Section of Litigation Business Torts & Unfair Competition



# Can Economic Pressure Alone Give Rise to a Tortious Interference Claim?

By David L. Johnson and Beau C. Creson – August 20, 2015

Competition and free enterprise are fundamental tenets of the American business model. From a very young age, American children are taught the mantra that hard work and competition make everyone better. Oftentimes, these lessons are learned through the lens of titanic business figures like Ford, Vanderbilt, and Carnegie. At some point, however, it becomes apparent that competition is only as good as the virtues of those who compete. Thus, each chapter in the story of American competition includes a struggle between proponents of pure competition for the sake of profit and those who look to the law for shelter from "unfair" or "improper" actions. One way the law has dealt with "unfair" or "improper" competition is through the creation of a cause of action for tortious interference. The law, however, is not uniform on where the line between fair play and unfair competition should be drawn.

**The *Restatement* View**

Courts in most states have accepted the *Restatement (Second) of Torts*' recognition of a cause of action for "improper" interference with existing and prospective contractual relations. *See Restatement (Second) of Torts* §§ 766–766B. The *Restatement* has created a list of non-exhaustive factors that offer guidance about the meaning of the inherently vague term "improper"; certain bad acts performed in the name of competition, such as physical violence, abuse of legal process, and fraud, are virtually universally recognized as "improper" and actionable. *See Restatement (Second) of Torts* § 767. When these established bad acts are not present, however, there often will be a gray area between improper competition and fair competition.

A prime example is the question of whether the exertion of economic pressure alone on a competing business may give rise to a tortious interference claim. For instance, could a major drink distributor like Coca-Cola be deemed to have committed a tort against Pepsi by telling a merchant that it will no longer allow the merchant to sell Coca-Cola products if it also sells Pepsi products? Surely not, but what if the same scenario involved two very small businesses and the party exerting pressure does so with the sole desire of putting the other out of business?

According to the comments to the *Restatement*, an "actor may use persuasion and he may exert *limited* economic pressure." *Restatement (Second) of Torts* § 768 cmt. e (emphasis added). This naturally begs the questions of what does "limited" mean and where is the line drawn between lawful pressure and unlawful pressure.

It is widely recognized that economic pressure is improper if it is exerted in a context unrelated to the business in which the parties compete. *See, e.g., DP-TEK, Inc. v. AT&T Global Info. Solutions Co.*, 100 F.3d 828 (10th Cir. 1996). An example set forth in the *Restatement* would be a distributor's inducement of a third party not to buy the distributor's competitor's personal dwelling. *See Restatement (Second) of Torts* § 768 cmt. e. That sort of pressure would be improper because it occurred outside the realm of the parties' natural business competition.

A more difficult question concerns whether economic pressure may be improper when it takes place within the boundaries of the competitive relationship. Not surprisingly, courts have taken different views.

**The Majority View**
A majority of courts that have addressed this issue have followed the *Restatement* and found that economic pressure typically is fair game and not improper if it is aimed directly at the parties' competitive relationship. Recognizing that competition is woven into the fabric of American business, these courts have held that such economic pressure is only improper if the exertion of pressure itself is independently actionable (i.e., an act of violence or defamation). *See, e.g., Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532 (7th Cir. 1986) (under Indiana law, proving that defendant acted illegally is "critical" to tortious interference claim); *Assembly Tech. Inc. v. Samsung Techwin Co.*, 695 F. Supp. 2d 168 (E.D. Pa. 2010) (predicating tortious interference claim on independently actionable conduct strikes proper balance between encouraging healthy competition and prohibiting conduct that interferes with free market); *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190, 192 (2004) (economic pressure does not rise to the level of "wrongful means" unless it is so "extreme and unfair" that it "amount[s] to a crime or an independent tort"); *San Francisco Design Center Assoc. v. Portman Co.*, 50 Cal. Rptr. 2d 716 (Cal. Ct. App. 1995) (recognizing privilege of competition as an affirmative defense that can only be overcome if alleged conduct is independently actionable); *Briner Elec. Co. v. Sachs Elec. Co.*, 680 S.W.2d 737 (Mo. Ct. App. 1984) ("unsporting" acts by competitor were not sufficient to prove tortious interference because they were not independently unlawful).

The majority view, therefore, comports with the *Restatement*'s reasoning that a person may "refuse to deal with the third persons in the business in which he competes with the competitor if they deal with the competitor. Or he may refuse other business transactions with the third person relating to that business." *Restatement (Second) of Torts* § 768 cmt. e.

**The Minority View**
A small minority of courts, on the other hand, have taken a much broader approach. They apply a fact-specific standard that asks whether the otherwise lawful economic pressure (1) had the indirect purpose of injuring the plaintiff or benefiting the defendant at the expense of the plaintiff, (2) was a malicious act, and (3) damaged the plaintiff. *See, e.g., Lightning Lube v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993) (holding that right to compete does not extend to actions taken with malicious purpose of harming competitor's business); *Woods Corp. Assocs. v. Signet Star Holdings*, 910 F. Supp. 1019 (D.N.J. 1995) (malice that will give rise to tortious interference includes conduct that is transgressive of generally accepted standards of morality or socially acceptable conduct); *Architectural Mfg. Co. v. Airotec, Inc.*, 166 S.E.2d 744 (Ga. Ct. App. 1969) (reasoning that otherwise legal persuasion can become unlawful if indirect purpose was to injure competitor). The greatest challenge presented by such a test is that it hinges on the intent of the defendant and whether it acted with malice. Does a defendant act maliciously if it hopes to disrupt a competitor's business, which at the same time, would naturally benefit the defendant's business?

In *Wear-Ever Aluminum, Inc. v. Townecraft Industries, Inc.*, 182 A.2d 387 (N.J. Super. Ct. Ch. Div. 1962), the court found that that a business unlawfully recruited a competitor's at-will employees who had not signed restrictive covenants, on the basis that such "corporate raiding" was intended to, and did, substantially harm the competitor's business. Even though such activity was not atypical in the industry, the court reasoned that it was charged with "rais[ing] the standard of business morality and care, not judicially to sanction tortious activities. Higher standards benefit and protect both the innocent members of an industry and the general public." *Id.* at 394.

**Conclusion**
The *Wear-Ever* court's paternalistic reasoning, which is indicative of the minority approach generally, raises troubling questions. Given that competition is a fundamental aspect of American business, should courts (often with unelected judges) be allowed to constantly redefine business morality depending on the factual circumstances of each case? Allowing the murky concept of morality to guide decision making is prone to produce inconsistent results based largely on the individualized experiences of each judge. Although the majority approach may have its faults, it is more likely to lead to consistency and less likely to lead to results dependent on the whims of a particular judge.

The divide between the majority and minority views is symbolic of the ongoing struggle between those who subscribe to the ideals of pure competition and those who seek protection for victims of what they perceive to be "unfair" competitive means. As it stands, most courts have accepted a more restrictive approach.

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