Evolution Driven by Marketplace

Trends in the Intentional Interference Torts

By Alex W. Craigie and Tamara A. Husbands

Recent cases paint a picture of a segment of business law that is undergoing a transformation.

Business torts are evolutionary animals. Just as other torts must remain elastic to right the universe of possible wrongs committed against the individual, business torts must also stretch to fit various business situations and relationships in an increasingly complex global marketplace. But the evolution of business torts is gradual, and its direction uncertain. Some courts are loath to broaden business torts' reach, perhaps hesitant to meddle with business affairs or principles.

Recent decisions about the twin "interference" torts—liability for intentionally fouling contracts or interfering with business relationships—reflect this shifting landscape. These torts have been traced back to 1621, when the Court of King's Bench, in *Garrett v Taylor*, Cro Jac 567, 79 Eng Rep 485, held one liable to another for interfering with his prospective contracts by threatening to "mayhem and vex with suits" those who worked for or bought from him. Others trace the torts' roots back much earlier, to ancient Roman law's protection of the "household," in which the highest ranking male household member, or *paterfamilias*, could maintain a legal action for injury to his family or slaves.

In 1939, the American Law Institute adopted the position in the First Restatement of Torts that, without a privilege to do so, if someone induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another, he or she is liable to the other for the harmful result. Torts were gradually refined so that the Restatement (Second) of Torts differentiates between existing and merely prospective contractual relationships. Specifically, the Restatement (Second) of Torts, §766, creates liability for interference with an *existing* contract. It provides:

> One who intentionally and improperly interferes with the performance of a contract… by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Section 766B governs interference with a *prospective* contractual relationship. It states:

■ Alex W. Craigie is a partner in the Los Angeles office of Dykema. He is a member of the DRI Commercial Litigation Committee. His practice focuses on business, real estate and construction litigation. Tamara A. Husbands is a senior associate in the Los Angeles office of Dykema. Her practice focuses on intellectual property, product liability and insurance coverage litigation.

One who intentionally and improperly interferes with another's *prospective* contractual relation… is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
(b) preventing the other from acquiring or continuing the prospective relation. (emphasis added).

This article briefly explores recent court decisions involving these interference torts. In particular, we will focus on three areas that have seen much activity in recent years: the so-called competition privilege, liability for interference with invalid or unenforceable contracts, and officer or director liability for interfering with a corporation's contracts. The article will conclude with a brief discussion of recent trends in attorney liability under these torts.

The Competition Privilege

Under the widely adopted Restatement (Second) of Torts approach, liability for interference will only be imposed for "improper" interference. For prospective or terminable at-will contracts, the law has long afforded a privilege to a party interfering with business or a contract if the party is in legitimate competition for the same business or contract. Under such circumstances interference is not "improper" as a matter of law. In other words, "it is no tort to beat a business rival to prospective customers." *Office Machines, Inc. v. Mitchell*, 95 Ark. App. 128, 130, 234 S.W.3d 906, 908 (Ark. App. 2006). As the Seventh Circuit remarked, "[T]he process known as competition, which though painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness, is the cornerstone of our highly successful economic system." *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999).

However, under the Restatement (Second) of Torts, §768, even where otherwise available, the privilege evaporates if a competitor employs "wrongful means" to be competitive. Reasonable minds differ on which "means," in the Darwinian world of commerce, are "wrongful." In short, what does "wrongful means" *mean*?

One Arkansas court, equating wrongful means with unlawful means, commented that, unless a defendant breaks a law, "a defendant seeking to increase his own business may cut rates or prices, allow discounts, enter into secret negotiations behind the plaintiff's back, refuse to deal with him or threaten to discharge employees who do, or even refuse to deal with third parties unless they cease dealing with the plaintiff, all without incurring liability." *Office Machines, Inc.*, 95 Ark. App. at 130, 234 S.W.3d at 908.

Some argue, however, that restricting "wrongful" conduct to unlawful conduct undermines the tort altogether. If a competitor's acts are excused, provided he or she does not break a law, the exceptions might swallow the rule. In the post-*Enron* era of heightened corporate scrutiny, should conduct be allowed, so long as conduct does not break the law? Or can a colorable argument be made that privilege should be barred for unethical conduct or conduct that violates industry standards, as well as illegal conduct?

A California court grappled with this very question. It concluded that acting "unethically" or violating industry standards alone did not invalidate the competition privilege. In *Gemini Aluminum Corp. v. Cal. Custom Shapes, Inc.*, 95 Cal. App. 4th 1249, 176 Cal. Rptr. 2d 358 (Cal. 2002), an aluminum parts manufacturer and its subcontractor were vying to supply components of a workbench for sale to the public. The subcontractor used drawings it had acquired in its subcontracting role to gain a competitive edge against the manufacturer-plaintiff. The plaintiff argued this violated industry standards and as such should invalidate the competition privilege. Noting the California Supreme Court previously invalidated the privilege only where conduct was independently actionable, the *Gemini* court rejected this approach, stating:

We conclude the nebulous 'industry

> standards' test advanced by Gemini does not satisfy… [the] requirement that the defendant's conduct 'was wrongful by some legal measure other than the fact of interference itself.'… The imposition of liability for interference based merely on opinions that the solicitation of a competitor's business was 'unethical' or violated 'industry standards' would create uncertainty and chill, not maximize, competition.

95 Cal. App. 4th at 1259, 176 Cal. Rptr. 2d at 366 (citations omitted).

Reasonable minds differ on which "means," in the Darwinian world of commerce, are "wrongful."

Other courts, however, have concluded that conduct is wrongful based on an intuitive concept of right and wrong, rather than require that the conduct be actionable or illegal.

The common thread running through each of these decisions is deceptive conduct. In *Whitesell Corp. v. Bamal Fasteners LLC*, 2007 WL 240709 (S.D. Ohio 2007), for example, a federal district court, applying Ohio law, held that a competitor who submitted "bogus" or "illegitimate" price quotations that it could not meet and that caused the plaintiff to lose dealings with a customer, was precluded from the competition privilege. *Id.* at *7.

In *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695 (M.D. Pa. 2006), another federal district court applied Pennsylvania law and refused to grant summary judgment based on a competitive privilege argument in a dispute between competing automobile glass replacement businesses. In *Diamond Triumph Auto Glass, Inc.*, the defendant, aware of customers' existing appointments with the plaintiff, nonetheless sent its own technicians to service the plaintiff's customers some hours *before* the plaintiff's technicians were scheduled to arrive. While neither illegal nor independently actionable, "[a] reasonable jury," the court said, "could find some of Safelite's… activity constituted wrongful means to interfere with Diamond's prospective relationships with policyholders." *Id.* at 716.

Ken-Pin, Inc. v. Vantage Bowling Corp., 2004 WL 783092 (N.D. Ill. 2004) provides yet another example. There, Ken-Pin had a nonexclusive distribution agreement with Computer Score, a manufacturer of bowling scoring equipment. Ken-Pin subcontracted with the defendant, Vantage, to enhance its ability to market Computer Score's product. Over time, Vantage hired away key Ken-Pin employees and entered into its own exclusive distributorship agreement with Computer Score. In the subsequent tortious interference suit, the defendant moved to dismiss the competition privilege. However, the federal district court, applying Illinois law, denied the privilege-based motion in the absence of illegal or independently actionable conduct, stating: "Ken-Pin alleges that the Vantage Defendants 'deceptively encouraged Ken-Pin to introduce Vantage to Computer Score… while hiding from Ken-Pin that their intention was not to enhance Ken-Pin's enjoyment of its right to distribute Scoring Systems, but to abrogate that right altogether.'" *Id.* at *8.

It remains to be seen whether the climate of increased corporate scrutiny will erode the competition privilege in tortious interference suits, if only slightly. A few courts have recently invalidated the privilege where conduct, while neither illegal nor independently actionable, was sufficiently deceptive to constitute wrongful means.

Interference with Invalid or Unenforceable Contracts

It is axiomatic that liability for tortious interference with a contract requires the existence of a valid contract. The Restatement (Second) of Torts, §774, provides, "One who by appropriate means causes the nonperformance of an illegal agreement or an agreement having a purpose or effect in violation of an established public policy is not liable for pecuniary harm resulting from the nonperformance." The rationale for this rule can be simply stated: "one cannot be charged with liability for inducing another to refrain from doing that which he was not legally bound to do." *Rhodes Eng. Co., Inc. v. Pub. Water Supply Dist. No. 1 of Holt County*, 128 S.W.3d 550 (Mo. 2004).

Comment b to Section 774 of the Restatement (Second) of Torts explains, "Illegal agreements and those in violation of public policy are commonly held to be entirely void and so not contracts at all. On that basis they are simply not within the rules stated in §§766 and 766A on liability for interference with performance of contracts and there is no liability for causing their breach."

While application of this rule appears straightforward, two recent cases involving Native American gaming contracts examine the intersection between the interference tort and well-established principles of contract law.

In *First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166 (10th Cir. 2005), the Kickapoo tribe of Oklahoma entered into a lease agreement with First American that provided for constructing, equipping and operating a casino on tribal land. Approximately one month after the casino opened, the National Indian Gaming Commission (NIGC) notified the Kickapoo that its gaming ordinances did not comply with the requirements of the Indian Gaming Regulatory Act (IGRA). The Kickapoo voluntarily closed the casino and subsequently met with NIGC approval, allowing the casino to reopen. The Kickapoo then terminated their relationship with First American and entered into a nonexclusive agreement to rent gaming equipment from Multimedia.

First American sued Multimedia for tortious interference with its lease agreement with the Kickapoo. Multimedia moved for summary judgment, arguing that the agreement between the Kickapoo and First American was in reality a "management" contract that was void absent the required NIGC approval. The district court, applying Oklahoma law, ultimately granted the summary judgment motion. The Tenth Circuit Court of Appeals affirmed, stating:

> Congress has determined that requiring NIGC approval of management contracts will advance its efforts to protect tribes from unsuitable influences and to ensure that tribes are the primary beneficiaries of Indian gaming operations. Oklahoma law, the law of this Circuit, and even the authorities on which First American relies, all support the position

> that an unapproved management contract may not form the basis of a suit for tortious interference with contract. Such perfect agreement is sufficiently rare that we are loath to disturb it.

Id. at 1177 (citation omitted).

Against this background, *NGV Gaming, LTD. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061 (N.D. Cal. 2005), provides an interesting contrast. There, the Guidiville Band of Pomo Indians entered into a series of contracts with F.E.G.V. Corporation to develop and construct a proposed gaming facility on restored trust land in Northern California. F.E.G.V. assigned its interest in these contracts to NGV. At the time of contracting, the Guidiville Pomo people had not yet acquired any land, and NGV was obligated under the agreements to assist the Guidiville Pomo people in identifying and purchasing land on which the gaming facility would eventually be built.

The defendant, Upstream, allegedly aware of the Guidiville Pomo people's existing contract with NGV, separately began negotiating with the City of Richmond to purchase 354 acres of land for the purpose of building a gaming facility. The Guidiville Pomo people subsequently sent a letter to NGV attempting to rescind the agreements with NGV, which would enable them to build the casino with Upstream. NGV, maintaining that the reasons given for the rescission were "entirely pretextual," sued Upstream for inducing the Guidiville Pomo people to terminate the agreements.

Upstream moved to dismiss the interference claim, arguing the agreements were invalid because they lacked regulatory approval pursuant to the IGRA. The district court, applying California law, denied the motion to dismiss, stating:

> It is true that the Transaction Agreements contemplate the necessity for regulatory approval before certain aspects of the Agreements could occur. However, execution of the Agreements may also have created immediate duties and obligations relating to matters for which no regulatory approval is needed. The Agreements themselves do not condition the validity of the contract on regulatory approval, but rather make such approval "conditions precedent" to subsequent obligations of each party under the Lease Agreement…. Therefore, even accepting Defendants' contention that the Transaction Agreements never received regulatory approval… Plaintiffs could prove the existence of a valid contract at the time of the alleged tortious interference, which is the relevant time period for Plaintiff's claim.

Id. at 1064–65.

The contrasting outcomes of these cases illustrate that, while inducing breach of a contract that is void *ab initio* because it lacks necessary regulatory agency approval cannot support a tortious interference claim, agreements that concern land that is not yet designated as tribal land and make regulatory approval a "condition precedent" to subsequent obligations of each party, are not void for purposes of a tortious interference claim. Equally important, however, the cases illustrate how courts' approach interference torts evolve to address an ever-changing business environment.

Corporate Officer or Director Liability

"Greed is good," declared Gordon Gekko in Oliver Stone's 1987 film *Wall Street*. But will a corporate officer or director's personal greed expose him or her to liability for interfering with the corporation's contracts or business relationships?

Officers and directors are typically free to breach an existing corporate contract without any risk of personal tortious interference liability. The basis for this privilege is that a party cannot be liable in tort for interfering with its own contract or business relationship. A corporation acts through its officers and directors. Therefore, the officer or director's liability—or lack thereof—matches that of the corporation.

An important exception exists, however, when the officer or director acts for a purpose that is unrelated to the interests of the corporation, such as out of consideration for his or her own success. Depending on the nature of the particular business, a sticky question in some instances becomes whether an officer or director's greed for his or her own personal success actually furthers the best interests of the corporation, such that the conduct should be privileged. A pair of recent cases examines this question.

In *Heffernan v. Robeco Investment Management, Inc.*, 23 Mass. L. Rptr. 237, 2007 WL 3244422 (Mass. Super. Ct. 2007), Heffernan was recruited for employment by an investment management firm, RIM. Supple, an officer of RIM, was his direct supervisor. After Heffernan had devoted substantial effort to a large potential sale, Supple injected himself into the process and told Heffernan that the two of them would split the commissions. Heffernan was later abruptly fired, without cause, and never received any commissions.

It remains to be seen whether the climate of increased corporate scrutiny will erode the competition privilege in tortious interference suits, if only slightly.

Heffernan brought suit against RIM and Supple, including a tortious interference claim against Supple. Supple moved to dismiss, arguing that, inasmuch as he was an officer of RIM, the complaint must allege malice rather than just that he acted out of a motive for personal gain. The Massachusetts Superior Court sided with Heffernan and denied the motion, stating:

> The complaint alleges that Supple's conduct was "motivated by self-interest and personal animus toward Heffernan and his superior skills and experience securing large institutional clients." With inferences drawn in plaintiff's favor, this allegation may be understood as claiming that Supple acted out of resentment toward the plaintiff for his success, as well as out of personal greed. In the context of the facts alleged, neither motive serves any interest of the corporation; indeed, to the extent that Supple's alleged conduct had the potential to deprive the corporation of the plaintiff's best efforts, and ultimately of his services, it would be contrary to the corporate interests. In that respect, the motive alleged goes be-

yond personal greed, extending to a willingness to sacrifice the corporate interest for personal interest.

2007 WL 3244422 at *1–2.

The Indiana Supreme Court reached a different conclusion in *Trail v. Boys and Girls Clubs of Northwest Indiana*, 845 N.E.2d 130 (Ind. 2006). There, Trail was forced to resign as executive director of a not-for-profit corporation. He sued the corporation and members of its executive committee. Against the committee members, Trail sought recovery based on a tortious interference claim, alleging they were "unhappy for personal reasons with the retention of Trail… [and] were upset with [him] because he refused to defer to them on those initiatives and actions that properly were [his] duties as Executive Director." 845 N.E.2d at 133.

A sticky question in some instances becomes whether an officer or director's greed for his or her own personal success actually furthers the best interests of the corporation.

The trial court granted the individual defendants' motion to dismiss and the Indiana Supreme Court affirmed. In its holding, the state supreme court found that the executive committee members' greed for greater control over the corporation did not invalidate the privilege they enjoyed as corporate officers and directors. It said:

> At oral argument, Trail asserted that the defendants' improper motivation was their desire to increase their own control over the operation of the Boys and Girls Clubs. However, in the unreported case that Trail himself cites, the court held that '[a]n increase in corporate control is not personal advantage' of the sort that takes a director or officer's actions outside the scope their authority for the purposes of a tortious interference claim. Nothing in Trail's complaint suggests that the "personal advantage" sought by the defendants was anything other than larger influence over the direction of the enterprise.

845 N.E.2d at 140–41.

These recent opinions suggest courts faced with alleged officer or director liability are increasingly looking beyond officer or director status to examine conduct, its nature and whether conduct furthers a corporation's interests. Greed in the interest of the corporation continues to be good (*e.g.*, *Trail*). Greed solely for personal profit will expose an officer or director to liability for tortious interference (*e.g.*, *Heffernan*).

Attorney Liability

Attorney liability for interference with the contract or business relationship of another in the course of client advocacy has also been considered by courts in recent years. Comment c to Restatement (Second) of Torts, §767, which enumerates "factors" to be used in determining whether interference is improper, identifies the threat or institution of meritless civil litigation as among the conduct that may be improper. Specifically, it states:

> When wrongfully instituted, litigation entails harmful consequences to the public interest in judicial administration as well as to the actor's adversaries. The use of these weapons of inducement is ordinarily wrongful 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.

If an attorney knowingly signs a meritless complaint that disrupts an opponent's business relationship, does he or she share liability for tortious interference with the client who directed its filing? Attorneys typically respond to the question by asserting the same litigation privilege that shields them from defamation suits for false statements made in the course of lawsuits. But will the privilege that shields attorneys from defamation protect a member of the bar from *all* tort liability in those instances in which the attorney threatens or initiates litigation knowing his or her client's position is frivolous?

A pair of recent cases illustrate two approaches to the extent to which an attorney's conduct in litigation that disrupts another's business opportunities will be considered privileged. Some courts are reluctant to allow an attorney to invoke the litigation privilege where his or her efforts are intended to harm the opponent, rather than mere adjudication of the claims.

In *Mantia v. Hanson*, 190 Or. App. 412, 79 P.3d 404 (Or. App. 2003), the Bailey law firm represented a former Hanson employee in a suit against Hanson. Hanson's counsel sent a letter to Bailey decrying the suit allegations baseless and demanded dismissal. Bailey proceeded with the suit. Hanson cross-complained against Bailey for interfering with Hanson's business. Hanson maintained he was forced to "devote substantial time and money defending against the false claims…" 190 Or. App. at 415, 79 P.3d at 406. Bailey moved to dismiss, successfully invoking the litigation privilege. On appeal, Hanson argued that the litigation privilege should not have applied to its tortious interference claim.

In the *Mantia* decision upholding the trial court's dismissal of Hanson's cross-complaint, the Oregon Court of Appeals noted:

> [E]ven a defense of absolute privilege cannot defeat a claim for tortious interference where the nature of the defendant's conduct was such that the underlying purposes of the privilege would not be served by immunizing that conduct…. [T]he 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.

190 Or. App. at 429, 79 P.3d at 414 (emphasis added).

While the *Mantia* court noted that Hanson's cross-complaint argued that Bailey

Interference, continued on page 75

Interference, from page 44
knew some of Bailey's client's claims were unfounded, and proceeded with the litigation "for the purpose of destroying Hanson's business" (*Id.*), the privilege could not be invalidated because the underlying action had not yet terminated in Hanson's favor. Thus, in *Mantia*, the Oregon Court of Appeals upheld the dismissal of Hanson's cross-complaint.

A federal district court, applying Illinois law, reached a different result. The case began when an in-house attorney for Northeast Illinois Regional Commuter Railroad Corporation suffered a work injury and filed an FELA lawsuit. Allegedly in retaliation for this suit, she was demoted and several other in-house lawyers defamed her, disrupting her ongoing relationship with the John Marshall Law School and a professional association.

In her subsequent, separate lawsuit for interference with prospective economic advantage, the individual attorney defendants moved to dismiss the claim, invoking a conditional privilege as counsel advising their client, their employer, the railroad. *Emery v. Northeast Ill. Reg. Commuter Railroad Corp.*, 2003 WL 22176077 (N.D. Ill. 2003). The district court, in *Emery*, refused to apply the privilege, given the allegations in the complaint:

> [E]ven where a conditional privilege exists, the privilege does not shield a defendant who acts with malice. For purposes of a claim for tortious interference with prospective economic relationship, 'malice' means 'intentionally and without justification…. Here, Emery alleges that the individual defendants *acted in their own personal interests, and… did so with 'a desire to harm Emery that was unrelated to the interests of their client*.'

Id. at *9 (emphasis added).

Although attorneys are mostly protected by the litigation privilege from liability for tortious interference for initiating litigation or conduct during civil litigation, these recent cases suggest courts may not uphold the privilege under circumstances in which the primary purpose of the litigation involves something other than adjudication of the claims, as illustrated by *Mantia*, or the attorney acts "with a desire to harm" an opponent, as illustrated by *Emery*.

Conclusion

The foregoing cases, drawn from district and appellate courts over the past six years, paint a picture of a segment of business tort law that is undergoing a transformation. Courts wrestle with whether to expand or contract longstanding privileges against liability for devious conduct by a competitor. Careful attention must be paid to fundamental principles of contract law when evaluating whether and when a contract is void for purposes of a tortious interference claim. Courts are carefully reviewing the motive behind and nature of conduct when evaluating whether an officer or director is personally liable under a tortious interference theory. Finally, an attorney's typical litigation privilege may not protect him or her from potential liability if his or her conduct toward an opponent is found to be malicious. These torts will surely continue to evolve to meet an increasingly competitive marketplace. FD