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Tortious Interference Issue

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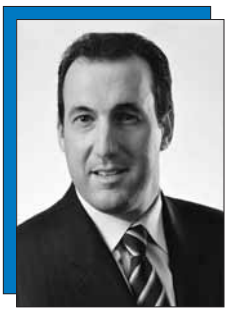

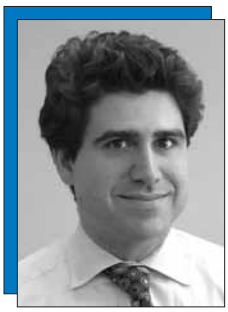

Navigating the Nuances of Tortious Interference Claims

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 &*

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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); *Obendorfer 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. ■

Zachary G. Newman is a partner and Anthony P. Ellis is an associate at New York-based Hahn & Hessen, LLP.