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PLEADING AND PROVING “BUSINESS TORTS” IN A COMMERCIAL CASE: *Avoiding the “Economic Loss” Rule and Enhancing Available Damages*

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I. Introduction.

A common dilemma in the plaintiff commercial litigation case is how to increase damages (and the defendant’s exposure) in a standard “breach of contract” case. In many commercial cases, clients are sometimes forced to abandon or dismiss legitimate claims since the potential economic benefits of a “victory” simply do not outweigh the sometimes extraordinary costs of commercial litigation.

From a practitioner’s standpoint, the question becomes: *What alternative “business torts” should be considered to enhance a seemingly benign “breach of contract” case in order to increase a potential recovery?*

This article analyzes available “business torts” against the dangerous defense of the “Economic Loss Rule,” and provides insight and direction for maximizing damages in a commercial case.

II. Defining the “Business Tort” Under Ohio Law.

Although frequently written about, the term “business tort” is not well-defined in academia or the law. A practical definition of a “business tort” is: *any common law, statutory or related claim which arises separate and distinct from any contract between the litigants, and which provides extra-contractual damages.*

Although not exhaustive, a list of available business torts would include the following: fraudulent inducement, fraudulent concealment, fraudulent conveyance,

conversion, trespass, abuse of process, tortious interference, breach of fiduciary duties, negligent misrepresentation, unfair competition, intellectual property claims, and a wide variety of statutory claims (i.e., deceptive trade practices, uniform trade secrets, disclosures, and state antitrust violations).

III. Distinguishing Business Torts from Contractual Claims.

Under Ohio law, the existence of a contract between two litigants generally excludes the opportunity to present the same case as a tort claim. As a result, courts frequently look to whether “business tort” claims are actually breach of contract claims in disguise. *Resource Title Agency, Inc. v. Morreale Real Estate Services, Inc.*, 314 F.Supp. 2d 763 (N.D. Ohio 2004). In a standard contract case, the motive of the breaching party is irrelevant - - irrespective of the addition of adverbs, such as “intentionally,” “willfully,” and “fraudulently.” *Schwartz v. Bank One, Portsmouth, N.A.*, 84 Ohio App.3d 806, 810, 619 N.E.2d 10 (1992).

Quite simply, “torts are based on duties of conduct that are imposed by *law* stemmed from *general social policy*, and protect all persons within range of the harm or injury to be anticipated for the breach of the duty of conduct.” Prosser, (4 Ed. 1971) 613, Section 92. In contrast, contractual duties arise from the specific commercial arrangement (i.e., agreement) between the parties at issue, and are owed *only* to those who exchange contractual promises.

IV. The Defense Lawyer’s Antidote to Business Torts: The “Economic Loss Rule”.

In *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, (2005), 106 Ohio St.3d 412, the Ohio Supreme Court reiterated that a litigant is barred from recovering in tort for “purely economic losses.” The “Economic Loss Rule” “stems from the recognition of a

balance between tort law . . . and contract law, which holds that ‘parties to a commercial transaction should remain free to govern their own affairs.’” *Id.*, at ¶6 (citing *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 45 and *Floorcraft Covering, Inc. v. Parma Comm. Gen. Hosp. Assn.* (1990), 54 Ohio St.3d 1, 3).

In order to combat the inevitable assertion of the Economic Loss Rule, the practitioner must identify exceptions to its application. The exceptions recognized under Ohio law are primarily based upon some form of an “independent duty” which gives rise to “independent damages.”

V. Identifying Extra-Contractual Duties and Damages that are In Addition to Those Flowing from the Contract.

Although as noted above, it is not a tort to breach a contract, business torts can still be pled and proven in a contractual setting if a party: (1) breached a duty that existed *separate and apart* from all contractual duties; and (2) caused damages which are *in addition* to those attributable to the breach of contract. *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151 (8th Dist. 1996).

To assist in determining whether a commercial dispute gives rise to a business tort, the following checklist may be used:

- What promises and inducements did the defendant make to the plaintiff which are separate and apart from the promises contained in the contract?
- What material facts did defendant conceal in the pre-contractual negotiations which would have altered the client’s willingness to enter into the subject contract, or changed the terms and conditions upon which the agreement was ultimately finalized?
- What funds, profits or other proceeds did the defendant embezzle, conceal or transfer, outside of the contract between the parties?

- What agreements or business relationships was the defendant aware of and/or did the defendant interfere with before or after execution of the contract?
- If the client was the minority owner of the subject business, did his/her partner (i.e., the defendant) usurp corporate opportunities, prevent the client from enjoying corporate opportunities, or otherwise breach heightened fiduciary duties?
- Even if the client and the defendant were 50/50 partners did the defendant exercise such dominion and control over the enterprise that he/she owed heightened fiduciary duties?
- Did the defendant fail to use due care, and as a result, negligently misrepresented material facts relating to the underlying transaction?
- Did the defendant engage in any conduct which would give rise to statutory causes of action and damages *independent* of the contractual damages?
- Did the defendant engage in unfair competition?
- Does the client possess any intellectual property (copyrights, trademarks, patents, etc.) which have been jeopardized as a result of the defendant's conduct?

V. Conclusion.

Commercial litigation is an allocation of risk, costs and potential rewards. From the plaintiff's perspective, "winning" a commercial case depends in large part upon the ability to identify and pursue business tort claims to increase damages and risk to the defendant. Success many times means avoidance of the Economic Loss Rule and thwarting the defendant's ability to intertwine plaintiff's facts, claims and damages into a simple contractual dispute.