damages on the fraud claims and it entered a judgment for the Plaintiffs on their piercing the corporate veil claims.

Analysis: The Supreme Court reversed, stating that the fraud claim was based on an alleged oral promise to perform future acts, which is a species of fraud known as "promissory fraud", which required a showing that at the time of the alleged promise, the Defendant had no intention of performing. Promissory fraud also requires a showing that the promise was made with an actual intent to deceive. The Court stated that "the law places a heavier burden upon the plaintiff in promissory-fraud cases than in ordinary fraud cases." It noted that after the purchase, the Defendants had invested more than 2 million dollars into the new Alabama corporation and that the business had failed due to the 2008 economic collapse. It ruled that the Defendants' alleged oral promises could not form the basis of a fraud claim because of insufficient proof of intent to defraud at the time of the alleged misrepresentations.
The Ala. Sup. Ct. also reversed the piercing of the corporate veil. The Court said that there are three theories under which a party might seek to pierce the veil of a corporate defendant: (1) inadequacy of capital; (2) fraudulent purpose in conception or operation of the business; and (3) operation of the corporation as an instrumentality or alter ego. *citing Messick v. Moring*, 514 So. 2d 892, 894 (Ala. 1987). The Court stated that under-capitalization alone is not sufficient to

establish personal liability. It also determined that the Alabama subsidiary was not conceived and operated as part of a fraudulent scheme. Therefore, the only issue presented with respect to the corporate veil claim was whether there was sufficient evidence to support the Trial Court's decision based on the “alter ego” theory of liability. In order to prevail on an “alter ego” theory, a Plaintiff must show: (1) that the dominant party had complete control and domination of the subservient corporation’s finances, (2) the control must have been misused, and (3) this misuse of control must proximately cause harm. Merely showing that the Defendants had complete control over the corporation is insufficient for piercing the veil. The Court rejected the Plaintiffs’ argument that the Defendants managed the defunct company in a way that left it “cash-poor” by making inter-company transfers of money between the defunct Alabama corporation and other of the Defendants’ subsidiaries. The Supreme Court reversed the Trial Court’s decision with respect to the corporate veil.

Defamation of a competitor; Punitive Damages

Tanner v. Chassity Greech Ebbole, 2011 Ala. Civ. App. LEXIS 364 | 2011 WL 68490292011 (Ala. Civ. App. Dec. 30, 2011).

Summary: Lawsuit between the owners of competing tattoo parlors. Appellate court upheld punitive damages award against the individual Defendant who had maliciously accused his competitor of having communicable diseases and dirty needles. Punitive damage award against corporate Defendant remitted because it was a small business.

Background: This case had previously been remanded to the Trial Court to conduct a hearing on motions seeking remittitur of punitive damage awards of $200,000 against a corporation and $110,000 of punitive damages against its owners. The parties to the litigation were the owners and operators of competing tattoo parlors. The Trial Court found that the Defendants had maliciously stated to the Plaintiff’s potential customers that the Plaintiff had AIDS, hepatitis, syphilis, or gonorrhea and that she had used "nasty needles." The Defendants admitted they had no factual basis for their statements and that they had deliberately intended to harm the Plaintiff’s reputation in an effort to enhance their competing business. The Defendants ignored the Plaintiff’s demand for a retraction and they refused to remove the defamatory statements from their web site.

Analysis: The Trial Court rejected the Defendants’ arguments that they were entitled to a remittitur because of the devastating effects of the judgment. The Trial Court ruled that the Defendants’ evidence – affidavits with averments of their minimal net worth – were not credible evidence because the affidavits were not supported by documentation such as tax returns, audited financial statements, or the like. After an extensive analysis, the Court of Appeals ruled that the *Hammond-Green Oil* standards had been met and it affirmed the awards as to the individual Defendants. The Court ordered a remittitur of the award against the corporate Defendant, however, based on its finding that the corporation had a net worth of less than $2 million. Ala. Code § 6-11-21(c). Judge Moore dissented, arguing that since the Plaintiff was unable to demonstrate any compensatory damages and since the punitive award was in excess of the

Defendants' net worth as established by uncontroverted evidence, the punitive damage award should have been remitted.

Alabama Motor Vehicle Franchise Act.

Smith's Sports Cycles, Inc. v. Am. Suzuki Motor Corp., 82 So. 3d 682 (Ala. Sup. Ct. Oct. 14, 2011).

Summary: Franchisee sued franchisor for breach of contract and violations of the Ala. Motor Vehicle Franchise Act arising from termination of the franchise agreement. Following a bench trial, the Trial Court ruled in favor of franchisor on both claims. The Ala. Sup. Ct. affirmed.

Background: Smith operated a Suzuki dealership in Tuscaloosa. On April 16, 2006, Suzuki sent Smith a letter notifying him of a "default and opportunity to cure" listing 6 alleged violations of the parties' agreement, mostly dealing with the appearance of Smith's dealership facility. Suzuki demanded that Smith cure the default within 180 days. On June 27, 2006, Suzuki sent Smith a letter terminating the franchise agreement because Smith had not cured the defaults. Smith sued Suzuki claiming that the termination of the franchise agreement constituted a breach of the franchise agreement and that the termination was in violation of the Alabama Motor Vehicle Franchise Act, § 8-20-1 et seq., Ala. Code 1975 ("the Franchise Act"). Following a 12-day bench trial, the Trial Court entered a judgment in favor of Suzuki on Smith's breach-of-contract claim, ruling that there was not substantial evidence that Suzuki had breached any provision of the franchise agreement. The Trial Court also entered a judgment in favor of Suzuki on Smith's claim that Suzuki had violated the Franchise Act.

Analysis: The Ala. Sup. Ct. summarily affirmed the Trial Court's ruling on the breach of contract claim based on the *ore tenus* rule. Smith's Franchise Act argument was based on a provision in the Act that prohibits a manufacturer from terminating an agreement if the franchisor does not take prompt action when it first learns of a default under the agreement. Section 8-20-5(b)(1) prohibits a manufacturer from terminating a franchise agreement based on violations that occurred more than 180 days prior to notification. Smith argued that Suzuki was on notice of the appearance issues and the deteriorating condition of the dealership in January 2005. The Ala. Sup. Ct. opined that the purpose of the provision at issue was to prevent a franchisor from terminating a franchisee based on old and long forgotten events. It ruled that when the violations are ongoing, however, the breaching event is not considered stale. Moreover, in this case the problems grew worse over time. The Ala. Sup. Ct. affirmed the Trial Court's decision that the franchisor acted in good faith and did not violate the statute.

Antitrust; State immunity for vendors.

Vandenberg v. Aramark Educ. Servs., 81 So. 3d 326 (Ala. Sup. Ct. Sept. 30, 2011).

Summary: Students and former students of Alabama, Auburn and UAB filed class-action lawsuits challenging on antitrust grounds the legality of schemes requiring undergraduate students to purchase "dining dollars" that could only be spent at on-campus dining outlets owned by food-service vendors that had entered into exclusive-rights contracts with the universities. The Trial Court granted 12(b) motions and the students appealed. The Ala. Sup. Ct. affirmed.

Background: Alabama, Auburn and UAB entered into contracts with vendors (Aramark Sodexo Chartwells) giving the vendors exclusive rights to install vending machines and operate dining halls on the schools' campuses. The schools imposed mandatory fees on students and issued ID cards with stored-value "dining dollars" that could only be used to purchase food from the vendors who had been granted the exclusive rights to sell food on the campuses. In exchange for the vendors' monopolies, the universities received "commissions" on food sales.
Students and former students filed three separate class actions in Jefferson County against the boards of trustees and the food-service vendors alleging violations of § 6-5-60, Ala. Code 1975 claiming that the contracts created "an unlawful trust, combine, or monopoly" and that those contracts were unconstitutional in that they violated the prohibition in Ala. Const. 1901, Art. IV, § 93, against the State's "be[ing] interested in any private or corporate enterprise." The suits against Alabama and Auburn alleged that those universities had also violated § 16-1-32(d), Ala. Code 1975, because their students' ID cards were effectively debit cards with transaction fees that were more than three times the statutory limit.

Analysis: The Ala. Sup. Ct. stated that federal antitrust law governs Alabama antitrust actions and that the state-action-immunity doctrine has long been a part of federal antitrust law. The Court opined that the state-action-immunity covered not only the Universities' board members, but also "any person, firm, or corporation creating, operating, aiding, or abetting such [a] trust, combine, or monopoly." The Ala. Sup. Ct. ruled that both university administrators and the vendors were entitled to immunity for alleged antitrust violations. It affirmed the Trial Court's 12(b)(6) order dismissing the case.

Securities Fraud; Derivative vs. individual claims.

Ex parte Morgan Asset Mgmt., 86 So. 3d 309 (Ala. Sup. Ct. Sept. 9, 2011).

Summary: Trust beneficiaries sued Regions Bank and various affiliates for fraud and breach of fiduciary duties in connection with the sale of proprietary mutual fund shares. Judge Vance denied the Defendants' 12(b) motion. The Ala. Sup. Ct. granted a petition for writ of mandamus and directed the Trial Court to dismiss the case on the grounds that the claims were derivative in nature and that the Plaintiffs had not complied with Rule 23.1.

Background: This is one of many legal proceedings arising from the precipitous declines of several proprietary mutual funds sold by Morgan Keegan to over 30,000 of its customers. The MK mutual funds lost approximately $1.5 billion from March 31, 2007 to March 31, 2008. In addition to a class action and numerous FINRA arbitrations, an investigation by a joint task-force of federal and state securities regulators resulted in a regulatory proceeding that was settled in June of 2011 when Morgan Keegan and Morgan Asset Management agreed to pay a $200 million fine to the governmental agencies. In a prior case against these same defendants arising from sales of MAM funds, *Ex parte Regions Fin. Corp.*, 67 So. 3d (Ala. Sup. Ct. Sept. 30, 2010), the majority ruled that the plaintiffs' claims were derivative.

The Plaintiffs' mother had created trusts for the benefit of her three daughters, one of whom was designated trustee. Regions was custodian of the trusts' assets and manager of the Trusts' investments. After her mother's death, the trustee met with representatives of Regions and Morgan Keegan to discuss the trusts' investment goals. The trustee advised Regions that she and her sisters were all older, unemployed, and needing income to pay health and living expenses. The Defendants invested the trusts' assets in high-risk proprietary funds that were allegedly unsuitable for the trusts. The complaint alleged that Morgan Asset Management (MAM) and Morgan Keegan (MK) were part of a "team" known as "Regions Morgan Keegan Trust" ("RMKT"). MAM served as investment advisor both to the trust customers and to the proprietary Morgan Keegan mutual funds. The trusts' beneficiaries brought a lawsuit alleging that the Defendants breached their duties to the plaintiffs by investing the trust's assets in unsuitable MK proprietary mutual funds and by failing to sell those funds despite their knowledge that the funds were unsuitable for the trusts. The Defendants moved to dismiss on the grounds that the Plaintiffs' claims were derivative. In denying the Defendants' motion, Judge Vance noted that the plaintiffs' claims were not based on any breach of duties relating to MAM's role as investment advisor to the RMK funds. The Plaintiffs' claims were premised on duties owed to the plaintiffs by virtue of MAM's separate role as investment advisor to the trusts. The Trial Court concluded that the plaintiffs' claims were not derivative because the duties at issue were not owed to the RMK funds.

Analysis: Justice Woodall, writing for the majority reasoned that, although the Plaintiffs did not allege that their losses resulted from mismanagement of the RMK funds, their amended complaint did indicate that the devaluation of the RMK funds resulted from mismanagement. Moreover, the Plaintiffs also alleged that the RMK funds were consistently overvalued by the defendants and that the funds were illiquid, high-risk, Collateralized Debt Obligations backed by subprime mortgages. The majority relying on their prior decision in *Ex parte Regions Fin. Corp.*, 67 So. 3d (Ala. Sup. Ct. Sept. 30, 2010), reasoned that, despite the various theories under which the plaintiffs sought relief, it appeared to the majority of justices that their claim was essentially that they were injured by the diminution in value of the RMK funds, which was a result of alleged mismanagement. Therefore, the majority concluded that "the injury fell directly on the fund as a whole and collectively, but only secondarily, upon its stockholders…such claims are derivative and subject to the requirements of Rule 23.1." (86 So. 3d at 316-17).

In their dissenting opinions, Justices Murdock and Main agreed with Judge Vance's reasoning. Justice Murdock noted that the law imposes duties on investment advisors running from the investment advisor to the individual investor. Justice Murdock pointed out that there is a "clear difference" between an individual investor's claim of fraud in connection with an investment decision and a claim by a "shareholder" who never received fraudulent investment advice but who nonetheless eventually suffered a loss when a fund manager subsequently mismanages the fund. Justice Murdock pointed out that numerous other courts have recognized the distinction between individual claims were an investor alleges fraud in connection with the sale of securities and derivative claims for losses suffered by a corporation or other entity resulting from mismanagement. Justice Murdock quoted from the U.S. District Court for the Western District of Tennessee in a decision denying these same Defendants' motion to dismiss the class action brought by shareholders of these same funds based on the same misrepresentations and omissions. *In re Regions Morgan Keegan Secs, Derivative, & ERISA Litig.*, 2010 U.S. Dist. LEXIS 13785 (W. Dist. Tenn, Dec. 30, 2010). In that case the U.S. District Court refused to follow the Ala. Sup. Ct's decision *Ex parte Regions Fin. Corp.* and rejected the very same arguments that the plaintiffs' claims were derivative. In summarily rejecting Regions' argument, the U.S. District Court noted that merely because the same allegations may support a derivative mismanagement claim and a securities law claim does not mean that a plaintiff must bring one claim instead of the other.

***Altrust Fin. Servs. v. Adams*, 76 So. 3d 228 (Ala. Sup. Ct. July 29, 2011).**

Summary: Shareholders alleged that they relied on material omissions in a proxy statement in deciding not to sell their shares. The Supreme Court overruled Justice Shores' *Boykin* decision allowing plaintiffs to bring individual claims for diminution in value of their shares.

Background: Bank holding company decided to go private and convert to an S corporation. Company's proxy statement stated that the number of its shareholders would be reduced to fewer than 300 through involuntary purchases of some shares and voluntary purchases of other shareholders' shares at $17.25/share. Plaintiffs - shareholders who declined the offer to sell - sued directors of a bank holding company claiming that the proxy statement and SEC filings contained material misrepresentations and that they relied on said misrepresentations in deciding not to sell at $17.25. The complaint alleged violations of the Alabama Securities Act, common law fraud and negligence. The trial court granted the defendants' 12(b)(6) motion as to the blue sky claims and denied their motion as to the common law claims. The Trial Court granted the Defendants' motion for a permissive appeal.

Analysis: The Supreme Court affirmed the dismissal of the securities claim because there was no purchase or sale of the Plaintiffs' stock. The Court reversed as to the fraud claim based on the rationale that the alleged harm was not unique to the shareholders but was suffered equally by all similarly-situated shareholders. The Court concluded, therefore, that the claims were derivative and could only be brought on behalf of the corporation. The court expressly overruled *Boykin v. Arthur Andersen & Co.*, 639 So. 2d 504 (Ala. 1994) and declared Justice Maddox's *Boykin* dissent to be the law in Alabama.

In Justice Murdock's concurring opinion, he noted that the *Boykin* Plaintiffs sought to recover for diminution in stock value caused by corporate officers' and directors' breaches of fiduciary duties, whereas in *Altrust*, the plaintiffs alleged that they missed an opportunity to sell at a higher price due to the Defendants' failure to disclose mismanagement, self-dealing, and interested-party transactions. Justice Murdock agreed with the Defendants' argument that there would never have been an opportunity to sell at $17.25 if the Altrust proxy statement had disclosed the malfeasance at issue. Justice Murdock opined that the plaintiffs should not be allowed to sue based on their failure to accept an offer at an artificially-inflated price resulting from the same wrongdoing that formed the basis of their complaint.

Justice Murdock took the majority to task for overruling *Boykin* in its entirety rather than limiting their opinion to the case presented. He took issue with the majority's decision to "overrule *Boykin* in its entirety, even to the extent Boykin stands for the proposition that a purchase or sale of securities made in reliance upon a fraudulent representation or suppression may be brought as a direct action, the main opinion employs the following statement from this Court's opinion in *Green v. Bradley Construction, Inc.*, '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.' As I indicate at the outset of this writing, I am concerned that in so doing this Court draws too much from the use of the term 'fraud' and, as a result, indicates with its analysis today that even a fraudulent representation or suppression that is directed to a shareholder and that results in a sale or purchase of a security is not directly actionable if the shareholder possesses his or claim in common with other shareholders." 76 So. 3d at 249 (citations omitted).