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Tortious Interference Issue

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Checking Misconduct in Competition Through the Tortious Interference with Contract Cause of Action

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Competition is the lifeblood of free-market capitalism. The opportunity to choose from among competing providers of goods and services fosters a race to the top in quality and a race to the bottom in price. As a society, we favor competition and the efficiencies realized by allowing stiff, even vicious, competition in the marketplace. Under the "efficient breach" theory, courts allow and public policy encourages parties to breach onerous, burdensome contracts and recommit resources to other contracting parties as long as the payment of damages is encompassed in the savings realized by nonperformance to the original party. There are, however, limits to competition and contract breaking. While parties are free to compete for and even breach their own contracts, society does not tolerate third parties using improper means to subvert existing contracts or encourage the use of noncompetitive strategies to effect breaches of contract.

Where is the line drawn? How does society accommodate the need for competition and efficiency in contracting against the need to protect the expectations of those who have already entered into contracts? The best way to illustrate the three-party relationship that gives rise to the tort of intentional interference with an existing contract is to recall the rather contentious relationship between Wiley Coyote, Acme Explosive Co., Inc., and Road Runner. Suppose Coyote enters into a contract with Acme for the provision of certain "mining equipment." Road Runner, a third party to this transaction, has a rather enhanced interest in seeing that the transaction between Acme and Coyote is not consummated. Road Runner, knowing of the contract between Acme and Coyote, calls Acme and offers double the money that Coyote had been willing to pay for the same mining equipment and to accept it FOB so that Acme need not traverse the precarious mountain roads and hair-pin turns otherwise required to deliver the shipment to Coyote's house. Recognizing the superior offer and calculating that it can pay damages to Coyote and *still* profit by redirecting the mining equipment to Road Runner, Acme breaches its contract with Coyote in favor of this better deal with Road Runner. Is this interference with the

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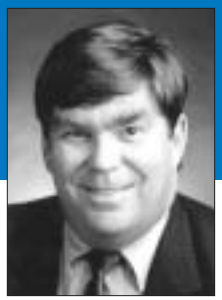


Robert E. Schaberg

R. Wayne Byrd

Message from the Chairs

We are excited about the accomplishments of the Committee and its Leadership Group over this past year and are looking forward to a successful and action-packed 2002-2003. Highlights for the coming year include the following:

Business Torts Journal

We are very pleased to introduce Bart Greenwald as our new Co-Editor of the *Business Torts Journal*. Bart is with Frost Brown Todd LLC of Louisville, Kentucky, and we are fortunate to have him assume this new position. In addition to changing the name of the Committee's publication from "newsletter" to "journal," Bart has aggressively redesigned the "look and feel" of the *Journal*. Please feel free to communicate any comments or thoughts to Bart at bgreenwald@fbtlaw.com.

CLE Seminar

Due to the overwhelming success of our co-sponsorship and participation in the 2001-2002 Midyear Meeting of the Corporate Counsel Group, we have been invited to co-sponsor its 2002-2003 meeting, now know as its CLE Seminar. It will be held from February 13-16, 2003, at the Biltmore Hotel, Coral Gables, Florida. This meeting is the best of both worlds because it not only offers a full array of substantive programs but it also offers an opportunity to meet and interact with fellow Committee members and those of the Corporate Counsel Group at a more intimate gathering. We received rave reviews about last year's meeting and expect this year's meeting to be even better. This year's CLE Seminar presents a perfect opportunity for you to get involved. We look forward to seeing you there.

Section Annual Conference in Houston, Texas

This year's Section Annual Conference will be held in Houston, Texas, April 10-13, 2003. We are particularly excited about this year's event because the Business Torts Litigation Committee will sponsor four substantive programs. In addition, as always, we will host an informal off-site dinner for our Committee members, and hold our Committee Business Meeting on one morning during the Conference. We will also present a substantive program at our morning business meeting. Our substantive programs at the Houston Meeting are all designed to focus on current issues of practical interest to our Committee members. We encourage you to attend these programs and come meet your fellow Committee members. Please remember that ALL Committee members are invited to attend our Business Meeting, which is usually held at 7:30 a.m. on the Friday of each Section Annual Conference and ABA Annual Meeting. Attending a Committee business meeting is one of the best ways to get involved in the Committee.

Committee Book Publications

As you probably already know, the Committee publishes two desk books: *Business Torts Litigation* and *Model Jury Instructions for Business Torts Litigation*. If you do not own and use these two publications, we encourage you to do so. They both are handy desk book references that offer quick answers to clients' questions. We are fortunate to have two Committee members who have volunteered to serve as Editors-in-Chief for the new editions of these two publications. David Solely of Bernstein Shur Sagyer & Nelson in Portland, Maine, will serve as Editor-in-Chief of *Business Torts Litigation* and Brad Nelson of Schopf & Weiss in Chicago, Illinois, will serve as Editor-in-Chief of *Model Jury Instructions for Business Torts Litigation*.

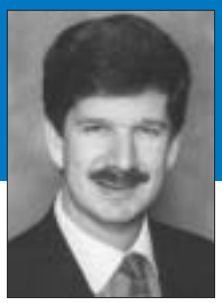
Just Do It—Get Involved

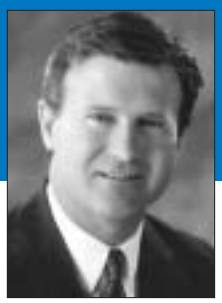
These past several years have been dynamic times for our Committee. We now have a proven track record of presenting cutting-edge programs at various Section meetings, and we are about to publish new editions of two of the biggest selling publications in the Section. We successfully co-sponsored the Corporate Counsel Committee's Midyear Meeting (now known as CLE Seminar), and it looks as though we will continue to do so in the future.

We have instituted an informal dinner gathering of Committee members at the Section's major meetings, which has served as a vehicle to both strengthen the ties between long-time members and provide an opportunity for new attendees to easily become integrated into the fabric of the Committee. This has resulted in an energized and interesting group of Committee members who have established friendships and professional connections. Wayne and I have seen attendance grow with each meeting and observed the ease with which Committee members welcome "first-timers." The new participants experience the fun, good fellowship, and camaraderie of our meetings and become regular attendees. There is so much more to membership in this Committee than simply receiving several newsletters per year. Rather, this Committee is composed of wonderful men and women who will make you a better litigatior, and make you laugh in the process.

Now is the time to be a "first-timer"! Just Do It! Be a "first-timer" at our next Committee or Section meeting!

Message from the Editors


Bart L. Greenwald


Timothy L. Bertschy

Welcome to the first edition of the new *Business Torts Journal*. We hope you find it informative, a good read, and helpful to your practice. Remember, this is your *Journal*. If you have any comments—good or bad—please let me know. We are always looking at ways to improve. And certainly, if you want to write articles for upcoming editions, please tell me as soon as possible. Space is limited, so we want to sign you up immediately. The schedule for future editions is as follows:

Edition	**Articles Due**
Unfair Trade Practices	January 15, 2003
Fiduciary Duty	May 15, 2003
Lanham Act/Trade Secrets	September 15, 2003
Fraud	January 15, 2004
Technology	May 15, 2004

I also want to highlight some of the interesting articles and other tidbits we will bring you in this and future issues. First, to get some of our younger Section members involved, we are asking for volunteers to interview some of our more seasoned members. In this edition, Amanda Main, a new Section member from Frost Brown Todd LLC in Louisville, Kentucky, has posed some interesting questions to Eric Olson, from Kirton & McConkie in Salt Lake City, Utah, on this month's topic—Tortious Interference. And Mark Ludolph, from Heyl, Royster, Voelker & Allen in Peoria, Illinois, probes our own Committee Co-Chair Bob Schaberg about what makes a good lawyer. If you would like to conduct one of these interviews in the future, just let me know. You also will see a new feature, called *Tips from the Trenches* in each edition of the *Journal*. In this issue, check out Michael Hyman's tips on how to write good (I mean, how to write *well*). At the ABA 2002 Annual Meeting in Washington, D.C., Michael and a host of other know-it-alls gave us a fantastic presentation on *101 Tips from the Trenches*. Because many of you couldn't make it to D.C., we decided to bring D.C. to you. Please let me know what you think of the new *Journal* and whether you can help write for future editions. I look forward to hearing from you. ■

Bart L. Greenwald

It has been a pleasure for the past seven years to serve as an editor of the *Business Torts Newsletter*. When I accepted this position, it was with a concern that I would end up writing much of the newsletter's content. That worry was quickly dispelled. Over the years, my co-editors, case reporters, and our subcommittee chairpersons have repeatedly come through, forwarding articles and case summaries of interest and pertinence to our practices.

Many thanks go to our Business Torts subcommittee chairpersons who have been particularly helpful and supportive. Not only the past success of our newsletter, but the vibrancy of our subcommittee, are reflections of their leadership and talent.

My special thanks go to those who have served faithfully as case reporters for federal and state jurisdictions across the country. Combing reported decisions for cases of interest to our readership and preparing synopses of these cases on a regular basis are not easy in the midst of busy law practice. Your dedication and commitment are appreciated not only by me but by our readership, too.

I look forward to my final year as a co-editor of the newsletter—now journal—with a great deal of enthusiasm. My friend Bart Greenwald is joining me as co-editor and will serve in that position for several years. He brings with him fresh ideas for keeping our publication timely, attractive, and valuable. I am sure that you will welcome the changes, while continuing to find the publication a source of meaningful assistance to your practice. ■

Timothy L. Bertschy

Checking Misconduct

(continued from page 1)

contract between Acme and Coyote? Certainly. Is it tortious interference with the contract between Acme and Coyote? No. This is the essence of aggressive competition.

Suppose, alternatively, that Road Runner—lacking opposable thumbs, sufficient vocational training and income—cannot out bid Coyote on the Acme contract. Instead, he resorts to a number of questionable schemes to disrupt the consummation of the deal and dedicates himself to making it difficult for Acme to deliver and be paid for the all-important mining equipment. For example, Road Runner creates a detour on a road that Acme intends to use to deliver the mining equipment. Instead of continuing on to Coyote's home, the road is deceptively detoured by Road Runner so that it runs directly into the face of a solid cliff wall that Road Runner falsely represents as a tunnel and continuation of the road. As a result of Road Runner's deception, the mining equipment is destroyed before it can be tendered to Coyote. Though Coyote is ready, willing, and able to accept and pay for the equipment, Acme is unable to deliver and is in breach of its obligations to Coyote. Is this tortious interference with the contract between Coyote and Acme? Yes. This is not aggressive competition. This is an intentional tort for which Road Runner owes compensation for damages.

There must be a valid contract subject to interference for there to be a claim for tortious interference. Without a valid contract, there is no cause of action.

Causes of Action for Tortious Interference with Existing Contracts

While there is something intuitively wrong with what Road Runner has done, it is a bit more complex to determine who has a cause of action against him for the breach of Acme's contract with Coyote. Under section 766 of the Restatement (Second) of Torts, followed by most jurisdictions that recognize the tort, Coyote has the cause of action against Road Runner for tortious interference with the contract for denying him the benefit of Acme's performance on their contract. When section 766A (which is recognized by only a minority of jurisdictions) is added to Section 766 of the Restatement (Second) of Torts, both Acme and Coyote have the cause of action. Coyote has a cause of action against Road Runner for the loss of Acme performance, yet, more interestingly and powerfully, Acme has a cause of action against Road Runner for causing its own breach of contract with Coyote.

A. Compensating the Non-Breaching Party for the Interference

Most states that recognize the tort of tortious interference with contract have modeled it on The Restatement (Second) of Torts section 766. Under the standard articulated by the Restatement,

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person 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. (emphasis added).[1]

Why is a cause of action under Restatement (Second) section 766 so powerful? It is powerful because, in its absence, Coyote would not have a remedy for Road Runner's interference with his transaction. Coyote might sue Acme for breach of contract, yet Acme might well be successful in claiming that performance was made impossible because of Road Runner's intentional torts. Coyote and Road Runner are not privies to the contract so Coyote lacks a direct breach of contract cause of action against Road Runner. Moreover, Coyote is not directly damaged by Road Runner's intentional tort against Acme. While Acme might have traditional tort causes of action against Road Runner, Acme might choose not to pursue Road Runner. Section 766 bridges the gap between Coyote and Road Runner by allowing Coyote to pursue Road Runner for intentionally and improperly interfering with Acme's performance of its obligations to him. Should Coyote succeed in his action against Road Runner, Coyote would be permitted to recover from Road Runner the loss caused by Acme's breach.

There must be a valid contract subject to interference for there to be a claim for tortious interference with such. Without a valid contract, there is no cause of action.[2] Demonstrating that the defendant actually knew of the existence of a contract between the plaintiff and a third party is another essential element of the cause of action.[3] Section 766, comment (i) of the Restatement (Second) of Torts (1977) states, "To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract."[4] If the defendant does not know of the contract, the intentional character of the tort is lacking and the cause of action collapses.[5]

A party, however, cannot escape liability by being willfully ignorant about the existence of a contract. Where a plaintiff can show that the interfering party had knowledge of such facts and

circumstances that would lead a reasonable person to believe in the existence of the contract and the plaintiff's interest in it, a finder-of-fact may determine that the defendant had inquiry notice of the contract. "It is enough to show that defendant had knowledge of facts, which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties."[6] Moreover, in a claim for interference with an existing contract, it is not necessary for the defendant to appreciate the legal significance of the facts that give rise to the contractual duty.[7] "If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what it is judicially held to have."[8]

Courts have applied the "but for" test to fulfill the damage requirement for tortious interference with contract.[9] The two-step "but for" test asks: (1) did the defendant actively and affirmatively take steps to induce the breach, and (2) if so, would the plaintiff's business expectancy been realized in the absence of the defendant's interference?[10] Once the fact of damages has been established, the measure of damages is calculated as the loss caused by the breach.[11] Yet, "[s]ince the damages recoverable for breach of the contract are common to the action against [the party breaching the contract and the party inducing the breach], any payment made by the one who breaks the contract or partial satisfaction of the judgment against him must be credit in favor of the defendant who has caused the breach."[12]

Another critical element to the cause of action is the requirement that the interference be "improper." To determine whether a defendant's acts are "improper," courts engage in an examination of various factors, including the interests of the parties and the interests of society.[13] A court must weigh the interest shared by society and the contracting parties in the security of established contracts against the interest in freedom of business action and society's concomitant interest in free competition.[14]

Improper Interference

Consider these factors to determine whether interference is proper:

- 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 action of the actor and the contractual interests of the other;
- the proximity or remoteness of the actor's conduct to the interference; and
- the relations between the parties.

The Restatement itself provides an amorphous list of factors to be weighed in determining whether interference is "improper."[15] (*See box in first column.)*

Means are generally thought to be improper if they involve acts that are independently tortious, such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade, or any other wrongful act recognized by statute or the common law."[16] Moreover, "[c]onduct specifically in violation of statutory provisions or contrary to public policy may for that reason make an interference improper."[17] No liability arises, however, from interfering with a contract or business expectancy, if the defendant had an unqualified legal right to do the action of which the petition complains.[18]

B. Compensating the Breaching Party for the Tortious Interference

Section 766A of the Restatement (Second) of Torts is, from one view, a logical extension of section 766; from another view, a dangerous expansion of contract liability. This section states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between, another and a third person, by preventing *the other* from performing the contract *or causing his performance to be more expensive or burdensome*, is subject to liability to the other for the pecuniary loss resulting to him (emphasis added).

As comment (c) to section 766A states,

> This Section and § 766 both involve interference with an existing contract. Under § 766, the plaintiff's interest in obtaining performance of the contract is interfered with directly. Under this Section the interference is indirect, in that the plaintiff is unable to obtain performance of the contract by the third person because *he has been prevented from performing his part* of the contract and thus from assuring himself of receiving the performance by the third person." (emphasis added).

More interestingly, comment (c) to section 766A states, "If the plaintiff's performance has intentionally been made *more burdensome or more expensive* by the actor, the cost that he incurs to obtain the performance by the third party has increased, and the net benefit from the third person's performance has been correspondingly diminished."[19] In other words, under section 766A, there is no requirement that the contract actually be breached. Section 766A allows a party to collect damages from the interferor if the interferor's conduct merely makes it more expensive for the contracting party to perform. Thus, going back to the Road Runner example, if Acme's encounter with the deceptively painted cliff wall had caused massive damage to Acme's vehicles, yet the mining equipment was undamaged and capable of being delivered to Coyote with no breach of contract, Acme could sue Road Runner for the additional cost of performing its contract.

Courts that have adopted section 766A think it is a logical extension of the liabilities imposed by section 766. For example, though Pennsylvania has not formally adopted section 766A, a Pennsylvania court has stated:

> It seems irrational to recognize a cause of action for a party's conduct directed at a third party designed to prevent that third party from performing a contract with another and not recognize a similar cause of action for that other party where the actor's conduct is instead directed at the other to prevent them from performing. In either case an actor's improper conduct is preventing the performance of a valid contract to which it is not a Party."[20]

The unity of interest between managers and their company has been defined as "the manager's privilege."

The expansive reach of section 766A troubles other courts. As the United States District Court for the Western District of Kentucky expressed its reservations,

> The actual language of § 766A is so all encompassing and vague that to adopt it directly would cause tremendous confusion without creating a clear societal benefit. The conduct conceivably within its scope could be indistinguishable from the kind of unfettered commerce upon which courts have been reluctant to pass judgment. . . . The torts discussed in § 766A necessarily involve highly speculative damages. Parties to contracts have a full array of contractual remedies to resolve inequities of performance caused by third persons. The Court is not persuaded that this new tort is necessary to correct a glaring inequity among commercial parties.[21]

Section 766A is problematic to some courts because it duplicates other causes of action. Reverting to the Road Runner fact pattern, it is assumed that where Road Runner has prevented Acme's performance, Acme is not a willing participant in Road Runner's actions. Road Runner's action with respect to Acme constitutes independently actionable tortious conduct. So characterized, the adverse effects on Acme's contract with Coyote should become an element of damages subject only to the usual limitations of causation, mitigation, and reasonable certainty.[22] As Professor Prosser points out,

> The bulk of the cases involving interference as distinct from inducement involve . . . physical interference with person or property and also involve the commission of some independent tort . . . Methods tortious in themselves are of course unjustified and liability is appropriately imposed where the plaintiff's contract rights are invaded by violence, threats and intimidation, defamation, misrepresentation, unfair competition, bribery and the like . . . *Thus in many cases interference with contract is not so much a theory of liability in itself as it is an element of damage resulting front the commission of some other tort, or the breach of some other contract*.[23]

What is bothersome to some of the courts that have rejected section 766A is that it duplicates protection already afforded through those tort causes of action. This duplication is seen as coming at a high cost. "It risks chilling socially valuable conduct and creates new liability of uncertain dimensions."[24]

Defenses and Privileges

Essential to recovery on the theory of tortious interference with contract is the existence of three parties: a tortfeasor who intentionally interferes with a contract between the plaintiff and another.[25] A claim for tortious interference with contractual relations "contemplates interference from a third party, not from a party to the contract itself."[26]

The Restatement (Second) of Torts recognizes that under certain circumstances, interference with contract relations is privileged and is therefore not improper as a matter of law.[27] The privilege to act for the welfare of a third person provides as follows: One who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract or enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if the actor (a) does not employ wrongful means and (b) acts to protect the welfare of the third person.[28] As the Georgia courts have described it, "[p]rivilege means a legitimate or bona fide economic interest of the defendant or a legitimate relationship of the defendant with the contract, which causes the defendant not to be considered a stranger, interloper, or meddler to the contract."[29]

The concept of not being a stranger to the contract is a constant theme that runs throughout the defenses to the tort of tortious interference with an existing contract. Where a defendant can show that he or she should be viewed as the *same person* as one of the contracting parties, the tort collapses because a party to a contract can only breach it; it cannot tortiously interfere with it.

A. The Manager's Privilege

Employees have filed actions against supervisors and managers claiming that, through disciplinary measures or negative performance evaluations, these people interfered with the employment contract the plaintiff had with his or her company. Absent a finding that the manager or supervisor acted improperly, as dis-

cussed below, such a cause of action will fail because a corporate officer acting for the corporation is the corporation for purposes of a tortious interference cause of action.[30] This is because corporations can *only* act through their officers and agents.[31] The unity of interest between managers and their company has been defined as "the manager's privilege." The manager's privilege establishes that where a manager, with impersonal or disinterested motive, properly endeavors to protect the interests of his or her principal by counseling the breach of a contract with a third party that the manager reasonably believes to be harmful to his or her employer's best interests, such conduct will be shielded from a claim of tortious interference.[32] Yet, "in order to take advantage of the manager's privilege, a director and shareholder of a corporation must show that he or she was involved in the management of the company and was authorized to act on behalf of the corporation when he or she interfered with the . . . contract at issue."[33] Thus, a court must make a factual inquiry before extending the benefit of this privilege to managers.

The manager's privilege is lost if it can be established that the manager engaged in a personal vendetta, an excursion from his or her duties to the company, acted with self-interest in a way that is harmful to the company, or otherwise acted maliciously.[34] "Particularly is this true in supervision of the plaintiff employee's performance or the power to participate in the corporate decision to terminate or otherwise discipline [a] plaintiff."[35] The privilege evaporates because it is clear that the manager is not representing and should not be treated as synonymous with his or her company. Thus, the requisite three-party relationship is restored and the cause of action resuscitated.

B. The Agent's Privilege

Of course, closely related to the manager's privilege is the "agent's privilege," founded on the same rationale. "An agent of a principal is conditionally privileged against a claim that it interfered in a third-party's relationship with the principal" essentially because the principal acts through its agents.[36] This privilege can be overcome if it is shown that the agent acted maliciously or without justification—which generally requires a showing that the agent acted in its own interests and contrary to the interests of its principal—or that the agent engaged in conduct totally unrelated or antagonistic to the interest giving rise to the privilege.[37]

C. The Parent/Subsidiary Privilege

Corporate organizational trees also might provide shelter from tortious interference claims. Again, the foundation of this purported "privilege" is the unity of interest between the allegedly tortfeasing parent corporation and the contracting subsidiary. Where there is unity between the corporate parent and the subsidiary, the three-party roster needed to play this cause of action is destroyed.

As a general statement of this principal, the Tennessee Supreme Court has stated that "a parent corporation has a privilege pursuant to which it can cause a wholly owned subsidiary to breach a contract without becoming liable for tortiously interfering with a contractual relationship."[38] It continued, however, by making clear that such a privilege "may be lost if the parent company acts contrary to the subsidiary's economic interests or if the parent corporation employs wrongful means in such situations"[39] and when the corporate parent employs wrongful means in causing the termination of a contract between a subsidiary and a third party.[40] Thus, even if a parent corporation acts in the interest of its subsidiary company, it can be found liable in tort if it accomplishes its end through acts "which are wrongful in and of themselves, such as 'misrepresentations of fact, threats, violence, defamation, trespass, restraint of trade, or any other wrongful act recognized by statute or common law.' "[41]

In explaining the policy choice behind the privilege enjoyed by corporate parents with respect to their company subsidiaries, a Texas court has stated, "a parent and a subsidiary are so closely aligned in business interests as to render them, for tortious interference purposes, the same entity."[42] Yet, some courts are uncomfortable providing such blanket protection to a corporate parent that is, designedly, separate from its subsidiary. Noting the lack of consistency between collapsing the distinctions between parents and subsidiaries for tortious interference claims, yet maintaining such separateness for veil piercing claims, the Eighth Circuit Court of Appeals has ruled that an allegedly tortfeasing parent corporation must rely on equitable principles to assert its unity with the contracting subsidiary. It stated that "[i]n cases where a creditor seeks to recover from a parent corporation for its subsidiary's debts, 100 percent ownership and control does not itself authorize piercing the corporate veil. It would be incongruous to protect a corporate parent in one situation with a rule that 100 percent ownership is *not* enough to find a parent and subsidiary identical and to protect a corporate parent in another situation . . . with a rule that 100 percent *is* enough to find a parent and subsidiary identical."[43] Thus, as in a corporate veil piercing context, where a plaintiff must establish that equity requires that the two corporations be treated as one, a defendant in a tortious interference

Some courts are uncomfortable providing such blanket protection to a corporate parent that is, designedly, separate from its subsidiary.

action must rely on equitable grounds for treating two separate corporations as a single entity so as to defeat the tortious interference cause of action.[44]

D. The Superior Interest Privilege

No liability arises for interfering with a contract if the action complained of was an act that the defendant had a definite legal right to do without any qualification.[45] There is no improper interference where one intentionally causes a third person not to perform an existing contract by asserting in good faith one's own legally protected interest.[46] Under this rule, if two parties have separate contracts with a third party, each may resort to any legitimate means at his or her disposal to secure performance of his or her own contract, even though a breach of the other contract will necessarily result.[47] With respect to an existing contract, however, it cannot be claimed that the interference is privileged merely because the action furthered "competition."[48] A qualified justification given to competition, which is set out in Restatement (Second) Torts section 768, has no application for an *existing* contract,[49] only for a *prospective* contractual relation.[50]

One who uses tortious or illegal means to disrupt a contract can expect to be sued by one or both of the contracting parties.

Conclusion

Competition has limits. Generally speaking, one who uses tortious or illegal means to disrupt a contract can expect to be sued by one or both of the contracting parties for tortious interference with contract. While a defendant to such claims can defeat liability by demonstrating that it should be treated as if it were one and the same as a contracting party, most jurisdictions will withdraw the benefit of such a defense if it is shown that the action by the defendant was harmful to the one it claims to represent or where the means for acting in that party's interests were tortious or illegal.

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Endnotes

1. Courts articulate the elements of such a cause of action differently, but generally speaking they are: (1) the plaintiff had a valid contractual relationship with a third party; (2) the defendant knew of that relationship; (3) the defendant intentionally interfered with that relationship; (4) the defendant's action caused the third party to breach its contractual relationship with the plaintiff; and (5) the plaintiff suffered damages. *Grimm v. U.S. West Communications, Inc.*, 644 N.W.2d 8, 13 (Iowa 2002); *cf. Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust*, 38 P.3d 12, 31 (Ariz. 2002) (stating the elements as (1) existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interferor; (3) intentional interference including or causing a breach; (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly); *Gore v. Sherard*, 50 P.3d 705 (Wyo. 2002): (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional and improper interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted; *Philadelphia Plaza Phase II v. Bank of America Nat. Trust and Sav. Assn.*, 2002 WL 1472338, *5 (May 30, 2002) (combining tortious conduct toward an existing contract with tortious conduct against a prospective contract: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct); *Hodges v. Buzzeo*, 193 F. Supp. 2d 1279, 1284 (M.D.Fla. 2002) (1) the existence of a business relationship under which the plaintiff has legal rights, not necessarily evidenced by an enforceable contract; (2) proof of the defendant's knowledge; (3) intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of interference.).

2. *Dolton v. Capitol Federal Sav. and Loan Assn*, 642 P.2d 21, 22-23 (Colo.App. 1981).

3. *See G.S. Enterprises, Inc. v. Falmouth Marine*, Inc., 571 N.E.2d 1363, 1369 (Mass. 1991).

4. *Ryan, Elliott and Co., Inc. v. Leggat, McCall & Werner, Inc.*, 396 N.E.2d 1009, 1013 n.5 (Mass. App. Ct., 1979) (citing with approval Restatement (Second) of Torts § 766, cmt. i (1977)).

5. *See Gore*, 50 P.3rd at 710-11 (upholding dismissal of cause of action where evidence showed that the oral lease between the parties had expired, contract negotiations had stalled and had not proceeded for months, that there was no meeting of the minds or agreement on the terms of any future contract, and that parties did not know of any contractual relationship or business expectancy and explaining that "[a] reasonable probability of a contract is shown if there is a reasonable assurance of a contract in view of all the circumstances."); *Walker v. Waltham House. Auth.*, 44 F.3d 1042, 1048 (1st Cir. 1995) (no liability where the defendant reasonably believed the plaintiff had abandoned the contract); W. Page Keeton et al., Prosser And Keeton on the Law of Torts Section 129 at 982 (5th ed. 1984), quoted with approval in *Bell v. May Dept. Stores Co.*, 6 S.W.3d 871, 878 (Mo. en banc 1999).

6. *ACT, Inc. v. Sylvan Learning Systems, Inc.*, 296 F.3d 657 (8th Cir. 2002) (describing the inquiry notice required under Iowa law to be "knowledge of facts which, if followed by reasonable inquiry, would have led to the disclosure of the contractual relationship" yet affirming the dismissal of the action where evidence was insufficient as a matter of law to create a jury question establishing that the defendant knew of the existence of the contract in question.); *See Ryan, Elliott & Co., Inc. v. Leggat, McCall & Werner, Inc.*, 396 N.E.2d 1009, 1012-13 (1979) (no knowledge of contract where the defendant reasonably relied on representation that no binding contract existed); 45 Am, Jur. 2d Interference § 11.

7. *Property Tax Representatives, Inc. v. Chatam*, 891 S.W.2d 153, 160

(Mo.App.1995) (quoting Restatement (Second) Torts § 766, cmt. i).

8. *Id.; See Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 821 (1st Cir. 1948).

9. *Fabricor, Inc. v. E.I. DuPont de Nemours & Co.*, 24 S.W.3d 82, 93 (Mo.App.2000).

10. *Id*. at 93-94.

11. *Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc*., 690 P.2d 207, 212 (Co. 1984).

12. Restatement (Second) of Torts § 774A.

13. *Id*.

14. *Id*.

15. *Philadelphia Plaza-Phase II v. Bank of America Nat. Trust and Sav. Ass'n*, 2002 WL 1472338 *5 (Pa.Com.Pl., May 30, 2002) (No.332 May term 2002).

16. *Ozark Employment Specialists, Inc. v. Beeman*, 80 S.W.3d 882, 895 (Mo. App. W.D. 2002); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 317 (Mo. 1993).

17. *Wells Fargo Bank v. Arizona Laborers*, 38 P.3d 12, 32-33 (Az 2002).

18. Ozark, 80 S.W.3d 882; *Vikings, USA Bootheel MO v. Modern Day Veterans*, 33 S.W.3d 709, 711 (Mo.App. S.D. 2000).

19. Restatement (Second) of Torts § 766A, comment c (1979).

20. *P.V.C. Realty ex rel. Zamias v. Weis Markets*, 2000 WL 33406981 (Pa.Com.Pl., 2000); *cf GE Capital Mortg. Services, Inc. v. Pinnacle Mortg. Inv. Corp*., 897 F. Supp. 854, 868 (E.D.Pa. 1995) (where the court found that "in Pennsylvania, the viability of a section 766A cause of action remains an open question.").

21. *CMI, Inc. v. Intoximeters, Inc.*, 918 F.Supp. 1068, 1080 (W.D. Ky. 1995).

22. *Windsor Securities, Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 663 (3rd Cir. 1993).

23. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129, at 992 (5th ed. 1984) (footnotes omitted) (emphasis added).

24. *Windsor Securities*, 986 F.2d at 663.

25. *Ryan v. Lower Merion Tp*., 205 F. Supp.2d 434, 441 (E.D. Pa. 2002). (citing *Maier v. Maretti*, 671 A.2d 701, 707 (Pa.Super. 1995), reargument denied (Mar 06, 1996), appeal denied 694 A.2d 622 (Pa. 1997).

26. *Howard v. Youngman*, 81 S.W.3d 101, 116 (Mo. App. ED, 2002); Fields v. R.S.C.D.B., Inc., 865 S.W.2d 877, 879 (Mo. App. E.D. 1993).

27. *Omedelena v. Denver Options, Inc*., 2002 WL 391697, *8 (Colo. App. March 14, 2002) No. 00CA1640.

28. *Id*.

29. *Culpepper v. Thompson*, 562 S.E.2d 837, 840-840-41 (Ga. App. 2002).

30. *Howard v. Youngman*, 81 S.W.3d 101, 117 (Mo.Ct.App 2002).

31. *Id.; Forrester v. Stockstill*, 869 S.W.2d 328 (Tenn.1994).

32. *Aalgaard v. Merchants Nat. Bank Inc*., 224 Cal.App.3d 674, 684 (Cal.App. 3 Dist. 1990), cert. denied, 502 U.S. 901 (1991); *see also Whealton v. Allen*, 2002 WL 1788431 *7 (Ca1.App. 6 Dist) No. H022421.

33. *Kozlowsky v. Westminster Nat'l Bank*, 6 Cal.App.3d 593, 598 600 (Cal .App. 2 Dist., 1970).

34. *Fahrmann v. Fredd*, 2002 WL 1467451, at *5 (Minn. App. July 1, 2002) (holding that "a company officer, agent or employee is privileged to interfere with or cause a breach of another employee's employment contract with the company, if that person acts in good faith, whether competently or not, believing that his actions are in furtherance of the company's business. This privilege may be lost, however, if the defendant's actions are predominantly motivated by malice and bad faith, that is, by personal ill-will, spite, hostility, or a deliberate intent to harm the plaintiff employee."); s*ee also Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 506-507 (Minn. 1991).

35. *Fahrmann*, at *5; *Nordling*, at 506-507.

36. *Traum v. The Equitable Life Assurance Society of the United States*, 2002 WL 1163725 at *13 (N.D. Il. May 31, 2002) No. 00 C 3444; *Citylink Group, Ltd. v. Hyatt Corp.*, 729 N.E.2d 869, 877 (I11. App. 1st Dist. 2000); *Stafford v. Puro*, 63 F.3d 1436, 1441 (7th Cir. 1995); *Stanford v. Kraft Foods, Inc*., 88 F.Supp.2d 854, 856 (N.D.Ill. 1999); *Roy v. Austin Co.*, 1996 WL 599435 *10 (N.D.Ill. Oct. 16, 1996).

37. *Traum*, 2002 WL 1163725, at *14; *See Citylink*, 729 N.E.2d at 877; *Storm & Associates, Ltd. v. Cuculich*, 700 N.E.2d 202, 209 (Ill. App. 1st Dist. 1998); *Stafford*, 63 F.3d at 1441; *Stanford*, 88 F. Supp.2d at 856; *Naeemullah v. Citicorp Services, Inc.*, 78 F.Supp.2d 783, 793 (N.D.Ill. 1999); *Roy*, 1996 WL 599435 at *10.

38. *Waste Conversion Systems, Inc. v. Greenstone Industries, Inc.*, 33 S.W.3d 779, 780 (Tenn. 2000) (citing *T.P. Leasing Corp. v. Baker Leasing Corp.*, 732 S.W.2d 480, 483 (Ark. 1987), corporation is privileged to interfere with contract relations when contract threatens economic interest of wholly owned subsidiary, unless there is clear evidence of wrongful means or improper purpose).

39. *Waste Conversion Systems*, at 783 (holding that "A parent corporation acting contrary to its wholly-owned subsidiary's economic interests can be considered a third party to its subsidiary's contractual relationship and can be held liable for tortiously interfering with that relationship."); *Long Distance International, Inc. v. Telefonos de Mexico, S.A.*, 2002 WL 384136, at *6 (Tex. App.-San Antonio, March 13, 2002) (denying privilege where evidence showed that parent corporation had divergent interests and only owned 10 percent of the subsidiary), opinion withdrawn following settlement, 2002 WL 1999754 (Tex. App.-San Antonio Aug 30, 2002).

40. *Waste Conversion Systems*, 33 S.W.3d at 784.

41. *Waste Conversion Systems*, 33 S.W.3d at 783-84 (citing *Paglin v. Saztec Int'l, Inc*., 834 F. Supp. 1184, 1196 (W.D. Mo. 1993)).

42. *American Medical Int'l v. Giurintano*, 821 S.W.2d 331, 336 (Tex.App.-Hous. (14 Dist.) 1991).

43. *Phil Crowley Steel Corp. v. Sharon Steel Corp*., 702 F.2d 719, 722 (8th Cir. 1983) (internal quotations and citations omitted; emphasis in the original).

44. *Id*.

45. *Howard v. Youngman*, 81 S.W.3d 101, 120 (Mo. Ct. App 2002); *see also Pillow v. General American Life Ins. Co*., 564 S.W.2d 276, 281 (Mo.App.1978).

46. *Francisco v. Kansas City Star Co*., 629 S.W.2d 524, 534 (Mo. App. W.D. 1981); Restatement (Second) Torts § 773.

47. *McReynolds v. Short*, 564 P.2d 389, 394 (Ariz. App. Div. 2 1977); *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 112 P.2d 631, 633 (Cal. 1941); Restatement (Second) Torts § 733, cmt. a, illus. 3.

48. *Howard v. Youngman*, 81 S.W.3d 101, 115 (Mo. App. E.D. 2002) (No. ED 79283, ED 79710, ED 79302, ED 79303), rehearing and/or transfer denied (79283) (Jun 05, 2002), transfer denied (Aug 27, 2002).

49. *Downey v. United Weatherproofing*, 253 S.W.2d 976, 982 (Mo. 1953).

50. Restatement (Second) Torts Section 768; *Briner Elec. Co. v. Sachs Elec. Co.*, 680 S.W.2d 737, 741-42 (Mo.App. E.D. 1984).

Parents Interfering with Their Children's Business: Are Parent Corporations Liable for Terminating Subsidiaries' Contracts?

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For the last three years, Production LLC has been providing Subsidiary, Inc., with parts critical to the manufacture of Subsidiary's primary product line. Production and Subsidiary have a written, five-year contract requiring Production to provide all of Subsidiary's requirements for those parts with payment due within 45 days of each delivery. While Subsidiary's payments have been relatively consistent over the years, that has slowed and many invoices remain open. At the same time, rumors begin to circulate that Subsidiary is having financial trouble and in need of significantly higher profit margins than are generated by the products on which it uses Production's parts.

Subsidiary has several affiliated, sister corporations all of which are owned, in whole or in part, by Parent, Inc., Production has never had business directly with Parent Inc., and in fact, Production's most recent attempt to expand its business to supply Parent, Inc., met with complete rejection and accusations of over billing and poor quality products to Subsidiary.

Having dealt primarily with employees of Subsidiary through the years, Production became even more concerned when top executives from Parent, Inc., and its other affiliated companies started attending meetings and making demands that Production renegotiate its prices with Subsidiary. In confidence, Subsidiary's national purchasing manager shared with Production's CEO that Parent, Inc., has decided that Subsidiary is not profitable enough to satisfy Parent, Inc.'s annual projections and is planning to implement significant constraints on Subsidiary's future business. Production's fears finally become reality when Subsidiary's CEO is replaced by a long time Parent, Inc., executive, and Parent, Inc., immediately delivers formal notice that Subsidiary will no longer honor the supply contract and that Subsidiary is likely to dissolve. Meanwhile, the Parent, Inc., family projects a record year of revenues and profits.

Unable to obtain voluntary payment from Subsidiary, Production considers litigation. Production is confident that it has an enforceable contract with Subsidiary and that the open invoices are fully defensible. But collection on a breach of contract judgment against Subsidiary is unlikely, especially to cover all of Production's losses. Can Production look to Parent, Inc., under a theory of tortious interference with the Production/Subsidiary contract?

Several courts around the country have addressed similar fact patterns. The primary question comes down to whether a parent corporation is privileged to interfere with the contracts of its subsidiary. As is often the case with state tort law, the answers to this question vary widely. Some states treat parent corporations no differently than any other third party to a contract. Other states grant a great deal of protection to parent corporations under a "unity of interest" theory that permits them to legally "interfere" with their subsidiaries' contracts. Still other states have adopted a limited or qualified privilege for parent corporations as a general rule, but have also recognized exceptions where the parent company acts in bad faith or uses improper means.

The Basics of Tortious Interference

A signatory to a contract will frequently only be liable in contract rather than tort, thereby preventing recovery of anything other than compensatory damages. To increase the likelihood of recovery (or settlement), many lawyers look for a third-party's inducement of a breach under a tortious interference with contract theory.

The majority of states recognize similar elements for tortious interference with contractual relations. Third parties to a contract are typically liable in tort upon a showing of (1) the existence of a valid contract, (2) the defendant's knowledge of that contract, (3) defendant's intentional acts designed to induce a breach, (4) actual breach, and (5) resulting damages.[1] However, application of that relatively uniform cause of action takes many twists and turns in the context of a parent corporation's interference with its subsidiary's contract.

From Bright Lines to Everything Else

Under many areas of corporate law, different corporate organization provides a critical distinction and separation between a parent and its subsidiary. Parent and subsidiary corporations are treated as different legal entities absent a showing that the alleged separate nature is merely a sham requiring piercing of the corporate veil. Likewise, many states carry that through to claims for tortious interference by a parent corporation. If the parent and subsidiary are different entities, the parent will be treated the same as any other third party to the subsidiary's contract - including potential liability for intentionally inducing the subsidiary to breach that contract.[2] Conduct from the well-reasoned business

decision to the "arbitrary and whimsical interference" can led to liability under those holdings.[3]

Several other jurisdictions appear to grant almost complete "immunity" to a parent corporation's actions with regard to its subsidiary's contracts.[4] The primary basis for this line of case law is that the parent and subsidiary have a unity of interest.[5] One court following this path concluded that "the interests of [parent and subsidiary] are aligned so closely that we have difficulty even recognizing their separate identities for the purpose of this [tortious interference] analysis."[6] If such a unity of interest exists, then the parent is effectively deemed not to be a third party to the contract and falls outside the elements of a tortious interference claim.[7]

Still other courts have split the difference between the bright line tests. That middle ground holds that parent corporations may enjoy a privilege to interfere with their subsidiaries' contract unless the parents employ "wrongful means" or acted with "improper purposes."[8] As is typical with both general rules and their exceptions, there does not appear to be any well-defined standards for evaluating what may constitute wrongful means or improper purposes. Improper means may include misrepresentations of fact, threats, violence, defamation, trespass, restraint of trade, or any other wrongful act recognized by statute or common law.[9] To determine whether interference in a given case is proper, one court has examined a number of factors to decide whether, upon consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another.[10]

Improper means may include misrepresentations of fact, threats, violence, defamation, trespass, restraint of trade, or any other wrongful act recognized by statute or common law.

Those factors included:

a. the nature of the actor's conduct;
b. the nature of the expectancy with which his conduct interferes;
c. the relations between the parties;
d. the interest sought to be advanced by the actor; and
e. the social interest in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.[11]

Whose Ox Is Being Gorged?

Yet another line of cases places the analytical focus on who benefits from the parent corporation's interference. While clear rules result, consensus still does not. Depending on your jurisdiction and choice of law, the parent corporation will enjoy a privilege for its actions in inducing a breach that was in the subsidiary's economic best interest.[12] Stated slightly differently, the parent can lose its privilege if it acts contrary to the subsidiary's interests.[13] Another iteration finds that a parent corporation's saving grace will be found in actions taken to protect the parent's own economic interests.[14]

Still another court has ruled that the parent corporation will be privileged as long as it does not benefit the parent.[15] To complete the nearly full circle of possibilities, in other jurisdictions the parent corporation's actions may be privileged only if they are not taken solely to protect the parent's economic interest.[16]

What may be a sound business decision in one jurisdiction may result in compensatory and punitive damages for tortious interference in another. As with human parents and their children, corporate parents' decisions sometimes hurt the parent as much as it hurts the subsidiary.

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Endnotes

1. *See, e.g.*, Restatement (Second) of Torts, §776; *Pacific Gas & Elec. Co. v. Bear Stearns & Co*., 791 P.2d 587, 589-90, 50 Cal.3d 1118; *Re/Max Int'l, Inc. v. Realty One, Inc*., 924 F. Supp. 1474, 1503-04 (N.D. Ohio 1996); *Mason v. FDIC*, 888 F. Supp 799, 807 (S.D. Tex. 1995).

2. *Oxford Furniture Cos. v. Drexel Heritage Furnishings, Inc*., 984 F.2d 1118, 1126 (11th Cir. 1993) (applying Alabama law); *Ashlar Financial Services, Corp. v. Sterling Finance Co., 2002 U.S. Dist. LEXIS 2086*, (N.D. Tex. 2002); *Addison v. Everest Connections Corp*., 2001 U.S. Dist. LEXIS 17805 (D. Minn. 2001), *aff'd*, 2002 U.S. App. LEXIS 12195 (8th Cir. 2002); *Richland Valley Products, Inc. v. St. Paul Fire & Marine Ins. Co*., 1995 U.S. Dist. LEXIS 22107 (W.D. Wis. 1995) (applying Wisconsin law); *Chase v. Weight*, 1988 U.S. Dist. LEXIS 11566, *7 (D. Ore. 1988) (applying Oregon law); *Shared Communications Services of 1880-80 JFK Boulevard Inc. v. Bell Atlantic Properties, Inc*., 692 A.2d 570, 576 (Pa. Sup. Ct. 1997*); Juengel Const. Co. v. Mt. Etna, Inc,*. 622 S.W.2d 510,516 (Mo. App. 1981)

3. *See, e.g., Juengel Const*., 622 S.W.2d at 516.

4. *Boulevard Associates v. Sovereign Hotels, Inc*. 72 F.3d 1029, 1036 (2d Cir. 1995); *Advent Systems Limited v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991); *Green v. IUM*, 748 F.2d 827 (3d Cir. 1984); *Hamamoto Corp. v. International Savings & Loan Assn., 2002 Haw. App. LEXIS 128, *49 (Haw. App. 2002); H.S.M Acquisitions, Inc. v. West*, 917 S.W.2d 872, 882 (Tex. Ct. App. 1996).

5. This unity of interest holding is analogous to the intra-corporate immunity doctrine that provides a defense to allegations that related corporations cannot be found liable for conspiring with one another.

(continued on page 24)

Tips from the Trenches: Legal Writing

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Justice Oliver Wendell Holmes might have said it best, "Lawyers spend a great deal of their time shoveling smoke." To breathe some fresh air into your legal writing, consider the following tips:

1. Forsake footnotes. Why write a brief that makes the reader feel as if he or she is watching an ice hockey game. Footnotes are like freezing the puck. In hockey, briefly stopping the play is part of the game but in legal writing, it's an annoying interruption and an unnecessary distraction.

2. Make way for metaphors. Metaphors help your audience read between the lines by conveying shades of meaning succinctly and tellingly. Metaphors say a mouthful.

3. Hatch headings and subheadings. You need street signs to navigate around town. Likewise, your reader needs headings to navigate any writing longer than three pages. Headings and subheadings should be informative or persuasive and never a single word.

4. Lay waste to biased language. Write inclusively. Avoid not only sexist language but also semantic bias on the basis of race, religion, sexual preference, ethnicity, disability, age, or economics. Today's English rightly rejects such outworn language, and so should every lawyer.

5. Pave the way with parentheticals. A case citation without a parenthetical is like a hamburger without a sesame bun, unfinished and unsatisfying. With a parenthetical, the reader has something to bite into. Always describe why the case has been cited or how the case relates to the facts or the law.

6. Say a mouthful with a summary of the argument. Let the reader know your key points from the get-go. Every memorandum should have a convincing summary right up-front so that by the time the reader gets to the middle of the second page, he or she is predisposed to your position.

7. Close ranks on counter-arguments. If you know what's coming from your opponent, it is far better to put major counter-arguments in context and deal with them first than to allow the other side to do so on its terms.

8. Plow over passive voice. Add energy to your writing by avoiding passive voice. Forceful, direct, and concise, active voice makes what you write dance rather than stand still. Since 9th grade English, writing instructors have tried to hammer this one home yet lawyers seem reluctant to crank up their writing.

9. Fit the facts to your purpose. The facts provide the most powerful weapon you have. Always organize the facts so that they are easily understood and then incorporate your facts into the argument. This might sound like a "no brainer," but, lawyers too often ignore the obvious.

10. Key on key cases. String cites obscure the importance of your authorities. Focus on those cases that best support your position and your facts. The more established the principle, the fewer cases you need to cite for the point.

11. Write to be read. Always leave time to edit. The Gettysburg Address comprises 286 words; the U.S. Government regulation on the sale of cabbage comes in at 26,911 words. If you don't want your writing to smell like sauerkraut, prepare an outline and organize your thoughts before you write, and then edit at least twice before sending anything out the door.

Michael B. Hyman, mbhyman@muchshelist.com, a partner with Much Shelist Freed Denenberg Ament & Rubenstein, Chicago, concentrates in prosecuting consumer, antitrust and securities class action lawsuits nationwide. He has served for more than 10 years as editor-in-chief of the CBA Record, the Chicago Bar Association's flagship publication. He co-chairs the ABA Section of Litigation's Consumer & Personal Rights Litigation Committee, and formerly served as editor-in-chief of Litigation Docket *and* Litigation News.

Profile Interview:
Robert E. Schaberg, Business Torts Committee Co-Chair
Shartsis, Friese & Ginsburg LLP, San Francisco, CA

Tell us about how you decided to become an attorney.
I was a Political Science Major in college and realized that all of the people who made major contributions to society throughout history were lawyers.

What kind of practice do you presently have?
I am a trial lawyer specializing in complex litigation involving intellectual property, securities, and antitrust issues.

What are the particular challenges you face in your practice?
As I have become more experienced, one of my primary challenges is dealing with the increased absence of civility and integrity in our profession. Another challenge is dealing with the phenomenon of very expensive litigation and balancing such costs with issues of fairness.

On a typical file, do you employ a "team" approach or do you work more as an individual?
Due to the complex nature of the litigation, we typically employ a team approach.

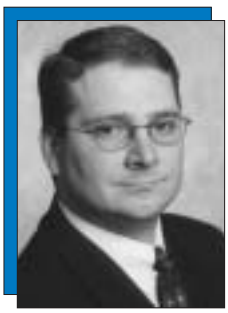
Who would make up a typical team for a file?
A typical team is: one partner, one associate, and one paralegal. On occasion there will be both a senior associate and a junior associate.

What technology do you regularly employ?
I regularly employ LiveNote, which is the accepted standard for direct interface with a court reporter during depositions. This greatly reduces the need to take notes and allows me to focus my attention on the witness. Another useful software program is CaseMap, which is a document and file management software we use to create case summaries and chronologies as well as for document management.

What changes do you see in the future for your style of practice?
One change that is already occurring is the greater use of mediation. In most cases we focus on preparing a case for mediation rather than trial. We discuss the possibility of mediation and pursue it early in the litigation. This results in cost savings and a more expedient resolution.

For younger lawyers, are there long-term growth opportunities in your field of legal practice?
The long-term growth opportunities are excellent in intellectual property law. Intellectual property issues will continue to grow geometrically along with advances in technology.

What is the best advice you ever received about the practice of law?
One of the more memorable pieces of advice I received earlier in my career was that it was better to stay in my office and read the *New York Times* that to take on a client who will not be willing to pay for your services. If you take such clients, regardless of the outcome, your client will be disappointed due to the cost and your firm will be disappointed due to your client's failure to pay. It is necessary to listen to your instincts in making the determination of whether to accept a client.



Mark Ludolph, an attorney with Heyl, Royster, Voelker & Allen in Peoria, Illinois, conducted and prepared the interview with Mr. Schaberg for the Business Torts Journal.

A War Story: How a Tortious Interference Claim Can Turn a Simple Contract Case Into a $3.5 Million Verdict

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A few years ago, the authors were co-counsel in litigation arising out of a series of contracts to purchase natural gas. What, on its face, should have been a "simple contract case" (if such a thing exists) grew into protracted litigation resulting in contract and tort claims in two federal district courts (the Southern District of Texas and the District of Utah), extensive motion practice, the bankruptcy of one party, and a five-day jury trial streamlined by counsels' mutual ultimate realization that, after all, the case really might be a "simple contract case." The course of this litigation offers insights into both the legal and the practical considerations of seeking tort remedies for a business-related harm.

The particular focus of this article will be the tortious interference claims that, for a time, were the key tort component of the action. These claims cannot be viewed in isolation, however; they are but one of several tools that bear on the resolution of a commercial injury. In the end, interference claims and business tort claims generally can serve to bring all actors in a business loss to the table as the parties seek to allocate responsibility for failed expectations.

The Facts

Purchaser (P), a small Utah gas marketing company, entered into a series of volumetric production contracts with Seller (S), a small Texas gas production company with energy properties in Utah. The production contracts called for the immediate payment to S of a fixed price for the future delivery of specific volumes of S's gas to P. To secure the future delivery of the gas, S granted P a trust deed interest in the Utah properties. The trust deed contained a standard "dragnet clause" that provided that the trust deed secured not only the volumetric contracts but also all other debts owed by S to P.

Big energy company (B), a large Texas gas production company, entered into a contract with S to acquire the encumbered Utah properties. Rather than buy out the volumetric contracts with P to eliminate the corresponding trust deed position before closing, S chose to put P on notice of two potential claims of avoidance: (a) that P was in breach of alleged fiduciary duties owing to S under the volumetric contracts; and (b) that P had obtained S's agreement to the contracts and trust deeds through misrepresentations. On the same date of this notice, S and B closed the sale of the Utah properties without resolving the issues raised in the notice. S and B failed to make payment to P a condition of the sale, and S subsequently refused to pay P for the losses stemming from S's failure to deliver the volumes of gas promised.[1]

Where To Fight?

Immediately upon receipt of this notice, counsel for P recognized from the tone of the correspondence that S was not interested in

Interview with Eric Olson
Tortious Interference: What You Need to Know from an Attorney Who Knows It

When a client comes to you with a case that might involve a claim of tortious interference, what facts do you want to know?

Well, I think the first very vital fact is to have a clear idea of what the contract was and how solid—how well-documented—the contractual rights are. Or if you're dealing with a prospective economic relation, how solid the evidence is, how persuasive it is that this particular entity, this client, would have realized some benefit in the future and how you're going to go about valuing that. I want to know from the start that if I ask a jury or judge to award damages to a client, that there's going to be a solid basis for them to do so, not just a simple speculation. Often clients come with an awareness that they've been injured but an incapability to articulate just exactly what that injury is in dollars. I want to be able to see the dollars, I want to be able to see with clarity where the rights are that were injured. If you can have those two [things] as your foundation on which you build your case, I think you have a much better shot at making the claim and having it taken seriously.

(continued on page 21)

the possibility of compromise. Indeed, P suspected that S, being in financial difficulty, might hope to solve its problems by ridding itself of the volumetric contracts with their future delivery obligations and the trust deed encumbrance in order to pocket the entire proceeds of the property sale to B. S apparently assumed that P would not fight or would quickly lose heart and seek a deal favorable to S. Based on their assessment of S's strategy, counsel immediately prepared and filed in Utah state court a complaint against S seeking declaratory relief with respect to the validity of the volumetric contracts and trust deeds.

Fourteen hours *before* the filing of P's complaint and only hours after sending the notice of breach, S filed its own legal action for breach of contract and fraud in the United States District Court for the Southern District of Texas. That court ultimately concluded that the first-filed case—the Texas action—should proceed forward. In the interim, S removed the Utah action to federal court in Utah. Eventually, that action was stayed by agreement pending resolution of the Texas action.

Filing in Utah state court, in the rural county where the encumbered property was located, was not a hard call. One would expect that the locals would be more favorably disposed to P, as a small Utah company. We were also aware that S had something of a reputation in the area as a company that did not pay its bills.

S wisely anticipated that P would recognize the notice of breach as the first volley in a war rather than an invitation to discuss resolution of a pre-existing dispute. Thus, the preemptive filing in the Southern District of Texas positioned S to avoid the negatives of litigation in Utah and brought initial pressure on P to capitulate rather than incur the expense and run the risks of litigating the claim before a Texas jury. This filing also reversed the customary positions of the parties: the party out of several million dollars found itself named as a defendant in Texas with the party refusing to pay as the nominal plaintiff advancing its defenses as claims in the action.

Who Are The Proper Parties?

S's injection of fraud into the dispute at the outset anticipated the breadth of the issues the parties would raise and address in attempting to resolve the validity of the volumetric contracts and the trust deed. Not long after P and S learned of the other's pending lawsuit, they began to amend their pleadings. P named B as an additional defendant stating, among others, claims of tortious interference with contract. Specifically, P contended that, by closing the sale of the Utah properties and acquiescing in S's effort to avoid its contractual obligations, B had intentionally interfered with P's existing volumetric contract with S.

S added a chain of tortious interference with contract to its existing claims of fraud and breach of fiduciary duty. In essence, S contended that P's insistence on full payment of the trust deed encumbrance in the face of S's claims of misconduct wrongfully interfered with S's advantageous relations with B.

P had a sufficient basis to name B simply because B now held title to the Utah property encumbered by the trust deed. Based only on status and not on conduct, however, this claim alone was fairly bland. While S's fraud and breach of fiduciary claims against P mandated jury evaluation of P's conduct in the gas purchase transactions, P had no claim that required a comparable analysis of B's conduct and motive in acquiring the Utah Properties. The tortious interference claims made relevant evidence of B's course of dealings with S to cut off P's contractual rights. This served to broaden the scope of discovery and gave the case, from P's perspective, a far greater emotional appeal. Now, the issues extended beyond the written contracts to the maneuvers leading to breach and the motive behind the choice to breach. Further, a tort claim allowed P to argue for broader consequentials and for punitive damages.

Furthermore, as business litigators are well aware, the tortious interference claims potentially allowed the jury to express its displeasure with the breach of contract by S. Jurors, unlike judges, perceive a moral component to business transactions. They disapprove of those who break their contractual promises. Thus, jurors often look to assess blame when a contract is broken. Judges, on the other hand, are thoroughly indoctrinated in the concept of "efficient breach," which suggests that a party should not be punished merely for failing to honor a contractual promise because breach may be an economically efficient choice for a party willing to pay the damages caused by the breach. While a judge might find the fact of breach distasteful, courts are reluctant to assess moral blame or punish those who breach contracts. Texas juries are well known for imposing substantial punitive damages on persons inducing breach of contract. *See Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 728 (Tex. App.-Houston [1st District] 1987, write ref'd n.r.e.) ($3 billion punitive damages award for tortious interference with contract). In short, the tortious interference claims placed B on the defensive. It was forced to provide the jury with a justification for its conduct or risk being blamed for S's breach of the contract.

Jurors often look to assess blame when a contract is broken. Judges, on the other hand, are thoroughly indoctrinated in the concept of "efficient breach."

By adding its claim for interference, S put P's choice to defend its contracts and trust deeds—the very choice to litigate—at issue.

Counsel must decide how good the client's story is in attempting to argue about the justice in pursuing litigation. In fact, P never took this particular claim very seriously. What is one going to do when faced with forfeiture of several million dollars in contracts secured by valuable real property? If a party is not prepared to go to court, there is little point in signing the contract.

Conflict of Laws and Summary Proceedings

As the action proceeded through discovery to pretrial motions, an interesting thing occurred: S and B, who had sought a Texas forum, now wanted Utah law to apply to P's interference claims, while P, whose Utah action was on hold, sought the application of Texas law. It will come as no surprise that each party's sudden enthusiasm for the law of a foreign forum arose out of a perceived advantage. The facts regarding interference were not in serious dispute, only the interpretation of those facts. Utah case law was ambiguous on the elements of a claim for tortious interference with contract, which created the possibility of a rule placing a heavy burden of proof on P to prove the tort. Texas case law arguably provided a clear rule for interference with contract that favored summary resolution of the claim.

To protect society's interest in competition, courts have usually treated "at-will" contracts as akin to "future business relationships" for purposes of the tortious interference torts.

Any judicial analysis of Utah law on the class of torts falling under the heading of "interference with economic relations" begins with the landmark case *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982). For P in its litigation with S and B, this was unfortunate. The *Leigh Furniture* court held that Utah law recognized a claim for interference with prospective economic relations. In so holding, the court took occasion to summarize pre-existing Utah case law with respect to interference with an existing contract. The court drew a distinction between "Interference with Contract" and "Interference with Prospective Economic Relations" characterizing each as "but one instance, rather than the total class, of protections against wrongful interference with advantageous economic relations..." 657 P.2d at 301[2].

Cases involving "at-will" contracts, such as employment contracts, have muddled the issue somewhat. An "at-will" contractual relationship shares characteristics both of an "existing contract" and of a "prospective business relationship." There is clearly an "existing" contractual relationship. But the parties' future expectations are not fixed; thus, such a contract generally involved only an expectation that the relationship will continue in the future without any value exchanged for an assurance of such continuation. Such contracts are necessarily subject to competition for the contracting parties' future business. To protect society's interest in competition, courts have usually treated "at-will" contracts as akin to "future business relationships" for purposes of the tortious interference torts. Parties seeking to confuse the issue on interference with contract will point to such cases as establishing a stricter rule in cases of interference with contract. Many of the cases cited by B in seeking summary adjudication of P's interference claims involved "at-will" contracts, requiring the court to make this fine distinction.

Prior to its decision in *Leigh Furniture*, the Utah Supreme Court had recognized a cause of action for interference with the contract but not for interference with prospective economic relations. *See Bunnell v. Bills*, 13 Utah 2d 83, 368 P.2d 597 (1962) ("one who persuades another or conspires with another to breach a contract is guilty of an actionable tort, unless such persuasion or other action causing the breach was done with just cause of excuse"). In discussing the test for interference with prospective economic relations applied in other jurisdictions, the *Leigh Furniture* court noted that in cases dealing with interference with contract, Utah courts had adopted a formulation of that tort mirroring the test from the first Restatement of Torts:

> To recover, the plaintiff need only prove a prima facie case of liability, i.e., that the defendant intentionally interfered with his prospective economic relations and caused him injury. As with other intentional torts, the burden of going forward then shifts to the defendant to demonstrate as an affirmative defense that under the circumstances his conduct, otherwise culpable, was justified and therefore privileged.

657 P.2d at 302-03.

The *Leigh Furniture* court did not have to apply this rule to the facts before it because the only existing contract was between the plaintiff and the defendant. Rather, the court found a potential claim for interference with prospective economic relations relying on the defendant's oppressive conduct toward the plaintiff after the breach of their contract. Thus, to afford the plaintiff a remedy, the *Leigh Furniture* court relied exclusively on the tort of interference with prospective economic relations, a tort which, in the court's words: "reaches beyond protection of an interest in an existing contract and protects a party's interest in prospective relationships of economic advantage not yet reduced to a formal contract." 657 P.2d at 302.

With respect to this newly recognized tort, the Utah court

expressly rejected the Restatement "prima facie tort" formulation otherwise employed for interference with contract and embraced what it referred to as the "Oregon definition" of the tort that requires proof of either improper means or improper purpose in the interference. *See* 657 P.2d at 302-04; *cf.* Restatement (Second) of Torts §§ 766B, 768. As in other jurisdictions, the Utah court struggled to reach a proper balance between the interests of the parties involved. On the one hand, an overly broad definition of the tort would stifle competition because an unsuccessful competitor could always charge that the successful bidder "interfered" with its business relationships. By requiring a showing of "improper purpose" or "improper motive," the Utah courts sought to limit the scope of the tort to situations in which mere competition was not involved, i.e., where the interference was the result of a malicious desire to inflict harm on the plaintiff or was accompanied by overtly wrongful conduct.

There is no suggestion in *Leigh Furniture* that a plaintiff must prove any impropriety, whether means or purpose, to establish interference with an existing contract. The approved jury instruction for intentional interference with contract, Model Utah Jury Instruction 19.8, sets forth an approved jury instruction that recognizes different elements for interference with contract than for interference with prospective economic relations. The former claim requires only a valid contract with a third party, the defendant's knowledge of that contract, intentional acts of the defendant inducing breach of the contract or interfering substantially with the performance thereof, and damages.

The law on intentional interference became muddled as later cases commented in dicta on the *Leigh Furniture* holding. Repeatedly, Utah appellate courts referred to a general tort of "interference with economic relations" and the need to prove "improper purpose or improper means" to establish liability. *See, e.g., St. Benedict's Development Co. v. St. Benedicts Hospital*, 811 P.2d 194, 200-01 (Utah 1991); *Promax Development Corporation v. Mattson*, 943 P.2d 247, 254 (Utah 1997); *Peterson v. Browning*, 832 P.2d 1280, 1284-85 (Utah 1992); *Sampson v. Richins*, 770 P.2d 998, 999 (Utah App. 1989). Other Utah cases appeared to recognize the difference between interference with an existing contract and interference with economic relations. *See American Airlines v. Christensen*, 967 F.2d 410, 413 n. 4 (10th Cir. 1992); *Jones v. Intermountain Power Project*, 794 F.2d 546, 554 (10th Cir. 1986); *Hill v. State Farm Mutual Automobile Insurance Co.*, 829 P.2d 142, 149 (Utah App. 1992).

P moved for summary judgment on its interference with contract claim against B arguing that there existed no factual dispute as to the elements of interference with contract. The Utah court's failure to draw a consistent distinction between interference with an existing contract and interference with economic relations proved a major legal issue in that motion. Based on the later authorities citing *Leigh Furniture*, S argued that P had to show, in addition to the facts not in dispute with respect to interference with contract, the absence of an issue of fact as to improper purpose or improper means. S contended that a claim of interference with contract was encompassed within the law of interference with economic relations and must include proof of impropriety.

In contrast to Utah law, there was no dispute that, under Texas law, a claim for interference with contract did not require proof of either an improper purpose or an improper means. *See Wardlaw v. Inland Container Corp.*, 76 F.3d 1372, 1375, 1378 (5th Cir. 1996); *ACS Investors v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997).[3] While P argued that Utah law tracked Texas law, it became necessary to make the fall back argument that Texas law applied to the interference claim. The court's decision of which state's law would apply could well be the determining factor as to whether the court could resolve P's interference claim against B on motion.

It was undisputed that, under choice of law provisions in the volumetric contracts, Utah law governed the contract claims between P, a Utah company, and S, owner of Utah gas properties.

The court's decision of which state's law would apply could well be the determining factor as to whether the court could resolve P's interference claim against B on motion.

However, the interference by B, a Texas entity not a party to the contracts, was a tort. B's liability was thus not governed by the contract's choice of law provisions. *See CPS int'l, Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 21 (Tex. Ct. App. 1995) (distinguishing tortious interference claim from related contract claims). It became necessary for the court to undertake a choice of law analysis to determine applicable law. *See id.* at 28-29.

The rule of the forum state as articulated by the Texas Supreme Court was that "all conflicts cases sounding in tort will be governed by the 'most significant relationship test as enunciated in sections 6 and 145 of the Restatement (Second) of Conflicts." *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). Section 6 provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
  (a) the needs of the interstate and international systems,
  (b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Section 145 provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6.

(2) Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred

It is nearly impossible to obtain summary judgment on a plaintiff's claim even though the undisputed facts appear to meet all of the elements of the tort.

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated to their relative importance with respect to the particular issue.

From these factors, P argued for the application of Texas law. Although the place of the injury, Utah, would have received additional weight, this factor standing alone was not dispositive. *See* Restatement (Second) of Conflicts § 156; *CPS Int'l*, 911 S.W.2d at 29. All of the other factors cited in the Restatement, P argued, favored application of Texas law. B and S, the two active parties in the tortious scheme, consummated the deal that caused injury in Texas. *See* Restatement (Second) of Conflicts § 145(2) (b). Both companies listed their principal place of business in Texas, and thus could expect their conduct to be governed by Texas tort law. *Id.* § 145(2)(c). And the relationship giving rise to the tortious interference claim was B's relationship with S in Texas. *Id.* § 145(2)(d). As the event precipitating the litigation, the B/S deal should be given significant weight in the Court's analysis. *Id.* § 145(2).

P also cited the principles enunciated in section 6 of the Restatement (Second) in support of the appropriateness of applying the Texas law of tortious interference to its claim against B. Texas law was easier to determine and apply. *Id.* § 6(2)(g). The Texas rule promoted certainty, predictability and uniformity of result. B sought to escape liability for its misconduct in Texas relying principally on the seemingly inconsistent formulations of Utah law. *Id.* § 6(2)(f). Application of Texas law would also protect the justified expectations of the parties. B, as a Texas company, would ordinarily expect to operate subject to Texas's tort principles, while P, as a Utah company, expected to have to prove nothing more than the principles outlined in the Model Utah Jury Instructions that would have governed the case had suit been brought in Utah. *Id.* § 6(d)(2). P further argued that to require a showing of "improper means or improper motive" would allow B to obtain, by forum-shopping, a benefit not available under the principles normally applicable under the law of either jurisdiction.

Additionally, applying the Texas rule would further the basic policies underlying tortious interference law. *Id.* § 6(2)(e). A party in B's position may not do as it did in Texas without paying money damages. *See ACS Investors*, 943 S.W.2d 426,. B sought to evade responsibility through the fortuity of a perceived legal ambiguity. Protecting P would further the policies of the state of Utah and meet the needs of the interstate commerce system, as P would have redress for actions taken against it in Texas. *See* Restatement (Second) § 6(2)(a), (c). Finally, the policies of the state of Texas would be furthered. Like virtually every state, Texas has determined that it is against the state's public policy for businesses to induce the breach of a contract. *Clements v. Withers*, 437 S.W.2d 818 (Tex. 1969); *American National Petroleum Co. v. Transcontinental Gas Pipe Line Co.*, 798 S.W.2d 274 (Tex. 1990).

In Texas, even "at-will" contractual relationships may be protected by principles applicable to interference with contract. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex. 1989). On analogous facts, the Fifth Circuit, applying Texas law, had found that a party could tortiously interfere with a contract by "intentionally interfer[ing] with [a party's] ability to pay" amounts due under the contract. Haralson v. E.F. Hutton Group, Inc., 919 F.2d 1014, 1038 (5th Cir. 1990). Texas had enunciated a strong public policy barring intentional misconduct designed to force or induce the breach by one party of its contract with another. Allowing B, a Texas corporation, to evade these principles by invoking the law of another state for conduct it had committed within Texas's borders would frustrate the policies Texas had embraced.

In retrospect, the parties consumed a lot of resources parsing the perceived inconsistencies in Utah law and fighting over the applicable law. The likelihood that P could obtain summary judg-

ment on the interference claim, even without the uncertainties regarding applicable law, was remote. Certainly, B's actions had prevented S's performance but, as the evidence unfolded, S was enthusiastic to breach the volumetric agreements. The lesson of the pretrial proceedings was one well known to seasoned counsel: It is nearly impossible to obtain summary judgment on a plaintiff's claim even though the undisputed facts appear to meet all of the elements of the tort. Allegation of a business tort does not afford any short cut to judgment. The trial judge covered her bets by applying Utah law, determining that the Restatement test governed the interference with contract claim (rather than the Oregon definition). The judge then simply denied all motions for summary judgment leaving the issues for the jury.

Trying the Interference Claim

Discovery established that B, with its able in-house counsel and sophisticated management, had taken a long look at the volumetric contracts and underlying trust deeds before agreeing to purchase S's Utah properties. Indeed, after reaching the deal with S, B's management sought and obtained a title opinion that the trust deed, with its dragnet clause, did not secure certain of the debts S owed P.[4]

Though B's diligence was admirable at one level, in the context of an interference claim it became something of a liability. This became apparent after S declared bankruptcy mere months before trial. While B inherited S's fraud claims and defenses, B now stood alone to answer for S's failure to perform according to the terms of the volumetric contracts. The care with which B had examined those contracts simply served to underscore the willful manner in which it had facilitated S's breach and precipitated P's losses. In light of B's conduct, there was no doubt B fully understood that (1) S intended to breach its contract with B and (2) B stood to lose substantial amounts of money as a result.

The trial unfolded, as dictated by the pleadings, in reverse order. B, the party seeking to avoid liability and heir to S's claims, presented its evidence first; then, P presented its case. This counterintuitive approach provided counsel for P with an unforeseen opportunity. B put its executives as well as its in-house counsel and outside title counsel on the stand to explain why B had chosen to do the deal despite knowledge of the trust deed and volumetric contracts. This amounted to presentation of a defense in the guise of an affirmative case (and without a clear explanation of the nature of the volumetric contract obligations). Through cross-examination of these key players in B's decision to proceed with the purchase of the Utah properties, counsel for P was able repeatedly to attack the good faith and intellectual honesty of the analysis that led B to believe that it could escape liability to P if it bought the Utah properties.

Interestingly, B chose not to call any of the principals of S. (Aside from the bankruptcy, these gentlemen each had their own past run-ins with the law in the form of white-collar felony convictions that diminished their credibility and made them appear to be rather unsavory contracting partners.) In the end, B's case had to rest on the jury's willingness to accept the assurances from B's management and counsel that it believed that acquisition of S's Utah properties would not expose B to liability for unperformed contractual obligations. What was missing from this analysis, of course, was any satisfactory justification to explain why B made a willing choice to inject itself into the dispute between S and P.

With the need to justify itself, B turned what might have been a simple contract case, focused on the interpretation of language defining the scope of a trust deed (hardly a bracing topic for a lay jury), into a matter of minor intrigue. Counsel for P was able to chart, day-by-day and hour-by-hour, the development of the nonliability position ultimately embraced by B as justification for its purchase of the Utah properties. The business torts claims made relevant lengthy inquiry into the state of mind of the various executives and attorneys.

It became apparent that presenting evidence first had actually left B in a vulnerable position. All it really had to offer was excuses for disregarding the contracts and what in retrospect likely appeared to a lay jury as a very technical reading of the trust deed's broad dragnet clause. P's counsel could deferentially grant the parade of B's executives and attorneys the highest level of skill and training only to pull the rug out from under the explanations by pointing to the inevitable result: $2.5 million in losses to P.

> Business reality, compounded by the exigencies of litigation and the ingenuity of counsel, is scary. Nothing fits the traditional slots.

An interesting thing happened at the conclusion of B's evidence: Counsel entered into discussions aimed at reducing the length of the trial, which already threatened to exceed the allotted time. It became apparent that the best way to focus the issues for the jury and the presentation of P's evidence was to drop all of the business tort claims—both B's fraud claims and P's interference claims. The parties agreed, the court entered judgment of nonsuit on those claims, and the contract claims were in the hands of the jury within a day and a half.

Why drop the interference claim after fighting so long to preserve it? The decision was not all that hard. The claim had served a very useful purpose in keeping B in the case when S had to be the primary focus of the contract claims. At trial, the claim

allowed extensive inquiry into B's thought process as it weighed whether to purchase the Utah properties (and thereby precipitate a breach). Motive and consequences became the jury's primary focus at the outset of the trial rather than the more mundane contract interpretation issues on which P's case against B ultimately turned.[5] Counsel reasoned that, if the jury members did not like how and why B chose to impose a massive loss on P, they might be inclined to view the interpretation issues (which were a close call) more charitably towards P.

At the same time, as every trial attorney must learn to be effective, jurors are not endlessly patient. One must get the case to them with some momentum or run the risk of being seen as insensitive and as making life needlessly difficult. As part of the bargain, to the extent possible, it is nice to send the message to the jury that you were the party "cutting" to the proverbial "chase" and expediting the prompt consideration of the merits.

Moreover, in the end, the case was about a contract. With B squarely on the hook for S's nonperformance, the interference claim added only a threat of punitives. This was not enough to delay the trial beyond the promised time limits. P chose to trade away the punitives for the elimination of any equitable defense. For P, this was a business case after all, not a matter of retribution. Elimination of fault issues from consideration allowed the jury to keep its attention on the contract language and the recoverable damages. So, as it turned out, the interference claim played an unusual but crucial role in defining the scope of relevance in B's case in chief. Strategically, it also placed B in the position of having to justify its conduct, placing B on the defensive in the presentation of its affirmative case. Those purposes served, the claim appeared less crucial to a fair consideration of the merits and was dropped in exchange for dismissal of the avoidance theories.

Conclusion

Business litigation is no law exam question. Exam questions are the easy fact patterns. Business reality, compounded by the exigencies of litigation and the ingenuity of counsel, is scary. Nothing fits the traditional slots. The facts are in play even after the filing of litigation. Parties end up enforcing their rights in places far distant from where the dispute arose and wearing labels that do not reflect their interests. Jurors want to know why; they want to discern the motive of the players and not just to evaluate the contract. The uncertainties of the litigation process require more than mere knowledge of the applicable law; they demand a substantial measure of innovation and flexibility.

An interference claim allows one to bring to the table all those who potentially bear responsibility for a loss. In the course of litigation, the interference claim can open doors for discovery and for introduction of evidence that might be closed in a conventional contract case. Such a claim keeps the focus on how and why a contractual relation collapsed. With the proper facts, interference claims strengthen a plaintiff's hand in sorting out who will pay for the loss.

In our case, the jury awarded P its full damages for breach of the contract. With prejudgment interest for the two years it took to get to trial plus substantial attorneys' fees and costs as provided in the production contracts and the trust deed, the award approached $3.5 million. The jury never had to resolve the claims for interference with contract, but we remain convinced that the issue of fault arising under those claims had a positive, possibly decisive, impact on the ultimate result.

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Endnotes

1. P had hedged its exposure to market fluctuations in the price of natural gas by entering into third-party swaps. When S failed to deliver the promised gas, however, P was obligated to reach into its own pockets to pay third parties to close out the swap positions. Because the price of gas had declined after the swaps were purchased, closing out the positions cost P substantial money.

2 . In so doing, Utah courts follow the near-universal practice of courts in other states. As recognized by the Restatement (Second) of Torts, the social interests at issue are manifestly different when one interferes with an existing contract and when one merely competes for a prospective economic relationship. Restatement (Second) of Torts § 768 & comment a. "If one party is seeking to acquire a prospective contractual relation, the other can seek to acquire it too. But an existing contract, if not terminable at will, involves established interests that are not subject to an interference on the basis of competition alone." *Id.*

3. Texas courts have recently adopted the definition of the tort of Interference with Prospective Contractual Relations set forth in the Restatement (Second) of Torts, section 766B. *See, e.g., Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001) (discussing prior case law). Accordingly, Texas courts now require a showing that the defendant's conduct was independently unlawful or improper aside from its effect on the plaintiff's business as a condition to finding liability for interference with prospective business relations. This is an element of the plaintiffs' affirmative claim. The test outlined in *Sturges* appears similar to the "wrongful means or wrongful motive" test outlined in the Utah cases discussed above. As the Texas Supreme Court explained in *Sturges*, Texas cases were unclear on exactly what the plaintiff must prove to establish the tort prior to 2001.

4. The decision to obtain a title opinion after the fact was a substantial issue in the trial. S argued that the opinion was nothing more than an *ex-post-facto* justification for a decision already made for improper reasons, while P pointed to the title opinion as showing its good faith in concluding the deal.

5. Interestingly, the trial court had held that the trust deed was ambiguous. While the court allowed B to present the opinion of its title attorney, the court instructed the jury that any claim by title counsel that the trust deed was unambiguous was contrary to the court's ruling and could be considered only to determine the state of mind of the plaintiff. At the very outset of the case, therefore, B's defense to the tort claim put it in a position of arguing with the court before the jury regarding the meaning of the trust deed, which affected adversely the credibility of B's witnesses on the question of interpretation. The jury understood that B's title counsel had already erred significantly, and thus discounted heavily the positions advanced by B as to the proper interpretation of the contract.

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So when you interview other witnesses, is that a similar line of facts that you want to inquire about?

Well, I almost look at the existence of a contract and the existence of damages as you should in this type of business-tort setting and interference claim. You should almost be able to establish those as if they were summary-judgment-type issues. At least in your mind, you should be satisfied that you can get those almost without dispute or with minimal dispute because you're really looking beyond that, to whether or not the party who interfered was entitled to do so, whether they did so in a way which is actionable and that's really what you're going to be working to. Talk to witnesses about the case, what happened that made this expectation as memorializing the contract and who did what to prevent that from occurring. That's sort of the second step and that's where you generally are looking to your witnesses. If the party that comes to you can't show you the essentials of the contract and some rationale for asserting damages, you're probably not going to find it from other people because they should be their own best witness.

In conducting discovery, is there any format that you follow that's peculiar to a tortious interference case?

Well, I'll tell you my first business torts war story. Not the first case I had, but the first one I took to trial, an interference claim where we were representing the defendant. I focused all my attention on establishing, under the Utah case law that's in our article (*see* "War Story," on p. 15 in this issue), that you either show improper service or improper means. And I focused all my attention on improper means and established fairly clearly and prevailed with the jury on the fact that there was no tortious behavior underlying this interference with the prospective economic relations.

I did not focus my attention fairly clearly on what I call the intangible type of claim, the dog in the manger claim, which is the improper purpose. Under Utah law, that requires malice and intent to do harm, not just simply to get an economic advantage. On that issue, the jury actually found for the plaintiff and my neglect of that has always been a sore point because I realize that what I needed to look at more fully was the motive behind the events that occurred and specifically, have my client more clearly focused on the economic motive in any actions that were taken. Instead, my client actually wanted very badly to claim that they had not intended to interfere at all. That seemed strategically good at the time. And then when we thought about it after the fact, we realized that what we had done is leave it entirely to the jury's supposition as to what the motive might have been, because clearly his actions resulted in determination of another person's prospective economic relation. If he said, "Well I didn't do it for the money so to speak," well then there really was only one other reason to do it, and that was because you didn't like the person. And you know, you learn your lessons the hard way I guess, but I think I would have done more discovery in that instance to establish the economic motive behind this and also prepare my witness better to testify to that point.

In your practice, have you found that there is a frequent or recurring case theme that develops around tortious interference cases?

Tortious interference cases generally arise when somebody tries to take a short cut. When you see somebody make the calculation, that if they take the short cut, the party who is injured is not going to have the wherewithal to assert their rights. Quite frankly, more often than not, after analyzing a case like this, you find that the party who's injured decides, based on what they can afford to do by way of hiring counsel and enforcing their rights, that they can't do it or don't have the energy to do it or oftentimes, it's not in their long-term economic interest to be suing people who have interfered because they may be potential partners down the road in other economic ventures, other business ventures. There is a whole business component to these type of cases that I think sometimes, as counsel, we lose sight of the business interest of the various parties and how they're not really in this to be in a lawsuit. They're in it to solve the business problem and get on with life. And so one of the themes that recurs is this presence of the business interest, the factual situations, and the need to address that early on so that you don't get way down the road on a case and find out that all of this was very improper behavior—and often behavior that could be brought to trial—there could be damages awarded and in business interests, we don't want to get that far.

> You're going to have a group of people you put on the jury that are essentially occupying seats and that aren't going to have a real strong ability to sway the result.

Is there a benefit to trying these types of cases to a jury, or to the bench?

If you'd ask me that question ten years ago, I would have told you that I'd always like to try a business case to the bench. But I've tried several to juries in the last ten years, and I've begun to think that if you have enough confidence in the quality of your jury pool, and that's a key consideration, then you should try it to a jury. In the case our article was about (*see* "War Stories," p. 15)

what I learned from our jury in the Houston federal court made a world of difference in the quality of jurors who considered the case. We had an accountant and several people with oil field experience on that jury. I recently tried a business case in which we had an accountant on the jury again who became the foreperson. We had people with accounting background, and it involved accounting issues in which we were defending a large railroad against a claim for wrongful termination and implied contracts with a business torts claim in it as well. It made all the difference in the world that we had that quality of jurors because they were being asked to follow fairly tight instructions, and I think to do something they were not naturally inclined to do, which was rule in favor of the railroad.

So, yeah, I think now that I would be inclined to try them to juries, except in a very bad set of facts I'd stay with a judge who will be less inclined to what the emotional side is as we suggested in the article. Judges often view a case from sort of an efficient breach theory, and they see so many breach of contract cases that to them, there doesn't seem to be a stigma attached to breach as it does for a jury. So, if you're a plaintiff, you're probably advised to always ask for a jury, unless you need a quick decision, and you hope to move quickly to trial, you can generally do that more quickly with a judge than with a jury. If you think you have summary judgment issues you can get resolved, you may want to ask for the judge because I am inclined to think judges rule more favorably on summary judgment issues when they know they're the one that's hopefully going to be deciding the fact issue. Otherwise, it's a question for the jury.

In conducting voir dire, what kind of jurors are you looking to exclude and which ones would you like on your jury?

Well, I've sort of portrayed a little of my prejudice with what I said earlier about the jurors we've had in the last few cases. I always look for jurors who seem to be, in a business case, seem to be bright and seem to have a grasp of the basics of numbers and economics. Having said that, of course you don't always see 8 or 12 people out of your pool that are going to fit that description. I try to shoot for one or two that I feel can lead the group. You're going to have a group of people you put on the jury that are essentially occupying seats and that aren't going to have a real strong ability to sway the result. The type of people I try to keep off—I'll give you a for instance. We had a person we kept on the jury in Houston who, if I could characterize her in a fair way, was what we would call sort of an aging flower child. And we thought this was a good person because she would be anti-establishment, and we were a small company against a big company. It turned out she was the hold-out on the jury; the juror that kept them out for seven hours when they would've been in and out after about four. She was just basically disgusted with the whole idea of people suing over money and just felt like everybody should go home and stop fighting. Well, that was a real education for me because I had thought that she would probably be favorable to our case.

Often, these types of cases have very complicated fact patterns. What techniques do you use to try to convey your take on the case to the jury?

I always thought it was a big problem, but I think from the very start when you hear about a case, you need to formulate the *Readers' Digest* version, the simple straight forward condensed version of what your story is going to be, because it is a real person on the jury that in the short time they have exposure to the case, is going to grasp everything the attorneys have been dealing with for years. An interesting experience I had with this most recent wrongful termination jury trial, I was asked to get involved in the case about six weeks before it went to trial as one of my partners needed some trial experience to be brought to bear on it as he looked at the scope of what was going to be happening. So I simply acquainted myself with the facts of the case that had been pending for more than six years. And it had been up on appeal once in a matter of approximately six weeks, but in the course of those six weeks, I got a take on the case, so it was a little different than what my partner had, and I persuaded him that that was probably the way the jury would see the case as well. And so for the two weeks we tried it, and I picked up about half the witnesses and did the closing argument and the voir dire, I pushed that view of the case. And I closed with the theme that plaintiff's counsel had been so involved in the case for these 6 1/2 years that essentially he couldn't see the forest for the trees and that this had led him to become emotionally involved as he was. He was very abusive in his closing statement and said he was very capable of seeing what was actually going on in the case and in being honest about his client's behavior. And the jury came back with a no-cause on all four of the theories, including the business torts theory that had been advanced, which was done under the guise of emotional distress—their intentional infliction of emotional distress.

I felt that that sort of indicates my theory that in conflict situations, you have to look for the few simple explanations that help the jury understand what's really being fought over, and I found time and again that is the way in which the jury can conceptualize the case. You don't want to oversimplify, you don't want to patronize but you've got to realize, as I realized in my own experience with that case, that six weeks to get on top of the case is not going to clue you into every possible legal argument that you can make in a case. But you can establish some boundaries and show the jury how the facts operate within those boundaries.

In your experience, what are some of the hard lessons that you've learned in trying these types of cases?

Well, I have one very distinct lesson that comes out of the case tried in Utah. It's actually a reported case called *Pratt v. Pro Data*, a Utah Supreme Court case. And the Opinion reflects just how ambiguous the facts were because the court couldn't get a majority to decide what to do with the case on appeal, but at trial, you'll recall I mentioned earlier, this case was decided on improper purpose, the fact that my client had acted with malice. The jury was

all female and very attentive to the demeanor and gestures of the witnesses and parties. After the adverse verdict, I asked the jury foreperson about the jury's thought process in finding for the plaintiff. Since the case involved plaintiff's loss of a prospective contract with a governmental entity for which my client, the defendant, had formerly worked, we had to call as witnesses many of his friends and former colleagues. I learned from the foreperson that, each time one of these witnesses left the stand, the jury had observed the witness nodding at my client, an old acquaintance, and he would acknowledge the nod. It was explained to me after the fact; this jury foreperson said, "You know, we just concluded that since your client had disclaimed any motive of trying to get an economic advantage, we could only conclude that, number 1, he was in bed with the folks at the big governmental entity, and number 2, he must have intended harm to this fellow." Through all of this, I was facing the witness stand or jury with my back to the departing witness oblivious to this friendly and seemingly innocuous gesture.

From these little exchanges between the defendant and four or five witnesses, the jury concluded that, notwithstanding the uniform testimony denying any malice in the refusal to deal with the plaintiff, my client and his government employee friends must have been up to something--otherwise, why would they be trading knowing glances? In the jury's mind, the combination of the defendant and the government must have intended harm to the plaintiff. The reality was far less sinister. Nonetheless, the adverse jury verdict rested largely on this surmise. And it was on that basis that they ruled on what is usually a very long shot, and that is an improper purpose motivated the interference with prospective economic relations. I will long remember this lesson in non-verbal communication and an alert jury's powers of observation. That was a very hard lesson to learn, but some issues about discipline with clients that I've tried to convey in the subsequent cases.

One other lesson that came out of the case in Houston—and you know you talk about little things that make a difference in trial—we learned that the courtroom would be available at 3:00 on Friday before the Monday start date of the trial for counsel to set up. At the last minute, I decided to fly down to Houston the night before and be there at noon on Friday and be ready to step into the courtroom and claim the table that was closest to the jury. We thought our client looked good; we wanted the jury to be engaged with us; we wanted them to have their eyes on what we were doing and realize we were fully open and so we did. We also used blowups of important documents. The alternative was to use a machine that allows you to project the document onto the television screen. The difficulty was that television screen. The jury sits perpendicular to the judge, and the screen sits at the very end of the jury box and does not project in a large enough fashion for people to see what's actually on the document. And so it had our opponents fumbling around with that whereas we were able to be right next to the jury box and with our documents fully blown up. We often put 2 or 3 of them up at a time, and we also then blocked off our opponents from being able to see the jury at all. And every time they put up their document, I would get up and stand with the jury to try to discern what it was they were seeing, which I think also had a positive sort of casual effect on them. But by getting that table—and I can tell you we barely beat the plaintiff in there by all of about three minutes, they had the same idea in mind—it turned out to be, I think, one of the advantages we had to reassuring the jury. I think tactfully, you need to make your fact-finder comfortable early on with the fact that you're comfortable with the case, that you're willing to let them look at anything and acknowledge your faults and still you know, point to them as to the right result.

Well, my final question is, do you had any tips for new attorneys that may be handling a tortious interference case for the first time?

I guess the tip I would give is the one that I learned in my very first case there in Louisville. It involved the Metropolitan Sewer District in a large spill of chemicals into the sewers back in the mid-1970s. It is: Respect the facts. The cases I think are generally decided on the facts, and the law is simply the construct into which we inject those facts. I think people, especially young attorneys, tend to take sides too quickly, to become partisan before they're entirely advised of all the potential evidence that may bear upon the resolution of their case. If you respect the facts, I think you do a careful job. You don't trust your client's story alone; you verify things; you find out what's really going on, what the real motives; are and by doing that early on, you save yourself considerable grief later in the case. You come into possession of information sufficient to resolve the case at a time when you may have more flexibility to resolve it and less invested in it. I think you gain some measure of control over your own destiny by not throwing at the judge or the jury issues that you could have made a sensible decision on yourself and position yourself to get those issues compromised without going into an all-or-nothing mode as you do when you go to trial.

So, respect the facts, and do all you can to understand those facts. And do it as early as you can, and then be willing to adjust your understanding of the facts as new information comes along. And always reference that back to the ultimate goal of your case, which you should have firm in mind, and decide on what the client had consensus about it so that as the facts develop, you can decide if your goal is still attainable within the context of the facts that you've learned. That would be my principal advice.

Amanda Main, a new committee member from Frost Brown Todd LLC, Louisville, KY, interviewed article author Eric Olson about the ins and outs of handling tortious interference cases.

Parents Interfering

(continued from page 11)

6. *Deauville Corp. v. Federated Dept. Stores, Inc., 756 F.2d 1183, 1197 (5th Cir. 1985).*

7. *See id.*; *F.C. Cycles Int'l, Inc. v. Fila Sport, S.P.A.*, 184 F.R.D. 64, 81 (D. Md. 1998); *Bendix Corp. v. Adams*, 610 P.2d 24, 29 (Alaska 1980); *Morast v. Lance*, 631 F. Supp. 474, 482 (N.D. Ga. 1986) (applying Georgia law), *aff'd*, 807 F.2d 962 (11th Cir. 1987); *Waste Conversion Systems, Inc. v. Greenstone Indus., Inc. 33 S.W.3d 779, 781 (Tenn. 2000); American Medical Int'l, Inc. v. Giurintano, 821 S.W.2d 331, 338 (Tex. Ct. App. 1991).*

8. *Speroni S.P.A. v. Perceptron, Inc.*, 2001 U.S. App. LEXIS 13967 (6th Cir. 2001) (applying Michigan law); *Green v. Interstate United Mgmt. Services Corp.*, 748 F. 2d 827 (3d Cir. 1987) (applying Pennsylvania law); *United States Fidelity & Guaranty Co. v. Petroleo Brasileiro S.A.*, 2001 U.S. Dist LEXIS 3349 (S.D.N.Y. 2001) (applying New York law); *Affiliated Computer Services, Inc. v. Caremark, Inc.*, 49 F. Supp.2d 882, 884 (N.D. Tex. 1999); *James M. King & Assocs., Inc. v. G.D. Van Wagenen Co.*, 717 F. Supp. 667 (D. Minn. 1989); *The Oak Agency, Inc. v. Warrantech Corp.*, 1997 U.S. Dist. LEXIS 6096, *6 (N.D. Ill. 1997); *T.P Leasing Corp. v. Baker Leasing Corp.*, 293 Ark. 166, 171, 732 S.W.2d 480, 483 (1987); *SunAmerica Financial, Inc. v. 260 Peachtree Street, Inc.*, 202 Ga. App. 790, 798, 415 S.E.2d 677, 684 (Ga. App.), *cert. denied*, 1992 Ga. LEXIS 306 (1992).

9. *Boulevard Associates v. Sovereign Hotels, Inc.*, 72 F.3d 1029, 1036-37 (2d Cir. 1995); *Paglin v. Saztec Int'l, Inc.* 834 F. Supp. 1184, 1196 (W.D. Mo. 1993); *Murray v. Ray*, 862 S.W.2d 931, 934-35 (Mo. Ct. App. 1993); *Waste Conversion Systems, Inc. v. Greenstone Indus, Inc., 33 S.W.3d 779, 784 (Tenn. 2000).*

10. *Seabury Management, Inc. v. Professional Golfers' Ass'n of America, Inc.* 878 F. Supp. 771 (D. Md. 1994) (quoting Restatement (Second) of Torts §767 cmt. B (1979)).

11. *Id.*

12. *Boulevard Associates*, 72 F.3d at 1038; *American Protein Corp. v. AB Volvo*, 844 F. 2d 56, 63 (2d Cir.), *cert. denied*, 488 U.S. 852 (1988); *Phil Crowley Steel Corp. v. Sharon Steel Corp.*, 782 F.2d 781, 783-85 (8th Cir. 1986) (applying Missouri law); *Diefenderfer v. Ford Motor Co.*, 916 F. Supp. 1155, 1161 (M.D. Ala. 1995), *aff'd*, 91 F.3d 163 (11th Cir. 1996); *Perry v. International Transp. Workers' Federation*, 750 F. Supp. 1189, 1202 (S.D.N.Y. 1990); *James M. King & Assocs., Inc. v. G.D. Van Wagenen Co.*, 717 F. Supp. 667, 681 (D. Minn. 1989).

13. *Waste Conversion Sys., Inc.* 33 S.W.3d at 783.

14. Restatement (Second) Torts, §769; *Seabury Management, Inc. v. Professional Golfers' Association of America, Inc.* 878 F. Supp. 771 (D. Md. 1994) (quoting Restatement Second of Torts §767 cmt. B (1979)); *Powderly v. Metrabyte Corp.*, 866 F. Supp. 39, 43 (D. Mass. 1994).

15. *Alexander & Alexander Inc. v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 658, 650 A.2d 260, 272 (1994) ("A parent corporation is generally justified in requiring its subsidiary to modify economic arrangements, contractual or otherwise, if those arrangements do not benefit the parent.").

16. *Phil Crowley Steel Corp. v. Sharon Steel Corp.*, 782 F.2d 781, 783-85 (8th Cir. 1986); *Diefenderfer v. Ford Motor Co.*, 916 F. Supp. 1155, 1161 (M.D. Ala. 1995).

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Reservations: call (305) 445-1926 by Wednesday, **January 22, 2003,** and ask for the ABA Section of Litigation Corporate Counsel Seminar to receive the ABA discounted rate.

Travel: For discounted coach airfares, call the airline directly, your travel agent, or Tower Travel, the ABA's travel agency, at (800) 921-9190.

More Info: Visit the Section of Litigation Website www.abanet.org/litigation/committee/corporate/home.html