TORTIOUS INTERFERENCE WITH EXISTING AND PROSPECTIVE CONTRACTS

Tortious interference has broad applications in civil disputes involving employment relationships and commercial transactions, yet it may be an unfamiliar concept to most non-lawyers and is little studied even in law school. “Tortious” is an adjective describing conduct for which an actor is subject to civil liability under the law of torts. A tort is a wrongful act or injury creating a legal claim. (The word is derived from the Latin for “twisted” or wrong.) Torts are generally considered distinct from contract based claims, but torts and contracts intersect in many ways. “Interference” can mean blocking, causing the breach of, or preventing the performance of a contract or business relationship. Tortious interference therefore requires three parties – two parties to a contract or other relationship and a third party interfering with that relationship. This triangular dynamic means a one-dimensional dispute solely between parties to a contract cannot give rise to a tortious interference claim.

Elements of a Claim

Various states set forth different requirements for a claim of tortious interference. In Minnesota, the claim of tortious interference with contract requires:

- The existence of a contract;
- The alleged wrongdoer’s knowledge of the contract;
- Intentional procurement of its breach;
- No justification; and
- Damages.

Kallok v. Medtronic, Inc., 573 N.W.2d 356, 362 (Minn. 1998). According to the Restatement (Second) of Torts, § 766, a non-binding scholarly treatise relied often on by courts, tortious interference with a third-party contract laws means that:

- 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.

Tortious Interference with Prospective Business Advantage

Tortious interference may arise even when the parties have not yet entered into a binding contract. This is known as tortious interference with a prospective economic advantage. The Minnesota Supreme Court has held that to recover for tortious interference with prospective economic advantage, a plaintiff must prove the following five elements:

- The existence of a reasonable expectation of economic advantage;
- The defendant’s knowledge of that expectation of economic advantage;
- That the defendant intentionally interfered with the plaintiffs’ reasonable expectation of economic advantage, and the intentional interference with either independently tortious or in violation of a state or federal statute or regulation;

- That in the absence of the wrongful act of the defendant it is reasonably probable that the plaintiff would have realized and economic advantage or benefit; and
- That the plaintiff sustained damages.

What is "Improper" Conduct?

A viable tortious interference claim requires an improper act. The question of what is wrongful or improper is complicated and fact-specific. Originally, interference claims were limited to cases of violence, intimidation, fraud, or defamation, most of which were separately actionable as torts in and of themselves. For example, if Party C causes Party A to breach its contract with Party B by sabotaging Party A's delivery of goods or making untrue statements that the goods have been contaminated, a court would likely see that behavior as wrongful because it is outside the bounds of fair competition. Depending on the facts, Party A could also sue for defamation or trespass to chattel. A claim of tortious interference, however, captures both the consequence and the motive of the wrongful act in a more holistic way. For example, trespass to chattel might only allow recovery of the value of the goods, whereas a tortious interference claim might allow Party A to seek the lost value of the contract with Party B.

The Restatement uses the word "improper" and explains that that term includes, but is not limited to, "malice." Malice, also known as "ill will," is not required under the Restatement, but malice can be used as strong evidence of impropriety or intent. In response to a claim that an action is improper, a defendant can assert "justification." Justification includes but is not limited to, the legal concept of "privilege," but these distinctions are not always clear. What is improper or justified can be based on consideration of the "varying ethical standards of the community, and especially the standards of business ethics [in that community]" 45 Am. Jur. 2d Interference Section 1.

Damages

Plaintiffs asserting a tortious interference claim might claim economic losses including lost profits; equitable remedies (in the form of an injunction); attorney fees (as damages); and, sometimes, punitive damages, depending on the nature and severity of the improper act.
In Minnesota, damages can, in certain circumstances, be "limited to those that might have been recovered for a breach of the contract itself." *Storage Tech. Corp. v. Cisco Sys., Inc*., 2003 WL 22231544, at *2 (D. Minn. Sept. 25, 2003), affirmed 395 F.3d 921 (8th Cir. 2005). Damages must be proven to a reasonable certainty and recovery or "speculative, remote or conjectural damages is not allowed." *Id.* Double recovery of breach of contract damages is not allowed. *Id.*

In theory, injunctive relief may be available against defendants in a tortious interference claim, so long as plaintiff otherwise meets the standard for injunctive relief. See, e.g. *Cherne Industrial, Inc. v. Grounds & Associates, Inc.,* 278 N.W.2d 81 (Minn. 1979) and *Young v. Meyer*, LEXIS 380, *3 (Minn. Ct. App. Apr. 4, 1989) (unpublished opinion) (referring to injunctive relief in cases also involving companion claims for breach of non-compete agreements).

Because tortious interference claims almost always involve an allegation of intentional improper conduct, it is not uncommon for plaintiffs to seek punitive damages, but being allowed to claim punitive damages is by no means a given. "Even though liability and punitive damages contain the common elements of willfulness, a finding of liability for compensatory damages does not dictate an award of punitive damages." *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 533 (Fla. 1985) In Florida,

for example, the main criteria for punitive damages are “(1) whether the interference was justified, and (2) the nature, extent and enormity of the wrong.” *Hospital Corp. of Lake Worth v. Romaguera,* 511 So.2d 559, 561 (Fla. 4th DCA 1986). That court held that, “to sustain a claim for punitive damages, the tort must be committed in an outrageous manner or with fraud, malice, wantonness or oppression.” *Id*. at 564. In Minnesota, a plaintiff must present the court with “clear and convincing evidence that the acts of the defendant showed deliberate disregard for the rights or safety of others” in order to even ask for punitive damages at trial. Minn. Stat. § 549.20.

Defenses to Tortious Interference Claims

Potential affirmative defenses to a tortious interference claim include fair competition, truth, justification, privilege, and advice of counsel. Other potential defenses include (1) the principle that you cannot interfere with your own contract (i.e. the lack of a triangle); (2) that the underlying contract was invalid or there was no contract; (3) that no breach of the contract occurred (and its performance was not frustrated or hindered); (4) that the defendant lacked knowledge of the contract; (5) lack of causation between the act and the breach; (6) lack of a separate underlying wrongful act such as fraud or defamation; and (7) lack of damages.

Truth is almost always a good defense, whether to claim of defamation, fraud, or tortious interference. The First Amendment protects spiteful, yet truthful statements made by individuals. *See C.R. Bard, Inc. v. Worldtronics Corp.,* 561 A.2d 694, 235 N.J. Super. 168 (1989) (“Defendant’s motive is not relevant to the determinations of this case… It is not improper to give truthful information to a customer about someone else’s product, and this is so even if the purpose is to interfere with an existing or prospective contractual relationship.”) S*ee also* Restatement (Second) of Torts § 772 (“One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other’s contractual relation, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice.”)

The Minnesota case of *Moore v. Hoff*, 821 N.W.2d 591 (Minn. Ct. App. 2012) is a good case study. The plaintiff sued a blogger known as “Johnny Northside” for defamation and interference with prospective advantage. The jury specifically found that the statements in the blog post were true and therefore ruled against the plaintiff on the defamation claim. But the jury ruled in favor of plaintiff on the interference claim, awarding him $60,000. The Minnesota Court of Appeals reversed, holding that plaintiff could not establish claim for interference based on publishing true statements on a blog.

“Fair competition” is also often raised as a defense. In *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001), for example, plaintiffs asked Wal-Mart to amend the easement on tract of land it owned so that plaintiffs could finance and purchase tract to build a food store. A Wal-Mart manager said it would provide the amendment, but before it was completed, another Wal-Mart manager swooped in to purchase the property for a new Wal-Mart store. A jury awarded Plaintiffs $1 million in lost profits and $500,000 in punitive damages on plaintiff’s interference claim. The Texas Supreme Court reversed the verdict, noting, “In an economic system founded upon the principle of free competition, competitors should not be liable in tort for seeking a legitimate business advantage.” It is axiomatic, that, “[a]bsent a contract, there can be no tortious interference [with contract.]” *Hartmann v. Northern Services, Inc.*, No. C1-96-135, 1996 WL 438810 (Minn. Ct. App. 1996) at *3, citing *Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867 (Minn. Ct. App. 1995). The defense of an invalid contract was successfully applied in *DeMoisey v. Ostermiller*, No. 2014-CV-001827, 2016 WL 2609321 (Ky. 2016). In *DeMoisey*, an attorney sued another lawyer for tortious interference with contractual relations for providing advice and representation to lawyer’s

former client, the Kentucky Court of Appeals dismissed the claim because the alleged underlying oral contingency fee agreement was invalid under Kentucky’s rules of professional responsibility.