At its core, American business is based on the concept of healthy, fair competition and free enterprise. Through laws like those pertaining to antitrust and unfair competition, America has taken great strides to preserve fair business competition. Sometimes, however, a business goes too far, engaging in tactics that lie beyond the outer boundary of “fair competition.” This is the purview of the interference torts—when a competitor’s unfair or unlawful tactics result in reasonably provable damage to a business.

This article provides an overview of the interference torts, the elements required to establish a prima facie claim of intentional interference, and defenses to interference tort claims. As discussed herein, it is not an easy task to succeed on an interference claim. Courts have tolerated some seriously cutthroat competitive maneuvers, as aggressive competition alone is obviously not actionable. Indeed, as the Seventh Circuit Court of Appeals wrote, “the process known as competition, which though painful, fierce, frequently ruthless, sometimes Darwinian in its pitilessness, is the cornerstone of our highly successful economic system.”

**Types of Interference Torts**

In most jurisdictions, there are two types of business interference torts: (1) intentional interference with contract or contractual relations and (2) intentional interference with prospective economic advantage. The former is derived from the tort of “inducing breach of contract”—the defendant intentionally disrupts a contract or business relationship that already exists between the plaintiff and a third party, causing the plaintiff damage. The latter, a much broader tort, is really a species of the former, based on the rationale that “the existence of a legally binding agreement is not a sine qua non to the maintenance of a suit based on the more inclusive wrong.”

The tort of intentional interference with an existing contract is straightforward—if a tortfeasor intentionally causes nonperformance of a valid contract that exists between the plaintiff and a third party, the tortfeasor may be liable to the plaintiff for its resulting pecuniary losses. This theory applies to cases where the tortfeasor induces or otherwise causes the third party to refrain from performing the contract, as well as cases where the tortfeasor’s intentional conduct makes contract performance impossible.

In most jurisdictions, negligent interference with an existing contract is not actionable, though there is some authority for recognizing this claim when the damage is physical harm rather than simply economic harm. California does recognize the claim of negligent interference if a special relationship existed between plaintiff and defendant, creating a duty.

The tort of intentional interference with prospective economic advantage is based on the theory that the defendant’s conduct prevented the plaintiff from gaining the financial benefit of a contract that would have been consummated but for the defendant’s actions. A tortfeasor commits this tort by inducing or causing a third party to refrain from entering into a contract that was certain to be consummated, or by otherwise preventing the plaintiff from acquiring or continuing its prospective relations.

In both the existing contract and prospective economic advantage torts, the conduct of the tortfeasor is essentially the same; the primary difference is whether a contract already exists. Because the two torts are so similar, most courts consider both interference with contract and interference with prospective economic advantage as essentially the same tort, “with broader grounds for justification of the interference where the latter situation is presented.” In other words, “when the interference is with a contract, an interference is more likely to be treated as improper than in the case of interference with prospective dealings, particularly in the case of competition . . . .”

California recognizes the tort of negligent interference with prospective economic advantage. This claim is premised on the theory that the defendant knew or should have known that if it did not act with due care, its actions would interfere with the relationship between the plaintiff and a third party. If the defendant subsequently fails to act with due care, causing the plaintiff to suffer foreseeable damages, it may be liable to the plaintiff. California’s negligent interference tort, though perhaps worthy of an independent article, is beyond the scope of this article, which focuses on the intentional interference claims only.

**Elements of Intentional Interference Claims**

The elements of an intentional interference claim are (1) an existing or prospective economic relationship between the plaintiff and a third party; (2) knowledge by the defendant of
that relationship; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damages to the plaintiff. These are discussed in turn below.

**Existing or Prospective Economic Relationship**

This element marks the primary difference between the two intentional interference torts. Any existing contract at issue must be valid and enforceable; a party cannot be charged with disrupting a void or unenforceable contract. This element can be the turning point of an interference case, as evidenced by a trio of Indian casino cases. In those cases, an Indian tribe entered into preliminary contracts with developers (the plaintiffs) to build and/or operate gaming casinos. A subsequent developer (the defendants) swooped in and convinced the tribe to sign with them instead. In each case, the plaintiff brought, among other things, an interference claim. The defendants in each case argued that the plaintiff’s contracts were legally invalid because they had not been properly approved pursuant to the Indian Gaming Regulatory Act. In two of the three cases, the courts agreed with the defendants that the contracts were invalid. However, the Northern District of California denied the defendant’s motion to dismiss because in that case, the court found that the contract at issue had made regulatory approval a “condition precedent” to the subsequent obligations of the parties. Because the contract, on its face, was valid only in the event of regulatory approval, the defendant was unable to successfully argue invalidity due to lack of approval.

Plaintiffs claiming interference with prospective economic advantage must demonstrate that the defendant intentionally disrupted a business relationship that would have resulted in a contract or other future economic benefit to the plaintiff but for the defendant’s conduct. Courts have differed slightly on the degree to which plaintiffs must prove a likelihood of consummation of the contract at issue. Some courts have stated that the plaintiff must prove that “a contract would, with certainty, have been consummated but for the conduct of the tortfeasor.” Others have looked for a “reasonable probability of business opportunity.”

**Defendant’s Knowledge of the Relationship**

By definition, these are intentional torts—the tortfeasor had to have acted with knowledge. “If the actor had no knowledge of the existence of the contract . . . he cannot be held liable though an actual breach results from his lawful and proper acts.” Note that the defendant must have been a stranger to the relationship between the plaintiff and the third party; there is no cause of action for conspiracy to interfere that includes as a defendant a party to the contract at issue.

**Defendant’s Intentional and Unjustified Interference**

Many intentional interference cases come down to this element, which considers whether the defendant’s conduct was actionable, rather than simply aggressive but lawful competition.

The first query is whether the conduct was intentional—whether the defendant intended to cause the result or believed the consequences were substantially certain to occur as the result of his or her actions. Note that the question is not whether the defendant intended to engage in the accused conduct, but whether the defendant intended for that conduct to have the alleged consequences. The court will also consider whether the defendant’s conduct was justified by the kinds of affirmative defenses discussed below.

For claims alleging interference with prospective economic relations, most jurisdictions have enhanced this element, requiring the plaintiff to prove that the defendant’s conduct was independently “wrongful.” This heightened requirement is discussed in more detail in the next section.

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**In both the existing contract and prospective economic advantage torts, the conduct of the tortfeasor is essentially the same.**

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**Damages to the Plaintiff**

Plaintiffs alleging interference with an existing contract will find it easier to prove damages than plaintiffs alleging interference with prospective contracts. Obviously, the stronger the certainty that the relations would have consummated in a contract with future economic benefits to plaintiff but for defendant’s conduct, the easier it is to prove damages resulting from that conduct. Generally, damages that reasonably flow from the interference are recoverable, regardless of whether a breach of contract was established as between the parties to the contract. The defendant may also be liable for punitive damages in cases of particularly egregious or outrageous conduct.

Generally, damages in interference cases are compensatory damages intended to compensate a plaintiff for lost profits and consequential damages resulting from the interference. In other words, a plaintiff must prove what it lost as a result of the interference, rather than trying to prove what the defendant gained as the result of its interference; it’s generally presumed that the plaintiff’s loss equals the defendant’s gain. Some authority exists, however, for courts to examine the defendant’s gain instead of the plaintiff’s loss, disgorging the defendant of profits resulting from its unlawful interference, which courts say are held in “constructive trust” for the plaintiff. Though
an exception to the typical standard, it is appropriate in cases where the defendant’s gains were actually more than the plaintiff’s losses because it furthers “the policy of discouraging tortious conduct by depriving the tortfeasor of the opportunity to profit from wrongdoing.”15

Defenses to Interference Claims
Most of the affirmative defenses to intentional interference claims derive from the prima facie elements themselves. For example, a defendant may successfully argue that the contract at issue is not valid or enforceable. It is also a viable affirmative defense to argue that the defendant had no knowledge of the contract or prospective contract and/or no intent to wrongfully interfere with that relationship.

The “Wrongful” Element in Claims of Interference with Prospective Economic Advantage

In many jurisdictions, to establish a claim of interference with prospective economic relations, a plaintiff must show that the interfering act was “wrongful” under this standard. One Arkansas court determined that “wrongful” meant unlawful, and nothing less than that would be actionable: [A] defendant seeking to increase his own business may cut rates or prices, allow discounts or rebates, enter into secret negotiation behind the plaintiff’s back, refuse to deal with him or threaten to discharge employees who do, or even refuse to deal with third parties unless they cease dealing with the plaintiff, all without incurring liability.16

Clearly, unlawful conduct constitutes “wrongful” conduct. In August 2008, the California Supreme Court held that an employer’s attempted use of a noncompete agreement to constrain a California employee’s future employment constituted intentional interference with that employee’s prospective economic advantage.17 Noncompete provisions are illegal under California law, so the employer’s requirement and attempted enforcement of the illegal contract constituted the wrongful act required to assert the interference claim, and the employee prevailed in the case. But the question continues to evolve as to what type of conduct, if any, falling short of “unlawful” would still constitute a “wrongful” act sufficient to satisfy this interference claim element. Some have argued that “wrongful” conduct should include unethical conduct, as well as conduct that violates industry standards and practices. California courts have defined an independently wrongful act as one that “is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.”18 California courts had previously rejected the argument that conduct violating “industry standards” alone may be “wrongful by some legal measure other than the fact of interference itself.” In Gemini Aluminum Corp. v. California Custom Shapes, Inc.,19 an aluminum parts manufacturer alleged that one of its subcontractors used drawings it had acquired as a subcontractor to gain a competitive edge against the manufacturer in violation of industry standards and practices. The court held that the “imposition of liability for interference based merely on opinions that the solicitation of a competitor’s business was ‘unethical’ or violated ‘industry standards’ would create uncertainty and chill, not maximize, competition.”20

Several courts have found blatantly deceptive conduct to be intuitively wrongful, thus satisfying this element, even though not necessarily illegal. For example, in Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.,21 a federal court, applying Pennsylvania law, refused to grant summary judgment to a defendant in a dispute between competing automobile glass replacement companies. The defendant, aware of the plaintiff’s existing customer appointments, would send its own technicians to serve those customers a few hours before the plaintiff’s scheduled appointment. This conduct was not illegal or independently actionable, but the court determined that “a reasonable jury could find some of Safelite’s . . . activity constituted wrongful means to interfere with Diamond’s prospective relationships . . . .”22

Endnotes
v. Id. at 366.
vii. Id. at 716.
infringe economic harm on the plaintiff, such behavior is tolerated by the law because of the state’s interest in protecting the individual freedom to enter, or to refrain from entering, into contractual relationships.16

Defendants acting to protect their own economic interests may enjoy a privilege against claims of interference. For example, a defendant who is a stockholder in a company is privileged to interfere with a contract between that company and a third party if the purpose of the interference is to protect his or her own interest and the defendant does not employ improper means.17 Similarly, a party seeking to protect its own contract rights in good faith cannot be guilty of tortious interference with the prospective contractual relations of a proposed competitor. On the other hand, a “defendant who is simply plaintiff’s competitor and knowingly solicits its contract customers” cannot claim the economic interest privilege in inducing breaches of those contracts.18

The “catch-all” affirmative defense to interference claims is the “competition privilege.” Simply stated, the competition privilege is a privilege afforded to interfering parties who are in legitimate competition for the same business or contract—essentially, the defendant argues, “it’s not wrongful; it’s just business.” Put another way, “it is no tort to beat a business rival to prospective customers.”19 In the Restatement (Second) of Torts section 768 and in the jurisdictions that require proof of “wrongful” action to sustain a claim, a defendant’s wrongful conduct voids the competition privilege. So long as the competitor defendant does not resort to unlawful tactics—such as defamation, misappropriation of trade secrets, or fraud—to engage in the competition, the competitor’s tactics will likely not be actionable.

Conclusion

In a lean economy, business competition can be particularly fierce, as businesses fight and claw for every available dollar. But robust competition is not actionable; indeed, it is encouraged. Businesses are increasingly tempted to bring interference actions to stop or punish competitors who adversely affect their financial interests. However, absent clearly “wrongful” conduct—a term that continues to evolve in the courts—interference claims can be difficult to sustain.

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Endnotes

1. Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 865 (7th Cir 1999).
5. Restatement (Second) of Torts § 766B (1979).
15. Id.
17. Morrison v. Frank, 81 N.Y.2d 743, 744 (Sup. Ct. 1948).
18. White Plains Coat & Apron Co. v. Cintas Corp., 8 N.Y.3d 422, 426, 867 N.E.2d 422, 384 (2007); Restatement (Second) of Torts § 768 (2).

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