The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law

Gary Myers

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Recommended Citation
https://scholarship.law.umn.edu/mlr/1355
The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law

Gary Myers*

TABLE OF CONTENTS

Introduction ................................................ 1098

I. Efficiency and Competition in Antitrust Law ........... 1101
   A. Protecting Competition, Not Competitors ........... 1101
   B. Efficiency and Consumer Welfare ................... 1102
   C. Market Power and Market Effect ................... 1104

II. The Business Tort Approach ........................... 1106
   A. Tortious Interference with Contract ............... 1107
      1. Defining the Tort ................................ 1107
      2. Ambiguities in the Tort Liability Standard ...... 1109
      3. The Special Case of the At-Will Contract ...... 1113
      4. The Voidable Contract ............................ 1116
      5. Tort Damages .................................... 1118
   B. Tortious Interference with Business Relations ... 1120
      1. Treatment of Prospective Relationships ........ 1120
      2. The Relevance of Competition .................... 1122
      3. The Burden of Proof ............................. 1125
      4. Consideration of Subjective Intent .............. 1126
      5. Vagueness in Defining Improper Means .......... 1135

III. Reconciling Antitrust and Tort Law .................... 1137
   A. Harmonizing Principles ............................. 1137
   B. Claims Involving Competitors ...................... 1140
   C. Dealer Termination Claims ........................ 1144
   D. Professional Associations and Other Group
      Behavior .......................................... 1148

Conclusion ................................................ 1149

* Assistant Professor of Law, University of Mississippi. B.A., New York University; M.A. (Econ.), J.D., Duke University. Member, State Bar of Georgia. The author would like to thank Dean Daskal for discussing this Article and commenting on a draft; George Cochran, Jill Fisch, and Richard Posner also provided excellent comments on an earlier draft. Finally, Rob Waters, James Pitts, and Ralph Ferro provided able research assistance.
INTRODUCTION

During the last twenty years, there has been a revolution in antitrust law. As a result of extensive scholarly and judicial analysis, a new learning has developed concerning the content, role, and effect of antitrust doctrines. This trend has focused primarily on the primacy of consumer welfare and economic efficiency. Most commentators now assume that these two interrelated goals are the principal, if not exclusive, concerns of antitrust law. The United States Supreme Court has responded to these new approaches by modifying or altering antitrust law in a long series of cases. Similarly, the new learning has affected the focus of antitrust enforcement by the Department of Justice and the Federal Trade Commission.

While these changes have occurred in the federal area, the state law of business torts has moved in a different direction. Indeed, the interaction between antitrust law and tortious interference doctrines has followed an unusual pattern. The Sherman Act was enacted in part because many believed that the common law governing trade practices did not adequately deter competitive abuses. After many years of expansive interpretation, the Supreme Court in the last two decades has limited the scope of antitrust liability in a manner generally consistent with the principal goals of competition, efficiency, and consumer welfare.

The common law of torts, in contrast, has undergone a rapid doctrinal expansion during the same period. The law of tortious interference has been carried along in this tide of liability expansion, with considerably less attention given to cons-

1. See United States v. Addyston Pipe & Steel Co., 85 F. 271, 278-79 (6th Cir. 1898) (discussing the Sherman Act’s affirmative prohibition of trade restraints, creation of new federal criminal and civil remedies, and extension of illegality beyond common law rules), aff’d, 175 U.S. 211 (1899); HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 2.4, at 52 & nn.12-13 (1985) (discussing Congress’s intent to make common law rules more effective and citing additional commentary). For an example of a common law case that failed to address exclusionary practices, see Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q.B. 598, aff’d, 1892 App. Cas. 25, in which the defendants committed no tort despite a horizontal conspiracy and a bitter trade war. In the 1960s, the heyday of antitrust expansion, one commentator stressed the availability of antitrust theories and remedies for claims traditionally brought under the common law of torts. See John H. Boone, Single-Corporation Competitive Torts and the Sherman Act: A Projection Based upon a Review of the Albert Pick, Atlantic Heel, and Perryton Cases, 2 GA. L. REV. 372, 372-91 (1968).

2. For citations to general commentary on tortious interference law, see infra note 54.
cerns of efficiency. Plaintiffs with weak antitrust claims have relied successfully upon various state law theories, principally tortious interference with contract or prospective business relations, but also unfair competition and breach of the duties of good faith and fair dealing. These business tort actions often apply legal standards different from, if not wholly inconsistent with, federal antitrust law. Moreover, tortious interference law suffers from considerable doctrinal confusion, which contributes to its conflict with antitrust law.

_Deauville Corp. v. Federated Department Stores_\(^3\) illustrates the tension between antitrust and business tort doctrines. Deauville and Federated were developing competing shopping malls in the suburbs of Houston, Texas.\(^4\) Montgomery Ward, a major retailer, sought to become an anchor tenant in a mall in the same area.\(^5\) Ward had discussions with both developers and signed a joint venture agreement with Deauville under which Ward would be an anchor tenant if Deauville's mall was built.\(^6\) Because Deauville had not yet constructed the mall, Ward could terminate the agreement at will.\(^7\) Federated, with knowledge of the nascent joint venture, approached Ward and induced it to become an anchor tenant in a new phase of Federated's mall.\(^8\) Deauville sued, claiming that Federated violated the antitrust laws against monopolization and restraint of trade and that it tortiously interfered with Deauville's business relationship with Ward.\(^9\)

The Fifth Circuit held Deauville's antitrust claims to be meritless as a matter of law but remanded the tort claim for trial.\(^10\) The court found the tortious interference claim viable because Federated's internal memoranda indicated that some "decision-makers favored offering Ward a store site, not to advance Federated's legitimate economic interests, but solely to prevent Ward's going to the [Deauville] site or to block development of the [Deauville] site altogether."\(^11\) The court noted "a degree of incongruity . . . in an opinion striking down the federal antitrust claims and yet finding evidence of malice neces-

---

3. 756 F.2d 1183, 1194-96 (5th Cir. 1985).
4. Id. at 1186-87.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id. at 1188.
10. Id. at 1197.
11. Id. at 1195-96.
necessary to support the state claim of unlawful interference. . . .

[T]he federal law protects competition; the state law, requiring no finding regarding market power, protects the competitor."12 Deauville illustrates the tendency of tortious interference law to base liability on the defendant's subjective state of mind, rather than on the defendant's conduct or the effect on the market. It also demonstrates the differing role of competition in antitrust and business tort law.

Part I of this Article briefly examines the analytical framework of antitrust law, which focuses primarily on the objective effect of a firm's activity on the relevant market. Antitrust law seeks to penalize behavior that threatens competition, while permitting free competition on the merits even at the expense of less efficient competitors. This competitive process should lead to efficiency and enhance consumer welfare.

Part II of the Article examines the law of tortious interference and finds that the business tort approach often conflicts with now-accepted antitrust reasoning. A party can interfere with either an existing, valid contract or with a prospective business relationship. In the case of existing contracts, tort law gives controlling weight to the interest in contract stability; a third party who interferes with this type of arrangement is liable in tort absent a countervailing privilege. Competition is not a defense. Although this general proposition is not problematic, courts often apply the rule to contracts that are either voidable or terminable at will. Thus, tort law in this area gives excessive protection to tenuous contractual relationships at the expense of competition and efficiency. Further, the availability of punitive damages for tortious interference with contract may deter efficient breaches of contract and, thereby, heighten the doctrinal conflict.

With regard to prospective economic relationships, tort law recognizes a competition privilege: a bona fide competitor may vie for potential customers so long as it employs lawful means. Nonetheless, these firms remain exposed to tort liability because they must show that they were not motivated by a subjective desire to harm their competitor. This rule often leads to litigation and may chill legitimate business practices that potentially would benefit consumers.

Finally, Part III of the Article contends that antitrust and tortious interference law should be harmonized, and it suggests

12. Id. at 1196 n.9.
the revision of business tort standards to reconcile these two bodies of law. It analyzes rules governing competitors, vertical relationships, and group behavior in light of the proposed standards.

I. EFFICIENCY AND COMPETITION IN ANTITRUST LAW

A. PROTECTING COMPETITION, NOT COMPETITORS

Courts and commentators widely recognize that the antitrust laws should serve to promote competition in the marketplace.\(^\text{13}\) Although some commentators have argued that antitrust law should also serve to protect small business,\(^\text{14}\) in recent years the Supreme Court has rejected this view. As Justice Brennan noted in *Cargill, Inc. v. Monfort of Colorado*,\(^\text{15}\) "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws." Hence, to the extent that small businesses fall prey to anticompetitive behavior, the Sherman and Clayton Acts protect them.\(^\text{16}\)

When the goals of efficiency and protection of small firms conflict, however, antitrust doctrine gives more weight to efficiency concerns. For example, a manufacturer might end its contract with one dealer and enter a substitute agreement with a newly established competing dealer. This transaction potentially increases competition in the market at the dealer level, albeit to the detriment of the terminated dealer. The antitrust

---


\(^{14}\) Commentators have identified several goals for antitrust law, including the protection of small businesses, general notions of commercial fairness, and creation of a level playing field for competitors. See, e.g., *Hovenkamp, supra* note 1, § 2.1, at 41-42 (summarizing the debate).

\(^{15}\) 479 U.S. 104, 116 (1986).

laws do not provide the dealer with a remedy on these facts.\textsuperscript{17}

\section*{B. Efficiency and Consumer Welfare}

The antitrust laws seek to promote efficiency and ultimately to benefit consumers by furthering competition in the marketplace. The Supreme Court's frequently quoted statement in \textit{Northern Pacific Railway Co. v. United States}\textsuperscript{18} illustrates the antitrust commitment to this principle:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.\textsuperscript{19}

A firm's competitive behavior, although it may enhance consumer welfare, can detrimentally affect others in the market. The Sherman Act, however, prohibits only exclusionary practices; vigorous competition is lawful.\textsuperscript{20} Thus, a firm may increase its market share and even attain a monopoly as long as it results from "superior skill, foresight and industry."\textsuperscript{21}

The federal courts have established elaborate guidelines regarding the types of pricing behavior that contravene the Sherman Act and the Robinson-Patman Act. Under these guidelines, price competition that harms a rival is not in itself

\begin{itemize}
  \item \textsuperscript{17} See Northwest Power Prods. v. Omark Indus., 576 F.2d 83, 91 (5th Cir. 1978), \textit{cert. denied}, 439 U.S. 1116 (1979). In a case involving similar facts, a district court upheld a jury verdict on a tortious interference claim and overturned an antitrust verdict because the plaintiff did not show any harm to competition or unreasonable restraint of trade. Machine Maintenance & Equip. Co. v. Cooper Indus., 661 F. Supp. 1112, 1114-19 (E.D. Mo. 1987). \textit{See generally} 1 AREEDA & TURNER, \textit{supra} note 13, \textit{\S} 111 (arguing that protection of small business cannot be a major antitrust goal); POSNER, \textit{supra} note 13, at 4, 19-20 (same).
  \item \textsuperscript{18} 356 U.S. 1 (1958); see Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting ROBERT BORK, THE ANTITRUST PARADOX 66 (1978))); \textit{see also} 1 AREEDA & TURNER, \textit{supra} note 13, \textit{\S} 103 (analyzing policy choices underlying the competition principle).
  \item \textsuperscript{19} 356 U.S. at 4-5.
  \item \textsuperscript{20} Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985). Exclusionary behavior is "'behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.'" \textit{Id.} (quoting 3 AREEDA & TURNER, \textit{supra} note 13, \textit{\S} 626b, at 78).
\end{itemize}
an antitrust violation. Predatory pricing, for example, is price cutting designed to drive out a competitor. A firm’s unilateral pricing decisions are lawful unless the price is below cost and therefore deemed predatory.\textsuperscript{22} Courts, therefore, generally require plaintiffs claiming predatory pricing to show that defendants’ prices are below some measure of “cost.” For instance, the First Circuit’s influential decision in \textit{Barry Wright Corp. v. ITT Grinnell Corp.}\textsuperscript{23} rejected an approach that would allow an antitrust plaintiff to proceed to trial even if the defendant’s price exceeded average total cost. The court indicated that an inquiry into the price-cutting firm’s subjective motivation for its acts would unduly chill price competition.\textsuperscript{24} An intent-based analysis, the court noted, “offers too vague a standard in a world where executives may think no further than ‘Let’s get more business,’ and long-term effects on consumers depend in large measure on competitors’ responses.”\textsuperscript{25}

The Supreme Court employed an economic analysis in \textit{Matsushita Electric Industrial Co. v. Zenith Radio Corp.}\textsuperscript{26} The Court expressed skepticism about predation through price cutting and noted that “predatory pricing schemes are rarely tried and even more rarely successful.”\textsuperscript{27} Allowing implausible claims to proceed to trial could deter procompetitive conduct. “[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the

\textsuperscript{23} 724 F.2d 227, 236 (1st Cir. 1983).
\textsuperscript{24} \textit{Id.} at 234-35.
\textsuperscript{25} \textit{Id.} at 232. The court further observed:
\begin{quote}
[If] the search for intent means a search for documents or statements specifically reciting the likelihood of anticompetitive consequences or of subsequent opportunities to inflate prices, the knowledgeable firm will simply refrain from overt description. If it is meant to refer to a set of objective economic conditions that allow the court to “infer” improper intent, . . . then, using Occam’s razor, we can slice “intent” away. Thus, most courts now find their standard, not in intent, but in the relation of the suspect price to the firm’s costs.
\end{quote}
\textit{Id.} (citations omitted). Moreover, the antitrust laws permit a firm to reduce its prices in response to a competitor’s lower price, even though the firm does not offer that lower price to other customers. Falls City Indus. v. Vanco Beverage, 460 U.S. 428, 445 (1983) (“A seller is permitted ‘to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller’s price to its other customers.’”) (quoting Standard Oil Co. v. FTC, 340 U.S. 231, 250 (1951))).
\textsuperscript{26} 475 U.S. 574, 589-90 (1986).
\textsuperscript{27} \textit{Id.}
very conduct the antitrust laws were designed to protect.”

Similarly, the antitrust laws do not forbid mergers that will produce increased economies of scale or other efficiencies unless there is evidence that they will reduce competition in the relevant geographic and product markets. The “true test of legality,” as the Court has noted, “is whether the restraint . . . merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”

These cases illustrate a guiding principle of the new antitrust learning: a firm will not be condemned for its aggressive behavior in the marketplace unless that behavior is anticompetitive, as measured by objective economic criteria.

C. MARKET POWER AND MARKET EFFECT

The rule of reason, the presumptive mode of antitrust analysis, focuses on the effect of a restraint on competition in the marketplace. As the Supreme Court recognized in Continental T.V. v. GTE Sylvania Inc., “an antitrust policy divorced from market considerations would lack any objective benchmarks.”

An important issue in any rule of reason inquiry is the market power of the firm or firms engaging in the alleged restraint of trade, as this evidence will reflect the restraint's likely market impact. Market power consists of the power to

28. Id. at 594.
29. 1 AREEDA & TURNER, supra note 13, ¶ 104, at 9 n.4 (citing Brown Shoe Co. v. United States, 370 U.S. 294, 319 (1962)).
31. See E.W. French & Sons v. General Portland, Inc., 885 F.2d 1392, 1400-01 (9th Cir. 1989) (stating that a § 1 rule of reason claim requires agreement, intent to restrain competition, and actual injury to competition) (citing NCAA v. Board of Regents, 468 U.S. 85, 104 n.27 (1984)). The Supreme Court has stated the rule as follows: “[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.” National Soc'y of Professional Eng'rs, 435 U.S. at 691.
control prices or exclude competition. Under the rule of reason analysis, a firm's "'evil intent'" to harm a competitor, although relevant to the market impact of its actions, does not in itself violate the Sherman Act.

Courts dispense with market power analysis only when a restraint is per se illegal under section 1 because the nature of the violation makes injury to competition extremely likely, as in the case of a horizontal price-fixing conspiracy. Hence, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." By identifying and uniformly condemning these practices, the Court provides guidance and reduces the cost of litigation.

In cases under section 2 of the Sherman Act, plaintiffs must prove either monopolization or attempted monopolization. To prove monopolization, a plaintiff must show monopoly power in the relevant market; to prove attempted monopolization, a dangerous probability of success in monopolizing the market. In evaluating a section 2 claim, courts

34. See NCAAs, 468 U.S. at 109 n.38; Reazin, 899 F.2d at 966-68 (discussing market power analysis).
35. Deauville Corp. v. Federated Dep't Stores, 756 F.2d 1183, 1192 (5th Cir. 1985) (quoting Northwest Power Prods., 576 F.2d at 90). Some older decisions permitted liability based on intent to harm under the "Pick-Barth" doctrine. See Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F.2d 96, 103 (1st Cir.), cert. denied, 286 U.S. 552 (1932).
39. Section 2 of the Sherman Act, 15 U.S.C. § 2 (1988), provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ."
41. Spectrum Sports v. McQuillan, 113 S. Ct. 884, 892 (1993) (requiring evi-
examine the defendant's market share, as well as other indicia of the defendant's ability or potential to achieve a monopoly. Section 2 of the Sherman Act thus constrains the behavior of dominant firms in defined markets: "[C]onduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even 'honestly industrial.'" Once again, there is no liability based solely on the defendant's subjective intent.

II. THE BUSINESS TORT APPROACH

A fundamental tension exists between antitrust law and business torts. Antitrust law focuses on allowing competitive free reign and preventing agreements that restrain competition. Much of business tort law, however, involves legal restraints on competition. Although commentators have recognized the tension between patent, which grants legal monopolies on inventions, and antitrust, the tension between antitrust and the broader field of business tort has received little attention.

dence of sufficient power in the relevant market to establish a dangerous probability of success); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 693 (10th Cir. 1989) (discussing attempted monopolization elements), cert. denied, 498 U.S. 972 (1990).

42. Colorado Interstate, 885 F.2d at 693-97 (evaluating market share and other evidence and concluding that the evidence did not support a claim of attempted monopolization).


44. Spectrum Sports, 113 S. Ct. at 890-92 (holding that evidence of anticompetitive intent and conduct is insufficient to show a violation of § 2, absent evidence of market power); Deauville Corp. v. Federated Dep't Stores, 756 F.2d 1183, 1190 (5th Cir. 1985) ("This court has given little weight to subjective intent when confronted with the absence, as a matter of economic reality, of the power to monopolize.").


The term "business tort" describes a wide array of tort-based claims asserted in the context of disputes between competitors, customers, or parties in vertical relationships. The most common claims are for tortious interference with contract or with prospective business relationships. Other significant claims involve unfair competition, breaches of duties of good faith and fair dealing, and violations of so-called "little FTC Acts."47

To assess the interplay between tortious interference and antitrust, it is necessary to analyze the elements and doctrinal underpinnings of this tort. The law of tortious interference, like antitrust, recognizes that competition and efficiency are significant social values. In recent decades, however, antitrust law has focused greater attention on the importance of competition, while business tort law has expanded with less direct consideration of these economic issues. A comparison of these two fields of law demonstrates the extent of this divergence.

A. TORTIOUS INTERFERENCE WITH CONTRACT

1. Defining the Tort

The tort of interference with contract involves intentional and improper interference with another's contract rights. The interference must proximately cause some type of harm by, for example, preventing performance, making it more costly to carry out the terms of the contract, or making performance less valuable.48 The leading modern case of Lumley v. Gye49 ex-

---

47. See, e.g., E.W. French & Sons v. General Portland, Inc., 885 F.2d 1392, 1394 (9th Cir. 1989) (state antitrust and unfair competition claims); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 688-90 (10th Cir. 1989) (breach of duty of good faith and fair dealing claim), cert. denied, 111 S. Ct. 441 (1990); Barquis v. Merchants Collection Ass'n, 496 P.2d 817, 828 (Cal. 1972) (breach of Cal. Civil Code § 3369 prohibiting unfair competition). These claims are beyond the scope of this Article, although they present difficulties similar to those in tortious interference law.

48. RESTATEMENT (SECOND) OF TORTS § 766 cmt. k (1977); W. PAGE KEeton ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 991 (5th ed. 1984). This tort can be traced to early Roman laws that allowed the pater familias (head of the household) to recover for harm to members of his family and servants. Francis B. Sayre, Inducing Breach of Contract, 36 HARv. L. REV. 663, 663 (1923). Professor Dan Dobbs notes the later history of "considerable and apparently irresistible expansion of liability from a rather small nub. That nub was a repressive scheme of compulsory labor imposed by the feudal
tended liability dramatically. In that case, an English court found the manager of an opera company liable for inducing Johanna Wagner, a noted opera singer, into breaching her exclusive performance contract with the plaintiff's opera company. 50

_Lumley_ is significant because it allowed recovery without any showing of improper means or independently tortious conduct towards Wagner, the party induced to breach the contract, or towards Lumley, the plaintiff. 51 After _Lumley_, courts needed to determine when interference with a contractual relationship, either existing or nascent, was permissible and when it was tortious. Commentators, such as Professor Dan Dobbs, view _Lumley_ as having created nearly absolute property rights in contract expectancies. 52

The tort of interference with contract is now widely recognized and accepted. Indeed, Louisiana is the only state that refuses to recognize the tort in its entirety. 53 Commentators have discussed the subject extensively. 54 The _Restatement (Second)_

---

powers of the 14th century to cope with a terrible labor shortage that followed the plague." Dan B. Dobbs, _Tortious Interference with Contractual Relationships_, 34 ARK. L. REV. 335, 336 (1980).


50. _Id_. at 752-53.

51. _Id_. Interestingly, the contract that Wagner breached was arguably anticompetitive in light of its exclusive dealing provision.

52. See Dobbs, _supra_ note 48, at 350-56 (criticizing property-like aspects of tortious interference law); _Note, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort_, 93 HARV. L. REV. 1510, 1511, 1522-28 (1980) (giving a historical overview of tortious interference law and arguing that the law has often treated contractual expectancies as if they were absolute property rights).


54. See, _e.g._, 2 RUDOLF CALLMANN, _THE LAW OF UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES_ §§ 9.01-20 (4th ed. 1982); KEETON ET AL., _supra_ note 48, § 129; 1 HARRY D. NIMS, _THE LAW OF UNFAIR COMPETITION AND TRADEMARKS_ §§ 162-184 (1947); Dobbs, _supra_ note 48, at 335-76; Fowler V. Harper, _Interference with Contractual Relations_, 47 NW. U. L. REV. 873 (1953); Perlman, _supra_ note 46, at 93-129; Sayre, _supra_ note 48, at 663-703. For an economic analysis of the role of the tort, see WILLIAM M. LANDES & RICHARD A. POSNER, _THE ECONOMIC STRUCTURE OF TORT LAW_ 223-25 (1987). For discussion of tortious interference claims involving professional relationships, see Phoebe Carter, _Annotation, Liability in Tort for Interference with Attorney-
of Torts defines the tort as follows:

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.55

This Article explores the line of cases in which the tortious interference involves no independent wrongful action. Cases involving physical violence, bribery, or other independently illegal acts are therefore inapposite, although they also can be framed as tortious interference claims.56 The following discussion focuses on liability based solely on a showing of "improper" interference.

2. Ambiguities in the Tort Liability Standard

The central drawback of interference with contract relates to its focus on the element of improper purpose or wrongful intent. Several commentators argue that the wrongful intent element is too flexible. For example, Prosser and Keeton note that actual spite or malice is not required, "leaving a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes

55. RESTATEMENT (SECOND) OF TORTS § 766 (1977). The defendant can also be liable for interfering with the plaintiff's ability to perform its obligations under a contract. Id. § 766A.

56. See generally KEETON ET AL., supra note 48, § 129, at 982, 992. The Restatement does not require an improper act to impose liability: "The interference is often by inducement. The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure." RESTATEMENT (SECOND) OF TORTS § 766 cmt. k (1977). Still, numerous cases have involved allegations of independent wrongful acts. See, e.g., Redies v. Nationwide Mut. Ins. Co., 711 F. Supp. 570, 573-74 (D. Colo. 1989) (alleging interference through fraudulent misrepresentations); Lekich v. IBM Corp., 469 F. Supp. 485, 487-89 (E.D. Pa. 1979) (alleging defamation and wrongful discharge).
must be considered improper in some undefined way."\(^{57}\) Professor Francis Bowes Sayre, in a seminal article, observed that "where the doctrine has been accepted, there has been so little careful inquiry as to its precise limits and fundamental nature that a somewhat uncertain law has resulted."\(^{58}\) Professor Dobbs argues that the problem with the tort "lies in the complete absence of any principle that will explain to us what judgments to make and why it is that liability sometimes is and sometimes is not imposed."\(^{59}\) Another commentator has observed that tortious interference law is "[o]ne of the most fluid and rapidly growing tort theories."\(^{60}\) As the commentary indicates, tortious interference law is troubling because it is expanding despite its lack of clear principles or doctrinal foundations.

In an attempt to distinguish legitimate competition and tortious interference, courts define the intent element in a variety of ways.\(^{61}\) A common approach requires the plaintiff to show merely that the defendant intended the interference, shifting the burden of proof to the defendant to establish some "justification" for the interference.\(^{62}\) Defendants often attempt to justify the interference as protection of the defendants' own contract or property rights.\(^{63}\) Shifting the burden, however, forces defendants to justify their actions amidst great uncertainty, given the lack of guidance regarding business justifications.\(^{64}\)

The *Restatement* appears to take a better approach, argua-
bly requiring the plaintiff to prove not only that the interference was intentional or knowing, but also that the defendant used either improper means or had an improper purpose.65 The Restatement view sets forth seven factors to be weighed in determining when the defendant has acted improperly. These factors are: the nature of the conduct, the defendant’s motive, the plaintiff’s interest that was harmed, the interests advanced by the defendant, the competing “social interests” in protecting both the plaintiff’s expectations under the contract and the defendant’s freedom to interfere, the proximity between the defendant’s conduct and the resulting interference, and the relationship between the parties.66

Although this framework helpfully delineates the relevant criteria, it nonetheless permits liability based on a vague and subjective standard. The comments to the Restatement highlight the importance of the intent factor.67 The comments also indicate, however, that the defendant need not intend to bring about the interference, so long as the defendant knows that the interference is likely to occur as a result of its actions.68 Fur-

was motivated by legitimate economic and safety concerns, or by desire to harm, was for the jury to decide. Id. at 1094.

65. The Restatement does not expressly allocate to the plaintiff or defendant the burden of proving improper means or purpose. Cf. Restatement (Second) of Torts §§ 766, 767 (1977). The comments note that “there is little consensus on who has the burden of raising the issue of whether the interference was improper or not and subsequently of proving that issue . . . .” Id. § 767 cmt. k. The comments also indicate, however, that courts often require the plaintiff to plead and prove lack of justification in interference with contract cases, and they recommend that the plaintiff take care to allege improper interference in the complaint. See id. cmt. b. Prosser and Keeton note that the Restatement can be read to put the burden on the plaintiff to show impropriety as a part of its prima facie case, and they argue that such a reading is preferable. Keeton et al., supra note 48, § 129, at 983-84.


67. “The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, . . . even though he acts for some other purpose in addition.” Id. § 766 cmt. j (emphasis added); see also id. cmt. r (“[T]he freedom to act in the manner stated in this Section may depend in large measure on the purposes of [the actor’s] conduct.”); id. § 767 cmt. d (noting that intent to interfere is significant if it is the primary motivation or even if it is a “casual” motive).

68. Comment j to § 776 of the Restatement states:

The rule . . . applies also to intentional interference . . . in which the actor does not act for the purpose of interfering with the contract . . . [,] but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor’s independent purpose and desire but known to him to be a necessary consequence of his action.
ther, because the Restatement analysis involves a balancing of seven specific factors, it requires a case-by-case inquiry, with few definite rules.69

The Restatement is also ambiguous regarding the issue of burden of proof. The language of the Restatement appears to require the plaintiff to prove, as part of its prima facie case, that the defendant’s interference was improper.70 The comments, however, indicate that this burden-of-proof issue is unresolved and should depend on state law.71 The preferable approach requires the plaintiff to establish as a part of its prima facie case that the alleged interference was improper. Placing the burden on the plaintiff strikes a better balance between competing interests by giving proper weight to the defendant’s freedom of action in the marketplace.

Moreover, a competitor cannot generally defend against a tortious interference claim by asserting that the interference was merely an attempt to compete for business. Although the Restatement recognizes a competition justification for interference with prospective business relationships and with at-will contracts, it specifically rejects this argument for interference with an existing contract.72 Apparently, the Restatement gives the plaintiff’s interest in contract stability priority over both the defendant’s interest in competition and the other con-

---

69. See Restatement (Second) of Torts § 767 cmt. b (1977) (stating that each case depends upon an individualized weighing of values).

70. See id. §§ 766, 767.

71. See id. § 767 cmts. b, k. Prosser and Keeton interpret the main text of the Restatement as placing the burden of proof on the plaintiff, as have several courts. Keeton et al., supra note 48, § 129, at 983-84. But see Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101, 1113 (1st Cir. 1989) (holding that under Rhode Island law, the defendant has the burden of proving justification), cert. denied, 494 U.S. 1027 (1990). For an excellent analysis demonstrating that the plaintiff should prove as a part of its prima facie case that the alleged interference was improper, see Top Service Body Shop v. Allstate Insurance Co., 582 P.2d 1365, 1369-71 (Or. 1978).

72. Restatement (Second) of Torts § 768(2) (1977). The comments indicate that “an existing contract, if not terminable at will, involves established interests that are not subject to interference on the basis of competition alone.” Id. cmt. a. The reasoning behind this rule is that “the social interest in the security of transactions and the greater definiteness of [the plaintiff’s] expectancy outweigh the interests in [the defendant’s] freedom of action in this situation.” Id. cmt. h.
tracting party's interest in striking a better deal and paying contract damages. The *Restatement* is not clear on this issue, however, because the comments indicate that, despite the absence of a specific competition privilege in cases involving existing contracts, the defendant may nonetheless prevail under the general seven-factor test for improper interference.\(^3\) As one court noted, the analysis in this area involves some "uncertainty" and "ambivalence."\(^4\)

Finally, the "malice" element that some courts employ offers little guidance in determining liability. Under Illinois law, for example, a plaintiff must demonstrate that the defendant acted with actual malice, defined as "a desire to harm which was unrelated to the interest he was presumably seeking to protect by bringing about the contract breach."\(^5\) Although the *Restatement* notes that ill will is not necessary for liability, it indicates that the defendant probably acted without justification if it acted with ill will toward the plaintiff.\(^6\) Hence, malice, as used in tortious interference law, generally means only that the interference was intentional or unjustified or both. Accordingly, the malice element adds nothing to the analysis of whether an interference should be lawful.

3. The Special Case of the At-Will Contract

A particularly difficult line of cases involves interference with contracts that are terminable at will. The *Restatement* permits liability in these cases on the ground that the at-will agreement still involves a "valid and subsisting" contract, although the at-will nature of a contract is relevant in assessing damages and defenses.\(^7\) Most courts agree that the plaintiff

---

73. *Id.* § 767 cmts. h, k.
76. *Restatement (Second)* of *Torts* § 766 cmt. r (1977). The *Restatement* further indicates that those decisions that use the term "malice" actually mean "intentional interference without justification," including acts motivated by malice or ill will. *Id.* cmt. s. For an excellent discussion of the malice element, see Sayre, *supra* note 48, at 672-86.
77. *Restatement (Second)* of *Torts* § 766 cmt. g (1977). Courts have
can state a claim based on an at-will contract, despite the contracting parties’ ability to opt out of their agreement at any time and for any reason. For example, in *Deauville Corp. v. Federated Department Stores*, the Fifth Circuit held that, under Texas law, a competitor can be liable for tortious interference with the at-will contract of a competing firm. The rationale supporting this conclusion, according to a New Jersey court, is that “[t]he right to terminate a contract at will is one which is peculiarly personal to the contracting parties, and a stranger to the contract may not exercise his will in substitution for the will of either of the parties to the contract.” This justification seems questionable, given that the stranger to the contract was able to persuade one of the contracting parties, who presumably could exercise its will to opt out of the agreement as it was entitled to do under the law.

In *Ahern v. Boeing Co.*, the plaintiffs sued Boeing for interference with an at-will contract involving an incinerator device. Applying Florida law, the district court granted summary judgment for Boeing on the ground that a competitor’s good faith attempt to obtain business permits interference with an at-will contract. The court stated that when “part of defend-

expressed a similar rationale for protecting at-will contracts. See, e.g., *Smith v. Ford Motor Co.*, 221 S.E.2d 282, 290 (N.C. 1976) (“The wrong for which the courts may give redress includes also the procurement of the termination of a contract which otherwise would have continued in effect.”). The Restatement does, however, allow a competition defense in cases of interference with at-will contracts. *Restatement (Second) of Torts* § 768(1) & cmt. i (1977).

78. *See, e.g.,* *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1518 (11th Cir. 1989) (“Interference with the plaintiff’s relationships with its customers, suppliers, or representatives may be actionable even though such relationships may be terminable at will.”), *cert. denied*, 494 U.S. 1081 (1990); *Warde*, 887 F.2d at 102 (“[T]he weight of authority holds that wrongful interference with contracts terminable at will is actionable.”); *Kemper v. Worcester*, 435 N.E.2d 827, 830 (Ill. App. Ct. 1982) (stating that interference with an employment relationship gives rise to a cause of action); *Lewis v. Oregon Beauty Supply Co.*, 733 P.2d 430, 433 (Or. 1987) (“The parties to an at-will employment relationship have no less of an interest in the integrity and security of their contract than do any other contracting parties.”); *Bocook Outdoor Media v. Summey Outdoor Advertising*, 363 S.E.2d 390, 394-95 (S.C. Ct. App. 1987) (holding that terminable-at-will oral contracts may give rise to a cause of action); *see also* *Keeton ET AL.*, *supra* note 48, § 129, at 995-96 (discussing cases).

79. 756 F.2d 1183, 1194-96 (5th Cir. 1985); *see supra* notes 3-12 and accompanying text (discussing *Deauville* in further detail).


82. *Id.* at 1213.
ant’s motivation for interfering with [an at-will] contract [is] to advance defendant’s business interests, the interference is privileged as competition and is therefore justified as a matter of law.”83 The Eleventh Circuit reversed, holding that the lower court had misstated Florida law and that the plaintiffs were entitled to a jury trial on their claim.84 In the circuit court’s view, Florida’s competition privilege protects only “mere self-interested and competitive solicitation,” and the plaintiffs sufficiently alleged that Boeing exceeded such mere solicitation.85

In another case, Chanay v. Chittenden,86 the plaintiff, an insurance broker, sued defendant Chittenden, a vice president of the Union Mutual Insurance Company, for tortious interference with the plaintiff’s at-will contract with the insurance company.87 The plaintiff claimed that Chittenden’s action in persuading the company to make him its exclusive Arizona agent displaced the plaintiff and other independent brokers, causing the company to terminate its contract with the plaintiff, albeit after giving the required fifteen days notice.88 The Arizona Supreme Court affirmed the trial court’s denial of the defendants’ motions for summary judgment, rejecting Chittenden’s competition privilege because of his status as an employee, rather than a competitor, of the insurance company.89 As an alternative ground for its decision, the court held that competitors do not have a free hand maliciously (meaning intentionally and without justification or excuse) to interfere with established contracts.90 Finally, the court remanded the case to the trial court to determine whether the defendants could offer any other justification for the interference.91

83. Id. The district court and the appellate panel noted that there was no evidence that Boeing harbored, or was motivated by, any ill will towards the plaintiffs. Ahern v. Boeing Co., 701 F.2d 142, 144 (11th Cir. 1983).
84. 701 F.2d at 145.
85. Id.
87. Id. at 291.
88. Id. at 291-92. The broker also sued the company on a respondeat superior theory. The application of respondeat superior in this case evades the general rule that a party to a contract cannot be liable for interference with its own contract. In this regard, Chanay is inconsistent with other cases. See 2 CALLMANN, supra note 54, § 9.01, at 3-4 & nn.27-32; Perlman, supra note 46, at 119-23 (discussing liability of corporations and their officers).
89. 536 P.2d at 292. The court apparently did not consider that Chittenden sought to enter the market as an insurance agent and, thus, was at least a potential competitor.
90. Id.
91. Id. at 292-93. A similar case is Pino v. Prudential Insurance Co., 689 F.
Commentators have criticized this line of decisions. Sayre, for example, notes that when a party terminates an at-will contract, there is no breach; hence, the inducing party has not induced a breach of contract. A few courts, in fact, have rejected the majority rule and thus denied blanket protection for at-will contracts. Moreover, several courts have recognized that interference with an at-will contract should not be actionable if the defendant did not employ improper means and had some legitimate business purpose. Even the Restatement acknowledges that a competitor might be entitled to encourage cessation of a contract that is terminable at will.

4. The Voidable Contract

A related line of cases deals with voidable contracts. According to the Restatement, a defendant can be liable for tortious interference even though the underlying contract is voidable, because "the contract is a valid and subsisting relation." This rule is disturbing, because the party induced into...
non-performance has a complete defense, entitling it to avoid the contract on grounds such as unconscionability, indefiniteness, lack of mutuality, failure of a condition precedent, and the statute of frauds. The rule also is inconsistent with the treatment of contracts that are illegal or contrary to public policy; interference with these contractual relationships is not actionable.

Texaco, Inc. v. Pennzoil Co. is probably the most famous case to address this issue. The litigation concerned a battle between oil giants Texaco and Pennzoil for control of Getty Oil Company. Getty had signed an “agreement in principle”—essentially an unenforceable agreement to agree—to merge with Pennzoil, but Texaco later presented Getty with a better offer. When the Pennzoil/ Getty merger collapsed, Pennzoil sued Texaco, claiming tortious interference with its “agreement.”

The case is notorious partly because of the size of the jury’s verdict for Pennzoil: over ten billion dollars, including three billion dollars in punitive damages. The Texaco v. Pennzoil court did not take into account the tentative nature of the relationship between Pennzoil and Getty, but instead protected it as if it were a binding, unalterable contract.

Competition should be a central consideration in assessing tortious interference claims involving contracts that are not valid and fully enforceable. As Rudolf Callmann notes, tortious interference law permits interference “only when the actor seeks to protect an interest of greater social value than that

---

Contract, 96 A.L.R.3d 1294, 1301-04, 1309-10 (1979) (same). But see id. at 1298-301, 1310-14 (citing cases finding no liability where the underlying contract was voidable).

98. Restatement (Second) of Torts § 766 cmt. f (1977).

99. Id. § 774 (“One who by appropriate means causes the nonperformance of an illegal agreement or an agreement having a purpose or effect in violation of an established public policy is not liable for pecuniary harm resulting from the nonperformance.”).


101. Id. at 786.

102. Id. at 784.

103. Id. For a well-reasoned critique and discussion of the case, see Timothy S. Feltham, Note, Tortious Interference with Contractual Relations: The Texaco, Inc. v. Pennzoil Co. Litigation, 33 N.Y.L. Sch. L. Rev. 111, 143-44 (1988), which concludes that the Texas decision improperly gave full protection to an agreement in principle. The litigation is also well known because of Texaco’s unsuccessful attempt to obtain federal intervention in support of relief from the Texas state court’s judgment. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 10-18 (1987) (holding the Younger abstention doctrine bars federal intervention in on-going state proceedings).
which attaches to the sanctity of the contract involved." The social benefit arising from enforcement and continuation of voidable and at-will contracts is necessarily smaller than the benefit from the enforcement of valid contracts of definite duration.

5. Tort Damages

A final area of tension is damages. Most courts allow recovery of the full range of tort damages, including punitive damages, such as those awarded in Texaco v. Pennzoil. These decisions generally draw an analogy to other intentional torts and conclude that the plaintiff's recovery should not be limited to contract damages or even to full compensatory damages. In many cases, courts have upheld jury awards of punitive damages that greatly exceeded actual damages. For

104. 2 CALLMANN, supra note 54, § 9.01, at 3.
105. KEETON ET AL., supra note 48, § 129, at 1003-04; see, e.g., Machine Maintenance & Equip. Co. v. Cooper Indus., 661 F. Supp. 1112, 1114-19 (E.D. Mo. 1987) (upholding jury award of almost two million dollars in compensatory damages and reducing punitive damage award from ten million dollars to $100,000). See generally 2 CALLMANN, supra note 54, § 9.20 (discussing the measure of damages in interference cases); Charles C. Marvel, Annotation, Recovery Based on Tortfeasor's Profits in Action for Procuring Breach of Contract, 5 A.L.R.4TH 1276 (1981) (discussing whether a court may consider the tortfeasor's profit from interfering with the contract in calculating damages).

If the plaintiff has recovered damages for the underlying breach of contract, the court deducts that amount from any recovery in tort. RESTATEMENT (SECOND) OF TORTS § 766 cmt. v (1977). Except for this set-off of damages, the ability of the plaintiff to sue for breach of contract does not impair its ability to sue for tortious interference. Id.

Tennessee provides by statute that plaintiffs may recover treble damages for tortious interference. TENN. CODE ANN. § 47-50-109 (1988). It nonetheless recognizes the extreme nature of this remedy and thus limits its availability to clear cases. Warde v. Kaiser, 887 F.2d 97, 101 (6th Cir. 1989) (applying Tennessee law).

106. KEETON ET AL., supra note 48, § 129, at 1003-04.
107. E.g., Gregg v. U.S. Indus., 887 F.2d 1462, 1472, 1475-77 (11th Cir. 1989) ($43,050 actual damages and two million dollars punitive damages, reduced by trial court from jury award of $18.5 million punitive damages); Cross v. American Country Ins. Co., 875 F.2d 625, 627, 631-32 (7th Cir. 1989) ($216 in actual damages and $15,000 in punitive damages); Boyer v. Grandview Manor Care Ctr., 805 S.W.2d 187, 188, 191-92 (Mo. Ct. App. 1991) (upholding award of $340 in actual damages and reducing punitive damage award from $330,000 to $100,000); United Labs. v. Kuykendall, 403 S.E.2d 104, 107 (N.C. Ct. App. 1991) (one dollar in nominal damages and $100,000 in punitive damages); Collins Music Co. v. Terry, 400 S.E.2d 788, 784 (S.C. Ct. App. 1991) (upholding judge's award of $100,000 in punitive damages, despite actual damages of only $18,000 in tort claim).

Antitrust commentators occasionally fail to note the potential for higher recoveries under tort as opposed to antitrust theories. See, e.g., 3 AREEDA &
example, in *Browning-Ferris Industries v. Kelco Disposal*,108 after a jury verdict for the plaintiff, the trial court gave the winning party two options: either an antitrust award of $153,438 in treble damages and $212,500 in attorneys' fees, or a tortious interference award of approximately fifty thousand dollars in compensatory and six million in punitive damages.109

These cases are inconsistent with the concept of efficient breach. An efficient breach occurs when the breaching party can pay full contract damages and still be better off because the gains from breaching exceed the damages.110 In the words of Oliver Wendell Holmes, "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."111

Full tort liability for inducing an efficient breach can discourage the breach from taking place, as Dobbs and Perlman have noted.112 Exacting such a heavy penalty for inducing a breach of contract seems unreasonable unless every breach is viewed as undesirable. This has never been the law, and it certainly is inconsistent with most economic analysis on the sub-
Indeed, if contract breach is always viewed as undesirable, the appropriate solution is to allow the non-breaching party to elect specific performance as the remedy for any breach. Except for cases in which specific performance is deemed appropriate, punitive damage liability discourages potentially efficient breaches. It is irrelevant that the inducing party rather than the party that breached the contract pays the damages, because the breach presumably would not have occurred but for the actions of the inducing party.

B. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

1. Treatment of Prospective Relationships

In the view of many courts, a logical outgrowth of the tort of interference with contract is the broader action for interference with prospective business advantage or relations. According to one decision, "in a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it." In the English case of Temperton v. Russell, three trade unions boycotted a supplier to persuade a contractor to comply with the unions' guidelines for working conditions. The supplier then sued the unions, claiming interference with its existing contracts and with future business. The court extended the common law principle established in Lumley v. Gye, that one can be liable for tortious interference without using independently tortious means, to

113. See, e.g., Patton, 841 F.2d at 750-51; Posner, supra note 110, § 4.8; Dobbs, supra note 48, at 360-61; Perlman, supra note 46, at 79-87.
114. See Keeton et al., supra note 48, § 129, at 1004 (noting that tort liability is appropriate in cases where specific performance of the contract would have been available); Dobbs, supra note 48, at 373-76 (same); cf. Posner, supra note 110, § 4.8, at 117-18 (arguing that opportunistic breaches of contract should be deterred by awards of restitution damages); David Baumer & Patricia Marschall, Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?, 65 Temple L. Rev. 159, 182-83 (1992) (arguing that attorneys fees or the double damages rule should be used to deter intentional breaches of contract).
117. Id. at 716.
118. 118 Eng. Rep. 749, 758 (Q.B. 1853). The Temperton court, per Lord Justice Smith, did not find the strike itself unlawful, 1 Q.B. at 733, although
cases involving prospective business relations. Contending that both situations involved the same wrongful intent and the same type of injury, Lord Esher concluded that

"It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable."

Reflecting present law, the Restatement also indicates that "some protection is appropriate against improper interference with reasonable expectancies of commercial relations even when an existing contract is lacking." Accordingly, the Restatement provides for liability for interference with business expectancies:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from the loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

This broader tort is more troubling than the tort of interference with contract, because it extends beyond situations in which there already exists a valid contract. The existence of a valid contract has several important ramifications. First, a contract defines the precise interests of the aggrieved party. Second, it provides some indication of and limitation on the amount of actual damages recoverable, although the problem of unbounded punitive damages remains in both torts. Finally, although one who interferes with the stability of a contractual relationship may be seen as an interloper and possibly a tortfeasor, one who interferes merely with a "prospective bus-

Lord Esher did note that the conspiracy to boycott might be independently unlawful, id. at 729.

119. 1 Q.B. at 728.

120. Id.


122. Id. § 766B. The scope of business relationships covered by this section is very broad and includes employment opportunities, potential employees, opportunities to buy or sell property or services, contract options, and continuing business relationships. Id. cmt. c. For case annotations, see Joel E. Smith, Annotation, Liability of Third Party for Interference with Prospective Contractual Relationship Between Two Other Parties, 6 A.L.R.4TH 195 (1981).
ness advantage” may be essentially a competitor.\textsuperscript{123} In an economic system founded upon the principle of free competition, competitors should not be liable in tort for seeking a legitimate business advantage.

2. The Relevance of Competition

Recognizing the need for vigorous competition, most courts give firms considerable leeway to pursue economic advantages, even if the firms damage competitors’ business prospects in the process.\textsuperscript{124} As the Restatement notes, “If one party is seeking to acquire a prospective contractual relation, the other can seek to acquire it too.”\textsuperscript{125} There appear to be three approaches to interference by competitors.

First, a minority of states require the plaintiff to prove that the defendant used improper, tortious, or unlawful means, such as violence, fraud, or frivolous litigation, to interfere with the plaintiff’s business expectancy.\textsuperscript{126} This line of cases involves

\begin{itemize}
  \item \textsuperscript{123} The Restatement recognizes this distinction. See, e.g., \textsc{Restatement (Second) of Torts} § 766 cmt. b (1977) (“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 …”).
  \item \textsuperscript{124} See generally Keeton et al., supra note 48, § 130, at 1012-13 (discussing privilege of fair competition and providing examples). According to an Illinois decision, “‘Competition in trade, business or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal service.’” Langer v. Becker, 531 N.E.2d 830, 833 (Ill. App. Ct. 1988) (quoting Doremus v. Hennessy, 52 N.E. 924, 926 (Ill. 1898)), appeal denied, 537 N.E.2d 810 (Ill. 1989).
  \item \textsuperscript{125} \textsc{Restatement (Second) of Torts} § 768 cmt. a (1977).
  \item \textsuperscript{126} See 2 Callmann, supra note 54, § 9.07 (citing cases); Keeton et al., supra note 48, § 130, at 1009 & nn.37-45 (same); Harper, supra note 54, at 877-78 & n.25 (same). According to one court, at common law, a trader … in order to get another man’s customers, could use any means not involving violation of the criminal laws, or amounting to “fraud,” “duress,” or “intimidation.” … He may use any mode of persuasion with such a customer, keeping within the limitations stated, which appeals to his self-interest, reason, or even his prejudices.
\end{itemize}
the narrowest zone of liability, and it is defensible given that, to recover for lost business expectancies, the plaintiff must prove the defendant committed an independent tort. Under this view, despite "selfish, fierce, and unfriendly contests for gain and for profit, the law is indifferent. Not until false, fraudulent, and malicious methods are used to kill off a competitor does the law take notice."\textsuperscript{127}

At the other extreme, some states require the plaintiff to prove only intentional interference and harm to satisfy its prima facie case, thus shifting to the defendant the burden of justifying the interference. This approach is the "old view," but several jurisdictions still adhere to it.\textsuperscript{128} This view, however, can chill competition on the merits by forcing the defendant to prove that it behaved honorably.

Under California law, for example, the defendant's justification for interfering with a business expectancy is deemed an affirmative defense. The reasoning behind this rule is particularly disquieting. California courts consider justification an affirmative defense for interference with both an existing contract and a prospective relationship, because "[t]o treat lack of justification as an element of the tort when it is a prospective advantage that is involved would create an additional and unwarranted difference between the two torts."\textsuperscript{129}

Most states, following Prosser and Keeton's reading of the Restatement, take a middle ground and require the plaintiff to prove not only intentional interference and harm, but also that the interference was improper.\textsuperscript{130} This approach is better than

\textsuperscript{127} Union Car Advertising Co. v. Collier, 189 N.E. 463, 467 (N.Y. 1934).

\textsuperscript{128} E.g., Thompson v. Allstate Ins. Co., 476 F.2d 746, 748-49 (5th Cir. 1973) (recognizing that Alabama and other jurisdictions consider justification an affirmative defense); Superior Models v. Tolkien Enters., 211 U.S.P.Q. (BNA) 876, 879 (D. Del. 1981) ("[T]he burden of proof in showing privilege as a defense in a tortious interference case rests upon the interferor."); Alyeska Pipeline Serv. Co. v. Aurora Air Serv., 604 P.2d 1090, 1095-96 & n.7 (Alaska 1979) (upholding jury verdict that defendant failed to meet its burden on justification issue); Furlev Sales & Assoc. v. North Am. Automotive Warehouse, 325 N.W.2d 20, 25 (Minn. 1982) (stating that Minnesota law requires the defendant to prove sufficient justification); 2 CALLMANN, supra note 48, § 9.02, at 28 & n.21 (citing cases); KEETON ET AL., supra note 48, § 130, at 1011 & n.62 (same).


\textsuperscript{130} See KEETON ET AL., supra note 48, § 130, at 1011 (citing cases); see also supra note 65 (discussing the Restatement's approach to burden of proof on the
the old rule because it requires the plaintiff to prove that the interference was unjustified. Still, it retains the ambiguity that is inherent in the rest of tortious interference law, ultimately leaving the issue of justification to the jury\textsuperscript{131} and the scope of lawful competition undefined.

The Restatement's test for improper interference is the same seven-factor assessment applied in cases of interference with contract.\textsuperscript{132} As with interference with existing contracts, the defendant's motive and actions are central considerations under this approach.\textsuperscript{133} Once again, the problem is that almost every interference will involve intentional conduct and some desire to harm the plaintiff.

In recognition of the importance of competition in the United States economy, however, section 768 of the Restatement specifically discusses competition as a justification for intentional interference:

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

\textsuperscript{131} Id. § 767; see id. § 766B cmt. d (discussing § 767's test in the context of improper interference).

\textsuperscript{132} Id. § 766B cmt. d; see also id. § 767 cmt. d ("The desire to interfere with the other's contractual relations need not . . . be the sole motive. If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances."). An earlier comment is also relevant:

If the means of interference is itself tortious, as in the case of defamation, injurious falsehood, fraud, violence or threats, there is no greater justification to interfere with prospective relations than with existing contracts; but when the means adopted is not innately wrongful and it is only the resulting interference that is in question as a basis of liability, the interference is more likely to be found to be not improper.

\textsuperscript{133} Id. § 766B cmt. e. As this comment indicates, the defendant can be liable for interference despite the use of purely lawful means in at least some undefined circumstances.
(c) his action does not create or continue an unlawful restraint of trade and
(d) his purpose is at least in part to advance his interest in competing with the other.\footnote{134}

Firms may thus compete and expand their customer base so long as they do not violate one of the four strictures in section 768.

3. The Burden of Proof

Once again, the \textit{Restatement} leaves unresolved the issue of allocating the burdens of pleading and proof, indicating instead that there is "no consensus" on the issue.\footnote{135} Allocation of the burden of proof is crucial in this context, however, because each of the elements (1)(a) to (1)(d) of section 768 must apply before the interference will be deemed proper. The defendant, if it bears the burden, must prove that it acted competitively, that it did not employ wrongful means, that it did not create or continue a trade restraint, and that it was motivated in part by competitive purposes.\footnote{136} For instance, in \textit{Alyeska Pipeline Service Co. v. Aurora Air Service},\footnote{137} the defendant failed to negate the plaintiff's claim that it desired to harm the plaintiff rather than achieve legitimate economic and safety goals.\footnote{138} The court's reasoning underscored the importance of the burden of proof, which in \textit{Alyeska} was on the defendant.\footnote{139} Professor Dobbs's criticism of such cases is particularly telling: "The

\footnotesize{
\begin{itemize}
\item 134. \textit{Id.} § 768(1).
\item 135. [T]his Section speaks of an interference that is improper or not, rather than of a specific privilege because there is no consensus that engaging in competition is an affirmative defense to be raised and proved by the defendant or is instead simply not improper conduct inconsistent with the American system of free enterprise. In either event the provisions of this Section are applicable. \textit{Id.} § 768 cmt. a; see also 2 CALLMANN, supra note 54, § 9.02, at 28 (noting split in authority regarding burden of proof). In the words of Henry Maine, "substantive law has ... the look of being ... secreted in the interstices of procedure." HENRY MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1886).
\item 136. \textit{See} \textit{RESTATEMENT (SECOND) OF TORTS} § 768 (1977).
\item 137. \textit{604 P.2d 1090} (Alaska 1979).
\item 138. \textit{Id.} at 1094-96.
\item 139. Allocation of the burden of proof to the plaintiff would have affected the case in two ways. First, the appellate court would have overturned the jury verdict and granted a new trial because the trial court's instruction placed the burden squarely on the defendant to justify its actions. \textit{Id.} at 1095 n.7. Second, this shift in the burden could have affected the outcome in a new trial, particularly on issues as subjective as a corporate defendant's motive in interfering with the plaintiff's contract. When a jury's decision hinges on a credibility choice, it might use the burden of proof to break the deadlock, finding that the burden was not met.
\end{itemize}
}
habit becomes to identify the [plaintiff's] interest and to protect it, and the promise of a balancing . . . is never fulfilled.\textsuperscript{140}

The better approach requires the plaintiff to prove unjustified interference. Contrary to the view in California and other jurisdictions,\textsuperscript{141} fundamental distinctions exist between tortious interference with prospective business relations and with contracts that are not terminable at will. Treatment of the justification issue as an affirmative defense is formalistic, given that the interference should not be deemed tortious unless it is in fact improper or unjustified.\textsuperscript{142} Therefore, in several states, the plaintiff must prove as a part of its prima facie case the absence of justification for the defendant's actions.\textsuperscript{143}

4. Consideration of Subjective Intent

Section 768 retains an inquiry into the defendant's subjective intent.\textsuperscript{144} The competition privilege remains intact if the defendant has mixed motives—a desire to compete and a desire to harm the plaintiff.\textsuperscript{145} If, however, the defendant's "conduct is directed solely to the satisfaction of his spite or ill will and not at all to the advancement of his competitive interests over the person harmed, his interference is held to be improper."\textsuperscript{146}

As one court stated: "While the effect of the defendant's actions..."
activities may be to cripple plaintiff’s business, it is the intent that is crucial.”

This view owes its origin, at least in part, to the landmark case of Tuttle v. Buck. In Tuttle, the plaintiff barber alleged that the defendant, a man of some wealth, established a competing barber shop for the sole purpose of destroying the plaintiff’s business and with no genuine intent to operate a barber business. The defendant allegedly solicited the plaintiff’s clients, persuading them by various means to use the defendant’s new shop. According to the court:

To divert to one’s self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one’s own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort.

From this case, in which the plaintiff alleged (plausibly or not) no bona fide competition, a broader principle with disturbing consequences has developed.

In a number of cases, plaintiffs have alleged that spite rather than competition motivated a competitor’s interference. For example, in A.F. Arnold & Co. v. Pacific Profes-


“While a trader may lawfully engage in the sharpest competition with those in a like business, by offering extraordinary inducements, or by representing his good to be cheaper than those of his competitors, yet when he oversteps that line and commits an act with the malicious intent of inflicting injury on his rival’s business, his conduct is illegal . . . .”

Id. at 1203 (quoting Kamm v. Flink, 175 A. 62, 66 (N.J. 1934)).

148. 119 N.W. 946 (Minn. 1909).

149. Id. at 946.

150. Id.

151. Id. at 948. A later case, Katz v. Kapper, 44 P.2d 1060 (Cal. Ct. App. 1935), involved similar facts, although the plaintiff did not argue that the defendant had no genuine intent to compete. In Katz, the plaintiff alleged that the defendant used price cutting and economic threats to coerce customers into dealing with the defendant instead of the plaintiff. Id. at 1061-62. The court held that the complaint failed to state a claim because the alleged conduct was neither unlawful nor committed in an unlawful manner. Id. Similarly, in Beardsley v. Kilmer, 140 N.E. 203 (N.Y. 1923), the defendant, whom the plaintiffs had ridiculed in their newspaper, opened a newspaper of his own, drove the plaintiffs out of business, and remained in operation. Id. at 205-06. The court dismissed the complaint because the defendant’s motive was not purely malicious. Id. at 206.

152. See, e.g., International Election Sys. Corp. v. Shoup, 452 F. Supp. 684,
sional Insurance, a California court held that the plaintiff’s tortious interference claim against competitors survives a motion to dismiss if the plaintiff merely alleges that the defendants’ conduct “was wrongful and malicious, and with the intent to injure plaintiff financially . . . . It will be for defendants to justify themselves if plaintiff can prove what it has alleged.”

In Deauville Corp. v. Federated Department Stores, the court permitted tortious interference claims to go to the jury because several of the defendant’s interoffice memoranda arguably indicated some desire to harm the plaintiff, a competing real estate developer. The court reached this result even

711 (E.D. Pa. 1978) (defendant allegedly hired away employees to drive a competitor out of business), aff’d, 595 F.2d 1212 (3d Cir. 1979); Ramirez v. Selles, 784 P.2d 433, 436 (Or. 1989) (denying motion to dismiss claim that a competitor’s interference was motivated by “malice and personal ill will”); see also Candalaus Chicago, Inc. v. Evans Mill Supply Co., 366 N.E.2d 319, 326-27 (Ill. App. Ct. 1977) (stating that liability for tortious interference with business advantage depends on a showing of purpose to injure or destroy); Nesler v. Fisher & Co., 452 N.W.2d 191, 199 (Iowa 1990) (same); Advance Music Corp. v. American Tobacco Co., 70 N.E.2d 401, 402 (N.Y. 1946) (denying motion to dismiss because complaint alleged that the defendant “wantonly and without good faith” omitted the plaintiff’s song from a weekly radio show); Top Serv. Body Shop v. Allstate Ins. Co., 582 P.2d 1365, 1371-72 (Or. 1978) (rejecting plaintiff’s argument that defendant desired to destroy plaintiff); 2 CALLMANN, supra note 54, § 9.15 (citing cases). Some courts, however, have dismissed tortious interference claims when the plaintiff merely alleges malice in conclusory terms. E.g., Langer v. Becker, 531 N.E.2d 830, 834-35 (Ill. App. Ct. 1988).

154. Id. at 101.
155. 756 F.2d 1183 (5th Cir. 1985); see supra notes 3-12 and accompanying text (discussing Deauville).
156. 756 F.2d at 1194-97. Some of the key statements by Federated employees were as follows:

“If we can’t get Joske’s [a major department store in Texas] (and there’s no assurance that we can]), shouldn’t we consider signing up Monty Ward & as this letter indicates stop the second centre. . . .

. . . .

I would appreciate your thoughts as regards . . . Montgomery-Wards as a suitable alternate to Joske’s.

I strongly urge we talk to MW and head off a new center, if possible.

. . . .

I do not consider Mont. Ward a suitable alternate to Joske’s . . . . It would only be worth considering if it were strictly a defensive measure to prevent the building of another center.

. . . .

[We recommend] bringing Montgomery Ward into the . . . . center and that in doing so they enlist Montgomery Ward’s best efforts to also bring Joske’s along with them . . . . This means a five (5) major store center, which we believe the best tactic to forestall another center being developed a few miles down the road.”
though the defendant, Federated, indisputably intended to compete for its own benefit by obtaining a major anchor tenant for its shopping center.\textsuperscript{157} Unlike the banker-turned-barber in \textit{Tuttle v. Buck}, Federated was a bona fide competitor; still, the court required it to justify its actions and demonstrate its corporate intent before a jury.

Another case that illustrates problems with the \textit{Restatement} approach is the aforementioned \textit{Alyeska Pipeline Service Co. v. Aurora Air Service}.\textsuperscript{158} Alyeska, a pipeline company, had a contract with RCA for communications services.\textsuperscript{159} RCA in turn contracted with Aurora for air services. Alyeska's contract with RCA permitted Alyeska to modify or cancel the arrangement if necessary; the RCA-Aurora contract included a provision allowing RCA to cancel at will.\textsuperscript{160} After it had a separate dispute with Aurora, Alyeska exercised its express right to modify its RCA contract by offering to provide RCA with air service. When RCA agreed and terminated Aurora's contract, Aurora sued Alyeska.\textsuperscript{161} The court held that the plaintiff successfully presented a prima facie case based on Alyeska's intentional interference with the RCA-Aurora contract, and that Alyeska had the burden to show that it acted with a good faith desire to further its own economic interests, rather than with intent to harm Aurora.\textsuperscript{162} The court indicated that Alyeska's liability hinged on which motive predominated: Alyeska's legitimate economic interests and safety concerns, or a desire to harm Aurora. Because the "evidence was susceptible to varying interpretations on the questions of good faith, justification, and motive," the court upheld the jury verdict for Aurora.\textsuperscript{163}

\begin{flushright}
\textit{Id.} at 1189 n.2 (alterations in original) (quoting memoranda between Bill Shiffick, a Federated official, and other Federated officials (Oct. 28, 1975)).
\end{flushright}

\textsuperscript{157} The record clearly indicates that Federated operated an on-going shopping center. In fact, Federated's mall, called Greenspoint, was already operating when the plaintiff began considering its own development. \textit{Id.} at 1186-87. Moreover, the same memoranda that indicated a desire to harm the plaintiff also showed a desire to obtain Montgomery Ward as a tenant in lieu of Joske's, another store. \textit{Id.} at 1189 n.2 (quoted \textit{supra} at note 156). Thus, the court should have recognized Federated's strong competitive interest as a matter of law.

\textsuperscript{158} 604 P.2d 1090 (Alaska 1979).
\textsuperscript{159} \textit{Id.} at 1092.
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.} at 1092-93.
\textsuperscript{162} \textit{Id.} at 1095-96 & n.7.
\textsuperscript{163} \textit{Id.} at 1093-94. Alyeska claimed it was motivated by safety and economic concerns, while Aurora argued that Alyeska initiated the sequence of cancellations because of ill will towards it that arose out of an earlier dispute.
Reazin v. Blue Cross & Blue Shield,¹⁶⁴ a complex case involving antitrust and tortious interference claims, further demonstrates the problem of evaluating the defendant’s subjective motive. The jury instructions in the case obfuscated the critical issues of intent and the right to interfere. The defendant contended that the jury instructions permitted the jury to impose liability for its lawful actions based solely on evidence of intent to injure the plaintiff.¹⁶⁵ Although the court stated that the instructions required improper conduct,¹⁶⁶ the language of the instructions was, at best, ambiguous and may have permitted liability based solely on evidence of the defendant’s mixed motives.¹⁶⁷

Finally, in Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America,¹⁶⁸ the Tenth Circuit established a “protect your competitor” rule. Two pipeline companies had a contract under which one purchased natural gas from the other.¹⁶⁹ When the buyer reduced its purchases from the seller and began obtaining supplies directly from the seller’s supplier, the seller brought suit, claiming tortious interference with its contract with the supplier, as well as attempted monopolization and other antitrust violations.¹⁷⁰ The court affirmed a jury verdict for the seller on the tortious interference claim, but overturned the antitrust verdict because no evidence of a dangerous probability of success supported the attempted monopolization claim.¹⁷¹ Although the court was “sympathetic” to the importance of permitting free competition as long as no unlawful conduct occurs, it adopted the Restatement view “that motive can be a determinative factor in converting otherwise lawful

between the two firms. Id. at 1092-94. For further discussion and criticism of this case, see Dobbs, supra note 48, at 348-50.
¹⁶⁵. Id. at 1427-34.
¹⁶⁶. Id. at 1429. The court cited the Restatement’s vague discussion of motive in tortious interference cases to support this conclusion. Id.
¹⁶⁷. Id. at 1427-29 (setting forth jury instructions). The instructions did not expressly require a showing of improper actions; they required only evidence that the defendant “undertook this conduct with the wrongful intent of injuring or destroying” the plaintiff’s business. Id. at 1427. The jury instructions in this case resembled hypothetical instructions that Professor Dobbs used to illustrate problems with the focus on state of mind in tortious interference law. See Dobbs, supra note 48, at 349.
¹⁶⁹. Id. at 685.
¹⁷⁰. Id. at 685-86.
¹⁷¹. Id. at 697.
behavior into "improper" conduct for which the defendant will be liable."^{172}

Incredibly, the court found that the buyer's freedom to make purchasing decisions could "be limited by a requirement not to exercise its discretion for the purpose of interfering with [the seller's] contractual relationships."^{173} Hence, although the seller could not show that the buyer violated the antitrust laws or breached its contractual duties, the court permitted the seller to recover the tort portion of a $412 million verdict^{174} without explaining when a refusal to deal crosses the bounds of legality. Although the court recognized that the antitrust laws protect "'competition not competitors,'"^{175} it interpreted tort law to protect competitors, not competition.

The problem with these cases is that they skew the balance between competition and protection of business expectancies, a balance the court in Tuttle v. Buck was careful to recognize: "The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual."^{176} It is all too easy for the plaintiff to highlight one or two vindictive statements of someone affiliated with the defendant and to base its claim on the resulting issue of motive, a factual determination a jury must resolve. The nature of business rivalry, however, necessarily involves some degree of enmity and a desire to defeat the competition.^{177}

Moreover, liability based solely on the defendant's motive contradicts the principle that a lawful act should not become

---

172. Id. at 691 (quoting RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1977)).
173. Id.
174. Id. at 685.
175. Id. at 697 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).
176. 119 N.W. 946, 947 (Minn. 1909).
177. See Chambers v. Baldwin, 15 S.W. 57 (Ky. 1891). The court in Chambers noted:
   Competition frequently engenders, not only a spirit of rivalry, but enmity; and, if the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered.
   Id. at 59-60. A case in which employees' off-hand statements served as a basis for tort liability is Deauville Corp. v. Federated Dep't Stores, 756 F.2d 1183 (5th Cir. 1985), discussed supra notes 3-12, 155-57 and accompanying text.
unlawful because of wrongful motive. The classic case of *Beardsley v. Kilmer* illustrates this point. In *Beardsley*, the plaintiff's newspaper repeatedly criticized the Kilmers and their family patent medicine business. The Kilmers decided to establish a competing newspaper to fight the plaintiff and to avenge their good name. They lured away subscribers and advertisers, hired some of the plaintiff's employees, and eventually drove the plaintiff out of business. In rejecting the plaintiff's tortious interference claim, the court indicated that, even though the Kilmers obviously intended to drive the plaintiff out of business, this did not make their conduct illegal, because they engaged in bona fide competition, remained in business after the plaintiff folded, and did not commit any unlawful acts. The New York Court of Appeals reasoned that it would be unsafe to go further in fastening an actionable liability upon acts in themselves lawful. We cannot afford to move the law to a stage where any person who, for his own advantage, starts a new business, will be compelled to submit to the decision of a jury the question whether also there was not a malicious purpose to injure some person who is thus brought under a new and disadvantageous competition.

Despite the sound analysis of the New York court in *Beardsley v. Kilmer*, many competitors have been called to account for their otherwise lawful market conduct because of the motive inquiry in tortious interference law.

Because of the ambiguities inherent in the motive inquiry in tortious interference law, many questionable cases can survive summary judgment, often forcing defendants to settle rather than run the risk of adverse jury verdicts and possible

---

178. See, e.g., 1 Nims, supra note 54, § 164, at 457-59 & n.7 (citing cases). Callmann notes Judge Cooley's statement that "malicious motives make a bad case worse, but they cannot make that wrong which is in its essence lawful." 2 Callmann, supra note 54, § 9.14, at 74. Callmann proceeds to note that "modern courts" no longer follow that rule rigidly and that "the pendulum has since moved to the other extreme." *Id.*; see also Dobbs, supra note 48, at 347-50 (criticizing focus on defendant's state of mind); Perlman, supra note 46, at 94-97 (same).

179. 140 N.E. 203 (N.Y. 1923).

180. *Id.* at 203.

181. *Id.*

182. *Id.* at 204-05.

183. *Id.* at 206; see also Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101, 1113 (1st Cir. 1989) (stating that, under Rhode Island law, "[c]onduct in furtherance of business competition is generally held to justify interference with others' contracts, so long as the conduct involves neither 'wrongful means' nor 'unlawful restraint of trade'"), *cert. denied*, 494 U.S. 1027 (1990).
punitive damage awards. Courts apply the widely accepted rule that summary judgment is inappropriate in cases where intent is an issue.\footnote{184}{See, e.g., Capital Options Invs. v. Goldberg Bros. Commodities, 958 F.2d 186, 189 (7th Cir. 1992) (discussing difficulty of obtaining summary judgment in tortious interference case because the plaintiff must show that the defendant acted with actual malice); 2 CALLMANN, supra note 54, § 9.02, at 282 ("The defendant's motive is a jury question."). For examples of cases in which the antitrust claim failed while the tort claim proceeded to trial, see infra notes 187 and 212.} Further, courts often emphasize that tortious interference claims should be resolved on a case-by-case basis, generally by a jury, and sometimes even under a standard of "common morality or of law."\footnote{185}{Leslie Blau Co. v. Alfieri, 384 A.2d 859, 866 (N.J. Super. Ct. App. Div.) ("The very nature of [the tort] prohibits a 'rule of thumb' in every case."); cert. denied, 391 A.2d 523 (N.J. 1978); see also Deauville Corp. v. Federated Dep't Stores, 756 F.2d 1183, 1197 (5th Cir. 1985) (imposing liability for "conduct below the behavior of fair men similarly situated" (quoting 45 AM. JUR. 2D Interference § 1 (1969))); Champion v. Wright, 740 S.W.2d 848, 854-55 (Tex. Ct. App. 1987) (upholding jury instructions equating reasonable competition with "fair play").} This inquiry, which focuses in part on the issue of the defendant's motive, is inevitably prone to error and misapplication. Professor Dobbs notes that the focus on the defendant's subjective state of mind "may invite the law to judge character or the defendant's whole being, not merely his conduct," and may result in judgments based on a "dislike of his person."\footnote{186}{Dobbs, supra note 48, at 348.} Consequently, plaintiffs often can proceed to trial, and then to victory, on tortious interference claims despite the failure of their antitrust count, either on summary disposition or at trial.\footnote{187}{See, e.g., Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 690-97 (10th Cir. 1989) (affirming a jury verdict for the plaintiff on a tortious interference claim, but overturning an antitrust verdict because there was no evidence of a dangerous probability of success to support the attempted monopolization claim), cert. denied, 498 U.S. 972 (1990); Deauville, 756 F.2d at 1197 (affirming a directed verdict for the defendants on antitrust claims, but requiring tortious interference claims to go to the jury); see also cases cited infra note 212. When a federal court dismisses an antitrust claim, it will often dismiss pendent state law claims (such as tortious interference) as well, unless there is diversity jurisdiction or remaining valid federal claims. Still, the plaintiff can bring the state law claims in state court, because the dismissal, of course, is without prejudice. See Les Shockley Racing v. National Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989) (affirming dismissal of tort claim without prejudice).} If the inquiry is limited to objective criteria, such as whether the defendant's conduct was improper, cases more readily can be resolved as a matter of
Unlike tortious interference law, antitrust law requires such an objective inquiry. The Supreme Court's decision in *Matsushita* indicates that summary judgment is proper in antitrust cases when the plaintiff fails to produce specific facts to support its claim, that is, "evidence (that tends to exclude the possibility) that the alleged conspirators acted independently." Underlying the Court's summary judgment rule is the concern that unabated litigation might chill legitimate competitive behavior. This chilling effect can occur just as easily as a result of potential liability in tort, particularly for punitive damages.

In addition, courts often use inadequate jury instructions when dealing with tortious interference claims. In one case, the trial court listed essentially the same elements in causes of action for interference with existing contracts and with prospective business relations, despite the significant differences between the two situations. Another instruction in the same case allowed the plaintiff essentially to recover solely on a showing of malice, defined as ill will or disregard for the plaintiff's rights. Other instructions have allowed recovery based

---

188. See, e.g., Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101, 1113-14 (1st Cir. 1989) (affirming grant of judgment n.o.v. for defendant because plaintiff failed to show wrongful means or restraint of trade), cert. denied, 494 U.S. 1027 (1990).
190. *Id.* at 594 ("[M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."). The Court also noted that "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Id.* at 593; see also *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1493, 1505 (11th Cir. 1989) (discussing increased availability of summary disposition in antitrust cases after *Matsushita*), cert. denied, 494 U.S. 1081 (1990); Thomas Jorde & Mark Lemley, *Summary Judgment in Antitrust Cases: Understanding Monsanto and Matsushita*, 36 ANTITRUST BULL. 271 (1991) (discussing the increased availability of summary judgment in antitrust cases and the problems lower courts encounter applying the *Matsushita* standard).
191. See supra part II.A.5 (discussing punitive damages in tortious interference cases).
192. *Nesler v. Fisher & Co.*, 452 N.W.2d 191, 196-97 (Iowa 1990) (quoting trial court's jury instructions); Feltham, *supra* note 103, at 143 (criticizing *Texaco v. Pennzoil* jury instructions because they did not clearly indicate that Pennzoil and Getty were at the precontractual stage when Texaco made its competitive offer).
193. *Nesler*, 452 N.W.2d at 196 ("[W]hen a defendant acts with malice to inflict injury upon his rival's business, his conduct becomes illegal . . . ."); see
on undefined standards of “fair play.”\textsuperscript{194}

In short, as one tort commentator has stated, “The test is admittedly vague, and the applications are difficult to classify, but the law is developing at a rapid rate.”\textsuperscript{195} It is essential that tortious interference cases not degenerate into battles over whether the jury will approve of the defendant’s brand of vigorous competition.

5. Vagueness in Defining Improper Means

A final problem is ambiguity regarding what constitutes improper means. In \textit{Azar v. Lehigh Corp.},\textsuperscript{196} the plaintiff land company offered free “vacations” during which customers would view property available for sale. The defendant sought out these customers and persuaded them to buy property from him instead. The court upheld a temporary restraining order barring the defendant from soliciting the plaintiff’s customers.\textsuperscript{197} Regardless of the merits of this particular case, given that the defendant was arguably free-riding on the investment the plaintiff had made in the real estate prospects, the court set a troubling standard. The court indicated that competition, like war, has its limits and concluded: “In the final analysis, the issue seems to turn upon whether the subject conduct is considered to be ‘unfair’ according to contemporary business

\textsuperscript{194} The jury instruction from Champion v. Wright, 740 S.W.2d 848, 854-55 (Tex. Ct. App. 1987), is worth full quotation:

You are instructed that reasonable competition is limited to what is considered “fair play.” If the means of competition are fair, you may find that a privilege exists, however, if the acts complained of do not rest on some legitimate interest or if there is sharp dealing or overreaching or other conduct below the behavior of fair men similarly situated, you must find that the actions were not privileged.

\textit{See also} Grillo v. Board of Realtors, 219 A.2d 635, 649 (N.J. Super. Ct. Ch. Div. 1966) (stating that test is whether the conduct was “both injurious and transgressive of generally accepted standards of common morality or of law”) (citations omitted).


\textsuperscript{196} 364 So. 2d 860 (Fla. Dist. Ct. App. 1978).

\textsuperscript{197} \textit{Id.} at 881-62. The defendant identified the plaintiff’s customers by the plaintiff’s promotional literature that they carried. He followed the happy vacationers, struck up conversations, and began his sales pitch. \textit{Id.}
This “business ethics” standard offers firms and courts little guidance and is not grounded upon a showing of independently illegal action by the competitor. It also may change over time: “The nature of the conduct which is acceptable today may, on examination at trial, prove unacceptable tomorrow as the mores of our marketplace change and as we require more stringent standards of conduct.”

Machine Maintenance & Equipment Co. v. Cooper Industries reflects a questionable finding of improper means. A terminated distributor sued the manufacturer, claiming antitrust violations and tortious interference with its customer contracts. The manufacturer terminated the distributor’s contract in order to do business with a newly established distributor, and the contract permitted the manufacturer broad discretion to terminate. Nonetheless, the court held there was sufficient evidence to support a jury verdict based on the manufacturer’s alleged use of improper means of interference. The court stressed that the manufacturer gave short notice of termination, causing customers to become dissatisfied with the plaintiff and to switch to the new distributor, and that it used the plaintiff’s customer lists to call customers, informing them that the plaintiff had been terminated because of poor performance.

Although the short notice violated the contract, there was no indication that the use of customer lists violated a trade secret, nor was there any evidence that the manufacturer made false statements to customers. Thus, the plaintiff effectively transformed a breach of contract claim (for the termination without adequate notice) into a tort claim, for which the jury awarded $1,790,342 in actual damages and a startling ten million dollars in punitive damages.

198. Id. at 862. The court derived this test from Prosser’s analysis. Id.; see also Inventive Music Ltd. v. Cohen, 617 F.2d 29, 32 (3d Cir. 1980) (per curiam) (applying standard of “common morality or of law”). See generally 2 Callmann, supra note 54, § 9.18 (discussing improper means cases).


201. Id. at 1114.

202. Id.

203. Id. at 1116.

204. Id.

205. Id. The contract provided for termination upon 90 days notice, but the manufacturer only gave 34 days notice. Id. at 1114.

206. Id. at 1114. The district court later reduced the punitive damages award to $100,000. Id. at 1118.
Although the approach in *Azar* and *Machine Maintenance* serves the purpose of capturing pesky defendants whose behavior seems objectionable, it does not inform competitors when and in what forms courts will permit aggressive competition. Courts should instead define improper means to include means that constitute an independent tort, breach of fiduciary duty, or antitrust violation. So defined, the improper means standard would provide a governing principle for decision making and guidance for interested parties.

III. RECONCILING ANTITRUST AND TORT LAW

A. HARMONIZING PRINCIPLES

State tortious interference law and federal antitrust law have developed largely independently. Commentators have given little attention to the interplay between these two important fields of business regulation. In theory the two areas should be consistent and, indeed, complementary. After all, "'[t]he policy of the common law has always been in favor of free competition.'" Indeed, as one court has stated, "'[c]ompetition in business, even though carried to the extent of ruining a rival, constitutes justifiable interference in another's business relations, and is not actionable.'" Moreover, courts have interpreted the antitrust laws to further our national competition policy. In many cases, a plaintiff can seek recovery under both antitrust and tortious interference theories. These cases often involve allegations of refusals to deal, predatory price cutting, and other forms of exclusionary conduct.

207. Cf. Dobbs, supra note 48, at 365-68 (discussing interference claims properly based on other torts, duress, fiduciary duty violations, and restraints of trade).

208. See sources cited supra note 46.


211. See supra part I (discussing the promotion of competition as a major purpose of the antitrust laws).

212. See, e.g., Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 261-62 (1989) (tortious interference and predatory pricing claims); Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 955 (10th Cir.) (claims included monopolization, restraint of trade, and tortious interference), cert. denied, 497 U.S. 1005
Nonetheless, disturbing inconsistencies in the law in these two fields have developed. The doctrinal underpinnings in the two fields differ widely, leading to troubling outcomes and questionable reasoning in several areas of tortious interference law. Today, although the two bodies of law are parallel and consistent in some respects, significant inconsistency and tension remain in tortious interference law.

Federal antitrust law does not mandate that state law conform unwaveringly to the strictures and policies of the Sherman Act. The Supreme Court emphasized this point in California v. ARC America Corp. In that case, several states brought suit under federal and state antitrust laws against cement producers, alleging that the defendants unlawfully conspired to raise prices. The states were indirect purchasers of cement; they purchased the cement from middle-level distributors, rather than directly from the manufacturers who allegedly fixed prices. Federal antitrust law generally precludes indirect purchasers from recovering damages against conspirators, permitting only direct purchasers to sue and collect damages. Some states' antitrust laws, however, permit indirect

(1990); E.W. French & Sons v. General Portland, Inc., 885 F.2d 1392, 1394-95 (9th Cir. 1989) (claims included price fixing, conspiracy to eliminate competitor by cutting prices, unfair competition, and tortious interference); H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1540-43, 1548 (8th Cir. 1989) (upholding jury findings of predatory pricing and tortious interference); Machine Maintenance & Equip. Co. v. Cooper Indus., 661 F. Supp. 1112, 1114-19 (E.D. Mo. 1987) (upholding jury verdict on tortious interference claim and overturning antitrust verdict because plaintiff did not show any harm to competition or unreasonable restraint of trade); Keeton et al., supra note 48, § 130, at 1014 nn.85-90 (citing cases); see also DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1507-19 (11th Cir. 1989) (rejecting tortious interference claims, but allowing antitrust and fraud claims to go to trial), cert. denied, 494 U.S. 1081 (1990); Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101, 1113-14 (1st Cir. 1989) (rejecting monopolization and tortious interference claims where the plaintiff failed to demonstrate wrongful means or unlawful restraint of trade), cert. denied, 494 U.S. 1027 (1990); Dunnivant v. Bi-State Auto Parts, 851 F.2d 1577, 1577-84 (11th Cir. 1988) (affirming summary judgment for defendants on monopolization, restraint of trade, and tort claims); Top Serv. Body Shop v. Allstate Ins. Co., 582 P.2d 1365 (Or. 1978) (rejecting tortious interference and price discrimination claims); Dobbs, supra note 48, at 367-68 (discussing misuse of economic power as the basis for a tort claim).

214. Id. at 96.
215. Id. at 96-98.
216. Illinois Brick Co. v. Illinois, 431 U.S. 720, 735-36 (1977). In Illinois Brick, the Court noted exceptions to the indirect purchaser rule, id. at 732 n.12, 736 n.16, that are not pertinent to this Article.
purchasers to sue and recover damages to the extent distributors passed along overcharges to indirect purchasers.\textsuperscript{217}

The issue in \textit{ARC America} was whether federal antitrust law preempted the state laws that permitted indirect purchaser recoveries.\textsuperscript{218} Noting the presumption against preemption, the Court concluded that Congress had not expressly preempted state antitrust laws, that federal law had not occupied the field and, finally, that the state indirect purchaser rules did not conflict with the policies and objectives of federal law.\textsuperscript{219} Further, the Court indicated that the federal antitrust laws would not preempt other state laws regarding unfair competition: “Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States.”\textsuperscript{220} This dictum undercuts the case for preemption of most business torts. Tortious interference law, however, is arguably distinguishable from other areas, such as unfair competition. Because unfettered tortious interference liability can have a chilling effect on competition without furthering a clearly articulated countervailing policy, those broad claims may be preempted because they directly conflict with antitrust policies. Nonetheless, in light of the Court’s reasoning in \textit{ARC America}, federal antitrust law does not generally preempt state tortious interference law, even in situations in which the tort doctrines cast a wider net of liability.\textsuperscript{221}

Despite Congress’s apparent willingness to allow state law to diverge from the Sherman Act and other federal antitrust law, some reconciliation and consistency is desirable. A narrow interpretation of tortious interference claims would avoid preemption arguments based on conflicts with federal antitrust

\textsuperscript{217} \textit{ARC America}, 490 U.S. at 98 & n.3 (citing state laws, including those of Alabama, Minnesota, and California, that expressly or otherwise permit indirect purchasers to sue for overcharges).

\textsuperscript{218} \textit{Id.} at 100.

\textsuperscript{219} \textit{Id.} at 100-06.

\textsuperscript{220} \textit{Id.} at 101 (footnote omitted).

\textsuperscript{221} \textit{See id.} at 105 (“Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law . . .”). Moreover, the Sherman Act does not provide “remedies for all torts committed by or against persons in interstate commerce.” \textit{Hunt v. Crumboch}, 325 U.S. 821, 826 (1945). \textit{But cf. Albert Pick-Barth Co. v. Mitchell Woodbury Corp.}, 57 F.2d 96, 103 (1st Cir.), \textit{cert. denied}, 286 U.S. 552 (1932) (permitting antitrust liability based on intent to harm). Certainly room exists for tort law to cover conduct, such as independently tortious acts, that is impermissible on some principled basis but that does not violate the antitrust laws.
policies favoring competition and efficiency. Moreover, to the extent state tortious interference law regulates business activity with the same goals as antitrust, the two areas of law should seek consistency in result and reasoning. Antitrust law, after all, focuses its attention on group behavior and seeks to eliminate the activities of large firms that are exclusionary or anticompetitive. Tortious interference law governs the actions of all firms, both large and small. Both seek to permit free competition on the merits. Although tortious interference law is also designed to protect the security and integrity of business relationships, this interest should be balanced against competing considerations.

When judges and legislators contemplate modifying the common law rules regarding tortious interference law, they should consider, as a guiding policy, the importance of competition and the economic reasoning that has been incorporated in federal antitrust law. As with antitrust law, courts have developed tortious interference law into a brief set of guiding principles, including the paramount principle of free competition.

B. CLAIMS INVOLVING COMPETITORS

Antitrust law recognizes vigorous competition as a foundation of the nation's economic system. Prosser and Keeton noted that "[t]he policy of the common law has always been in favor of free competition." Nonetheless, tortious interference law has, at times, demonstrated hostility to this basic tenet of our economic system. The early English cases took place during severe labor shortages and were "designed to prevent laborers from jumping ship for higher wages. Traces of this sort of anti-competitive thinking certainly can be discerned in case law from subsequent centuries." Even some modern decisions fail to discuss whether the plaintiff and defendant competed with one another, giving this fact no importance to the outcome of a tortious interference case.

Modern tortious interference law should seek to advance

---

222. See supra part I (discussing the promotion of competition as a primary purpose of the antitrust laws).

223. Keeton et al., supra note 48, § 130, at 1012; see also Frandsen v. Jensen-Sundquist Agency, 802 F.2d 941, 947 (7th Cir. 1986) (Posner, J.) ("One of the most firmly established principles of the common law is that competition is not a tort.") (citation omitted).


225. 2 Callmann, supra note 54, § 9.02, at 26 & n.4 (citing cases).
free competition and economic efficiency, by allowing competition on the merits. In the words of one court, "Lawful competition is not actionable even though carried to the extent of ruining a rival."  

Furthering the interest in free competition on the merits requires courts to modify tortious interference law governing at-will contracts, voidable contracts, punitive damages, and prospective business advantages. With regard to at-will and voidable contracts, the countervailing interest in contract stability should not be given controlling weight. These are not valid, specific contracts of definite duration, in which the parties expect performance as promised. The law, by definition, permits a party to end such an agreement, either because a flaw in the contract renders it voidable or because it is expressly or implicitly determined to be an at-will contract. Allowing a party to avoid performance of a voidable contract or to end an at-will agreement thus furthers important contract law policies—policies that trump the need for general contractual stability. Tortious interference law should recognize this interest and permit a competitor to interfere with at-will and voidable contracts, unless the competitor employs means that are otherwise unlawful.

On the issue of damages for interference with an existing contract, courts should not permit the plaintiff to recover punitive damages unless it can demonstrate independently tortious or wrongful acts, rather than merely the act of interference. Permitting punitive damages in a simple case of interference with contract deters efficient breaches of contract. If the defendant's actions involve a serious, independent wrong, the in

226. See Warde, 887 F.2d at 103 (stating that modern law seeks to protect advantages accruing from free competition and economic efficiency); Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101, 1114 (1st Cir. 1989) (describing antitrust laws as the only true indicator "of whether or not [competitors'] conduct can be found to be 'wrongful' or 'illegitimate'—and, hence, tortious"), cert. denied, 494 U.S. 1027 (1990).
227. Candalaus Chicago, Inc. v. Evans Mill Supply Co., 366 N.E.2d 319, 327 (Ill. App. Ct. 1977); see also Conoco, Inc. v. Inman Oil Co., 774 F.2d 895, 906 (8th Cir. 1985) (holding supplier was not liable for charging a customer of its distributor a lower price than the distributor offered); Fairbanks, Morse & Co. v. Texas Elec. Serv. Co., 63 F.2d 702, 705-06 (5th Cir. 1933) (noting the interest in competition can outweigh protection of a firm's business expectancies), cert. denied, 290 U.S. 655 (1933).
228. See supra notes 77-104 and accompanying text (discussing liability for interference with at-will and voidable contracts).
229. See supra part II.A.5 (discussing punitive damages in interference cases).
effect of punitive damages is appropriate. If not, the plaintiff's recovery logically should be limited to actual damages and perhaps attorneys' fees.

With regard to tortious interference with prospective business relations, the need for modification is less serious, because the law already recognizes a right to compete for future business. The inquiry into motive, however, should be eliminated whenever the defendant is a bona fide competitor of the plaintiff. In such cases, although the defendant may have made a vindictive statement showing mixed motives, the defendant's right to compete vigorously should preclude a tort claim. In every case, it would seem, a competitor would be motivated at least in part by economic self-interest when it interferes with a prospective business relationship. As one court has observed, "A competitor has an absolute right to take away as much of the 'other fellow's' business as he can lawfully."232

Even in the worst case, where an emotional competitor harbors ill will towards the plaintiff, a court should still find that the competitor's actions are motivated in part by a desire to compete. In the rare case233 of a defendant acting out of pure spite, the introduction of this subjective state-of-mind issue into the competition analysis unnecessarily complicates the test. Juries would often have difficulty resolving this question accurately, given its subjective nature. Similarly, the cost of ju-

230. See supra part II.B.4 (criticizing the inquiry into motive).
233. In competitive cases it is virtually impossible to find an instance where one party, from no other motive but sheer malevolence, attempts to injure or destroy the business of his competitor. Were there such a situation, proof of the solely malevolent motive would be extremely difficult, if not impossible, for the defendant could always establish that he derived profit thereby . . . .

2 CALLMANN, supra note 54, § 9.15 (footnote omitted). Indeed, Callmann's text discusses only two cases on purely malevolent motives. One is Tuttle v. Buck, 119 N.W. 946 (Minn. 1909), discussed supra notes 148-51 and accompanying text, and the other is Boggs v. Duncan-Schell Furniture Co., 143 N.W. 482 (Iowa 1913), which involved the improper means of false advertising. See 2 CALLMANN, supra note 54, § 9.15.
dicial error would be high, potentially chilling legitimate competition. Finally, section 768(1)(a) of the Restatement includes a provision for cases in which the interference does not relate to the competition between the plaintiff and the defendant. This provision should allow plaintiffs to get to a jury in those cases in which the interference does not involve bona fide competition.

By eliminating purpose as a determinative factor, courts will apply tortious interference standards that are consistent with the goals of antitrust. "An evil intent alone is insufficient to establish a violation under the rule of reason, although proof of intent may help a court assess the market impact of the defendants' conduct." Although a firm may engage in exclusionary behavior for the purpose of driving out a competitor, the firm should not be liable unless the behavior meets the standards for an independent antitrust violation.

Finally, the burden of proof of improper interference should fall squarely on the plaintiff and serve as part of the prima facie case. This change from the existing law in many jurisdictions reduces the risk that a defendant must justify its lawful competitive behavior. Rather, the defendant can point to the plaintiff's failure to show any impropriety.

It would simplify and improve competition analysis to eliminate the "purpose" prong and place on the plaintiff the burden of proving that the competitor's interference was improper. The plaintiff would be free to show that the interference did

234. Restatement (Second) of Torts § 768(1)(a) (1977); cf. id. cmt. g (noting the overlap between this provision and the provision dealing with purpose).


236. For example, a number of cases have held that predatory pricing constitutes improper means and can serve as the basis for a tortious interference claim. E.g., H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1540-43, 1548 (8th Cir. 1989); C.E. Servs. v. Control Data Corp., 759 F.2d 1241, 1249 (5th Cir. 1985), cert. denied, 474 U.S. 1037 (1985); see also Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 261-64 (1989) (upholding jury verdict finding predatory pricing and tortious interference); Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101, 1114 (1st Cir. 1989) (using antitrust rules as "barometer" for competitor's tortious interference claim), cert. denied, 494 U.S. 1027 (1990).

237. See supra text accompanying notes 62-64 (discussing approach whereby courts allocate the burden of proof to the defendant).
not involve bona fide competition, that the defendant employed wrongful means, or that the defendant created or continued a restraint of trade.

A few courts have adopted a similar approach. One court in New Jersey concluded:

Liability of a competitor depends upon whether the means used to compete are unlawful. If the competitor employs unlawful means, he is liable. For example, if a competitor uses violence or engages in fraud or intimidation, or misrepresents, or threatens civil or criminal actions, or violates the law, then the competition is considered to be outside of permissible parameters, and liability will ensue.\(^\text{238}\)

This approach would harmonize the treatment of competition under antitrust and tortious interference law, while leaving intact the tort law interest in the stability and integrity of existing, valid contracts. It also would continue to permit plaintiffs to recover for harm to existing or prospective contractual expectancies that are damaged as a result of a competitor's actions, provided those actions are independently tortious or constitute unlawful restraints of trade.

C. DEALER TERMINATION CLAIMS

Thus far, the discussion of antitrust and tortious interference has focused mainly on cases involving competitors, which present the most common setting for these claims. Nonetheless, a significant number of cases have involved a terminated dealer's lawsuit against a manufacturer or supplier. Unlike cases involving direct competitors, these cases implicate the conflicting interests of manufacturers in establishing dealer networks suitable to their needs, and of dealers in stable business arrangements. Once again, however, these cases involve the interplay of antitrust and business tort.

The terminated dealer's tort claim typically alleges that the manufacturer wrongly interfered with the dealer's business relationship with its customers by ending the dealer contract.\(^\text{239}\)

\(^{238}\) C.R. Bard, Inc. v. Wordtronics Corp., 561 A.2d 694, 697 (N.J. Super. Ct. Law Div. 1989) (citations omitted). The court also observed, "We live, after all, in a society consumed by the desire to acquire wealth, enamored by entrepreneurship and enthralled by success. Competition is always the premise, winning always the goal." \textit{Id.} at 698.

\(^{239}\) The manufacturer cannot be liable for interfering with the dealer contract itself because it is a party to that contract. \textit{See} Childers Oil Co. v. Exxon Corp., 960 F.2d 1265, 1271 (4th Cir. 1992) ("Tortious interference claims lie only against a party that is a stranger to the relationship."); \textit{see also} Machine Maintenance & Equip. Co. v. Cooper Indus., 661 F. Supp. 1112, 1114-19 (E.D. Mo. 1987) (citing cases) (upholding jury verdict against manufacturer on
The manufacturer normally responds by claiming that there were grounds for the termination and that a manufacturer should be free to deal with whomever it believes will most effectively market its product or service.

Courts generally recognize a conditional privilege to interfere based on the manufacturer's financial interest in the dealer's business. For example, in Pierce Ford Sales v. Ford Motor Co., the Second Circuit overturned a jury verdict that found Ford liable for refusing to approve the plaintiff's attempt to sell its dealership to various third parties. The court indicated Ford had a right to prevent the sale of the dealership in light of an express clause requiring Ford's approval. The court further stated that "even without such a condition Ford would be justified in protecting its own interest to have a dealer financially sound."

One case that diverges from this pattern is Smith v. Ford Motor Co., in which the North Carolina Supreme Court held that a manufacturer may be liable for inducing its dealer to terminate a manager who had joined an alliance. Professor Dobbs criticized the opinion in Smith on the ground that "a business might make the judgment that it was economically sound to discourage dealer alliances."

Similarly, a competing dealer generally may approach a supplier and seek a dealership, even if it means the supplier will terminate an existing dealer. Courts often have found that the competition privilege under section 768 permits this form of interference provided there is no restraint of trade, the defendant did not use improper means, and the defendant seeks to ad-

---

dealer's tortious interference claim and overturning antitrust verdict because plaintiff did not show harm to competition or unreasonable restraint of trade); Smith v. Ford Motor Co., 221 S.E.2d 282, 296 (N.C. 1976) (holding manufacturer may be liable for inducing termination of manager who had joined dealer's alliance); James O. Pearson, Annotation, Liability for Interference with Franchise, 97 A.L.R.3d 890 (1980) (citing cases).

240. In addition to the cases discussed in the text, see Babson Brothers Co. v. Allison, 337 So. 2d 848 (Fla. App. 1976), cert. denied, 348 So. 2d 944 (Fla. 1977), which held that a parent corporation may interfere with a subsidiary's contracts with dealers because of its financial interest in the sale of its products.

242. Id. at 427.
243. Id. at 429.
244. Id.
vance its competitive interest. Still, several courts have refused to recognize this principle on the formalistic ground that the aspiring dealer tortiously induced the breach of an existing exclusive contract.

Finally, several cases have recognized that a manufacturer may compete with its distributors in downstream markets, including undercutting the distributor's price. Others, however, have found potential liability in the same situation. To some extent, the outcome in these cases should depend on the terms of the contract between the manufacturer and the distributor—a manufacturer should be liable under the contract if it has violated an express provision against competing downstream. Assuming no express understanding, however, the competition principle should permit a manufacturer to compete downstream, provided it does not employ predatory or price-discriminatory means. The effect of allowing manufacturer autonomy should be to increase, not decrease, competition.

Federal antitrust policy clearly affirms manufacturers' freedom to establish, regulate, and terminate dealerships. Except for a few specific statutory exceptions, such as the Petroleum Marketing Practices Act, manufacturers face only limited federal scrutiny in this important arena. The antitrust laws permit suppliers to cease doing business with a dealer and to form agreements with new parties to replace the terminated dealer, so long as their actions are undertaken independently. As the Supreme Court observed in Continental T.V.


251. E.g., Oreman Sales, 768 F. Supp. at 1184 (contract allowed manufacturer to compete directly with distributor).


v. GTE Sylvania Inc., the "primary concern of antitrust law" is interbrand competition, which is not harmed and may actually be enhanced by vertical dealer agreements. The Court explained that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products... [M]anufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products." Similarly, although a few states have statutory guidelines regulating dealer relationships, the principle of laissez faire is the predominant rule.

Tortious interference law, as it exists in many states, is thus a poor vehicle for governing manufacturer-dealer relationships. One commentator, Harvey Perlman, explained that antitrust rules have been developed to resolve questions that arise in this context. Given that many vertical agreements lead to efficient and pro-competitive results, tortious interference law should play a limited role in restricting a manufacturer's ability to structure intrabrand competition in the market. Courts should limit the role of tort law in governing dealer relationships to third-party liability for interference with existing dealer contracts of definite duration and to liability for independently tortious acts and restraints of trade.

---


255. Id. at 52 n.19. The Court noted, however, that the potential reduction of intrabrand competition renders complex the market impact of vertical restrictions. Id. at 51-52. For a case applying GTE Sylvania's analysis, see Machine Maintenance & Equipment Co. v. Cooper Industries, 661 F. Supp. 1112, 1118-19 (E.D. Mo. 1987), which overturned a dealer's antitrust verdict because the dealer did not show any harm to competition or unreasonable restraint of trade.

256. GTE Sylvania, 433 U.S. at 51-56. Eleven years later, the Court in Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988), held that vertical dealer agreements are not illegal per se unless there is an agreement on price or price levels. Id. at 735-36. If no price agreement were required, the Court reasoned, a jury would have to evaluate a manufacturer's motive. Id. at 727-28. The ultimate effect could be to chill legitimate competitive conduct with the threat of treble damages and criminal penalties. Id.

257. See, e.g., Dobbs, supra note 48, at 368-69 n.133 (citing examples from Arizona and New Jersey).

258. Perlman, supra note 46, at 108-09.

259. See id. (suggesting limitation of tort liability to wrongful acts).
D. PROFESSIONAL ASSOCIATIONS AND OTHER GROUP BEHAVIOR

Group behavior presents related, but slightly different, issues. When a self-regulatory organization, such as a professional association, takes actions to regulate its membership or to exclude a party for non-compliance with governing rules, the adversely affected party often seeks legal recourse. For instance, a doctor denied hospital staff privileges often will sue under various antitrust and state tort theories.\(^\text{260}\)

To the extent that these claims allege a violation of section 1 of the Sherman Act, the plaintiff must show either a per se violation, such as certain group boycotts,\(^\text{261}\) or that the defendants have unreasonably restrained competition.\(^\text{262}\) To show an unreasonable restraint of trade, the plaintiff must demonstrate that the defendants reduced output, raised prices, or otherwise had a detrimental effect on the relevant product and geographic market.\(^\text{263}\) Courts recognize that a showing that the association’s actions caused the plaintiff injury does not suffice; the plaintiff also must show injury to competition. For example, in *Les Shockley Racing v. National Hot Rod Ass’n*,\(^\text{264}\) the

\(^{260}\) See, e.g., Willis v. Santa Ana Community Hosp. Ass’n, 376 P.2d 568, 569-70 (Cal. 1962) (en banc) (osteopath sued hospital for restraint of trade and tortious interference for its refusal to grant staff privileges and for impugning his reputation).


\(^{262}\) *Section 1 provides: “Every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States, or among foreign nations, is hereby declared to be illegal.” 15 U.S.C. § 1 (1988).* The Supreme Court has interpreted this section to prohibit only those contracts, combinations, and conspiracies that *unreasonably* restrain trade. *See United States v. American Tobacco Co.*, 221 U.S. 106, 179-80 (1911); *Standard Oil Co. v. United States*, 221 U. S. 1, 51 (1911).

\(^{263}\) See, e.g., *Les Shockley Racing v. National Hot Rod Ass’n*, 884 F.2d 504, 508 (9th Cir. 1989); see also *International Travel Arrangers v. NWA, Inc.*, 723 F. Supp. 141, 143-45, 155 (D. Minn. 1989) (denying motion for summary judgment where plaintiff alleged violation of § 1 of the Sherman Act and tortious interference with prospective business relations); *Reazin*, 663 F. Supp. at 1396 (finding unreasonable restraint of trade based on evidence of market power, horizontal conspiracy, and reduction in competition); Grillo v. Board of Realtors, 219 A.2d 635, 641-49 (N.J. Super. Ct. Ch. Div. 1966) (finding that realtor organization’s refusal to allow non-members to use multiple listing service is both restraint of trade and tortious interference).

\(^{264}\) 884 F.2d 504 (9th Cir. 1989).
plaintiffs, owners and operators of jet-powered trucks and motorcycles, alleged that the National Hot Rod Association and other defendants had excluded them from drag racing events, in violation of the Sherman Act and state tort law. 265 The court held that the antitrust claim should fail because the plaintiffs did not allege any injury to competition.266

Tortious interference claims do not focus on the injury to competition issue. Rather, the question again is whether the defendant has a "justification" for interference.267 One example of such a tort rule is in Willis v. Santa Ana Community Hospital Ass'n,268 where an osteopath sued a hospital for restraint of trade and tortious interference because of its refusal to grant staff privileges and for impugning his reputation to other local hospitals. The court applied the common law rule that the plaintiff can recover if the defendant interfered with his livelihood "by unlawful means or by means otherwise lawful when there is a lack of sufficient justification."269 The justification issue, the court stated, is determined through a balancing of society's and the parties' interests in protecting the activities interfered with and in permitting the interference.270

In these settings, as in those earlier discussed, tortious interference law would be more precise and could promote efficiency if it were confined to cases of interference with existing contracts and to cases involving wrongful acts, such as independent torts or restraints of trade.

CONCLUSION

Antitrust law and the law of tortious interference play significant roles in the regulation of marketplace behavior. Both areas of law define the "rules of the game," that is, the boundaries between lawful and impermissible competition. Both seek to promote desirable economic arrangements while deterring behavior that undermines the operation of efficient markets.

265. Id. at 508.
266. Id. at 506-09. The court affirmed the dismissal of the plaintiffs' pendant state law claims in light of the dismissal of the only federal claim in the case. Id. at 509.
267. See, e.g., Grillo, 219 A.2d at 649 (discussing standard of fair dealing). For an analysis of refusals to deal as bases for tort claims, see RESTATEMENT (SECOND) OF TORTS § 766 cmts. l, g, § 767 cmt. c, § 768 cmts. e, f (1977) and KEETON ET AL., supra note 48, § 130, at 1023-26.
269. Id. at 570.
270. Id.
Plaintiffs often include both types of claims in litigation with competitors.

Antitrust doctrine, particularly as the Supreme Court has developed it in the last twenty years, generally furthers free competition and economic efficiency for the ultimate benefit of consumers. Accordingly, antitrust law has focused on the objective economic effect of the challenged restraint on the market. Practices that harm competition, based on demonstrable experience and economic analysis, are presumptively unlawful under the per se rule. The courts analyze practices that have more uncertain economic effect under the more relaxed standards of the rule of reason, with its focus on whether the restraint promotes or inhibits competition.

Business tort law, however, has not consistently developed in accordance with the competition principle. Although "'[t]he policy of the common law has always been in favor of free competition,'"271 tortious interference law has developed haphazardly. Some decisions display insufficient concern for competition, efficiency, or the interests of consumers. Therefore, several aspects of tortious interference law, as interpreted in most jurisdictions, should be modified to permit more vigorous competition.

Tortious interference law reserves its strongest protection for cases involving interference with existing, valid contracts. The nearly unanimous view is that third parties do not have a right, absent a privilege, to undermine the stability of these economic arrangements. Like the protection given these agreements under contract law, tort protection for existing contracts is economically defensible. The only economic objection concerns the availability of punitive damages, which may deter efficient breaches of contract. This aspect of tortious interference law consequently requires, at most, limitation of remedies to actual damages, except in cases involving independently tortious actions.

The treatment of at-will and voidable contracts in tortious interference law is less certain. Some states give these agreements the same or nearly the same degree of protection as valid contracts of definite duration, while other states recognize that at-will and voidable contracts deserve less insulation from the influence of third parties. The competition principle developed in this Article suggests that third parties should be free to in-

terfere with these tenuous economic relationships. At-will and voidable contracts accordingly should be treated under the competition analysis applied to prospective business relationships, allowing greater scope for third-party interference.

Tort law governing prospective business relationships requires less severe modification because courts almost universally recognize that competitors have a right to compete for future business. Nonetheless, two problems remain. First, under section 768 of the Restatement and the law of most jurisdictions, a competitor still may be liable for interference if a desire to harm the plaintiff motivated its actions. This loophole permits extensive litigation over a firm's subjective motive for its actions in the marketplace, which in turn presents opportunities for legal error and potentially chills vigorous competition on the merits. For reasons of efficiency and sound judicial administration, the "purpose" prong of section 768 should be eliminated.

Second, the Restatement leaves unresolved the issue of which party has the burden of proof on the question of whether a firm's interference with a competitor's business prospects was improper. Indeed, many courts view competition as a "privilege" and require the defendant to prove that it is entitled to receive protection for its actions. In cases in which the alleged interference arises from the behavior of a bona fide competitor, the plaintiff should have the burden of proving that the interference was improper. If the plaintiff can prove that the defendant engaged in some unlawful act, including a violation of the antitrust laws, then the plaintiff has established this element of its tortious interference claim. In this manner, tortious interference law would provide greater latitude for competition on the merits and strike the proper balance between competition and the promotion of stable economic relationships.

Finally, if the "purpose" analysis under section 768 is retained, then the plaintiff should at least have the burden of showing that subjective element. If the plaintiff, after a suitable opportunity for discovery when appropriate, cannot come forward with evidence of the defendant's bad faith, then the tortious interference claim should fail as a matter of law.

272. Restatement (Second) of Torts § 767 cmt. c, at 31 (1977); see, e.g., International Travel Arrangers v. NWA, Inc., 723 F. Supp. 141, 143-45, 155 (D. Minn. 1989) (plaintiff's claims included violation of § 1 of the Sherman Act and tortious interference with prospective business relations).

These revisions in tortious interference law would not eviscerate that area of tort law. Rather, the changes would resolve some of the doctrinal tensions already present there while at the same time reconciling the treatment of behavior that falls within the bailiwick of both tort and antitrust law.