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Intentional Interference with Prospective Economic Advantage – a Way Forward at Last?

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The tort of intentional interference with prospective economic advantage has had an unstable history. Originally the creation of English common law, it emerged as a distinct tort in California with *Zimmerman v. Bank of America* (1961) 191 Cal.App.2d 55, and reached workable definition in *Buckaloo v. Johnson* (1975) 14 Cal.3d 815. *Buckaloo v. Johnson* was an action brought by a real estate broker alleging collusion between a buyer and a seller to avoid paying a commission. The Supreme Court took that opportunity to clarify the elements of the tort and made it available for a broader range of claims.

By the 1990s, intentional economic interference had become a standard feature of business litigation. Its attraction lay in its versatility. The 1994 edition of BAJI 2.78.1 was invitingly ambiguous, requiring only: (a) an economic relationship of probable future benefit; (b) defendant's knowledge of the relationship; (c) intentional interference; and (d) disruption of the relationship. Available also as a negligence cause of action, economic interference held out the promise of recompense to almost every injured business interest.

Yet clearly there was a problem. Most notably, the tort of intentional interference seemed to collide with the competition privilege, for often such claims would be brought by a business competitor who had simply lost out in an ambiguous course of dealing. Or, more generally, the litigant would be a player in a nexus of market forces whose lawsuit obstructed their efficient outcome. For example, in *Sade Shoe Co. v. Oschin & Snyder* (1984)162 Cal.App.3d 1174, economic interference was held to be properly pled against a commercial landlord who withheld approval of a lease assignment in the hope that the assignee would negotiate a new rent at market rate. And in *Lowell v. Mother's Cake & Cookie Co.* (1978) 79 Cal.App.3d 13, economic interference was held to be properly pled against a manufacturer who threatened to stop using a trucking company in order to lower its value and purchase the company itself. Arguably, both defendants were merely exercising legitimate market prerogatives.

The expansive redefinition of economic interference meant that a whole new range of competitive activity now came under threat of litigation. While this was consistent with other developments in tort law over the same period, in reality the competition privilege had very deep roots. In fact, free competition never ceased to be the underpinning of California business law. As Prosser pithily observed,

> **[I]n the absence of prohibition by statute, illegitimate means, or some other unlawful element, a defendant seeking to increase his own business may cut rates or prices, allow discounts or rebates, enter into secret negotiations 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.**

Prosser, *Law of Torts* (4th ed. 1971) § 130, pp. 954-955.

In theory, this remained true. But in practice, defendants facing an economic interference claim could raise the competition privilege only as a **defense**. And not only were there strict limitations on when the privilege could be used (see, *e.g.*, *Sade Shoe Co. v. Oschin & Snyder*, *supra*, and *Lowell v. Mother's Cake & Cookie Co*., *supra*), it often entailed a difficult factual proof as to the defendant's intention or state of mind – effectively precluding summary remedy. As a result, defendants in economic interference litigation could be held hostage on very slender pleadings.

Concern had been raised by commentators throughout the 80s and early 90s, and in *Della Penna v. Toyota Motor Sales* (1995) 11 Cal.4th 376, the California Supreme Court resolved to act. Following a trend in out-of-state decisions, the court took the radical step of shifting the burden of proof. From now on, the defendant in an intentional interference claim need not raise reasonable competition as a defense. Instead, the plaintiff would be required to show the defendant's competitive actions were **un**reasonable. Justice Arabian, writing for the majority, held,

> **A plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself.**

Penna v. Toyota Motor Sales, *supra*, at 392-393.

The court did not say what it meant by "wrongful conduct" and in fact explicitly refrained from explanation. Nevertheless – despite a prescient warning in Judge Mosk's dissenting opinion – the majority evidently felt it had made its position clear and that the remedial framework had now been established.

But the court was badly mistaken. "Wrongful" was not an easy word to define or apply, and it lacked precision in civil law. As a result, the *Della Penna* decision, far from setting economic forces free, began a period of deep confusion. Some courts turned to pre-*Della Penna* decisions. (See, for example, *Arntz Contr. Co. v. St. Paul Fire and Marine Ins*. (1996) 47 Cal.

App.4th 464; *Marin Tug & Barge, Inc*. (2002) 271 F.3d 825.) Others considered whether "wrongfulness" might be understood in terms of normative trade practices. (See, for example *Gemini Aluminum Corp. v. California Custom Shapes, Inc*. (2002) 95 Cal.App.4th 1249.) But in large part, business litigators simply did not believe the party was over. And many courts too did not take the "wrongfulness" requirement as a serious restraint. Thus, "wrongful" was often applied to conduct that was merely ethically dubious. For example, in *Willard v. Caterpillar, Inc*. (1995) 40 Cal.App.4th 892, 920, conduct was tortious if it was "unfair or immoral according to the common understanding of society." And in *PMC, Inc. v. Saban Entertainment, Inc*. (1996) 45 Cal.App.4th 579, 603, conduct undertaken for an "improper motive" was sufficient to bring a claim. For these courts it seemed to be business as usual.

But clearly this was not what the Supreme Court had in mind. Before long it issued a rebuke that left no doubt as to its severity. In *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, the Supreme Court declared:

> **An act is not independently wrongful merely because defendant acted with an improper motive. ...The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct.**

Id., 29 Cal.4th at 1159 [emphasis added].

Doubtless all who read this were chastened, but few could have been enlightened. Did the court mean defendants must be liable on other counts before a claim of tortious interference could be brought? That was what the *Korea Supply* decision seemed to be saying. Yet surely there were *some* situations in which no independently tortious act occurred, but the interference lay outside the rubric of fair competition? It seemed a new dark age had descended.

Now, three years after the *Korea Supply* decision effectively closed the door, *Stevenson Real Estate Services v. CB Richard Ellis Real Estate Services* (2006) 138 Cal. App.4th 1215, offers a way forward. Stevenson was a realty firm suing to recover brokerage fees on the grounds that CB Richard Ellis interfered in its lease negotiations and improperly took the commission. CB Richard Ellis moved for judgment on the pleadings. Citing *Della Penna* and *Korea Supply*, it argued that its conduct had not been "independently actionable," and the trial court agreed.

Considering the matter on appeal, the *Stevenson* court did not focus on the culpability of the defendant's conduct *per se*. For clearly, if conduct cannot be framed as an independent wrong, its culpability is irrelevant. Instead the court turned to the policy **underlying** the Supreme Court's concern that conduct be independently wrongful: that the risk of liability be measurable and therefore be **predictable** to business. In particular, the court cited *Korea Supply's* requirement that wrongful conduct be proscribed by some "*determinable* legal standard." *Id*. at 1159 (emphasis added).

As it happened, Stevenson's complaint alleged the defendant's actions had contravened the rules of the American Industrial Real Estate Association. Noting this, the court observed that, in contrast to *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, *supra*, in which normative trade practices were rejected as a criterion of "wrongful conduct," here the rules were *written* and therefore could give *notice* to members of the association. On this basis, the court concluded that "in certain circumstances, violation of well-defined, established rules or standards of a trade, association or profession may constitute the type of wrongful conduct that will support a cause of action for intentional interference with economic advantage." *Stevenson v. CB Richard Ellis*, *supra*, 138 Cal. App. 4th at 1223.

There can be little doubt that, while ostensibly following *Korea Supply*, this reasoning offers a significant expansion of what may be considered "wrongful conduct." Moreover, the *Stevenson* court found that the rules of the American Industrial Real Estate Association also met the "independently wrongful" requirement because they provided "some other source of limitations upon behavior by which conduct could be assessed." *Id*. The court acknowledged that infraction of the Association's rules was unlikely to give rise to legal causes of action, but nevertheless concluded, "internal remedies available within the association, such as the right to arbitration between aggrieved members, should suffice to establish 'independently actionable conduct.'" *Id*.

Thus, with a few deft, if summary, conclusions, the *Stevenson* court has created a real way forward out of the uncertainty created by *Della Penna* and *Korea Supply*. It is true that most businesses do not operate within the level of self-regulation assumed by real estate industry. But the American Industrial Real Estate Association is, after all, merely a trade group. If the fact that its rules are written and circulated to members is sufficient to make their breach "independently actionable conduct," the door may now be open for every industry with a trade association.