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Business Torts Journal (ISSN 1549-2923) is published quarterly by the Committee on Business Torts Litigation, Section of Litigation, American Bar Association, 321 N. Clark Street, Chicago, IL 60654-7598. The views expressed within do not necessarily reflect the views of the American Bar Association, the Section of Litigation, or the Committee on Business Torts Litigation.

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Navigating the Nuances of Tortious Interference Claims

By Zachary G. Newman
and Anthony P. Ellis

As any seasoned litigator is aware, there are many claims available to a company to address wrongful competition or to combat wrongful conduct by former employees. Tortious interference claims are designed to tackle tortious interference with contracts, business relationships, and prospective economic opportunities. These claims, however, are intensely factual, and litigants that run afoul of the jurisdiction's pleading standards will find their claims forever dismissed.

Courts generally recognize three universal members of the "tortious interference family." The elements of each claim are similar but not identical, and some of these differences are in fact more substantive than linguistic.

The first, and perhaps most common, member of this family is a claim for tortious interference with an existing contract. To sustain this claim, a plaintiff generally must allege the existence of a contract between the plaintiff and a third party, the defendant's knowledge of the contract, the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and damages to the plaintiff. *See, e.g., Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 5 (1956). The plaintiff must allege actual knowledge, as generally "objective standards like implied knowledge or constructive knowledge are insufficient." *DBS Constr., Inc. v. New Equip. Leasing, Inc.*, 2011 U.S. Dist. LEXIS 32681, at *11 (N.D. Ind. Mar. 28, 2011).

Another member of the tortious interference family is a claim for tortious interference with business relations. Perhaps the most obvious distinction between this claim and its sister claim is that it is not necessary to establish the existence of any actual contract between the parties. *Cole v. Homier Distrib. Co. Inc.*, 599 F.3d 856, 861 (8th Cir. 2010) (applying Missouri law). Instead, the plaintiff must only show that the plaintiff had a business relationship with a third party and the defendant knew of that relationship and intentionally interfered with it, the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort, and the defendant's interference caused injury to the relationship with the third party. *Amaranth, LLC v. J. P. Morgan Chase & (Continued on page 20)*

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Message from the Chairs

Among business torts, tortious interference claims present a range of challenges. At the threshold, we confront a basic problem of characterization: With what has the defendant interfered—a contract or an advantageous relationship? The consequences of such an interference might be the same, but the proof and defenses could differ.

Then, what are the acts of interference? When does competitive conduct rise to the level of tortious interference? Some cases have confused the analysis by making malice the distinguishing factor, but malice is a complex thicket, as the very word focuses on the actor's state of mind, when some conduct can be malicious in law even absent a malevolent intent.

Hence, the modern trend gravitates away from malice and explores instead whether the defendant acted with improper means or motive, prompting debate over what is "proper" in a business context. If a defendant intends to divert business away from the plaintiff by making potential customers think ill of the plaintiff's product, is the defendant's intermediate motive improper—to have potential customers feel negatively about the plaintiff's product? If so, is the improper intermediate motive trumped by a presumptively proper ultimate motive—to have potential customers do business with the defendant? In cases of mixed motives, does the defendant's liability turn instead on whether the means of disparaging the plaintiff's product crossed some line? And in all cases where the propriety of a defendant's means or motives are called into question, what standards determine where the line of propriety lies?

These are only some of the many issues lying just beneath the surface of a business torts claim waiting to be scratched up. In the Business Torts Committee, we aim to raise the level of awareness of these and many other issues. We hope you'll find this issue of the *Business Torts Journal* on point and helpful when prosecuting or defending claims for tortious interference.

We're pleased to announce the committee is now on Facebook (www.facebook.com/home.php?sk=group_212299215465728) and LinkedIn (www.linkedin.com/e/-ov2d8t-gnui1fdx-2e/vgh/

3916794). These are just two more ways we carry on the work of our committee and our connection to each other between our various meetings. We hope you'll become a friend on our Facebook page and that you'll make a connection with us on LinkedIn.

As we look ahead, we're planning for a wonderful mid-winter meeting in Carlsbad, California, February 16–19, 2012, at the Park Hyatt Aviara Resort, where we will sponsor with the Corporate Counsel Committee, Minority Trial Lawyer Committee, and Woman Advocate Committee. Please save the date; you can reliably look forward to first-rate CLE programs, a productive committee business meeting, a delicious committee dinner, social events, great networking, a fun golf tournament, and even some free time to enjoy the amenities offered in and around the host venue. Details will be found soon on our webpage, <http://apps.americanbar.org/litigation/committees/businessstorts>.

Meanwhile, if you are interested in writing for future issues of the *Business Torts Journal*, please contact the editors, Gerardo Barrios (gbarrios@bakerdonelson.com), David Johnson ([dljohnson@millermartin.com](mailto:djohnson@millermartin.com)), or Peter Boyer (boyer@hylandlevin.com).

If you have any news of interest to litigators who handle business torts, including new cases or statutes, developments in the law, practice tips, and the like, please forward it to our web editors, Betsy Hyatt (ehyatt@starrslaw.com), Dan Kaufmann (dkaufmann@bab.com), and Jonathan Shapiro (jshapiro@shapirolawofficesct.com). Like the *Journal*, our webpage is another great way we deliver content of interest to our members.

Finally, if you are not already a member of our committee, we welcome you to join, which you can easily do by clicking on the "Join" link on our webpage. By joining, you will receive our listservs, receive the *Business Torts Journal*, be invited to participate in monthly teleconference calls, and become part of the lifeblood of this active committee. The Business Torts Litigation Committee is one of the most active and popular committees in the Section. We encourage new members to join, and we offer many opportunities to get involved. ■

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Message from the Editors

The *Business Torts Journal* has a proud history, and we are honored to carry on the legacy created by our predecessors as editors of the publication. This issue marks an important milestone for the publication, as this will serve as the last hard-copy issue to be mailed to recipients. With that in mind, we felt it prudent to take a trip down memory lane and recount the history of the *Journal*.

Initially, the *Journal* was called something else—the *Business Torts Newsletter*. At its inception, which is believed to be at some point in the 1970s, the *Newsletter* focused on case notes rather than substantive legal articles. The newsletter was published sporadically until 1991, when Peoria, Illinois, attorney Timothy Bertschy agreed to assume the role of editor. Bertschy served as editor for more than 10 years—the longest tenure of any editor in the publication’s history. During that time, Bertschy, with the assistance of others who intermittently served as coeditors, facilitated the *Newsletter*’s transition to more regular publication, such that it was published up to four times each year.

A significant transition took place in 2002, when the Business Torts Litigation Committee was under the direction of San Francisco, California, attorney Robert Schaberg and Florence, South Carolina, attorney Wayne Byrd. Schaberg describes as a “turning point” for the publication a Phoenix, Arizona, meeting attended by committee leaders, including Schaberg; Byrd; Bertschy; Louisville, Kentucky, attorney Bart Greenwald; Portland, Maine, attorney David Soley; Mobile, Alabama, attorney Douglas McCoy; and New Orleans, Louisiana, attorney Kent Lambert. The leadership felt that the publication could be “spruced up” and appointed Greenwald to serve with Bertschy as coeditor.

Beginning with the Fall 2002 issue, the publication underwent five meaningful changes that have continued through to today. First, the publication transitioned from primarily providing case notes and, instead, set forth substantive articles. Second, and consistent with this transition, the name of the publication was changed from the *Business Torts Newsletter* to the *Business Torts Journal*. The committees’ leaders felt that this name change would be more consistent with fostering a scholarly reputation for the publication.

Third, the *Journal* became committed to regularly publishing four quarterly issues each year. Fourth, Schaberg suggested that

the *Journal* should transition to themed issues and that topical subcommittees should be formed that would be responsible for generating articles related to their respective substantive area of law. Since that time, the *Journal*’s quarterly publications have generally cycled around the following themes: tortious interference, unfair trade practices, fiduciary duty, trade secrets, fraud, and technology. Over the years, numerous subcommittee chairs have worked very hard to provide articles for these issues.

Finally, the publication received a major facelift. The *Journal* was selected to participate in a Section of Litigation pilot program to upgrade the “look and feel” of the publication. Greenwald asked the marketing department of his law firm, Frost Brown Todd, LLC, to help redesign the layout. Greenwald’s marketing gurus, in conjunction with the ABA staff, worked their magic, and the result was a very snazzy and professional publication.

Bertschy ended his lengthy tenure with the *Journal* after 2002, eventually becoming a Section chair, and was replaced by Boston, Massachusetts, attorney Joseph Steinfeld. Schaberg believes that the *Journal* has become regarded as “one of the best publications in the Section of Litigation.” In fact, under Steinfeld and Greenwald’s leadership, the *Journal* was honored as the Section’s “Outstanding Newsletter” for the 2003–2004 bar year.

After performing a herculean effort in improving the *Journal*, Greenwald departed in 2004 and was replaced by Cincinnati, Ohio, attorney Jeffrey Teeter, who dedicated several years to improving the quality of the *Journal*. Since that time, several other attorneys from across the country, as well as ABA staff, have spent tireless hours helping the *Journal* to be what it is today. As of the present, each issue of the *Journal* is sent to approximately 2,500 members of the Business Torts Litigation Committee.

Beginning with the Fall 2011 edition, all future issues of the *Journal* will be sent digitally in the form of an email. For committee members who have opted out of ABA emails, it is imperative that you change your email settings if you wish to receive copies of this publication in the future. To do so, access “myABA” from the ABA’s website at americanbar.org/myaba. Once there, click on “edit” next to the “Subscriptions” tab. From there, you will be able to adjust your settings for receipt of ABA information. ■



Punitive Damages and Intentional Interference with a Contractual Relationship

By Andrew M. Bossory

At first blush, a contract is a simple thing—an offer and acceptance. But as those two terms are broken down, the highly nuanced nature of contract law becomes apparent. From the mystic parol-evidence rule to substantial performance, the intricacies are complex and factually demanding. However, issues of damages for breach of contract have always conceptually been relatively straightforward: economic relief to place the aggrieved party in as good a position as it would have been upon performance. Tortious concepts of fraud, malice, and ill will had no impact on the amount of remuneration for which a breaching defendant was responsible. These distinct ideologies are not as separate as they once were. For instance, jurisdictions have consistently recognized that a third party may wrongfully interfere with a contractual relationship. This wrongful conduct is not classified as a breach of contract—allotting only compensatory damages—but as an actionable tort in and of itself. This has given rise to a new class of damages.

Through years of statutory and case law, a bridge has developed between the historical remedy for a breach of contract and the independent tort of intentional interference with a contractual relationship. Whereas a contract has been viewed as a mere expectation of performance, the tort remedy incorporates an understanding that this expectation should be free from interference by third parties. The dichotomy between contract and tort damages illustrates this distinction. The type of action (contract or tort) that is brought may have a profound impact on the possible damages originating from the same contract.

The Historical Remedy and the Efficient Breach

At its core, the remedy for a breach of contract is intended to compensate a nonbreaching party for its economic losses. Under this stoic ideology, the breaching party's motive and intent is immaterial. Instead, inquiry is focused solely on the actual damage incurred. Any intrinsic desire to “do good” or punish wrongdoers must, to the largest extent possible, be set aside. As noted by Oliver Wendell Holmes in “The Path of the Law,” 10 *Harv. L. Rev.* 457, 462 (1897):

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties

are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.

In other words, damages for breach of contract are designed to make the injured party whole. *See, e.g., Kattar v. Demoulas*, 433 Mass. 1, 15, 739 N.E.2d 246 (2000) (“A fundamental principle on the rule of damages is based on compensation. Compensation is that amount of money that reasonably will make the injured party whole. Compensatory damages may not exceed this amount. Anything beyond that amount is a wind-fall.”); *Larsen v. First Bank*, 245 Neb. 950, 966, 515 N.W.2d 804 (1994) (“[I]n a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.”). The intent is not to punish or deter behavior, but to compensate the injured party for any economic losses it has sustained. As courts have repeatedly reiterated:

The purpose of damages for breach of contract is “to put the plaintiff . . . in as good a position as he would have been had the defendant kept his contract.” The damages should be equal to the value of performance. The injured party is not, however, entitled to be placed in a better position than he would have been if the contract had not been broken. . . .

Goodwin, Inc. v. Coe, 62 Mich. App. 405, 412–13, 233 N.W.2d 598 (1975).

Courts have widely recognized the concept of the efficient breach—the notion that a breaching party may occasionally come out ahead from a breach of contract, despite owing compensatory sums to the aggrieved party. *See, e.g., Patton v. Mid-Continental Sys., Inc.*, 841 F.2d 742, 750 (7th Cir. 1998) (“Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth something more to someone else. If so, efficiency is

promoted by allowing him to break his promise, provided he makes good on the promisee's actual losses. If he is forced to pay more than that, an efficient breach may be deterred, and the law doesn't want to bring about such a result." This mantra walks hand-in-hand with the ideology that the law does not favor an injured plaintiff garnering a windfall. *See, e.g., Goodwin*, 233 N.W.2d at 413 ("The injured party is not, however, entitled to be placed in a better position than he would have been if the contract had not been broken.") This principle is firmly engraved in contractual authorities. For example, as noted in 24 *Williston on Contracts* § 64:1 (4th ed. 2010):

The fundamental principle that underlies the availability of contract damages is that of compensation. That is, the disappointed promisee is generally entitled to an award of money damages in an amount reasonably calculated to make him or her whole and neither more nor less; any greater sum operates to punish the breaching promisor and results in an unwarranted windfall to the promisee, while any lesser sum rewards the promisor for his or her wrongful act in breaching the contract and fails to provide the promisee with the benefit of the bargain he or she made.

Nevertheless, authorities have recognized that limiting contractual damages solely to expectation damages may actually work to hinder the administration of justice. In some instances, a breaching party may completely "get off free" if the aggrieved party chooses not to pursue legal action for any number of reasons, such as the expense or inconvenience of litigation and/or the prospect of receiving only expectation damages. As noted by one commentator, "As long as this reality exists [wherein a breaching party escapes a contract financially unscathed], the justice of the law of contract remains a fiction." James H. Cook, "*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.: Tortious Breach of the Covenant of Good Faith and Fair Dealing in a Noninsurance Commercial Contract Case*," 71 *Iowa L. Rev.* 893, 909–10 (1986).

This "contractual fiction" has provided a foundation for modern jurisprudence to cultivate the tort of intentional interference with a contract. Recognition of a cause of action in tort can be justified by regarding contractual rights as inviolable—rights that need to be protected against trespass by those not party to the contract. Clark A. Remington, "Intentional Interference with Contract and the Doctrine of Efficient Breach; Fine Tuning the Notion of the Contract Breacher as Wrongdoer," 47 *Buff. L. Rev.* 645, 645 (1999). When viewed in this manner, it is not difficult to understand the rationale behind imposing damages beyond compensatory sums. Arguably there is a justification for punishment and deterrence.

Gradually, courts across the country have recognized intentional interference with a contractual relationship as a cause of action. The unique damages allowed under such a cause of

action have made it an attractive option for plaintiffs. Set forth below is a discussion of three states' treatment of damages in both contract and tort.

Michigan

Michigan courts have preserved the distinction between damages available in an ordinary breach-of-contract action and those available in a tortious interference action. Michigan courts have consistently held:

[I]n breach of contract cases, the general rule is that exemplary damages are not recoverable absent allegations and proof of tortious conduct that is "independent of the breach." This is because "the plaintiff is adequately compensated" for a breach of contract "when damages are awarded by reference to the terms of the contract."

Casey v. Auto Owners Ins. Co., 273 Mich. App. 388, 402, 729 N.W.2d 277 (2006) (quoting *Kewin v. Mass. Mut. Life Ins. Co.*, 409 Mich. 401, 420–21, 295 N.W.2d 50 (1980)).

The preclusion of exemplary damages extends even to bad-faith breaches of insurance contracts—those unique instances in which courts may be inclined to award exemplary damages despite being an ordinary breach of contract. *See, e.g., Isagholian v. Transam. Ins. Corp.*, 208 Mich. App. 9, 17, 527 N.W.2d 13 (1994). Michigan courts have reasoned that a contract imposes a duty owed merely between the parties—not a duty imposed by the law upon all. *See Ferrett v. General Motors Corp.*, 438 Mich. 235, 244, 475 N.W.2d 243 (1991).

Authorities have recognized that limiting contractual damages to expectation damages may work to hinder the administration of justice.

However, Michigan courts recognize tortious interference with a contract if a plaintiff can show the following elements: "(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant." *Mahrle v. Danke*, 216 Mich. App. 343, 350, 549 N.W.2d 56 (1996). In such event, exemplary damages may be awarded. *See, e.g., Jackovich v. Gen. Adj. Bureau, Inc.*, 119 Mich. App. 221, 235, 326 N.W.2d 458 (1982). With the exception of the third element, these elements appear to be very similar to the elements required to show breach of an ordinary contract. Yet, a plaintiff—even if its actual damages

remain the same—stands to recover exemplary damages if it can prove that the defendant's conduct was tortious.

New York

Acknowledging that the traditional role of damages for breach of contract is simply to enable the injured party to be made whole, New York courts historically have not allowed a plaintiff to recover punitive damages. *M. S. R. Assoc., Ltd. v. Consolid. Mut. Ins. Co.*, 396 N.Y.S. 684, 685, 58 A.D.2d 858 (1977) (“[I]t has always been held that punitive damages are not available for mere breach of contract, for in such a case only a private wrong, and not a public right, is involved.”). New York courts, however, have recharacterized the nature of contractual damages. The duties assumed upon entering a contract have been expanded to include the covenants of good faith and fair dealing:

The punitive nature of damage for the bad faith breach of contract is a characteristic of the law of contracts generally, and is not a peculiarity alone of the contract of liability insurance. In every contract “there exists an implied covenant of good faith and fair dealing.”

Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 437, 285 N.E.2d 849 (1972) (quoting *Kirke La Shelle Co. v. Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163 (1933)).

New York courts have formally recognized tortious interference with contractual relations as an independent tort.

Gradually, New York courts have bridged the gap between contract and tort damages and, in the process, eroded the traditional position of ignoring moral culpability for a breach. Thus, punitive damages may be awarded in an ordinary breach-of-contract case upon an “extraordinary showing of a disingenuous or dishonest failure to carry out a contract.” *Id.*; see also *Scott v. KeyCorp*, 669 N.Y.S. 2d 76, 79–80, 247 A.D.2d 772 (1998).

An example of a plaintiff making such a showing in a breach-of-contract case is set forth in *Aero Garage Corp. v. Hirschfeld*, 586 N.Y.S. 2d 611, 613, 185 A.D.2d 775 (1992). The plaintiff in that case was a tenant of a parking garage structure. The plaintiff renewed the lease in 1977 for a term extending until 2000. Under the lease, the defendant landlords were required to obtain an extension for a certificate of occupancy for the

property that was set to expire in 1982. In 1979, the defendants applied for an extension, but withdrew the application at some point before the expiration. The defendants informed the plaintiff that they wished to buy out the lease to construct a high-rise building. The defendants made it clear that if the plaintiff would not sell, the defendants would find some other way to terminate the lease. The plaintiff refused and submitted his own application for a certificate of occupancy, which was granted. In response, the defendants attempted to revoke the certificate through administrative appeals. In 1984, the plaintiff brought suit and obtained an injunction precluding the defendants from pursuing revocation of the certificate. The defendants violated this order and, ultimately, the trial court awarded a permanent injunction and assessed \$224,000 in damages against the defendants for breach of contract, including \$150,000 in punitive damages.

The New York Supreme Court affirmed the award of punitive damages. While recognizing that the remedy for a breach of contract is generally limited to compensatory damages, the court noted that the defendants' actions were in blatant violation of the lease agreement. *Id.*, 586 N.Y.S. 2d at 613. The defendants' “blatant” breach of unambiguous contractual provisions, coupled with a “willingness to go to any lengths to achieve their ends,” satisfied the standard to award punitive damages in the breach of contract action.

New York courts have also formally recognized tortious interference with contractual relations as an independent tort. See, e.g., *Anesthesia Assoc. of Mount Kisco, LLP v. N. Westchester Hosp. Ctr.*, 873 N.Y.S. 2d 679, 682, 59 A.D.3d 473 (2009). As with other torts, punitive damages may be awarded. See, e.g., *Don Buchwald & Assoc., Inc. v. Rich*, 723 N.Y.S. 2d 8, 9, 281 A.D.2d 329 (2001) (noting that punitive damages may be awarded for tortious interference with economic relations upon a showing of intentional or deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, or a willful and wanton disregard of the rights of others).

California

The California legislature has statutorily barred recovery of exemplary damages in ordinary breach-of-contract cases. As codified in Cal. Civ. Pro. Code § 3294(a):

In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

As with many other states, California courts have not allowed exemplary damages to be recovered in a breach-of-contract case. For example, in *Crogan v. Metz*, 47 Cal.2d 398, 402–03, 303 P.2d

1029 (1956), a property owner arranged for his real-estate broker to sell the property for \$100,000. The broker conspired with two other brokers to negotiate a “three cornered deal”—a scheme with the goal of selling the property in excess of asking price to guarantee a commission. Thereafter, the plaintiff, a client of one of the brokers, purchased the property for \$115,000. After learning of the inflated purchase price, the plaintiff brought suit against the brokers. Following a trial, the trial court entered a verdict in the plaintiff’s favor. The court found that the defendants acted willfully and fraudulently, and, therefore, the court awarded punitive damages. *Id.*, 47 Cal.2d at 402–03.

The California Supreme Court, however, reversed and vacated the award of punitive damages. The court stood firm in the deeply rooted tradition of denying exemplary damages “in an action based on breach of contract even though the defendant’s breach was willful and fraudulent.” *Id.* at 405. California courts have continued to follow this reasoning today. *See, e.g., Brewer v. Premier Golf Properties*, 168 Cal. App. 4th 1243, 1255–56 (2008); *Tomaselli v. Transam. Ins. Co.*, 25 Cal. App. 4th 1269, 1286 (1994) (“It has been examined many times in appellate decisions, and we but summarize. First, simple breach of contract, no matter how willful and hence tortious, is not a ground for punitive damages.”).

California courts have nevertheless carved out exceptions to this doctrine. For example, where an insurance company wrongfully withholds payments under a policy, it has been held:

[W]hen an insurer fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing.

Neal v. Farmers Ins. Exchange, 21 Cal.3d 910, 920, 582 P.2d 980 (1978).

As with the tort of intentional interference with a contractual relationship, California courts have blended concepts of good faith and fair dealing with the availability of exemplary damages. Nevertheless, California courts have reserved this “good-faith” tort action to insurance cases. *See Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 88, 900 P.2d 669 (1995) (holding that tort recovery does not lie in action for noninsurance contract breach in absence of violation of independent duty arising from principles of tort law other than bad-faith denial of existence of, or liability under, breached contract).

Thus, California courts hold fairly rigidly to the historical rule that an award of exemplary damages is not available for breach of an ordinary contract, even when done fraudulently and willfully. In such an instance, the only recourse to a breach is the compensatory sum to make the injured party whole.

California courts also recognize intentional interference with a contract as an independent tort in its own right. To

recover against a defendant for intentional interference with a contractual relationship, a plaintiff must show that there is a valid, existing contract; that the defendant had knowledge of the contract and intended to induce its breach; that the contract was in fact breached by the other contracting party; that the breach was caused by the defendant’s unjustified and wrongful conduct; and that the plaintiff has suffered damage. *Charles C. Chapman Bldg. Co. v. Calif. Mart*, 2 Cal. App. 3d 846, 853 (1969). Unlike damages for breach of contract, California courts allow a plaintiff to recover punitive damages when a defendant has intentionally interfered with a contractual relationship. *See, e.g., Ramona Manor Convalescent Hosp. v. Care Enter.*, 177 Cal. App. 3d 1120, 1127–28, 1142 (1986).

A Case Study

The California Court of Appeal’s decision in *Webber v. Inland Empire Investments*, 74 Cal. App. 4th 884 (1999), highlights the role of exemplary damages in quasi-contract litigation. In 1989, Hyatt Land Development Corp. (HLDC) sold four parcels of property to Forecast Mortgage Corp. (FMC). As part of the financing, FMC executed a note for \$754,000 in favor of HLDC, secured by a deed of trust on one of the four parcels. This deed was originally held by HLDC and eventually transferred to the plaintiff. *Id.* at 893.

California courts have blended concepts of good faith and fair dealing with the availability of exemplary damages.

In addition to the note, FMC took a loan from Sanwa Bank, using this money as payment to HLDC. As security on the loan, FMC gave Sanwa Bank a deed of trust on all four parcels. This deed was recorded prior to the HLDC deed and, therefore, was senior to the existing deed on the fourth parcel. In 1990, FMC transferred title to all four parcels to Forecast Corp. (FC), which, in turn, transferred title to All Cities Mini-Storage in 1992. FMC failed to make any payments on the HLDC note—now owned by the plaintiff.

The multiple transfers were designed to further a scheme of FC’s owner, James Previti. Previti, in lieu of paying on the note, developed a plan to avoid payments to the plaintiff, wherein he ultimately planned to transfer the title to the four parcels now owned by FC to All Cities Mini-Storage, which he also owned; use an additional corporation he controlled, Inland

Empire Investments (IEI), to purchase the note from Sanwa Bank; have FMC default on the note now in possession of IEI, and senior to that owned by the plaintiff; and then have IEI foreclose on the property, thus eliminating the plaintiff's junior interest. IEI, in fact, purchased the note from Sanwa Bank, and the note and deed were assigned to IEI. FMC failed to pay on the note, allowing IEI to purchase the property at foreclosure. Consequently, the plaintiff's \$745,000 junior lien was extinguished. *Id.* at 893–94.

Contract and tort law is becoming less distinct, and counsel should closely review state law before advising clients.

The plaintiff brought suit against Previt and the corporate entities. The plaintiff pursued multiple theories, including a claim for conspiracy to interfere with a contract. Following trial, the jury determined that the defendants had conspired to interfere with the contracted relationship. The trial court entered a judgment on the jury's award of more than \$1 million in compensatory damages against Previt, FC, and IEI, plus \$50,000 in punitive damages, against both FC and IEI.

Citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 869 P.2d 454 (1994), the defendants argued that a party cannot be liable for interfering with its own contract. The defendants contended they were mere alter egos of Previt and, therefore, could not be held responsible for interfering with a contract to which they essentially were a party. They claimed that the multiple title transfers orchestrated by Previt were intended to protect his own economic interests related to contracts made by his corporations. In other words, Previt argued that FMC, FC, All Cities, and IEI were alter egos, and there was no "outside" contractual interference. According to the defendants, "consistent with its underlying policy of protecting the expectations of contracting parties against frustration by outsiders who have no legitimate social or economic interests in the contractual relationship, the tort cause of action . . . does not lie against a party to the contract." *Webber*, 74 Cal. App. 4th at 898.

The California Court of Appeal agreed that if each individual defendant were treated as one collective corporate entity, there could be no interference with its own contract, and the plaintiff would not be able to recover in tort. The court, however, rejected the defendants' ploy and incorporated the "sword and shield doctrine." The court noted that the defendants were attempting to use the alter ego doctrine as a sword—using the multiple corporations to secure the surreptitious acquisition of the note and deed, while simultaneously relying on the doctrine as a shield to protect Previt from tort liability and exemplary damages. *Id.* at 901. According to the court, the alter ego doctrine was designed to:

prevent a corporation from using its statutory separate corporate form as a shield from liability only where to recognize its corporate status would defeat the rights and equities of third parties; it is not a doctrine that allows the persons who actually control the corporation to disregard the corporate form. . . . In other words, "Alter ego is a limited doctrine, invoked only where recognition of the corporate form would work an injustice to a third person."

Id. (quoting *Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th 980, 995 (1995)). By holding the alter ego doctrine nonapplicable, the court distinguished the holding of *Applied Equipment* and permitted the individual defendants to be treated as separate entities relative to the counts involving conspiracy.

Conclusion

Intentional interference with a contractual relationship has intertwined foundational principles of both tort and contract law. The practical implications on contract-based litigation may be subtle, yet could result in severe consequences. Parties can face difficult choices with unclear outcomes. For instance, should a party induce a breach between two contracting parties (premised on the fact that, historically, the breaching party is liable only for compensatory damages) to secure an advantageous economic position while risking a potential exemplary damage award for malicious or willful conduct? Can a parent corporation be held responsible for punitive damages if it encourages a subsidiary to breach a contract with a third party? Contract and tort law is becoming less distinct, and counsel should closely review state law before advising clients. ■

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Alternative Methods of Satisfying the Elements of Tortious Interference Claims

By Donald N. David and Kathlyn M. Schwartz

In today's competitive world, businesses often employ a wide array of tactics to consummate a sale and create value for their companies. In a society that promotes free competition, it often seems that anything is fair game and no conduct ever crosses the line. Courts across the country, however, have recognized a need to balance competitors' tactics with concern for the integrity of formal contracts and, in some instances, prospective contracts that are close to completion. In doing so, courts protect and promote contractual reliability. But where is this balance struck, and what actions tip the balance in favor of finding a competitor liable for interfering with a contract?

Courts have fashioned two similar causes of action as a means of affording recourse for a party to a contract or business relationship who has been damaged by another party's intentional interference. Depending on the jurisdiction, these actions are generally labeled intentional interference with contract rights (applicable to instances in which a contract exists) and intentional interference with prospective economic advantage (applicable to instances in which a contract or business relationship is being developed). Courts treat key elements of these causes of action differently, and courts have recognized alternative approaches to satisfying the essential elements of these causes of action.

Basic Elements

Most states facially apply the following elements to determine whether a third party has intentionally interfered with either an existing or prospective contract: the existence of a contractual relationship or proposed contractual relationship/business relationship, the defendant's knowledge of the existence of the relationship, intentional or willful acts by the defendant designed to wrongfully disrupt the relationship, actual disruption, and damages to the plaintiff as a result of the disruption. *See, e.g., Dome Property Mgt., Inc. v. Barbara*, 47 A.D.3d 870, 870, 850 N.Y.S.2d 208, 209 (2008); *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118, 1126, 791 P.2d 587, 270 Cal.Rptr. 1 (1990); *Thompson v. Rinker Materials of Florida, Inc.*, 390 F. Supp. 2d 1165, 1168 n. 15 (M.D. Fla. 2005); *First Health Group Corp. v. Nat'l Prescrip. Admin., Inc.*, 155 F. Supp. 2d 194, 232–33 (M.D. Pa. 2001). Greater protection is generally afforded to an existing contract than to a prospective one. *See, e.g., Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191, 406

N.E.2d 445, 449, 428 N.Y.S. 2d 628, 633 (1980).

Some states require a plaintiff to prove other elements. For example, Pennsylvania courts require a plaintiff to demonstrate that the defendant did not have a privilege that justified the interference. As one court noted, "While some jurisdictions consider a justification for defendant's interference to be an affirmative defense, Pennsylvania courts require the plaintiff, as part of his prima facie case, to show that the defendant's conduct was not justified." *Acumed, LLC v. Advanced Surgical Servs.*, 561 F.3d 199, 214 (3d Cir. 2009). Pennsylvania courts, however, have struggled to reach a consensus concerning what constitutes such a privilege and when it should be invoked. Privileges that have been recognized include a competitor privilege, whereby interference actions are acceptable among competitors as long as no "wrongful means" are employed (*Gilbert v. Otterson*, 379 Pa. Super. 481, 488–89, 550 A.2d 550, 554 (Pa. Super. Ct. 1988)); a parent/subsidiary privilege, whereby the parent is privileged to influence a subsidiary's actions under an existing or proposed contract (*Nat'l Data Payment Sys., Inc. v. Meridian Bank*, 212 F.3d 849, 858 (3d Cir. 2000)); and an agency privilege, whereby an agent acting within the scope of authority is not deemed a third party for purposes of interference claims (*CGB Occupational Therapy, Inc. v. RHA Health Servs. Inc.*, 357 F.3d 375, 389 (3d Cir. 2004)).

Courts in California and New York differ as to what constitutes an "existing contract" for purposes of this cause of action. Focusing on the nature of the wrongdoer's conduct, California courts interpret the definition of "contract" broadly, extending relief based on agreements that are verbal or even unenforceable or void. In explaining the rationale for this, one court noted that "[t]he nature of the tort does not vary with the legal strength, or enforceability, of the relation disrupted," and that "the actionable wrong lies in the inducement to break the contract or to sever the relationship, not in the kind of contract or relationship so disrupted, whether it is written or oral, enforceable or not enforceable." *Zimmerman v. Bank of Am. Nat'l Trust & Savings Ass'n*, 191 Cal. App. 2d 55, 61, 12 Cal. Rptr. 319, 320–21 (1961).

By contrast, New York courts only recognize the cause of actions in instances in which a legally enforceable contract exists and have held that, absent wrongful conduct, "the party seeking to impose liability enjoys no legally enforceable right to performance; his interest is a mere expectancy—a hope of

future contractual relations.” *Guard-Life*, 50 N.Y.2d at 193–94, 406 N.E.2d at 450, 428 N.Y.S. 2d at 634. In this instance, the aggrieved party could potentially have a claim for interference with prospective economic advantage.

The different approaches in New York and California also extend to “at-will” contracts that may be terminated at any time.

The different approaches in New York and California also extend to “at-will” contracts—valid contracts that may be terminated at any time by either party. Most states allow a party to pursue an action against another for intentional interference with contract rights when the outsider induces a party to terminate the at-will contract when it otherwise would not have. See Gina M. Grothe, “Interference with Contract in the Competitive Marketplace,” 15 *Wm. Mitchell L. Rev.* 453 (1989). New York is not among these states, however, and, based on the decision in *Guard-Life*, will likely treat interference with an at-will contract as an interference with prospective economic advantage claim, unless there is wrongful conduct. *Guard-Life*, 50 N.Y.2d at 193–194, 406 N.E.2d at 450, 428 N.Y.S. 2d at 634.

Nature of Wrongful Acts

Decisions in most cases appear to hinge on the third element above. In particular, focus is made concerning whether the defendant’s motive is wrongful. Courts have struggled with what type of conduct is sufficiently “wrong” so as to be unlawful. The Restatement (Second) of Torts § 767 (1977) identifies the following factors:

- the nature of the actor’s conduct,
- the actor’s motive,
- the interests of the other with which the actor’s conduct interferes
- the interests sought to be advanced by the actor
- the social interests in protecting the freedom of the actor and the contractual interest of the other,
- the proximity or remoteness of the actor’s conduct to there interference, and
- the relations between the parties.

See also *Guard-Life*, 50 N.Y. 2d at 191, 406 N.E. 2d at 449, 428 N.Y.S. 2d at 632 (finding that wrongful means include “physical violence, fraud or misrepresentation, civil suits and criminal

prosecutions, and some degrees of economic pressure, they do not, however, include persuasion alone although it is knowingly directed at interference with the contract”) (citing Restatement § 768, cmt. e; § 767 cmt. c).

Courts have found a wide variety of conduct to be wrongful, such as breach of a recognized duty, circumventing an existing contract, concerted activities with a wrongful purpose, inducing termination or interfering with the performance of a contract, interfering with employment, interfering in the relationship between customers and a former employer, interfering with competitors’ contracts in a market in which the defendant does not compete, and commencing an involuntary bankruptcy case against a party.

Breach of Duty

A defendant’s special relationship with the plaintiff may create a duty that gives rise to an actionable claim. For instance, in *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg*, 216 Cal. App.3d 1139, 265 Cal.Rptr. 330 (1989), one of three partners in Tri-Growth who was also a partner in the defendant law firm that represented Tri-Growth used confidential information obtained in both capacities to assist his law firm in purchasing a parcel of land that Tri-Growth had been actively negotiating to purchase. Tri-Growth brought suit, and the court found that the defendant unlawfully interfered with Tri-Growth’s prospective economic advantage. In reaching its conclusion, the court said, “A fiduciary or confidential relationship can arise when confidence is reposed by persons in the integrity of others, and if the latter voluntarily accept or assume to accept the confidence, they cannot act so as to take advantage of the others’ interests without their knowledge or consent.” *Id.*, 216 Cal. App.3d at 1150. The court also stated that the attorney/client relationship is a fiduciary relationship that may extend to former clients.

Circumventing an Existing Contract

In *Ingalsbe v. Stewart Agency, Inc.*, 869 So.2d 30 (Fla. Dist. Ct. App. 2004), a law firm entered into contingency-fee agreement to represent a consumer against a car dealership in an action under Florida’s Lemon Law. The dealership circumvented the attorneys and entered into a settlement with the plaintiff. The settlement agreement included an allotment for attorney fees, but the attorneys claimed that the amount allotted was less than what they were entitled. As a result, the attorneys brought suit against the dealership for tortiously interfering with the fee agreement. The trial court dismissed the attorneys’ claims, and the attorneys appealed.

The Florida Court of Appeal reversed and held that the dealership tortiously interfered with the contract between the attorney and client. The court found that “[t]he very tort of interference with a contractual relationship itself necessarily, and logically, can properly include attempts to alter or change

only a single contractual provision benefitting the person bringing the action” and that “[t]his obvious implication must be true, whether the attempt is to extinguish the provision entirely or instead simply to alter it, so long as the effect is to interfere with benefits otherwise due the plaintiff.” *Id.* at 33–34.

Concerted Activities with a Wrongful Purpose

In *Speegle v. Board of Fire Underwriters of the Pacific*, 29 Cal.2d 34, 172 P.2d 867 (1946), the defendant underwriters board took action against one of its insurance agents for placing insurance with nonboard companies and encouraged all companies on the board to terminate their contracts with the agent. The court held that if the board took action for the unlawful purpose of stifling competition by enforcing a scheme to restrain trade, this would amount to intentional and unjustifiable interference with the contractual relations between the agent and the companies. *Id.*, 29 Cal.2d at 40–41.

In *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal.4th 26, 960 P.2d 513, 77 Cal. Rptr.2d 709 (1998), the plaintiff brought suit against three title insurance companies, alleging that they wrongfully interfered with land-sale contracts by refusing to issue title insurance on parcels purchased by tax sale in which the title was deeded free and clear by operation of law. Citing *Speegle*, the court held that the plaintiffs sufficiently pled a cause of action for intentional interference with existing contract relations and noted that “concerted activities for an unlawful purpose such as activities in restraint of trade could form the basis of a cause of action for interference with contractual relations.” *Id.*, 19 Cal. 4th at 37.

Inducing Termination or Interfering with Performance of a Contract

In *Pacific Gas & Electric Co. v. Bear Stearns and Co.*, 50 Cal.3d 1118, 721 P.2d 587, 270 Cal. Rptr. 1 (1990), the plaintiff power company brought suit against an investment brokerage firm for inducing the county’s water agency to commence litigation to determine whether its agency could terminate the contract with the power company. The court stated that “it may be actionable to induce a party to a contract to terminate the contract according to its terms,” reasoning that it is the contractual relationship and not any specific term of the contract that is protected against outside interference and that a provision in the existing contract allowing for termination at will protects others who seek to cause one of the contracting parties to exercise such a right. *Id.*, 50 Cal.3d at 1127. The court, however, found that the facts of the case were insufficient to meet the standard for a claim of interference with contractual relations.

Interfering with Employment

In *Thompson v. Rinker Materials of Florida, Inc.*, 390 F. Supp.2d 1165 (M.D. Fla. 2005), the plaintiff material transport driver alleged that her former employer was interfering

with her employment relationship with her new employer. The defendant allegedly told the plaintiff’s new employer that it would not accept deliveries at its facilities by the plaintiff and sought her termination. The plaintiff claimed that the defendant’s actions were motivated by a discrimination suit she had brought. The court found the allegations that the “[d]efendant’s conduct was unjustified, i.e., without a legitimate business purpose and motivated only by malice towards the [p]laintiff for her discrimination complaints” were sufficient to survive the defendant’s motion to dismiss. *Id.* at 1168.

In *Nowik*, the plaintiff alleged that he would have obtained employment but for an unfairly negative job reference.

In *Nowik v. Mazda Motors of Am. (East) Inc.*, 523 So.2d 769 (Fla. Dist. Ct. App 1988), the plaintiff alleged that he would have obtained employment but for an unfairly negative job reference by his supervisor with his former employer. The defendant, the plaintiff’s former employer, responded that the supervisor’s negative reference was a privileged opinion that could not give rise to a cause of action. The court concluded that the plaintiff could pursue an intentional interference claim and found that the negative reference was not a pure statement of opinion and, therefore, was not privileged. *Id.* at 770–71.

Interfering with the Relationship Between Customers and a Former Employer

In *Prudential Ins. Co. of Am. v. Stella*, 994 F. Supp. 318 (E.D. Pa. 1998), a former Prudential employee wrote insurance policies for Prudential customers at his new position with a competitor, failed to return his client files and cards to Prudential in a timely fashion, and took and sold the computer he used while at Prudential. The district court found that this conduct was sufficiently wrongful so as to support a claim that the former employee had tortiously interfered with contracts between Prudential and its customers. *Id.* at 324.

Interfering with Competitors’ Contracts Where the Defendant Does Not Compete

In *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998), the defendant, a competitor of the plaintiff in one market, placed economic pressure on the plaintiff in another market where the parties did not compete with each other, for

the sole purpose of forcing the plaintiff's hand in the market where they did compete. Applying Pennsylvania law, the court held that this type of action could be considered wrongful and gives rise and claim to tortious interference claim. *Id.* at 533.

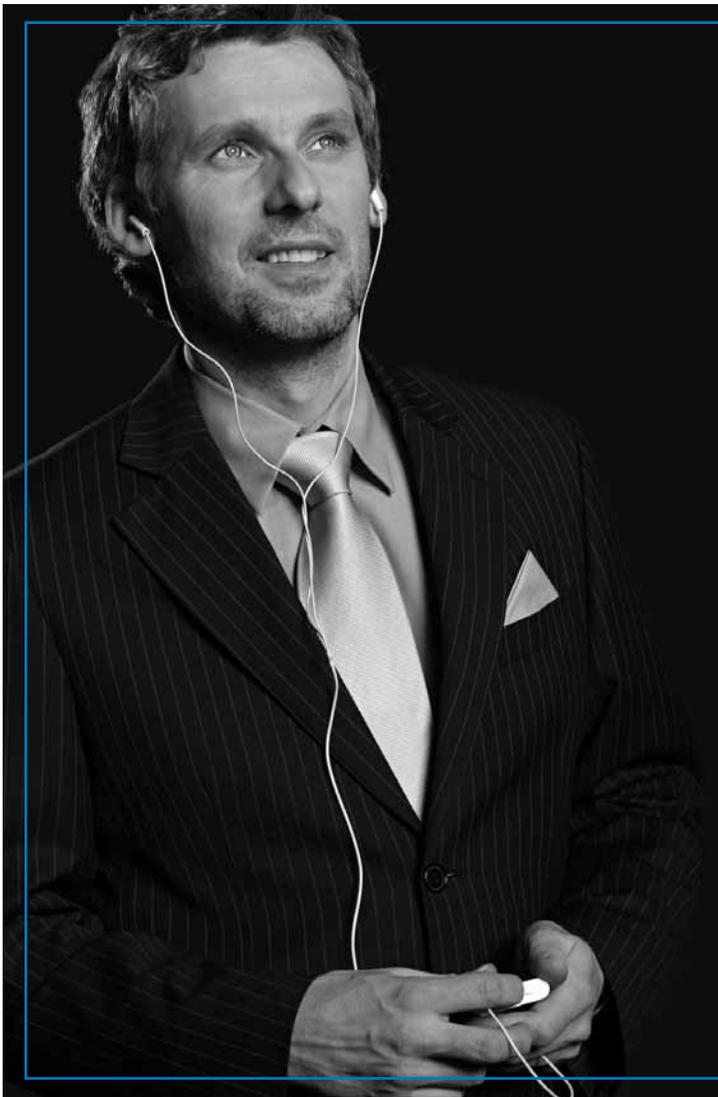
Commencing an Involuntary Bankruptcy Case

In *Silver v. Mendel*, 894 F.2d 598 (3d Cir. 1990), the defendant commenced an involuntary bankruptcy against the plaintiff to exert pressure on the plaintiff as part of a wider business dispute between the two parties. The plaintiff commenced an action for tortious interference with both existing and prospective contracts. The defendant invoked judicial privilege as an affirmative defense to the claims. Applying Pennsylvania law, the Third Circuit found the defendant's actions were not protected because the defendant's motive was to injure the plaintiff and because filing the bankruptcy petition was a wrongful use of civil proceedings. *Id.* at 603–604.

Conclusion

The cases discussed above demonstrate that courts are hesitant to craft bright-line rules for determining what conduct will be deemed wrongful enough to give rise to a cause of action for interference with an existing contract or prospective business relationship. Nevertheless, the underlying principle is arguably one of practicality; namely, does the conduct at issue on its face “smell” so bad that the court considers it wrongful? Courts have utilized these tort causes of action as a tool in balancing the competitive nature of the business world with the integrity of contractual relationships. Thus, the key to success for a litigator is understanding that balance and convincing the court to rule on the client's side of the scale. ■

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Rule 26: Has the Pendulum Swung Back to Efficient Expert Discovery?

By David R. Singh and Patricia Astorga

In 1993, Federal Rule of Civil Procedure 26 was amended to require more robust disclosures by specially retained testifying experts. The 1993 amendments required, among other things, disclosure of each opinion to be expressed at trial and the bases for each opinion, Fed. R. Civ. P. 26(a)(2)(B)(i), along with all data or “other information” considered in forming these opinions. Fed. R. Civ. P. 26(a)(2)(B)(ii) (amended 2010). The intent of these amendments was to preclude the common argument at that time that materials furnished to an expert to be used in forming or her opinions are privileged, which would thereby eliminate surprise, and to reduce the cost of litigation by streamlining expert depositions and, in some cases, eliminating their need altogether. Advisory Committee Notes to 1993 Amendments to Fed. R. Civ. P. 26. The Advisory Committee Notes stated, “Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.”

In the ensuing years, however, the cost of expert discovery has not decreased—it has skyrocketed, prompting calls for further amendments to Rule 26 to rein in costs. Specifically, the 1993 amendments chilled communications between counsel and testifying experts, forcing counsel and experts to go to extraordinary, inefficient lengths to communicate with each other without creating a paper trail. Furthermore, the fear of creating a potentially damaging paper trail often prompts parties to retain consulting experts to develop and test theories—separate and apart from the testifying expert—to make sure that the theory works without risk that the testifying expert could become “tainted” by unfavorable test results. This increases the cost of litigation and strains budgets.

Accepting these arguments, the Supreme Court approved new amendments to Rule 26 that took effect in December 2010. The 2010 amendments narrowed the disclosure requirements under Rule 26 and protected draft expert reports and most communications between counsel and testifying experts as work product.

The 1993 Amendments to Rule 26

Under the 1993 amendments, parties were obligated to disclose the identity of any expert witness they may use at trial. With

respect to experts specially retained for the purpose of offering expert testimony at trial, the party was also required to submit a complete statement of all opinions the witness will express at trial and the basis and reasons for them; the data “or other information” considered by the witness in forming those opinions; any exhibits (other than demonstrative exhibits) that the expert will proffer at trial in support of his or her opinions; the witness’s qualifications, including a list of publications authored in the previous 10 years; a list of cases in which the expert has testified in the past four years; and a statement of compensation to be paid for work in the case.

The requirement that “the data and other information *considered* by the [expert] witness in forming” the expert’s opinions be disclosed eschewed language from the prior version of the rule, which required disclosure of only the “substance” of the expert’s testimony through interrogatories. Fed. R. Civ. P. 26(a)(2)(B)(ii) (emphasis added). The committee notes to the 1993 amendments explained that more liberal discovery was necessary because “[t]he information disclosed under the former rule in answering interrogatories about the ‘substance’ of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness.” Fed. R. Civ. P. 26(b)(3)(A)(ii) advisory committee’s note (1993).

Given this purpose, courts broadly construed the requirement that all “data or information considered by the witness” be disclosed. For example, a majority of courts held that experts were required to disclose not just data that affirmatively supports their opinions, but also data that they considered and ultimately rejected. *See, e.g., Fidelity Nat. Title Ins. Co. of N.Y. v. Intercounty Nat. Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005); *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 637 (N.D. Ind. 1996); *see also B.C.F. Oil Refining Inc.*, 171 F.R.D. 57, 65 (S.D.N.Y. 1997); *Musselman v. Phillips*, 176 F.R.D. 194, 197-99 (D. Md. 1997); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305 (W.D. Va. 1998). As one court noted:

The “drafters of the new Rule clearly contemplated that the term ‘considered’ was something different than the term ‘relied,’ given that they rejected an earlier draft version of

subdivision (a)(2), which required that the expert's report set forth 'the data or other information relied upon in forming such opinions.' 'Considered,' which simply means 'to take into account,' clearly invokes a broader spectrum of thought than the phrase 'relied upon,' which requires dependence on the information."

Weil v. Long Island Sav. Bank FSB, 206 F.R.D. 38, 42 (E.D. N.Y. 3001) (quoting *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 635 (N.D. Ind. 1996)).

Nor was there any exception to the disclosure requirements for information provided by counsel and considered by the testifying expert. The disclosure requirements extended to, among other things, any notes taken by the expert during discussions with counsel—including notes regarding the scope of the assignment, relevant facts in the case, the strengths and weaknesses of respective positions, and/or potential areas of vulnerability to take into account in formulating opinions. *See, e.g., Sparks v. Seltzer*, 2007 WL 295603, at *1–2 (E.D. N.Y. 2007) (requiring plaintiffs to "disclose any materials considered by their experts, including material that is otherwise protected by the attorney work product doctrine").

Courts held that the disclosure requirement encompassed draft expert reports, including preliminary drafts of all the evidence.

Courts reasoned that this kind of "disclosure creates a level playing field by providing a party with the information necessary to effectively cross-examine an opposing party's expert witness." *Id.* at *2. Further, the rationale follows that, because it is the attorney who retains the expert and decides what materials to share, the attorney has control over whether or not work product would be discoverable: "Counsel wishing to maintain the protections afforded by the work product doctrine may do so by choosing not to provide an expert witness with the counsel's opinion work product." *Id.*; *see also Weil*, 206 F.R.D. at 42 (noting that "[i]t is the lawyer who retains the expert and who decides whether to provide that expert with material that might otherwise be protected by the work product doctrine," and that "[i]f an attorney wants to keep her opinions private, she should not communicate them to her expert witness"). Finally, courts justified the broad interpretation of the disclosure requirements by noting that "[i]f the work product privilege is intended to

keep private the opinions of the attorney, that interest is not served by allowing an expert to consider those opinions and present them in the guise of the expert's own opinion." *Id.* (citing *Mussleman v. Phillips*, 176 F.R.D. 184, 201 (D. Md. 1997) (holding that work-product interests are not served when an attorney discloses opinions or theories to an expert "to shape opinion testimony to be offered at trial").

Courts also generally held that, absent a stipulation between the parties, the disclosure requirement encompassed draft expert reports, including preliminary drafts before the expert understood the nuances of the case or digested all of the evidence. *See Sparks*, 2007 WL 295603, at *2 (requiring plaintiffs to disclose "any draft reports by the experts, any notes made or reviewed by the experts, and all other material considered by the experts"). Accordingly, an adversary could require production of all drafts to track how the expert's opinions evolved over their work on the case, including whether any opinions were ultimately omitted or softened, or whether language or opinions were proposed by the expert and amended or rejected altogether by counsel. The rationale offered for such broad disclosure of draft is that drafts allow the adversary to explore the bases for the expert's opinions. *Moraine Props, LLC v. Ethyl Corp.*, 2010 WL 518034, at *1 (S.D. Ohio Feb. 4, 2010).

The direct consequence of the broad disclosure requirements was obstruction to the flow of information between counsel for the party and the party's testifying expert. Counsel was usually circumspect in communications with testifying experts, carefully framing the issues in the case, stating any opinions about those issues, and considering what information to share (or not to share) with the expert. Experts were told not to take notes or to be cautious about what is memorialized in writing. Written communication (*i.e.*, email) was discouraged, and more expensive modes, such as conference calls and in-person meetings, were preferred.

Nowhere was the inefficiency more glaring than with respect to drafting the expert report. Experts were frequently advised not to put pen to paper until counsel for the party and the testifying expert could exhaustively discuss and agree on all opinions to be included in the expert report. Rather than exchange drafts and comments back and forth via email, as is ordinarily done in most fields of expertise (including law), counsel and the testifying expert would often sit together in front of a computer or laptop, or virtually on a WebEx platform, and draft the expert report together, sentence by sentence and word for word. This was a particularly expensive and burdensome process when the expert is shared by multiple parties in a joint prosecution or defense group because discussion and debate can quickly mushroom a two-hour discussion into a 12-hour project.

Because former Rule 26(a)(2)'s disclosure requirements often posed difficulties to all parties to a litigation, stipulations that information between an expert and counsel would not be disclosed were common. For the most part, courts honored such stipulations despite the policy for open disclosure under the

former Rule 26. In instances of successive litigation, however, stipulations are not a perfect solution. Even with a stipulation, uncertainty remains as to whether an attorney's communications with the expert will be discoverable in related litigation.

In addition, given the fear of creating discoverable evidence establishing the adversary's case, parties often retained consulting experts to develop and test theories—separate and apart from the testifying expert—to make sure that the theory works without risk that the testifying expert could become “tainted” by unfavorable test results. If the theory works, the testifying expert was then asked to perform the study from scratch, with the assurance that the outcome will likely be favorable. Any input by the consulting expert was discouraged, as it could waive the consulting expert privilege. This two-step dance was not cost efficient, and it often resulted in a near doubling of expert-witness fees—no trivial burden, given the high hourly rates of most experts at the top of their respective fields.

As the Judicial Conference explained in its report to the Supreme Court, “lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications.” Report of the Judicial Conference Committee on Rules of Practice & Procedure, p. 11 (Sept. 2009). The Judicial Conference has noted that such “artificial and wasteful discovery-avoidance practices” are aimed at avoiding the creation of “a discoverable record of the collaborative interaction with the experts.” The intent of the 2010 amendments was to eliminate the inefficiencies resulting from the disclosure requirements and, thereby, reduce costs.

The 2010 Amendments to Rule 26

The 2010 Amendments revised Rule 26 in several key respects. First, in an attempt to restore efficiency to the attorney-expert relationship, Rule 26(a)(2)(B)(ii) was amended to substitute the phrase “facts or data considered by the witness” for the phrase “data or other information considered by the witness.” As the committee note explains, “[t]he refocus of disclosure on ‘facts or data’ is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel.” Fed. R. Civ. P. 26(a)(2)(B) advisory committee's note (2010 amendments). The advisory committee further noted that “[t]his amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports.”

Second, the 2010 amendments added a new Rule 26(b)(4)(C), which shields communications between counsel for a party and a testifying expert as attorney work product under Rule 26(b)(3) (A) and (B). The rule, however, excepts three categories of communications: communications relating to compensation for the expert's study or testimony, facts or data that the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed, and assumptions that the party's

attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The accompanying committee note explains that “[t]he addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery.” The note further explains that while “[t]he most frequent method for discovering the work of expert witnesses is by deposition . . . Rules 26(b)(4) (B) and (C) apply to all forms of discovery.” Fed. R. Civ. P. 26(a)(2)(B) advisory committee's note (2010 amendments).

Parties often retained consulting experts to develop theories without the risk of “tainting” the testifying expert with unfavorable test results.

Third, the 2010 amendments incorporated new Rule 26(b)(4)(B), which extends the work-product privilege to draft expert reports. The committee note explains that this protection extends to all drafts, “oral, written, electronic or otherwise,” as well as any supplementation under Rule 26(e). This encompasses communications between counsel and the testifying expert about the draft expert report unless the work product privilege is overcome on an appropriate showing of substantial need.

These amendments have been widely supported, receiving the backing of the American Bar Association, the American College of Trial Lawyers, the American Association for Justice, and the Federation of Defense and Corporate Counsel. The question remains, however, if the 2010 amendments will fulfill the promise of restoring efficiency to the attorney-expert witness relationship and reduce the high cost of developing expert testimony. In practice, the benefits of the amendments may be illusory, and they may just spawn additional motion practice. Take, for example, the substitution of the phrase “the facts or data” for “data or other information” in Rule 26(a)(2)(B)(ii). The party must still disclose facts or data “considered” by the expert, not only what the expert relied on, and the line between facts and data on the one hand and information on the other is hardly a bright one.

Similarly, although Rule 26(b)(4)(C) purports to make communications between counsel for the party and the testifying expert work product, one of the exceptions to the rule—facts or data that the party's attorney provided and that the expert considered—risks swallowing the rule. Depending on how broadly courts construe the “facts or data” considered exception, nearly all communications between counsel for the party and the testifying

expert could be excepted from the rule. Moreover, in practice, it will be difficult for counsel to assert claims of work product on a question-by-question basis while defending the expert's deposition, given the potentially broad scope of the "facts or data" considered exception. Counsel, who will likely not want to risk having to produce the expert for a second deposition, may also be reluctant to instruct the expert not to answer a question, given the uncertain and arguably broad scope of the exception.

Furthermore, the revised Rule 26 will not eliminate the need to be circumspect in communications with testifying experts. That is because the work-product privilege afforded by revised Rule 26 can sometimes be overcome with a show of substantial need and because draft expert reports and communications between experts and counsel may not be shielded from discovery in parallel or successive state-court proceedings, in response to subpoenas from third parties, or in response to investigative demands by certain governmental entities.

State-court procedures on expert discovery, for example, vary. Some states (e.g., Delaware, Massachusetts, and Pennsylvania) employ a two-step, expert-witness discovery procedure similar to the 1970 version of Rule 26. Under this scheme, a party serves a standard witness interrogatory and then obtains court permission to depose the experts. Other states (e.g., Florida, Georgia, and New Jersey) mandate a standard expert-witness interrogatory but do not require court permission to take other expert-witness discovery.

Finally, some state courts (e.g., California, New York, and Texas) substitute expert testimony disclosure for other forms of expert witness discovery. Whether draft expert reports or communications between counsel for the party and testifying experts are privileged under any of these schemes, however, will vary from jurisdiction to jurisdiction.

Given the uncertainty of whether draft reports and attorney-expert communications will be protected in other proceedings, cautious counsel will generally continue to discourage testifying experts from communicating in writing, from taking notes during discussions with attorneys and/or while reviewing discovery materials, and from writing preliminary drafts of their expert report without the direct approval of, and input from, counsel.

Conclusion

Despite the laudable goal of reducing costs by incentivizing rational communication between counsel and the testifying expert and minimizing the need for separate consulting and testifying experts, it seems unlikely the amendments to Rule 26 will result in a significant reduction in the cost associated with developing and proffering expert testimony. ■

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Tortious Interference with Expectation of Inheritance

By Christine Lipsey and Zelma M. Frederick

Although the tortious interference with expectation of inheritance cause of action is not new, it was recently highlighted when the U.S. Supreme Court discussed it in the high-profile case, *Marshall v. Marshall*, 547 U.S. 293, 126 S.Ct. 1735 (2006). In *Marshall*, the widow, Vickie Lynn Marshall, brought an adversary action counterclaim in her Chapter 11 bankruptcy case seeking recovery for her stepson's alleged tortious interference with an *inter vivos* gift from her deceased husband. The case drew national attention, not because of the intriguing legal basis of the claims asserted, but because the grieving widow was better known in pop culture as former *Playboy* Playmate and reality television star Anna Nicole Smith. In the course of the case's journey through the federal courts, Smith was awarded approximately \$44.3 million dollars in compensatory damages and an equal amount in punitive damages, withstood a probate exception challenge to the federal court's jurisdiction through the U.S. Supreme Court decision, and, ultimately, lost all due to preclusion by a Texas probate court judgment. *Marshall v. Marshall*, 600 F.3d 1037 (9th Cir. 2010).

While the Supreme Court described Smith's tortious interference cause of action as being "widely recognized," a survey of case law demonstrates that it is far from universally recognized. *Marshall*, 547 U.S. at 312, 126 S.Ct. at 1748. Some jurisdictions have expressly adopted the tort. *See, e.g., Wackman v. Rubsamén*, 602 F.3d 391, 410 (5th Cir. 2010) (the Fifth Circuit acknowledges that the Texas Supreme Court has not ruled on the issue, but Texas intermediate appellate courts have recognized the cause of action); *DesMarais v. Desjardins*, 664 A.2d 840 (Me. 1995). Courts of various jurisdictions have acknowledged the claim, which has not yet been addressed by their highest courts. *See, e.g., Lindberg v. U.S.*, 164 F.3d 1312, 1319 (10th Cir. 1999); *Harris v. Kritzik*, 480 N.W.2d 514 (Wis. Ct. App. 1992). Still, in other jurisdictions, the highest court or appellate courts have been asked to adopt the tort, but they have not been presented with sufficient cause to adopt or formally reject the cause of action. *See, e.g., Kibbee v. First Interstate Bank*, 242 P.3d 973, 992 (Wyo. 2010); *Geduldig v. Posner*, 743 A.2d 247 (Md. Ct. App. 1999). Arkansas, Connecticut, and South Carolina are among those definitively refusing to recognize the claim. *See Jackson v. Kelly*, 44 S.W.3d 328 (Ark. 2001); *Dimaria v. Silvester*, 89 F. Supp. 2d 195 (D. Conn. 1999);

Douglass v. Boyce, 542 S.E.2d 715 (S.C. 2001). Even in those jurisdictions in which the claim is recognized, several hurdles exist that may prevent recovery under such a claim.

Basic Elements of the Cause of Action

The Restatement (Second) of Torts, § 774B (1977), specifies that "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." Inheritance includes "any devise or bequest that would otherwise have been made under a testamentary instrument or any property that would have passed to the plaintiff by intestate succession," and a gift is broadly defined to include "any donation, gratuity or benefaction that the other would have received from the third person." *Id.*, cmt. b.

Although jurisdictions recognizing the tort have characterized the tort slightly differently, the basic elements of an intentional interference with an expected inheritance claim are the existence of an expectancy; intentional interference with the expectancy through tortious conduct such as duress, fraud, or undue influence; causation; and damages. *See, e.g., Cyr v. Cote*, 396 A. 2d 1013 (Me. 1979). In some jurisdictions, the second element is described as intentional interference through "improper means or for an improper purpose." *Taylor v. Cooksey*, 2007 WL 2323367, at *2 (D. Or. Aug 7, 2007). The alleged "improper means" must be "independently wrongful by reason of statutory or common law, beyond the mere fact of the injury complained of . . . [and it would] include 'violence, threats, intimidation, deceit, misrepresentation, bribery, unfounded litigation, defamation and disparaging falsehood.'" *Id.* (quoting *Church v. Woods*, 77 P.3d 1150, 1154 (Or. Ct. App. 2003)).

The tortious interference with expectancy of an inheritance cause of action is designed to provide a remedy where a probate proceeding does not. *See, e.g., Geduldig v. Posner*, 743 A.2d 247, 258 (Md. Ct. App. 1999) (refusing to recognize a tort based on the facts of the case, explaining that it would do so if it were necessary to afford complete, but traditional, relief, and stating that it would decline to recognize the tort where the "sole reason" is an "expansion of traditional remedies, as opposed to a situation . . . where the traditional remedy

might be insufficient to correct the pecuniary loss”); *DeWitt v. Duce*, 408 So.2d 216, 219–20 (Fla. 1981) (holding that tortious interference action is allowable only when inadequacy of the probate remedy is established or apparent). In fact, courts in some jurisdictions require a plaintiff to exhaust any available probate remedies before pursuing an action for tortious interference with an expected gift (assuming the probate remedies adequately compensate for the damages incurred). See, e.g., *Kryder v. Kryder*, 2010 WL 425092, at *2 (N.D. Ohio Jan. 27, 2010) (final adjudication from a probate court is required before a plaintiff can assert a claim for intentional interference with expectancy of inheritance to prevent the plaintiff’s double recovery); *Moore v. Graybeal*, 843 F.2d 706, 710 (3d Cir. 1988) (the plaintiffs are precluded from maintaining cause of action in tort because they failed to pursue the exclusive statutory remedy of contesting probate of the will at issue); *McGregor v. McGregor*, 101 F. Supp. 848, 850 (D. Colo. 1951), *aff’d*, 201 F.2d 528 (10th Cir. 1953) (finding that a prerequisite to seek relief after being deprived by another of a just bequest under a will in a court other than probate court is for that person to have tried to probate the will that forms the basis of his claim).

Courts in some jurisdictions require a plaintiff to exhaust any available probate remedies before pursuing an action for tortious interference with an expected gift.

The cause of action may be viable where the putative testator was prevented from forming a will. See *Allen v. Hall*, 974 P.2d 199 (Or. 1999). The tort may also be available if there is nothing left in the estate for probate due to the tortfeasor’s receipt of all the estate property. Diane J. Klein, “The Disappointed Heir’s Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits,” 55 *Baylor L. Rev.* 79, 82 (2003).

As the Supreme Court observed in *Marshall*, probate litigation is an in rem proceeding addressing property distribution and the possible nullification of a will, whereas tortious

interference with an expectancy of inheritance is an in personam action in which a plaintiff seeks damages against the alleged tortfeasor. *Marshall*, 547 U.S. at 312. This difference drives the type of recovery a plaintiff may receive. In a will contest, one seeks the nullification of a will to receive property belonging to the estate. *In re Estate of Sharpley*, 653 N.W.2d 124, 158 (Wis. Ct. App. 2002) (noting the difference between a will contest and a tort action for interference with an expected inheritance and the remedy for each). In a tortious interference case, however, a plaintiff seeks to recover damages from the tortfeasor rather than actual property from the estate. *Id.*

Included among the classes of plaintiffs advancing the cause of action have been a decedent’s companion who was disliked by the decedent’s family, *Harris v. Kritzik*, 480 N.W.2d 514 (Wis. Ct. App. 1992); children who were omitted from the testament and replaced by a decedent’s lover or new spouse, *Schneider v. Cate*, 405 F. Supp. 2d 1254 (D. Colo. 2005) (children of a deceased trust grantor, as trustees and beneficiaries, brought unsuccessful diversity action against the grantor’s husband); children or grandchildren who received less than others in the family, *In re Loraine Boley Ingersoll Trust*, 950 A.2d 672 (D.C. 2008); and a child or stepchild who had a strained relationship with the decedent but still felt he or she would be entitled to a portion of the decedent’s estate. *In re Estate of Hendrix*, 2006 WL 2048240 (Wash. Ct. App. June 24, 2006). Heirs have also brought suit against a testator’s accounting firm and a testator’s attorney. See *O’Keefe v. Merrill Lynch & Co.*, 84 P.3d 613 (Kan. Ct. App. 2004); *Chase v. Bowen*, 771 So.2d 1181 (Fla. Ct. App. 2000).

Standard and Burden of Proof

The Restatement specifies that the interference at issue must be by a means that is independently tortious. Restatement (Second) of Torts § 774B, cmt.c. Some jurisdictions do not require this for a claim of interference with contract or a prospective contractual relation. See *id.* § 766B (relating to tortious interference with a contract). A claimant, however, is not required to prove that he is or was ever named as a beneficiary under a will or that he has been devised the disputed property, as doing so would defeat the purpose of a claim for tortious interference with expectancy. *Plimpton v. Gerrard*, 668 A.2d 882, 886 (Me. 1995).

A litigant in probate court is required to meet a rigorous standard of proof—sometimes described as clear and convincing—because the court is charged with determining the intent of a person who, because of death, is unavailable to testify. See *In re Estate of Hendrix*, 2006 WL 2048240, at *18. In most jurisdictions, a testator’s intent is considered proven upon the testimony of two credible, disinterested witnesses. See Restatement (Third) of Property, § 3.1, 1999. The standard of proof in a tortious interference with expectation of inheritance claim, however, is often, but not always, the lesser preponderance of evidence standard. See, e.g., *Wackman v. Rubsam*, 602 F.3d 391, 410 (5th Cir. 2010) (applying Texas law); *Peralta v. Peralta*,

131 P.3d 81, 84 (N.M. Ct. App. 2005); *Moore v. Brower*, 2006 WL 2411382, at *3 (Conn. Super. Ct. June 26, 2006).

Under the Restatement, tortious interference with expectancy of inheritance or of a gift is viable only when the plaintiff would have received the gift but for the defendant's tortious interference. Restatement (Second) of Torts § 774B, cmt. d. A plaintiff must, therefore, present "proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator or that the gift would have been made *inter vivos*, if there had been no such interference." *Id.* Complete certainty is not required because the testator is ordinarily deceased when the action is brought. Accordingly, in some jurisdictions, a plaintiff must prove "to a reasonable degree of certainty" that, but for the alleged conduct of the defendant, he would have received a share of the allegedly wrongfully diverted property. *Firestone v. Galbreath*, 895 F. Supp. 917, 927-28 (S.D. Ohio 1995), *aff'd* 25 F.3d 323 (6th Cir. 1994). Presumably the "reasonable degree of certainty" standard is the same as the "preponderance of the evidence" standard, as cases describing both standards require less than the higher "clear and convincing" standard and adopt the Restatement as the foundation of the tort. *See, e.g., Morrill v. Morrill*, 712 A.2d 1039 (Me. 1998).

In *Breen v. Lucas*, 2005 WL 2736540 (Me. Super. Ct. July 4, 2005), a Maine court explained that when there is a fraud element in the tortious interference cause of action, the standard of proof is a preponderance of the evidence, as opposed to the clear and convincing standard required for an independent fraud claim. *Id.* at *7 (citing *Petit v. Key Ban of Maine*, 688 A.2d 427, 432-33 (Me. 1996)). Some courts, however, suggest that a tortious interference claim rooted in fraud and duress triggers the application of the clear and convincing standard of proof. For instance, in dicta in *Minton v. Sackett*, 671 N.E.2d 160, 163 (Ind. Ct. App. 1996), an Indiana court opined that the plaintiff's fraud and duress allegations necessitated the same standard of proof as if raised in a probate context.

In Wisconsin, one may demonstrate undue influence by proving the following two elements through "clear, satisfactory and convincing evidence": a "confidential relationship between the testator and the favored beneficiary" and "suspicious circumstances surrounding the making of the will." *Wickert v. Burggraf*, 570 N.W.2d 889, 890 (Wis. Ct. App. 1997) (quoting *Sensenbrenner v. Sensenbrenner*, 278 N.W.2d 887, 891 (Wis. 1979)). Other jurisdictions simply require that undue influence be proven by "clear and convincing evidence." *See, e.g., Gay v. Ludwig*, 2004 WL 911324, at *2 (Ohio Ct. App. Apr. 30, 2004).

Florida courts have held that, due to the difficulty in obtaining direct evidence of undue influence, a plaintiff may satisfy his burden by presenting facts "sufficient to raise a presumption thereof." *See Metropolitan Life Ins. Co. v. Carter*, 2005 WL 2810699, at *15 (M.D. Fla. Oct. 27, 2005) (citing *In re Estate of Carpenter*, 253 So.2d 697, 701 (Fla. 1971)). A presumption of undue influence arises when a devisee had a confidential

relationship with the decedent at the time the undue influence is alleged to have occurred and "actively procured" the bequest. *Id.* (citing *In re Estate of Stetzko*, 714 So.2d 1087, 1090 (Fla. Ct. App. 1998)). Upon a plaintiff's showing of sufficient evidence to raise a presumption, "the burden shifts to the beneficiary to prove an absence of undue influence." *Id.* at n. 37.

The cause of action challenges the basic policy that a deceased's property should pass in accordance with the testator's written direction or through intestate succession.

Ohio courts have described the burden allocation somewhat differently. If a "confidential or fiduciary relationship exists between the donor and the donee," a presumption of undue influence arises, and the transfer is assumed to be unauthorized. *Gay*, 2004 WL 911324, at *2. The burden then shifts to the recipient of the gift or transfer to present evidence that the transfer was valid, although the plaintiff retains the "ultimate burden of proving undue influence through clear and convincing evidence." *Id.*

Conclusion

Although the U.S. Supreme Court has portrayed the cause of action of tortious interference with expectation of inheritance as being "widely accepted," the dimensions of this tort claim continue to evolve. The cause of action challenges the basic policy that a deceased's property should pass in accordance with the testator's written direction or through intestate succession. Recognition of the tort also may be perceived as conflicting with probate remedies. Thus, it is important for a plaintiff to ensure that the claim is appropriately advanced as a civil claim rather than a probate claim and that the plaintiff understand the forum's proof requirements. ■

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TORTIOUS INTERFERENCE

(Continued from page 1)

Co., 71 A.D.3d 40, 47, 888 N.Y.S.2d 489 (N.Y. App. Div. 2009). What exactly qualifies as a “business relationship” is a factual issue, but courts have provided some guidance. For instance, one court has noted that a business relationship is “something less than a contractual right, something more than a mere hope’ [and] exists only when there is a reasonable probability that a contract will arise from the parties’ current dealings.” *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994) (quoting *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 209, 412 A.2d 466, 471 (Pa. 1979)).

If no valid contract exists and the ability to establish a business relationship is murky, some jurisdictions may recognize a cause of action for tortious interference with an “economic advantage.”

If no valid contract exists and the ability to establish a business relationship is somewhat murky, some jurisdictions may nevertheless recognize a cause of action for tortious interference with an “economic advantage.” To establish this claim, a plaintiff generally must show an existing reasonable expectation or reasonable expectation of economic benefit or advantage; the defendant’s knowledge of that expectancy; the defendant’s wrongful, intentional interference with that expectancy; the reasonable probability that the claimant would have received the anticipated economic benefit in the absence of the defendant’s interference; and damages resulting from the defendant’s interference. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1167 (3d Cir. 1993).

A valid business expectancy is one in which there is a reasonable likelihood or probability that the expectancy will come to fruition; mere wishful thinking is not sufficient to support a claim. *See, e.g., First Public Corp. v. Parfet*, 246 Mich. App. 182, 199, 631 N.W.2d 785 (Mich. Ct. App. 2001), *vacated in part on other grounds*, 468 Mich. 101, 658 N.W.2d 477 (Mich. 2003); *Trepel v. Pontiac Osteopathic Hosp.*, 135 Mich. App. 361, 377, 354 N.W.2d 341 (Mich. Ct. App. 1984). In some instances, courts have considered the length of the relationship as a factor.

For example, one court recognized a customer relationship as a protectable right because the relationship existed for close to 20 years, even though every year the customer offered its business to all bidders. *Conoco, Inc. v. Inman Oil Co. Inc.*, 774 F.2d 895, 907 (8th Cir. 1985) (applying Missouri law). According to another court, “a regular course of similar prior dealings suggests a valid business expectancy.” *Slone v. Purina Mills, Inc.*, 927 S.W.2d 358, 370 (Mo. Ct. App. 1996).

Proving the “Tort” for a Tortious Interference Claim

To establish any tortious interference claim, a plaintiff must establish that “the defendant’s conduct was independently tortious or wrongful.” *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001). What distinguishes legitimate competitive economic activity—something that is protected in our free-market system—from actionable interference? The act must be tortious, meaning that the plaintiff “must plead and prove at least some improper motive or improper means.” *Golembeski v. Metichewan Grange No. 190*, 20 Conn. App. 699, 702, 569 A.2d 1157 (Conn. App. Ct. 1990).

Tortious conduct generally requires proof that “the defendant was guilty of fraud, misrepresentation, intimidation or molestation or that the defendant acted maliciously.” *Blake v. Levy*, 191 Conn. 257, 261, 464 A.2d 52 (Conn. 1983). Courts generally have required a plaintiff to show that the defendant wrongfully interfered for the sole purpose of harming the plaintiff or that it committed independent torts or predatory acts. *See, e.g., EDP Hosp. Computer Sys. Inc. v. Bronx-Lebanon Hosp. Ctr.*, 212 A.D.2d 570, 571, 622 N.Y.S.2d 557 (N.Y. App. Div. 1995). Moreover, most courts require this conduct to be “knowing” or “intentional”—mere negligence will not suffice. *See, e.g., Tenta v. Guraly*, 140 Ind. App. 160, 167, 221 N.E.2d 577, 580 (Ind. Ct. App. 1966); *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426, 867 N.E.2d 381, 835 N.Y.S.2d 530 (N.Y. 2007); *see also Vigoda v. DCA Prods. Plus, Inc.*, 293 A.D.2d 265, 266, 741 N.Y.S.2d 20 (N.Y. App. Div. 2002). A plaintiff must also show actual loss “resulting from the improper interference with the contract; the tort is not complete unless there has been actual damages suffered.” *Appleton v. Bd. of Educ. of Town of Stonington*, 254 Conn. 205, 213, 757 A.2d 1059 (Conn. 2000).

“Not every act that disturbs a contract or business expectancy is actionable.” *Secord v. Purkey*, 2011 Conn. Super. LEXIS 158, at *14 (Conn. Super. Ct. Jan. 24, 2011). As a matter of public policy, courts encourage competition and frown upon a litigant’s attempt to stifle competition or to promote one’s self-interest. In fact, competitors “have a ‘preference’ in the eyes of the law such that it is not a tort to interfere with a contract” if the action is competitive and the actor does not “employ

wrongful means” or create “an unlawful restraint of trade.” *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982) (quoting Restatement (Second) of Torts § 768 (1979)).

Another hurdle of which plaintiffs must be acutely aware when drafting tortious interference claims is the Supreme Court’s recent heightened pleading requirements, as set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Therefore, a plaintiff is well advised to provide as much detail as possible in its complaint to better its chances of surviving a motion to dismiss.

Litigants should carefully research and heed applicable state law that may impact the viability of a tortious interference claim in certain unique circumstances. For instance, under Arizona law, an officer of a corporation cannot, as a matter of law, interfere with the corporation’s contracts. *Southern Union Co. v. S.W. Gas Corp.*, 165 F. Supp. 2d 1010, 1038 (D. Ariz. 2001). A Texas court declined to recognize the cause of action in a suit brought by an attorney’s former client against both the attorney and the attorney’s own legal counsel after the attorney allegedly breached his fiduciary duty to the former client. *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 407 (Tex. Ct. App. 2005). Another Texas court refused to “recognize a cause of action by an insured against his insurer for tortious interference with the insured’s relationship with his attorney arising out of the insured’s handling of the defense of a third party claim. . . .” *Taylor v. Allstate Ins. Co.*, 2011 Tex. App. LEXIS 2418, at *20 (Tex. Ct. App. Mar. 31, 2011).

Some states have even addressed the viability of the cause of action if the contract at issue is terminable at will. *See, e.g., Duggin v. Adams*, 234 Va. 221, 226, 360 S.E.2d 832, 836 (Va. 1987) (permitting such claims provided allegations support improper means); *New Stadium, LLC v. Greenpoint-Goldman Corp.*, No. 600493/05, 2010 NY Slip Op 30869U, *11–12 (N.Y. Sup. Ct. Apr. 12, 2010) (only permitting such claims when improper means are specifically alleged, as there is no assurance of future performance in at-will contracts that can be terminated at any time).

A litigant that fails to recognize the strong predisposition expressed by many state courts to allow competitive behavior and, instead, simply relies on general allegations concerning ambiguously referenced conduct will likely find his or her tortious interference claim dismissed. *See, e.g., U.S. Bank Nat’l Ass’n v. Parker*, 2010 U.S. Dist. LEXIS 68324, at *9 (E.D. Mo. July 9, 2010).

Attracting Competitor’s Customers

Businesses frequently resort to tortious interference claims to prevent competitors or former employees from luring away loyal customers. Given the deluge of these claims, courts have drawn a fair delineation between legitimate competition and unlawful interference. In New Jersey, a plaintiff survived a motion to dismiss when the court found it had a “reasonable expectation” to continue its sales of products to its existing customers and

distributors and to sell its products to other members of the trade. The court protected the plaintiff from the steps undertaken by the defendant to wrongfully undermine the plaintiff’s business expectations. *Graco, Inc. v. PMC Global, Inc.*, 2009 U.S. Dist. LEXIS 26845, at *69–70 (D. N.J. Mar. 31, 2009).

The analysis of whether the competition is lawful turns on “whether the actor’s conduct was fair and reasonable under the circumstances.” *ESCP Corp. v. Premier Source USA, Inc.*, 2009 U.S. Dist. LEXIS 124881, at *9 (S.D. Iowa May 13, 2009) (quoting Restatement (Second) of Torts, § 767). For example, while it dismissed a tortious interference with contract claim, as the plaintiff was not able to proffer any evidence that it had a contract with any of its customers with which the defendant or the plaintiff’s former employee interfered, the *ESCP* court nevertheless sustained a tortious interference with prospective business advantage claim as the defendant conspired with the former employee while he still was employed by *ESCP* to compete with *ESCP*.

A litigant that simply relies on general allegations concerning ambiguously referenced conduct will likely find his or her tortious interference claim dismissed.

Claims also have been sustained where the defendant is alleged to have “disseminated false, misleading, or malicious information” to the plaintiff’s existing and prospective clients, *Floorgraphics Inc. v. News Am. Marketing In-Store Serv., Inc.*, 2006 U.S. Dist. LEXIS 70834, at *2 (D. N.J. Sept. 29, 2006), or when a city official discouraged potential buyers from buying real estate. *Golden Valley Lutheran Coll. v. City of Golden Valley*, 1991 Minn. App. LEXIS 1174, at *8 (Minn. Ct. App. Dec. 17, 1991).

To establish any claim for lost customers or business, however, it is prudent to understand at the pleading stage the level of specificity the local courts require to sustain the claims. Some courts have taken a more lenient approach, permitting claims to go forward even if the plaintiff cannot identify any specific customer or contract that was lost. *See, e.g., Floorgraphics, Inc.*, 2006 U.S. Dist. LEXIS 70834, at *18–19 (holding that a plaintiff need not identify specific lost business opportunities in its pleading for tortious interference). Other courts, however, have dismissed pleadings that do not contain adequate and specific allegations identifying the actual customers or contracts that were lost as a result of the

alleged tortious conduct. *See, e.g., Soaring Helmet Corp. v. Nanal, Inc.*, 2011 U.S. Dist. LEXIS 262, at *21 (W.D. Wash. Jan. 3, 2011).

Consumer and Commercial Lending Disputes

For years, borrowers and guarantors have been employing tortious interference claims to try to stave off enforcement by lenders, claiming that a lender's conduct in either failing to lend or imposing various conditions "tortiously interfered" with some business strategy or customer relationship that eventually led to the default and, in some cases, the demise of the business.

One court rejected a borrower's claim against the lender's servicer for wrongfully and unreasonably withholding consent to the imposition of second liens and releasing impounds.

Although these claims often appear significant, they are summarily dismissed under prevailing law, as, in most cases, a lender must only establish that its conduct was motivated by "legitimate business purposes" rather than malice or a "disinterested malevolence." *Bilimoria Computer Sys., LLC v. America Online, Inc.*, 829 N.E.2d 150, 157 (Ind. Ct. App. 2005). Thus, secured lenders should be able to overcome these claims by establishing their intention to preserve and liquidate the collateral security. The secured lender's exercise of its "self-help rights by taking possession of the collateral equipment did not occur in the 'absence of justification,'" and thus could not be the basis for a tortious interference claim. *New Equip. Leasing, Inc.*, 2011 U.S. Dist. LEXIS 32681 at *13. A lender's concern for managing pledged collateral and security interests can also constitute a legitimate business concern. *Flintridge Station Assocs. v. Am. Fletcher Mortg. Co.*, 761 F.2d 434, 442 (7th Cir. 1985) (applying Indiana law).

One court rejected a borrower's claim against the lender's servicer for wrongfully and unreasonably withholding consent to the imposition of second liens and releasing impounds with respect to the mortgaged property. Granting summary judgment to the loan servicer, the court dismissed the interference claims, finding that the loan servicer was acting within the scope of its authority and in accordance with the loan documents. *Wells Fargo Bank, N.A. v. Ash Org.*, 2010 U.S. Dist. LEXIS 66542, at *36–38 (D. Or. July 1, 2010).

Tortious interference claims have been emerging with greater frequency in residential mortgage lending cases. These claims, however, have not yet received much traction in the foreclosure courts for reasons unique to mortgage-lending cases. "[D]efenses to foreclosure are recognized when they attack the note itself rather than some behavior or business practice of the mortgagee." *Homeside Lending v. Torres*, 1999 Conn. Super. LEXIS 3452, at *8 (Conn. Super. Ct. Dec. 23, 1999). "[S]pecial defenses which are not limited to the making, validity or enforcement of the note or mortgage fail to assert any connection with the subject matter of the foreclosure action and as such do not arise out of the same transaction as the foreclosure action." *Green Point Bank v. Klein*, 2000 Conn. Super. LEXIS 900, at *4 (Conn. Super. Ct. Apr. 11, 2000).

In applying these principles, courts have found that "tortious interference claims do not attack the making, validity or enforcement of the note and are therefore not proper special defenses in a foreclosure action." *Lafayette Bank & Trust Co. v. D'Addario*, 1993 Conn. Super. LEXIS 2572, at *4 (Conn. Super. Ct. Oct. 7, 1993); *see also J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (Nev. 2003).

Agent and Employee Liability

When business troubles arise, many parties look to the agent as the responsible party. Agents are not generally held responsible for interfering in a business relationship involving the agent's principal, and courts generally abide by the old adage of "don't kill the messenger."

Accordingly, courts typically dismiss tortious interference claims against agents upon proof that the agent was "acting legitimately within the scope of his authority." *Wellington Systems, Inc. v. Redding Group, Inc.*, 49 Conn. App. 152, 168, 714 A.2d 21 (Conn. App. Ct. 1998); *Fioriglio v. City of Atl. City*, 996 F. Supp. 379, 392 (D. N.J. 1998), *aff'd*, 185 F.3d 861 (3d Cir. 1999); *Obeidtorfer v. The Gitano Group, Inc.*, 838 F. Supp. 950, 956 (D. N.J. 1993); *Sammon v. Watchung Hills Bank for Sav.*, 259 N.J. Super. 124, 127, 611 A.2d 674, 676 (N.J. Super. Ct. Law Div. 1992).

However, a claim may be sustained "if the agent did not act legitimately within the scope of his duty but used the corporate power improperly for personal gain." *Metcoff v. Lebovics*, 123 Conn. App. 512, 521, 2 A.3d 942, 948 (Conn. App. Ct. 2010). For instance, an agent can be charged with tortious interference if he or she "acts against the best interests of the principal or acts solely for his own benefit." *Welch v. Bancorp Mgmt. Advisors, Inc.*, 296 Or. 208, 216, 675 P.2d 172, 178–79 (Or. 1983). Nonetheless, the presumption against holding an agent liable for such claims is strong, and "even if the agent is acting with 'mixed motives' [it] will usually garner a dismissal." *Welch*, 675 P.2d at 178–79.

This same rationale applies to a company's employees. In fact, even a "managing officer of a corporation, including one with the authority to hire and fire, [can be] subject to liability for intentional interference in the same way as any other

corporate employee if the officer acts without any purpose to serve the employer, but solely with improper motives or purposes.” *Boers v. Payline Sys., Inc.*, 141 Or. App. 238, 243, 918 P.2d 432, 436 (Or. Ct. App. 1996). Thus, employees and agents are not immune from tortious interference claims.

Encouraging a Party to Exercise Its Legal Rights

Few states have addressed whether a party may tortiously interfere with a contract by inducing a contracting party to pursue legal action with respect to the contract at issue. Under the Restatement, the prosecution of a civil suit may be deemed tortious “if the actor has no belief in the merit of the litigation or if, though having some belief in its merit, he nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication.” Restatement (Second) of Torts § 767 cmt. c.

California courts compare such tortious interference claims with malicious prosecution claims. For a malicious prosecution claim to be actionable, the plaintiff must have been forced “to expend financial and emotional resources to defend against a baseless claim. . . . The bringing of a colorable claim is not actionable.” *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1131, 270 Cal. Rptr. 1, 7-8, 791 P.2d 587, 593-94 (Cal. 1990). California applies this same rule to a tortious interference claim because permitting “a cause of action for interference with contract or prospective economic advantage to be based on inducing potentially meritorious litigation on the contract would threaten free access to the courts by providing an end run around the limitations on the tort of malicious prosecution.” *Id.*,

791 P.2d at 598. California courts, therefore, have held that “a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff’s favor.” *Id.*

Oregon courts also “have consistently endorsed intentional interference claims in which the alleged ‘improper means’ has been the prosecution of baseless litigation. . . .” *Mantia v. Hanson*, 190 Or. App. 412, 429, 79 P.3d 404, 414 (Or. Ct. App. 2003). Thus, “the prosecution of unfounded litigation constitutes actionable ‘improper means’ for purposes of tortious interference where (1) the plaintiff in the antecedent proceedings lacked probable cause to prosecute those proceedings; (2) the primary purpose of those proceedings was something other than to secure an adjudication of the claims asserted there; and (3) the antecedent proceedings were terminated in favor of the party now asserting the tortious interference claim.” *Id.* at 414.

Conclusion

When properly pled and litigated, tortious interference claims can be used as a valuable weapon in the business-litigation arsenal. However, if the litigant fails to properly understand the exact contours of the claim in the particular jurisdiction in which the claim is pursued, it could be a weapon that is quickly rendered ineffective. ■

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