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Checking Misconduct in Competition Through the Tortious Interference with Contract Cause of Action

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Competition is the lifeblood of free-market capitalism. The opportunity to choose from among competing providers of goods and services fosters a race to the top in quality and a race to the bottom in price. As a society, we favor competition and the efficiencies realized by allowing stiff, even vicious, competition in the marketplace. Under the "efficient breach" theory, courts allow and public policy encourages parties to breach onerous, burdensome contracts and recommit resources to other contracting parties as long as the payment of damages is encompassed in the savings realized by nonperformance to the original party. There are, however, limits to competition and contract breaking. While parties are free to compete for and even breach their own contracts, society does not tolerate third parties using improper means to subvert existing contracts or encourage the use of noncompetitive strategies to effect breaches of contract.

Where is the line drawn? How does society accommodate the need for competition and efficiency in contracting against the need to protect the expectations of those who have already entered into contracts? The best way to illustrate the three-party relationship that gives rise to the tort of intentional interference with an existing contract is to recall the rather contentious relationship between Wiley Coyote, Acme Explosive Co., Inc., and Road Runner. Suppose Coyote enters into a contract with Acme for the provision of certain "mining equipment." Road Runner, a third party to this transaction, has a rather enhanced interest in seeing that the transaction between Acme and Coyote is not consummated. Road Runner, knowing of the contract between Acme and Coyote, calls Acme and offers double the money that Coyote had been willing to pay for the same mining equipment and to accept it FOB so that Acme need not traverse the precarious mountain roads and hair-pin turns otherwise required to deliver the shipment to Coyote's house. Recognizing the superior offer and calculating that it can pay damages to Coyote and *still* profit by redirecting the mining equipment to Road Runner, Acme breaches its contract with Coyote in favor of this better deal with Road Runner. Is this interference with the

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contract between Acme and Coyote? Certainly. Is it tortious interference with the contract between Acme and Coyote? No. This is the essence of aggressive competition.

Suppose, alternatively, that Road Runner—lacking opposable thumbs, sufficient vocational training and income—cannot out bid Coyote on the Acme contract. Instead, he resorts to a number of questionable schemes to disrupt the consummation of the deal and dedicates himself to making it difficult for Acme to deliver and be paid for the all-important mining equipment. For example, Road Runner creates a detour on a road that Acme intends to use to deliver the mining equipment. Instead of continuing on to Coyote's home, the road is deceptively detoured by Road Runner so that it runs directly into the face of a solid cliff wall that Road Runner falsely represents as a tunnel and continuation of the road. As a result of Road Runner's deception, the mining equipment is destroyed before it can be tendered to Coyote. Though Coyote is ready, willing, and able to accept and pay for the equipment, Acme is unable to deliver and is in breach of its obligations to Coyote. Is this tortious interference with the contract between Coyote and Acme? Yes. This is not aggressive competition. This is an intentional tort for which Road Runner owes compensation for damages.

There must be a valid contract subject to interference for there to be a claim for tortious interference. Without a valid contract, there is no cause of action.

Causes of Action for Tortious Interference with Existing Contracts

While there is something intuitively wrong with what Road Runner has done, it is a bit more complex to determine who has a cause of action against him for the breach of Acme's contract with Coyote. Under section 766 of the Restatement (Second) of Torts, followed by most jurisdictions that recognize the tort, Coyote has the cause of action against Road Runner for tortious interference with the contract for denying him the benefit of Acme's performance on their contract. When section 766A (which is recognized by only a minority of jurisdictions) is added to Section 766 of the Restatement (Second) of Torts, both Acme and Coyote have the cause of action. Coyote has a cause of action against Road Runner for the loss of Acme performance, yet, more interestingly and powerfully, Acme has a cause of action against Road Runner for causing its own breach of contract with Coyote.

A. Compensating the Non-Breaching Party for the Interference

Most states that recognize the tort of tortious interference with contract have modeled it on The Restatement (Second) of Torts section 766. Under the standard articulated by the Restatement,

> 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. (emphasis added).[1]

Why is a cause of action under Restatement (Second) section 766 so powerful? It is powerful because, in its absence, Coyote would not have a remedy for Road Runner's interference with his transaction. Coyote might sue Acme for breach of contract, yet Acme might well be successful in claiming that performance was made impossible because of Road Runner's intentional torts. Coyote and Road Runner are not privies to the contract so Coyote lacks a direct breach of contract cause of action against Road Runner. Moreover, Coyote is not directly damaged by Road Runner's intentional tort against Acme. While Acme might have traditional tort causes of action against Road Runner, Acme might choose not to pursue Road Runner. Section 766 bridges the gap between Coyote and Road Runner by allowing Coyote to pursue Road Runner for intentionally and improperly interfering with Acme's performance of its obligations to him. Should Coyote succeed in his action against Road Runner, Coyote would be permitted to recover from Road Runner the loss caused by Acme's breach.

There must be a valid contract subject to interference for there to be a claim for tortious interference with such. Without a valid contract, there is no cause of action.[2] Demonstrating that the defendant actually knew of the existence of a contract between the plaintiff and a third party is another essential element of the cause of action.[3] Section 766, comment (i) of the Restatement (Second) of Torts (1977) states, "To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract."[4] If the defendant does not know of the contract, the intentional character of the tort is lacking and the cause of action collapses.[5]

A party, however, cannot escape liability by being willfully ignorant about the existence of a contract. Where a plaintiff can show that the interfering party had knowledge of such facts and

circumstances that would lead a reasonable person to believe in the existence of the contract and the plaintiff's interest in it, a finder-of-fact may determine that the defendant had inquiry notice of the contract. "It is enough to show that defendant had knowledge of facts, which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties."[6] Moreover, in a claim for interference with an existing contract, it is not necessary for the defendant to appreciate the legal significance of the facts that give rise to the contractual duty.[7] "If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what it is judicially held to have."[8]

Courts have applied the "but for" test to fulfill the damage requirement for tortious interference with contract.[9] The two-step "but for" test asks: (1) did the defendant actively and affirmatively take steps to induce the breach, and (2) if so, would the plaintiff's business expectancy been realized in the absence of the defendant's interference?[10] Once the fact of damages has been established, the measure of damages is calculated as the loss caused by the breach.[11] Yet, "[s]ince the damages recoverable for breach of the contract are common to the action against [the party breaching the contract and the party inducing the breach], any payment made by the one who breaks the contract or partial satisfaction of the judgment against him must be credit in favor of the defendant who has caused the breach."[12]

Another critical element to the cause of action is the requirement that the interference be "improper." To determine whether a defendant's acts are "improper," courts engage in an examination of various factors, including the interests of the parties and the interests of society.[13] A court must weigh the interest shared by society and the contracting parties in the security of established contracts against the interest in freedom of business action and society's concomitant interest in free competition.[14]

Improper Interference

Consider these factors to determine whether interference is proper:

- the nature of the actor's conduct;
- the actor's motive;
- the interests of the other with which the actor's conduct interferes;
- the interests sought to be advanced by the actor;
- the social interests in protecting the freedom of action of the actor and the contractual interests of the other;
- the proximity or remoteness of the actor's conduct to the interference; and
- the relations between the parties.

The Restatement itself provides an amorphous list of factors to be weighed in determining whether interference is "improper."[15] (*See box in first column.*)

Means are generally thought to be improper if they involve acts that are independently tortious, such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade, or any other wrongful act recognized by statute or the common law."[16] Moreover, "[c]onduct specifically in violation of statutory provisions or contrary to public policy may for that reason make an interference improper."[17] No liability arises, however, from interfering with a contract or business expectancy, if the defendant had an unqualified legal right to do the action of which the petition complains.[18]

B. Compensating the Breaching Party for the Tortious Interference

Section 766A of the Restatement (Second) of Torts is, from one view, a logical extension of section 766; from another view, a dangerous expansion of contract liability. This section states:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between, another and a third person, by preventing *the other* from performing the contract *or causing his performance to be more expensive or burdensome*, is subject to liability to the other for the pecuniary loss resulting to him (emphasis added).

As comment (c) to section 766A states,

> This Section and § 766 both involve interference with an existing contract. Under § 766, the plaintiff's interest in obtaining performance of the contract is interfered with directly. Under this Section the interference is indirect, in that the plaintiff is unable to obtain performance of the contract by the third person because *he has been prevented from performing his part* of the contract and thus from assuring himself of receiving the performance by the third person." (emphasis added).

More interestingly, comment (c) to section 766A states, "If the plaintiff's performance has intentionally been made *more burdensome or more expensive* by the actor, the cost that he incurs to obtain the performance by the third party has increased, and the net benefit from the third person's performance has been correspondingly diminished."[19] In other words, under section 766A, there is no requirement that the contract actually be breached. Section 766A allows a party to collect damages from the interferor if the interferor's conduct merely makes it more expensive for the contracting party to perform. Thus, going back to the Road Runner example, if Acme's encounter with the deceptively painted cliff wall had caused massive damage to Acme's vehicles, yet the mining equipment was undamaged and capable of being delivered to Coyote with no breach of contract, Acme could sue Road Runner for the additional cost of performing its contract.

Courts that have adopted section 766A think it is a logical extension of the liabilities imposed by section 766. For example, though Pennsylvania has not formally adopted section 766A, a Pennsylvania court has stated:

> It seems irrational to recognize a cause of action for a party's conduct directed at a third party designed to prevent that third party from performing a contract with another and not recognize a similar cause of action for that other party where the actor's conduct is instead directed at the other to prevent them from performing. In either case an actor's improper conduct is preventing the performance of a valid contract to which it is not a Party."[20]

The unity of interest between managers and their company has been defined as "the manager's privilege."

The expansive reach of section 766A troubles other courts. As the United States District Court for the Western District of Kentucky expressed its reservations,

> The actual language of § 766A is so all encompassing and vague that to adopt it directly would cause tremendous confusion without creating a clear societal benefit. The conduct conceivably within its scope could be indistinguishable from the kind of unfettered commerce upon which courts have been reluctant to pass judgment. . . . The torts discussed in § 766A necessarily involve highly speculative damages. Parties to contracts have a full array of contractual remedies to resolve inequities of performance caused by third persons. The Court is not persuaded that this new tort is necessary to correct a glaring inequity among commercial parties.[21]

Section 766A is problematic to some courts because it duplicates other causes of action. Reverting to the Road Runner fact pattern, it is assumed that where Road Runner has prevented Acme's performance, Acme is not a willing participant in Road Runner's actions. Road Runner's action with respect to Acme constitutes independently actionable tortious conduct. So characterized, the adverse effects on Acme's contract with Coyote should become an element of damages subject only to the usual limitations of causation, mitigation, and reasonable certainty.[22] As Professor Prosser points out,

> The bulk of the cases involving interference as distinct from inducement involve . . . physical interference with person or property and also involve the commission of some independent tort . . . Methods tortious in themselves are of course unjustified and liability is appropriately imposed where the plaintiff's contract rights are invaded by violence, threats and intimidation, defamation, misrepresentation, unfair competition, bribery and the like . . . *Thus in many cases interference with contract is not so much a theory of liability in itself as it is an element of damage resulting front the commission of some other tort, or the breach of some other contract.*[23]

What is bothersome to some of the courts that have rejected section 766A is that it duplicates protection already afforded through those tort causes of action. This duplication is seen as coming at a high cost. "It risks chilling socially valuable conduct and creates new liability of uncertain dimensions."[24]

Defenses and Privileges

Essential to recovery on the theory of tortious interference with contract is the existence of three parties: a tortfeasor who intentionally interferes with a contract between the plaintiff and another.[25] A claim for tortious interference with contractual relations "contemplates interference from a third party, not from a party to the contract itself."[26]

The Restatement (Second) of Torts recognizes that under certain circumstances, interference with contract relations is privileged and is therefore not improper as a matter of law.[27] The privilege to act for the welfare of a third person provides as follows: One who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract or enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if the actor (a) does not employ wrongful means and (b) acts to protect the welfare of the third person.[28] As the Georgia courts have described it, "[p]rivilege means a legitimate or bona fide economic interest of the defendant or a legitimate relationship of the defendant with the contract, which causes the defendant not to be considered a stranger, interloper, or meddler to the contract."[29]

The concept of not being a stranger to the contract is a constant theme that runs throughout the defenses to the tort of tortious interference with an existing contract. Where a defendant can show that he or she should be viewed as the *same person* as one of the contracting parties, the tort collapses because a party to a contract can only breach it; it cannot tortiously interfere with it.

A. The Manager's Privilege

Employees have filed actions against supervisors and managers claiming that, through disciplinary measures or negative performance evaluations, these people interfered with the employment contract the plaintiff had with his or her company. Absent a finding that the manager or supervisor acted improperly, as dis-

cussed below, such a cause of action will fail because a corporate officer acting for the corporation is the corporation for purposes of a tortious interference cause of action.[30] This is because corporations can *only* act through their officers and agents.[31] The unity of interest between managers and their company has been defined as "the manager's privilege." The manager's privilege establishes that where a manager, with impersonal or disinterested motive, properly endeavors to protect the interests of his or her principal by counseling the breach of a contract with a third party that the manager reasonably believes to be harmful to his or her employer's best interests, such conduct will be shielded from a claim of tortious interference.[32] Yet, "in order to take advantage of the manager's privilege, a director and shareholder of a corporation must show that he or she was involved in the management of the company and was authorized to act on behalf of the corporation when he or she interfered with the . . . contract at issue."[33] Thus, a court must make a factual inquiry before extending the benefit of this privilege to managers.

The manager's privilege is lost if it can be established that the manager engaged in a personal vendetta, an excursion from his or her duties to the company, acted with self-interest in a way that is harmful to the company, or otherwise acted maliciously.[34] "Particularly is this true in supervision of the plaintiff employee's performance or the power to participate in the corporate decision to terminate or otherwise discipline [a] plaintiff."[35] The privilege evaporates because it is clear that the manager is not representing and should not be treated as synonymous with his or her company. Thus, the requisite three-party relationship is restored and the cause of action resuscitated.

B. The Agent's Privilege

Of course, closely related to the manager's privilege is the "agent's privilege," founded on the same rationale. "An agent of a principal is conditionally privileged against a claim that it interfered in a third-party's relationship with the principal" essentially because the principal acts through its agents.[36] This privilege can be overcome if it is shown that the agent acted maliciously or without justification—which generally requires a showing that the agent acted in its own interests and contrary to the interests of its principal—or that the agent engaged in conduct totally unrelated or antagonistic to the interest giving rise to the privilege.[37]

C. The Parent/Subsidiary Privilege

Corporate organizational trees also might provide shelter from tortious interference claims. Again, the foundation of this purported "privilege" is the unity of interest between the allegedly tortfeasing parent corporation and the contracting subsidiary. Where there is unity between the corporate parent and the subsidiary, the three-party roster needed to play this cause of action is destroyed.

As a general statement of this principal, the Tennessee Supreme Court has stated that "a parent corporation has a privilege pursuant to which it can cause a wholly owned subsidiary to breach a contract without becoming liable for tortiously interfering with a contractual relationship."[38] It continued, however, by making clear that such a privilege "may be lost if the parent company acts contrary to the subsidiary's economic interests or if the parent corporation employs wrongful means in such situations"[39] and when the corporate parent employs wrongful means in causing the termination of a contract between a subsidiary and a third party.[40] Thus, even if a parent corporation acts in the interest of its subsidiary company, it can be found liable in tort if it accomplishes its end through acts "which are wrongful in and of themselves, such as 'misrepresentations of fact, threats, violence, defamation, trespass, restraint of trade, or any other wrongful act recognized by statute or common law.' "[41]

In explaining the policy choice behind the privilege enjoyed by corporate parents with respect to their company subsidiaries, a

Some courts are uncomfortable providing such blanket protection to a corporate parent that is, designedly, separate from its subsidiary.

Texas court has stated, "a parent and a subsidiary are so closely aligned in business interests as to render them, for tortious interference purposes, the same entity."[42] Yet, some courts are uncomfortable providing such blanket protection to a corporate parent that is, designedly, separate from its subsidiary. Noting the lack of consistency between collapsing the distinctions between parents and subsidiaries for tortious interference claims, yet maintaining such separateness for veil piercing claims, the Eighth Circuit Court of Appeals has ruled that an allegedly tortfeasing parent corporation must rely on equitable principles to assert its unity with the contracting subsidiary. It stated that "[i]n cases where a creditor seeks to recover from a parent corporation for its subsidiary's debts, 100 percent ownership and control does not itself authorize piercing the corporate veil. It would be incongruous to protect a corporate parent in one situation with a rule that 100 percent ownership is *not* enough to find a parent and subsidiary identical and to protect a corporate parent in another situation . . . with a rule that 100 percent *is* enough to find a parent and subsidiary identical."[43] Thus, as in a corporate veil piercing context, where a plaintiff must establish that equity requires that the two corporations be treated as one, a defendant in a tortious interference

action must rely on equitable grounds for treating two separate corporations as a single entity so as to defeat the tortious interference cause of action.[44]

D. The Superior Interest Privilege

No liability arises for interfering with a contract if the action complained of was an act that the defendant had a definite legal right to do without any qualification.[45] There is no improper interference where one intentionally causes a third person not to perform an existing contract by asserting in good faith one's own legally protected interest.[46] Under this rule, if two parties have separate contracts with a third party, each may resort to any legitimate means at his or her disposal to secure performance of his or her own contract, even though a breach of the other contract will necessarily result.[47] With respect to an existing contract, however, it cannot be claimed that the interference is privileged merely because the action furthered "competition."[48] A qualified justification given to competition, which is set out in Restatement (Second) Torts section 768, has no application for an *existing* contract,[49] only for a *prospective* contractual relation.[50]

One who uses tortious or illegal means to disrupt a contract can expect to be sued by one or both of the contracting parties.

Conclusion

Competition has limits. Generally speaking, one who uses tortious or illegal means to disrupt a contract can expect to be sued by one or both of the contracting parties for tortious interference with contract. While a defendant to such claims can defeat liability by demonstrating that it should be treated as if it were one and the same as a contracting party, most jurisdictions will withdraw the benefit of such a defense if it is shown that the action by the defendant was harmful to the one it claims to represent or where the means for acting in that party's interests were tortious or illegal.

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Endnotes

1. Courts articulate the elements of such a cause of action differently, but generally speaking they are: (1) the plaintiff had a valid contractual relationship with a third party; (2) the defendant knew of that relationship; (3) the defendant intentionally interfered with that relationship; (4) the defendant's action caused the third party to breach its contractual relationship with the plaintiff; and (5) the plaintiff suffered damages. *Grimm v. U.S. West Communications, Inc.*, 644 N.W.2d 8, 13 (Iowa 2002); *cf. Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust*, 38 P.3d 12, 31 (Ariz. 2002) (stating the elements as (1) existence of a valid contractual relationship; (2) knowledge of the relationship on the part of the interferor; (3) intentional interference including or causing a breach; (4) resultant damage to the party whose relationship has been disrupted, and (5) that the defendant acted improperly); *Gore v. Sherard*, 50 P.3d 705 (Wyo. 2002): (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional and improper interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted; *Philadelphia Plaza Phase II v. Bank of America Nat. Trust and Sav. Assn.*, 2002 WL 1472338, *5 (May 30, 2002) (combining tortious conduct toward an existing contract with tortious conduct against a prospective contract: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct); *Hodges v. Buzzeo*, 193 F. Supp. 2d 1279, 1284 (M.D.Fla. 2002) (1) the existence of a business relationship under which the plaintiff has legal rights, not necessarily evidenced by an enforceable contract; (2) proof of the defendant's knowledge; (3) intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of interference.).

2. *Dolton v. Capitol Federal Sav. and Loan Assn*, 642 P.2d 21, 22-23 (Colo.App. 1981).

3. *See G.S. Enterprises, Inc. v. Falmouth Marine,* Inc., 571 N.E.2d 1363, 1369 (Mass. 1991).

4. *Ryan, Elliott and Co., Inc. v. Leggat, McCall & Werner, Inc.*, 396 N.E.2d 1009, 1013 n.5 (Mass. App. Ct., 1979) (citing with approval Restatement (Second) of Torts § 766, cmt. i (1977)).

5. *See Gore*, 50 P.3rd at 710-11 (upholding dismissal of cause of action where evidence showed that the oral lease between the parties had expired, contract negotiations had stalled and had not proceeded for months, that there was no meeting of the minds or agreement on the terms of any future contract, and that parties did not know of any contractual relationship or business expectancy and explaining that "[a] reasonable probability of a contract is shown if there is a reasonable assurance of a contract in view of all the circumstances."); *Walker v. Waltham House. Auth.*, 44 F.3d 1042, 1048 (1st Cir. 1995) (no liability where the defendant reasonably believed the plaintiff had abandoned the contract); W. Page Keeton et al., Prosser And Keeton on the Law of Torts Section 129 at 982 (5th ed. 1984), quoted with approval in *Bell v. May Dept. Stores Co.*, 6 S.W.3d 871, 878 (Mo. en banc 1999).

6. *ACT, Inc. v. Sylvan Learning Systems, Inc.*, 296 F.3d 657 (8th Cir. 2002) (describing the inquiry notice required under Iowa law to be "knowledge of facts which, if followed by reasonable inquiry, would have led to the disclosure of the contractual relationship" yet affirming the dismissal of the action where evidence was insufficient as a matter of law to create a jury question establishing that the defendant knew of the existence of the contract in question.); *See Ryan, Elliott & Co., Inc. v. Leggat, McCall & Werner, Inc.*, 396 N.E.2d 1009, 1012-13 (1979) (no knowledge of contract where the defendant reasonably relied on representation that no binding contract existed); 45 Am, Jur. 2d Interference § 11.

7. *Property Tax Representatives, Inc. v. Chatam,* 891 S.W.2d 153, 160

(Mo.App.1995) (quoting Restatement (Second) Torts § 766, cmt. i).

8. *Id.; See Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 821 (1st Cir. 1948).

9. *Fabricor, Inc. v. E.I. DuPont de Nemours & Co.*, 24 S.W.3d 82, 93 (Mo.App.2000).

10. *Id.* at 93-94.

11. *Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc.*, 690 P.2d 207, 212 (Co. 1984).

12. Restatement (Second) of Torts § 774A.

13. *Id.*

14. *Id.*

15. *Philadelphia Plaza-Phase II v. Bank of America Nat. Trust and Sav. Ass'n,* 2002 WL 1472338 *5 (Pa.Com.Pl., May 30, 2002) (No.332 May term 2002).

16. *Ozark Employment Specialists, Inc. v. Beeman*, 80 S.W.3d 882, 895 (Mo. App. W.D. 2002); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 317 (Mo. 1993).

17. *Wells Fargo Bank v. Arizona Laborers,* 38 P.3d 12, 32-33 (Az 2002).

18. Ozark, 80 S.W.3d 882; *Vikings, USA Bootheel MO v. Modern Day Veterans,* 33 S.W.3d 709, 711 (Mo.App. S.D. 2000).

19. Restatement (Second) of Torts § 766A, comment c (1979).

20. *P.V.C. Realty ex rel. Zamias v. Weis Markets*, 2000 WL 33406981 (Pa.Com.Pl., 2000); *cf GE Capital Mortg. Services, Inc. v. Pinnacle Mortg. Inv. Corp.*, 897 F. Supp. 854, 868 (E.D.Pa. 1995) (where the court found that "in Pennsylvania, the viability of a section 766A cause of action remains an open question.").

21. *CMI, Inc. v. Intoximeters, Inc.*, 918 F.Supp. 1068, 1080 (W.D. Ky. 1995).

22. *Windsor Securities, Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 663 (3rd Cir. 1993).

23. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129, at 992 (5th ed. 1984) (footnotes omitted) (emphasis added).

24. *Windsor Securities*, 986 F.2d at 663.

25. *Ryan v. Lower Merion Tp.*, 205 F. Supp.2d 434, 441 (E.D. Pa. 2002). (citing *Maier v. Maretti,* 671 A.2d 701, 707 (Pa.Super. 1995), reargument denied (Mar 06, 1996), appeal denied 694 A.2d 622 (Pa. 1997).

26. *Howard v. Youngman*, 81 S.W.3d 101, 116 (Mo. App. ED, 2002); Fields v. R.S.C.D.B., Inc., 865 S.W.2d 877, 879 (Mo. App. E.D. 1993).

27. *Omedelena v. Denver Options, Inc.*, 2002 WL 391697, *8 (Colo. App. March 14, 2002) No. 00CA1640.

28. *Id.*

29. *Culpepper v. Thompson*, 562 S.E.2d 837, 840-840-41 (Ga. App. 2002).

30. *Howard v. Youngman,* 81 S.W.3d 101, 117 (Mo.Ct.App 2002).

31. *Id.; Forrester v. Stockstill*, 869 S.W.2d 328 (Tenn.1994).

32. *Aalgaard v. Merchants Nat. Bank Inc.*, 224 Cal.App.3d 674, 684 (Cal.App. 3 Dist. 1990), cert. denied, 502 U.S. 901 (1991); *see also Whealton v. Allen*, 2002 WL 1788431 *7 (Ca1.App. 6 Dist) No. H022421.

33. *Kozlowsky v. Westminster Nat'l Bank*, 6 Cal.App.3d 593, 598 600 (Cal .App. 2 Dist., 1970).

34. *Fahrmann v. Fredd*, 2002 WL 1467451, at *5 (Minn. App. July 1, 2002) (holding that "a company officer, agent or employee is privileged to interfere with or cause a breach of another employee's employment contract with the company, if that person acts in good faith, whether competently or not, believing that his actions are in furtherance of the company's business. This privilege may be lost, however, if the defendant's actions are predominantly motivated by malice and bad faith, that is, by personal ill-will, spite, hostility, or a deliberate intent to harm the plaintiff employee."); *see also Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 506-507 (Minn. 1991).

35. *Fahrmann*, at *5; *Nordling*, at 506-507.

36. *Traum v. The Equitable Life Assurance Society of the United States*, 2002 WL 1163725 at *13 (N.D. Il. May 31, 2002) No. 00 C 3444; *Citylink Group, Ltd. v. Hyatt Corp.*, 729 N.E.2d 869, 877 (I11. App. 1st Dist. 2000); *Stafford v. Puro*, 63 F.3d 1436, 1441 (7th Cir. 1995); *Stanford v. Kraft Foods, Inc.*, 88 F.Supp.2d 854, 856 (N.D.Ill. 1999); *Roy v. Austin Co.*, 1996 WL 599435 *10 (N.D.Ill. Oct. 16, 1996).

37. *Traum*, 2002 WL 1163725, at *14; *See Citylink*, 729 N.E.2d at 877; *Storm & Associates, Ltd. v. Cuculich*, 700 N.E.2d 202, 209 (Ill. App. 1st Dist. 1998); *Stafford*, 63 F.3d at 1441; *Stanford*, 88 F. Supp.2d at 856; *Naeemullah v. Citicorp Services, Inc.*, 78 F.Supp.2d 783, 793 (N.D.Ill. 1999); *Roy*, 1996 WL 599435 at *10.

38. *Waste Conversion Systems, Inc. v. Greenstone Industries, Inc.*, 33 S.W.3d 779, 780 (Tenn. 2000) (citing *T.P. Leasing Corp. v. Baker Leasing Corp.*, 732 S.W.2d 480, 483 (Ark. 1987), corporation is privileged to interfere with contract relations when contract threatens economic interest of wholly owned subsidiary, unless there is clear evidence of wrongful means or improper purpose).

39. *Waste Conversion Systems*, at 783 (holding that "A parent corporation acting contrary to its wholly-owned subsidiary's economic interests can be considered a third party to its subsidiary's contractual relationship and can be held liable for tortiously interfering with that relationship."); *Long Distance International, Inc. v. Telefonos de Mexico, S.A.,* 2002 WL 384136, at *6 (Tex. App.-San Antonio, March 13, 2002) (denying privilege where evidence showed that parent corporation had divergent interests and only owned 10 percent of the subsidiary), opinion withdrawn following settlement, 2002 WL 1999754 (Tex. App.-San Antonio Aug 30, 2002).

40. *Waste Conversion Systems*, 33 S.W.3d at 784.

41. *Waste Conversion Systems*, 33 S.W.3d at 783-84 (citing *Paglin v. Saztec Int'l, Inc.*, 834 F. Supp. 1184, 1196 (W.D. Mo. 1993)).

42. *American Medical Int'l v. Giurintano*, 821 S.W.2d 331, 336 (Tex.App.-Hous. (14 Dist.) 1991).

43. *Phil Crowley Steel Corp. v. Sharon Steel Corp.*, 702 F.2d 719, 722 (8th Cir. 1983) (internal quotations and citations omitted; emphasis in the original).

44. *Id.*

45. *Howard v. Youngman,* 81 S.W.3d 101, 120 (Mo. Ct. App 2002); *see also Pillow v. General American Life Ins. Co.*, 564 S.W.2d 276, 281 (Mo.App.1978).

46. *Francisco v. Kansas City Star Co.*, 629 S.W.2d 524, 534 (Mo. App. W.D. 1981); Restatement (Second) Torts § 773.

47. *McReynolds v. Short,* 564 P.2d 389, 394 (Ariz. App. Div. 2 1977); *Imperial Ice Co. v. Rossier*, 18 Cal.2d 33, 112 P.2d 631, 633 (Cal. 1941); Restatement (Second) Torts § 733, cmt. a, illus. 3.

48. *Howard v. Youngman*, 81 S.W.3d 101, 115 (Mo. App. E.D. 2002) (No. ED 79283, ED 79710, ED 79302, ED 79303), rehearing and/or transfer denied (79283) (Jun 05, 2002), transfer denied (Aug 27, 2002).

49. *Downey v. United Weatherproofing*, 253 S.W.2d 976, 982 (Mo. 1953).

50. Restatement (Second) Torts Section 768; *Briner Elec. Co. v. Sachs Elec. Co.*, 680 S.W.2d 737, 741-42 (Mo.App. E.D. 1984).