CORPORATE WAR STORIES

CORPORATE DEFENSE LITIGATORS SHARE SOME OF THEIR RECENT VICTORIES IN THE DOG-EAT-DOG ARENA OF ENTERPRISE.

BY JESSICA ARMSTRONG

When rectifying wrongs in civil cases, sometimes it's about defending the little guy and sometimes it's about defending corporations. Alabama's corporate defense lawyers stay busy handling a variety of cases for banks, insurance companies, health care facilities, automotive giants and other major businesses.

Corporate defense is all about being "on your A game," says Greg Schuck, defense attorney for Huie, Fernambucq & Stewart, who handles cases for Ford Motor Co. "You're dealing with a sophisticated client who knows as much about the issues as the lawyers do," he says. "You must be extremely prepared to work with a corporate client."

Defense attorney David Hymer, with Bradley Arant Boult Cummings, says it's vital to maintain a good working relationship with in-house counsel. The role of a corporation's on-staff legal department is primarily strategic with an eye on "the big picture," and outside law firms typically are hired to handle individual cases, Schuck adds.

A benefit to working corporate cases, says Gerald Gillespy, of Burr & Forman, is the opportunity they provide to learn about various industries and sectors. "We work closely with in-house counsel and company officers to learn everything we can about a particular client's business and goals, then work jointly to reach those goals."

There's a consensus among corporate defense lawyers that public concern over corporate misconduct can be particularly challenging when a case goes to trial. According to recent Gallup polls, 62 percent of Americans believe corruption is widespread across corporate America.

This perception "casts a dark shadow on all companies," says James Nolan, a partner with Constangy Brooks & Smith. Charlie Potts, an attorney with Briskman & Binion, believes the challenge in representing a large corporation in an Alabama courtroom remains difficult because Alabama is historically a populist state with a "strong vein of distrust of large corporations."

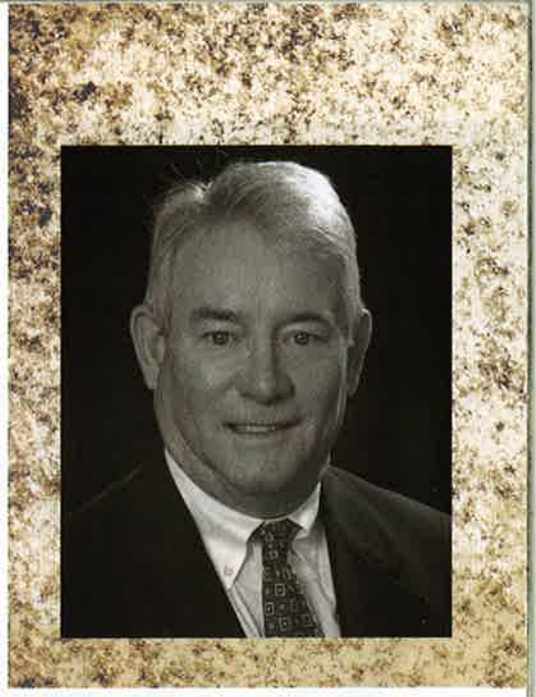
Mitt Romney's comment during the presidential campaign that "corporations are people" sparked controversy, but few would argue that the heart of a company is its people. Jurors tend to see a corporation as "just a name — a brand or a big faceless box," notes attorney Scott Brown, of Maynard Cooper & Gale.

"I think there is the perception that when you represent a company, that you lose the human element — that it is hard to connect with a corporation," adds Brown. "You are representing people and trying to help them solve a problem; providing that assistance is extremely gratifying."

Nolan mentions a close relationship he's built with an Alabama company he has represented over the past 30 years. "I've watched it grow from 500 to over 4,000 manufacturing jobs. I've learned about their children and taken them to the courthouse as their mentor. My greatest reward is feeling like I've made a contribution."

HIGH-PRESSURE PNEUMATICS TACTICS

MICHAEL MULVANEY
MAYNARD COOPER & GALE



Michael Mulvaney, with the Birmingham office of Maynard Cooper & Gale, served as lead counsel in a case in which he represented a business hoodwinked by its biggest customer into a $3.8 million loss. So egregious was the scheme, the jury also hit the defendant with $7.6 million in punitive damages.

Mulvaney's client was Birmingham-based Ligon Capital, a privately owned major manufacturer of hydraulic cylinders. The firm's attorneys, Scott Brown and Christopher Frost, also represented the client at trial.

A few years ago, Ligon purchased, out of bankruptcy, Hydraulic Technologies Inc., an Ohio hydraulic cylinder manufacturer. At the time of the purchase, HTI's primary customer was CNH America, an agricultural and construction equipment manufacturer.

Unknown to Ligon, CNH had lined up a new supplier for the long term, but for the short term CNH was dependent on getting cylinders from its old supplier, HTI. Ligon's purchase of HTI would secure CNH's short-term supply, so CNH encouraged the Ligon-CNH deal by hiding the fact that it was going to drop HTI like a hot casting.

Mulvaney says CNH cooked up a plan of action that was "fraudulent suppression."

"At that time, CNH's senior managers knew that, for the suppression to work, CNH would have to affirmatively conceal this decision from Ligon/HTI, including using false delivery schedules to deceive our clients," adds Mulvaney, who says CNH further deceived Ligon/HTI over a nine-month period by telling HTI to "buy to forecast," knowing the forecasts were false.

During this nine-month period, Mulvaney says, Ligon/HTI spent hundreds of thousands to expedite delivery of cylinder components and invested millions of dollars in new equipment to keep up with CNH's large volume of orders. Had Ligon failed to keep HTI operational as the company emerged from bankruptcy, CNH faced hundreds of millions of lost revenues.

Those losses occurred after CNH terminated HTI and refused to mitigate Ligon/HTI's losses, he says. CNH could have mitigated a large portion of Ligon/HTI's losses by purchasing the remaining $2.3 million in component parts unique to CNH's cylinders and reselling the components to its new suppliers with no loss to CNH, but CNH refused to do so.

A Jefferson County jury returned a verdict in favor of Ligon/HTI's claim for fraudulent suppression and awarded Ligon/HTI $11.4 million in damages, $3.8 million in compensatory damages and $7.6 million in punitive damages.

"Typically, we are defending our clients against claims that they have done something wrong," says Mulvaney. "In this case, we were prosecuting a claim on behalf of our client. You cannot afford to only be reactive or to wait and simply respond to what the other side does. You have to take every opportunity to aggressively shape the case and keep the other side on its heels."

Real estate development is an uncertain business even in a robust economy. Risks grew during the recent subprime mortgage crisis and housing market slump.

These were just two of the obstacles that landed its developers in court — suing their bank — rather than breaking ground on a new Lake Martin residential community.

George Walker and Paul Beckmann, with Hand Arendall, in Mobile, obtained a judgment as a matter of law dismissing claims seeking $13.5 million in damages from their bank defendant after four days of trial in Montgomery County Circuit Court.

Plaintiffs in the case obtained a loan in 2007 to purchase 37 acres on Lake Martin to build a residential community.

The defendant bank issued a $5 million temporary loan to the plaintiffs to purchase the property and committed to an $8.6 million permanent loan the plaintiffs were to use to pay off the temporary loan and build the project's infrastructure.

Six months later — after a drought, the subprime mortgage crisis, a downturn in the lake residential real estate market, and the failure of other projects of the loan's guarantors — the bank terminated its commitment to fund the permanent loan, relying on a provision that allowed it to terminate the commitment in the event of material adverse changes.

The plaintiffs — the project contractor and a company developed for the single purpose of developing the lake project — were unable to pay off the temporary

FINANCIAL DURESS VS. EVERYBODY'S DURESS

GEORGE WALKER
HAND ARENDALL

loan, and later sued the bank, seeking $13.5 million in damages owing to lost profits.

Plaintiffs argued that the release language could not be enforced against them because they had executed the forbearance agreement under duress.

The bank's refusal to fund the permanent loan left them without any option to save their project other than to sign the agreement. The bank, they claimed, put them under financial duress.

"The judge concluded they were under the same duress as anyone would be and that they signed the forbearance agreement for no other reason than to avoid foreclosure," explains Walker.

Walker says such cases are typically resolved in a summary judgment rather than going to trial.

Walker and Beckmann argued that the bank did not apply unlawful pressure to secure the plaintiffs' signatures on the agreement. Moreover, the plaintiffs had the benefit of counsel before executing the agreement and had reasonable alternatives other than signing the agreement if they wished to contest the bank's action.

The trial judge agreed and entered judgment as a matter of law at the end of the fourth day of trial.

They had previously persuaded the court to award summary judgment to the bank on its counterclaim for the unpaid loan, resulting in a judgment in favor of the bank for $4.4 million.

STAFF WALKS, TAKES BUSINESS WITH THEM

JAMES NOLAN
CONSTAGNY BROOKS & SMITH

Most businesses must take a hard line approach in order to prosper during a struggling economy.

Capture your market share.

Dominate your competition.

There's nothing wrong with being aggressive, as long as you play by the rules. Trouble comes when companies and their employees ignore the rules.

James Nolan, a partner with Constangy Brooks & Smith in Birmingham, successfully defended a company that claimed its competition didn't play by the rules.

Nolan's client, CEBCO Staffing, a professional employee organization and temporary staffing agency based in Warrior, was in the business of supplying temporary employees to clients.

CEBCO employed sales representatives to recruit clients. When hired, the sales staff executed non-competition and non-solicitation agreements. Among the terms of these agreements were a promise that CEBCO employees would not accept employment with a nearby competitor for at least a year. New employees also agreed that they would not call on any CEBCO client, who had been a client when the employee left his or her CEBCO job.

About two years ago, CEBCO's entire Selma office staff resigned on the same day. All of the CEBCO employees went to work for a new agency. They took their current clients with them to the new agency, telling those clients that CEBCO was going out of business.

CEBCO filed a complaint against the company and its founder for theft of business property, unfair competition and intentional interferences with contractual relations.

CEBCO also filed complaints against its former employees, saying they had breached their non-compete agreements and engaged in unfair competition.

CEBCO also filed a temporary restraining order asking for return of its electronic data files and enforcement of the non-competes.

Nolan says an informant told him about a scheme among the then-CEBCO staff to accept employment with the new agency and transfer CEBCO's client base.

Based on this testimony, the judge entered a temporary restraining order granting most of the relief requested and ultimately granted summary judgment to CEBCO against the company and its founder and found them liable to CEBCO for damages.

Prior to the litigation, CEBCO was purchased by the Alabama Credit Union League, which later sold it to a Florida company.

"Sales personnel in many industries are jumping from one employer to another chasing a bigger paycheck," observes Nolan.

"Employers already suffering from the down economy can hardly afford to lose business when a sales person accepts employment with a competitor and attempts to take clients and business with them as they walk out the door."

HIGH COURT 180s IN BANK CASE

GERALD GILLESPY
BURR & FORMAN

Winning an appeal is always gratifying, and it's even sweeter when a prior decision of the ruling court is reversed. In 2011, Gerald Gillespy, a partner in the Birmingham office of Burr & Forman, won an Alabama Supreme Court appeal on behalf of Altrust Financial Services Inc., the holding company for Peoples Bank of Alabama, in Cullman.

The plaintiffs were a group of shareholders who claimed the company was in violation of the Alabama Securities Act and that the value of their stock had been diminished as a result of alleged mismanagement. On motion of the defendants, the trial court dismissed the securities claims but did not dismiss the common law fraud claims, because of conflicting case law, in particular a 1994 Alabama Supreme Court case decision.

On appeal, the Alabama Supreme Court affirmed the dismissal of the securities claims and reversed the trial court's denial of the motion to dismiss the common law fraud claims, based on the defendant's argument that the claims were derivative and could not be brought as direct claims, overruling the court's prior decision.

"We do these types of suits all the time," notes Gillespy, whose 20-year practice focuses on complex commercial litigation cases. "But this one was significant because we overruled some old laws that had been on the books since 1994."

Shareholders were attempting to bring claims individually, based on allegations that the value of their stock, which declined during the economic crisis that started in 2008, had been diminished as a result of alleged mismanagement, says Gillespy. Most jurisdictions recognize that shareholders have no right to bring such a claim individually when they have not suffered an alleged injury unique from other shareholders.

Gillespy says the challenge of this case was conflicting case law in Alabama, most notably the 1994 case, which suggested a stockholder could bring such an individual claim. Acknowledging that the earlier case diverged from its own other decisions and decisions in other jurisdictions, the Alabama Supreme Court overruled the lower court ruling.

ROAD RAGE IS NOT A DESIGN FLAW

GREG SCHUCK
HUIE, FERNAMBUCQ & STEWART

Ford Motor Co. is Greg Schuck's main client, and he's defended the auto giant in a variety of cases for 13 years as an attorney with Birmingham-based Huie, Fernambucq & Stewart. Having defended Ford for so long, the company not only relies on Schuck to help with its defense in Alabama but brings him in on cases in other states, as well.

Although road rage is rarely at the heart of such cases, it was when Schuck recently traveled to New Jersey to defend Ford against accusations of faulty design. A couple crashed their Ford Explorer on a New Jersey highway when an angry motorist passed them on the right, cut in front, and then tapped his brakes, apparently enraged that the plaintiffs were staying in the left lane.

The plaintiffs contended that their Explorer's defective design caused it to roll over, resulting in significant brain damage and other injuries to the plaintiffs. Schuck and his team proved that several abrupt and extreme steers executed by the Explorer driver had caused the crash.

A jury returned a unanimous verdict in favor of Ford. The aggressive driver (not charged) denied tapping his breaks and making offensive middle finger gestures even though witnesses testified seeing him do so. Witnesses also reported seeing the plaintiffs return the gesture.

Road rage is commonplace these days. Yet according to the National Institutes of Health, only 2 percent of incidents culminate in serious damage to people or vehicles, so cases like Schuck's are relatively uncommon. On the other hand, product liability cases involving allegations of automotive design defects and manufacturing defects are indeed quite commonplace.

"These are very technical cases when dealing with automotive engineering," Schuck explains, "and part of the challenge is to explain the issues of the case in a way jurors can understand. And you almost have to take a crash course each time the engineering and the technology [of the vehicles] change."

HEALTHSOUTH GOES OFFENSIVE BIG-TIME

DAVID HYMER
BRADLEY ARANT BOULT CUMMINGS

David Hymer of Birmingham-based Bradley Arant Boult Cummings handles high-stake lawsuits for corporate clients — and the stakes rarely get higher than the fraud case between HealthSouth Corp. and its former CEO Richard Scrushy. As HealthSouth's lead counsel, Hymer helped obtain one of the largest verdicts in Alabama history against Scrushy for breach of fiduciary duty.

The perpetrators overstated HealthSouth's net income and assets by billions of dollars over a seven-year period to inflate the company's stock price and profit. HealthSouth became embroiled in extended litigation as both a plaintiff and a defendant.

"Each lawsuit had its own challenges," recalls Hymer, "but the biggest challenges were managing the large volume of extremely high-stakes litigation, making sure that the company's position was consistent across all of that litigation, and organizing the massive amounts of documentary evidence and witness testimony."

The litigation produced millions of pages of documents and more than 100 depositions. Portions of the litigation are still active, nearly 10 years after the fraud was uncovered, says Hymer.

Some of the more prominent cases include an action in which HealthSouth sued its former officers and employees involved in the fraud, along with UBS Securities, HealthSouth's investment banker. HealthSouth obtained a judgment against Scrushy of more than $2.8 billion and a settlement with UBS worth more than $100 million.

HealthSouth shareholders and bondholders sued, saying HealthSouth and others violated federal securities laws; that case settled. Other major cases include Scrushy's action against HealthSouth for breach of his employment agreement (HealthSouth obtained a judgment in its favor), and a case against HealthSouth's outside auditor Ernst & Young that's still pending.

"Helping to rectify the wrong that was done to HealthSouth by its dishonest employees and others was important to the lawyers who worked on the case," says Hymer, adding that the lawyers wanted to help HealthSouth's hard-working employees, "who themselves were in a way victimized by the fraud."

AREA RUG HEIST SWEPT INTO MEDIATION

JULIAN BUTLER
SIROTE & PERMUTT

A multicolored area rug is an inexpensive way to give a room an instant makeover, so there's a big market for them in bold stripes, geometric patterns and other eye-catching designs. A North Carolina-based textile manufacturing company devised a cost-effective coloration process for its area rugs.

Julian Butler, a lawyer in Sirote & Permutt's Huntsville office, represented the North Carolina company in its suit against an Alabama textile manufacturing company that was using a similar dyeing machine. The Alabama company purchased the machine from a former employee of Butler's client. While in the company's employment, he was on the team that developed its innovative dyeing machine.

"This was a classic trade secret case, which falls under unfair competition," Butler explains. "He left the company, then manufactured a similar machine and sold it to the Alabama company, giving them a competitive advantage."

Companies can keep their confidential information from competitors by requiring employees to sign non-compete or non-disclosure agreements prohibiting them from disclosing trade secrets. Misuse of trade secrets is considered a form of unfair competition, and state and federal laws protect them from disclosure. Butler's case was resolved in mediation rather than going before a jury. He says about 90 percent of corporate cases are handled in this manner.

"Neither side was totally happy with the outcome, but it was less expensive than litigation even if we had won in court," adds Butler. "Most corporations don't like to be in litigation. Of course, you always have to be prepared for the possibility of litigation but it's in the best interest of your client to avoid it. Any time a business is in court, the company is losing money."

Jessica Armstrong is a freelance writer for Business Alabama. *She lives in Auburn.*