



## The IDC Monograph

Mark J. McClenathan

Heyl, Royster, Voelker & Allen, P.C., Rockford

# Crossing the Line: Interference with Business and Contractual Relations

---

## I. Introduction

A prospective client approaches you and asks if you are willing to represent her in a real estate case that has been pending for some time. She explains that she fired her attorney and is filing an ARDC complaint against him. You immediately turn down the assignment, and, at her request, give her the names of three local attorneys who specialize in real estate law and are respected litigators. The meeting lasted 20 minutes.

Several months later, the client's discharged attorney serves you with a summons and complaint charging you and the client's new attorney with tortious interference with business relations. What did you do to deserve this lawsuit? What did you do wrong? Did you "interfere" with another attorney's relationship with his client? Was your act "intentional"?

In today's litigious society, common law causes of action are being stretched to the limit to give anyone a forum to seek redress for their alleged injuries, damages, failures, and disappointments, especially when something does not go their way. Losing a client or customer happens every day; there are no guarantees.

But what if the competitor is not playing "fair"? There are plenty of attempts by business owners to protect what is "theirs." For instance, employers may ask their employees to sign restrictive covenants, such as covenants not to compete and confidentiality agreements. If employees leave and either start their own business or work for a competitor, we often see employers filing petitions for injunctions to enforce said "contracts" against former employees and their new employers to protect market share and proprietary information.

This article examines lawsuits filed by business owners who assert that a third party interfered with an existing or potential business relationship which led to economic and consequential damages. Suits alleging tortious interference are not exclusively reserved to business settings, these claims are also being brought against defendants and their litigation attorneys during discovery as a tool to attempt to stop subpoenas.

## II. Mixing Business Law and Tort Law

Interference with business relations—sometimes referred to as *tortious* interference with business relations—is a type of common law tort that occurs when a person intentionally interferes or damages another person's relationship with a third person.<sup>1</sup> There are two general categories of "tortious interference," interference with business relations,<sup>2</sup> and interference with contracts.<sup>3</sup> Tortious interference with business relations is interference with a business expectancy or relationship, while tortious interference with a contract is based on the existence of a valid contract between the plaintiff and a third party. Only intentional interference is actionable in Illinois. Negligent interference with business relations is not a recognized cause of action in Illinois.

In some circumstances, one who is liable for intentional interference may also be liable under other legal theories, including fraudulent misrepresentations<sup>4</sup> (e.g., defamation), negligent misrepresentations, or possibly even false advertising.

### *a. Federal Law and “Interference”*

While this article focuses on Illinois law, it is noteworthy that federal laws may prohibit “interference” with contractual and business relations. Section 3 of the Clayton Act states:

[I]t shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods . . . or fix a price charged therefor . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.<sup>5</sup>

Section 2 of the Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .”<sup>6</sup>

Finally, section 45 of the Federal Trade Commission Act states that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”<sup>7</sup>

### *b. Balancing Friendly Competition in a Free Market Versus Intentional Acts*

There is no denying that this country’s economy is based on the free market system. Consumers of goods and services are free to choose who they do business with and competition is encouraged. There are, however, legitimate social and economic interests in protecting not only the freedom of a competitor, but also the contractual and business interests of the other party. Thus, the common law tort of interference with business relations strikes caution, or even fear, into anyone playing on the free market stage, because it allows a business person to protect an existing or prospective business or contractual relationship built on legitimate and valid business interests.

While courts encourage competition, they frown upon intentionally improper means and methods—such as misrepresentation, fraud, or intimidation—to interfere with business relationships or contracts. For instance, absent an enforceable non-competition agreement, a salesman is free to compete with his or her former employer upon resignation or termination.

### *c. Interference or Abuse—Pitfalls in the Practice of Law*

It is important for defense attorneys to know what is fair and what is crossing the line when competing for clients, advising clients, and representing clients in litigation. Intentional interference has been alleged not only in cases where one party alleges an unfair fight for business, but in litigation to stop an alleged abuse of process in discovery.

### III. Tortious Interference Claims

#### *a. Tortious Interference with Business Relations*

To state a cause of action for tortious interference with a valid business relationship and expectancy (sometimes referred to as “interference with prospective business advantage”), a plaintiff must allege: (1) a reasonable expectancy of entering into a valid business relationship; (2) the defendant’s knowledge of the expectancy; (3) an intentional and unjustified interference<sup>8</sup> by the defendant that induced or caused a breach of termination of expectancy; and (4) damage to the plaintiff resulting from the defendant’s interference.<sup>9</sup>

This tort “recognizes that a person’s business relationships constitute a property interest and as such are entitled to protection from unjustified tampering by another.”<sup>10</sup> It also “implies a balancing of societal values an individual has a general duty not to interfere with the business affairs of another, but he may be privileged to interfere, depending on his purpose and methods, when the interference takes a socially sanctioned form, such as lawful competition.”<sup>11</sup>

In some cases, “malice” is identified as a necessary element.<sup>12</sup> In this context, “malice” means the intent to interfere without sufficient justification.<sup>13</sup> Additionally, the defendant’s interference must be directed toward a third party.<sup>14</sup> It is the interference with a business relationship that creates the actionable tort, and there is no requirement that the cause of action be based on an enforceable contract.<sup>15</sup> The mere hope, or possibility, of a future business relationship is insufficient to show a reasonable expectancy.<sup>16</sup>

#### *b. Tortious Interference with Contract*

To maintain a cause of action for tortious interference with contract (or “contractual relation”), a plaintiff must allege “(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant’s awareness of this contractual relation; (3) the defendant’s intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant’s wrongful conduct; and (5) damages.”<sup>17</sup> For purposes of this claim, “inducement” requires “active persuasion, encouragement, or incitement that goes beyond merely providing information in a passive way.”<sup>18</sup>

Pleadings a cause of action for tortious interference requires more than general, conclusory allegations setting for these five elements. For instance, Illinois courts have held that the first element of a prima facie case for tortious interference—that a plaintiff had a valid business expectancy—requires allegations of business relationships with specific third parties.<sup>19</sup> In *Du Page Aviation Corp. v. Du Page Airport Authority*, the Illinois Appellate Court Second District found that, rather than alleging business relationships with specific third parties, the plaintiff alleged in general and conclusory terms that “plaintiffs were continually negotiating and entering into business relationships with others” and that such was insufficient and by itself fatal.<sup>20</sup>

As to the third element, Illinois courts require “that a tortious interference claim be supported by allegations that the defendant acted toward a third party.”<sup>21</sup> In *Du Page Aviation Corp.*, the court found that the plaintiffs’ complaint was insufficient where they sought to hold the defendant liable for refusing to enter into leases or contracts with them, claiming that the refusal interfered with the plaintiffs’ ability to continue dealing with their own customers.<sup>22</sup>

It is settled law that a party cannot tortiously interfere with his or her own contract.<sup>23</sup> Further, an employer cannot interfere with its own business relationship with its employees.<sup>24</sup> The exception is where a corporate officer interferes with an employee’s employment with the corporation.<sup>25</sup> A claim for tortious interference against a corporate officer must show that the officer’s conduct was malicious or without justification, and that the corporate officer acted solely for his or her own gain or solely for the purpose of harming the plaintiff.<sup>26</sup>

## IV. Affirmative Defenses to Tortious Interference Claims

### *a. Conditional Privilege and the Business Judgment Rule*

Illinois courts recognize a privilege in intentional interference cases where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff’s contractual rights.

In *Koehler v. Packer Group, Inc.*, the individual defendants appealed a jury verdict against them for tortious interference with a contract, arguing that they were not outsiders capable of tortious interference because they signed the employment agreement (between the company and the plaintiff) on behalf of the corporate defendants, were shareholders, and comprised a majority of the board of directors and the board’s managing committee.<sup>27</sup> At trial, the plaintiff presented evidence in support of his theory of liability that the individual defendants acted in their own self-interest, outside the scope of their duties, and to the detriment of plaintiff and the corporate defendants when he was discharged as CEO.<sup>28</sup>

In affirming the circuit court’s judgment, the appellate court refused to find that the jury instructions for tortious interference with a contract mislead the jury as to (1) actual malice, (2) the conditional privilege or business judgment rule, and (3) proximate cause.<sup>29</sup> First, the appellate court upheld the trial court’s rejection of the defendants’ contention that the jury should have been instructed that the plaintiff was required to prove the individual defendants acted with malice.<sup>30</sup>

The appellate court agreed with the circuit court’s rejection of the defendants’ contention that the jury instruction must include the words “actual malice.” Similarly, the appellate court rejected the defendants’ claim that they were entitled to a privilege because of their responsibilities as corporate officers and directors. In doing so, the court noted that:

Illinois courts “recognize a privilege in intentional interference with contract cases where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff’s contractual rights.” Because “the duty of corporate officers and directors to their corporations’ shareholders outweighs any duty they might owe to the corporations’ contract creditors,” our supreme court has recognized that corporate officers and directors are privileged “to use their business judgment and discretion on behalf of their corporations.” A defendant who is otherwise protected by the privilege, however, “is not justified in engaging in conduct which is totally unrelated or even antagonistic to the interest which gave rise to [the] privilege.” In such cases, “it is the plaintiff’s burden to plead and prove that the defendant’s conduct was unjustified or

malicious.” In this context, “[t]he term ‘malicious,’ \* \* \* simply means that the interference must have been intentional and without justification.”<sup>31</sup>

Further, the appellate court agreed with the circuit court that the individual defendants’ proposed instruction stating that corporate officers are entitled to put the company’s interests over those who contract with the company was sufficiently incorporated into the plaintiff’s proposed instruction.<sup>32</sup> The court ruled:

Defendants additionally argue that plaintiff was required to prove the individual defendants acted *both* for their own gain and contrary to the company’s best interests, though they identify no specific proposed instruction of theirs that the court erroneously refused in this regard. The instruction given required plaintiff to prove that the individual defendants acted “solely out of self-interest,” just as defendants’ proposed instruction required plaintiff to prove that they acted “solely for their own personal gain.” In both, use of the word “solely” adequately addresses the possibility that a corporate officer’s actions taken in his own self-interest might also be in the best interests of the company. We similarly reject defendants’ argument that the instructions given were confusing simply because the individual defendants were shareholders; just because they were shareholders does not mean, as defendants contend, that any action taken in their own self-interest was “necessarily” in the company’s best interest.<sup>33</sup>

### *b. Agency Liability*

Generally, agents are not responsible for interfering with a contract or business relation involving the agent’s principal. Illinois law provides an agent with a qualified privilege against claims of tortious interference with a contract where the agent acted legitimately within the scope of his or her authority as a representative of the principal, unless it was for personal gain or with improper motives.<sup>34</sup>

In *Gardner Denver, Inc. v. National Indemnity Co.*, Gardner Denver filed a complaint against defendants National Indemnity Company and Resolute Management, Inc., alleging that they tortiously interfered with its settlement agreement with another defendant, National Union, and engaged in deceptive practices.<sup>35</sup> National Indemnity and Resolute filed a motion to dismiss for failure to state a cause of action, which the trial court granted.<sup>36</sup> The plaintiff appealed, asserting that the trial court erred in dismissing its complaint. Specifically, Gardner Denver argued it alleged sufficient facts to overcome National Indemnity’s and Resolute’s conditional agency privilege, thus stating a cause of action supporting its complaint.<sup>37</sup> The appellate court reversed the trial court’s judgment.<sup>38</sup>

The facts of the case are somewhat complex. Starting in 1978, National Union entered into certain indemnity agreements with Gardner Denver’s predecessors in interest in which Gardner Denver paid fees to National Union in exchange for liability coverage.<sup>39</sup> The indemnity agreements outlined the parties’ obligations to one another regarding products liability actions.<sup>40</sup> In 2001, Gardner Denver initiated litigation against National Union seeking a declaration that National Union was obligated to defend and indemnify it against claims arising under the indemnity agreements.<sup>41</sup> In 2003, the parties entered into a settlement agreement resolving National Union’s obligation to Gardner Denver and in the years following, National Union performed its obligations under the settlement agreement.<sup>42</sup>

However, in 2011, the relationship between Gardner Denver and National Union began to change and National Union entered into a “retroactive reinsurance” agreement with National Indemnity.<sup>43</sup> Under a retroactive-reinsurance policy, an insurance company (like National Union), pays a significant sum to a more financially stable insurance company (like

National Indemnity), to “reinsure” its debt and liabilities and the reinsurer assumes the obligations and liabilities of the reinsured company.<sup>44</sup> Because many of the obligations and liabilities are ongoing over the course of years or decades, the reinsurer is free to invest the substantial sum paid by the reinsured company until insurance claims become due.<sup>45</sup>

Under the retroactive-reinsurance policy, Gardner Denver claimed that National Indemnity obtained total control over claims-handling decisions regarding National Union’s asbestos and other mass tort liabilities, and National Indemnity then delegated its control to Resolute Management.<sup>46</sup> Because the interests and arguments of National Indemnity and Resolute were the same for purposes of the appeal, the court referred to them collectively as “NICO.”<sup>47</sup>

In 2012, not long after National Union entered into its agreement with NICO, National Union stopped making payments to Gardner Denver under the 2003 settlement agreement.<sup>48</sup> In October 2013, Gardner Denver filed a complaint against National Union and NICO. Gardner Denver alleged that NICO engaged in (1) tortious interference with a contract by inducing National Union to breach the settlement agreement, and (2) deceptive business practices by, in-part, asserting a new and frivolous defense to excuse its performance under the settlement agreement.<sup>49</sup>

NICO filed a motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure asserting Gardner Denver failed to state a cause of action.<sup>50</sup> NICO argued that it had a qualified privilege against claims of tortious interference with a contract where it acted as a representative of the principal—i.e., National Union—and, therefore, Gardner Denver could not state a claim for tortious interference with a contract.<sup>51</sup>

The trial court agreed and dismissed Gardner Denver’s complaint against NICO.<sup>52</sup> As to tortious interference with a contract count, the court noted the allegations in the complaint were “inconsistent with the necessary factual allegations that NICO was acting *solely* for its benefit and totally unrelated to the interests of [National Union]. \* \* \* Since the complaint does not adequately allege facts that NICO was acting solely for its own benefit, or solely to harm [Gardner Denver], the court finds that it would only state a cognizable action if the allegations establish the *methods or means* of the interference are malicious or unjustified.”<sup>53</sup>

Though Gardner Denver claimed NICO acted with “oppression, fraud, and malice” toward Gardner Denver, the court found the complaint contained insufficient facts to support those legal conclusions.<sup>54</sup> The court also found the complaint lacked factual allegations demonstrating NICO had committed a tort, and thus, NICO could not be liable for tortious interference with a contract.<sup>55</sup> Because the court found the complaint failed to set forth factual allegations that NICO had committed an independent tort, it also dismissed the deceptive-practices count as being preempted by section 155 of the Insurance Code.<sup>56</sup>

On appeal, Gardner Denver asserted the trial court erred in dismissing its complaint because it had adequately stated a claim for (1) tortious interference with a contract by alleging NICO acted without justification and with malice, defeating NICO’s conditional agency privilege; and (2) by sufficiently alleging a claim for tortious interference with a contract, it demonstrated facts to sustain its deceptive business practices claim.<sup>57</sup>

Because the trial court dismissed Gardner Denver’s complaint pursuant to section 2-615(a) for failure to state a cause of action, at issue was whether it was Gardner Denver’s burden to plead a lack of justification.<sup>58</sup> The court noted that where a conditional privilege exists, the burden is on the plaintiff to demonstrate the defendant acted without justification.<sup>59</sup> First, the court addressed whether the complaint demonstrated NICO was acting as an agent for National Union.<sup>60</sup> In defining a conditional privilege, the court noted:

Entities exercising their business judgment for the benefit of a client are similar to agents or corporate officers who exercise their discretion for the benefit of their company. Parties serving in that capacity enjoy a conditional

privilege against a claim that it interfered in a third party's contractual relationship with its client. This privilege is afforded so long as the advice given is (1) requested, (2) within the scope of the request, and (3) honest, regardless of whether the agent profits from the advice.<sup>61</sup>

On appeal, Gardner Denver abandoned the argument that NICO was not an agent of National Union and was therefore not entitled to the conditional agency privilege, and instead focused on whether NICO engaged in unjustified actions that would defeat the privilege.<sup>62</sup> The appellate court noted that:

Where an agency relationship has been established, thereby creating a conditional privilege, the plaintiff bears the burden of pleading the defendant's conduct lacked justification or was done with malice. "The term 'malicious,' in the context of interference with contractual relations cases, simply means that the interference must have been intentional and without justification." Additionally, the agency privilege does not extend to bad-faith conduct engaged in by the defendant solely for its own benefit or for the sole purpose of harming the plaintiff.<sup>63</sup>

Gardner Denver alleged NICO acted without justification and with malice by refusing to follow the terms of the settlement agreement, thus overcoming the conditional agency privilege.<sup>64</sup> Gardner Denver alleged that NICO's defense for failing to pay was frivolous and was an unjustified and malicious attempt to reduce its liabilities in order to increase profits.<sup>65</sup>

In the circuit court's written order on the motion to dismiss, it noted that neither party cited cases directly on point answering whether "the intentional interjection of alleged frivolous insurance defenses would constitute unjustified or improper methods of contract inference by a party conditionally protected to interfere."<sup>66</sup> The appellate court held that while no cases may directly answer the court's question, "the ultimate issue remained the same—whether NICO's actions, as agents of National Union, in denying or refusing to pay claims were unjustified or malicious."<sup>67</sup>

NICO also asserted that Gardner Denver's complaint contained insufficient facts to show that it was acting solely for its own benefit rather than that of National Union.<sup>68</sup> The appellate court interpreting the settlement agreement and the extent to which National Union endorsed NICO's actions, along with subsequent facts that may be revealed in the course of discovery regarding whether NICO lacked justification or acted with malice solely to further its interests, were factual questions inappropriate for resolution on a motion to dismiss.<sup>69</sup>

In viewing the allegations of the complaint and all reasonable inferences to be drawn there from, the appellate court held that it could not conclude that no set of facts existed under which Gardner Denver could recover.<sup>70</sup> Thus, the court ruled that count I of Gardner Denver's complaint alleged sufficient facts to state a claim for tortious interference with a contract.<sup>71</sup>

### *c. Statute of Limitations*

There is no specific statute of limitation provision governing tortious interference actions. Rather, the five-year statute of limitations set forth in 735 ILCS 5/13-205 applies.<sup>72</sup>

#### *d. Lawful Competition*

The privilege of lawful competition is an affirmative defense to the tort of intentional interference with prospective business advantage.<sup>73</sup> This privilege to engage in business and to compete “allows one to divert business from one’s competitors generally as well as from one’s particular competitors provided one’s intent is, at least in part, to further one’s business and is not solely motivated by spite or ill will.”<sup>74</sup>

Section 768 of the Restatement (Second) of Torts sets forth the elements of the “lawful competition” privilege:

- (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor . . . 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
  - (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.<sup>75</sup>

#### *e. Attorney’s Conditional Privilege*

Generally, attorneys are protected from tortious interference claims arising out of the representation of clients in and out of court. It is well-established that the purpose of imposing liability on persons who interfere with the contractual relationships of others is to protect one’s interest in such relationships against forms of interference which, on balance, the law finds repugnant.<sup>76</sup> The question of justification therefore rests on whether protection of the contractual interest merits prohibition of the particular conduct which interferes with that interest.<sup>77</sup>

Illinois courts recognize that “under certain circumstances a third party may be privileged purposely to bring about a breach of contract between other parties.”<sup>78</sup> This privilege arises where the third party acts to protect a conflicting interest which is considered to be of equal or greater value than the contractual rights involved.<sup>79</sup>

For instance, claims against attorneys for tortious interference with contract and tortious interference with business expectancies are subject to the defense of the attorney’s conditional privilege. All out of court communications between an attorney and his or her client are protected by absolute privilege. However, the privilege accorded an attorney when advising his client is not absolute.

In *Schott v. Glover*, the court pointed out that “a plaintiff can only state a cause of action for tortious interference with a contract against a third party who is conditionally privileged if the plaintiff can set forth factual allegations from which actual malice may reasonably be said to exist.”<sup>80</sup> Such allegations must include a “desire to harm, which is independent of and unrelated to the attorney’s desire to protect his client.”<sup>81</sup> In the *Schott* case, the court found no such allegations were contained in the plaintiff’s count against the defendant bank’s attorney, and, in light of the attorney’s conditional privilege (based on public policy), found that plaintiff failed to allege sufficiently unjustified conduct.<sup>82</sup> The court held:

The fiduciary duty owed by an attorney to his client is such an interest and under the circumstances here alleged Glover was privileged, in his capacity as the bank’s attorney, to perform the acts and give the advice alleged in



count II. We need not decide whether the advice given was correct in every aspect. Although incorrect advice as to a client's contractual obligations might cause that client to become liable to a third party in contract, it does not follow that the attorney would also be liable to that party. To impose such liability on an attorney would have the undesirable effect of creating a duty to third parties which would take precedence over an attorney's fiduciary duty to his client. Public policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons if the advice later proves to be incorrect.<sup>83</sup>

This privilege has also been found to exist because of an attorney's fiduciary duties to their clients where the advice was provided in "good faith."<sup>84</sup> Moreover, attorneys are entitled to an absolute privilege to publish defamatory statements concerning another during the course and as a part of a judicial proceeding in which he participates as counsel.<sup>85</sup> That privilege is also based on the "public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients."<sup>86</sup> This absolute privilege naturally extends to anything attorneys say outside of court, including in any legal, judicial, or quasi-legal proceedings, as long as the communications pertain to the proceedings.<sup>87</sup>

It is well-established under Illinois law that a defamatory statement is protected by an absolute, qualified, or conditional privilege, and that such is a question of law for the court.<sup>88</sup> Illinois courts have also prohibited basing a cause of action for tortious interference with business opportunity on the wrongful filing of a lawsuit because Illinois has a broad and absolute litigation privilege that protects statements made in a judicial proceeding.<sup>89</sup> Under Illinois law, the only cause of action recognized for the wrongful filing of a lawsuit is one for malicious prosecution or abuse of process.<sup>90</sup>

## V. Damages and Punitive Damages

Damages recoverable when a plaintiff proves intentional interference with contractual relations include pecuniary loss of the benefits of the contract,<sup>91</sup> actual harm to reputation, and consequential losses for which the interference is the legal cause,<sup>92</sup> less any damages separately paid by the breaching party.<sup>93</sup> It is well established that economic losses are recoverable where a cause of action is brought based on tortious interference with contract.

In *Berlant v. Goldstein*, the Illinois Appellate Court Second District affirmed the trial court's dismissal of the plaintiff's complaint where the plaintiff could not show any damages resulting from the defendants' conduct where the plaintiff lost a certain teaching position.<sup>94</sup> In that case, a substitute teacher who was held in "high esteem" was removed from the calling list as a substitute teacher only at the school her grandson attended (but not other schools in the district).<sup>95</sup> In addition to alleging a claim for defamation *per se*, plaintiff alleged a cause of action for tortious interference with prospective business relations. The court dismissed the case with prejudice because, among other things, she presumably could have taught at one of the other school buildings in the district.<sup>96</sup>

In *Bank Financial, FSB v Brandwein*, the appellate court also dismissed a tortious interference claim based on lack of damages.<sup>97</sup> In that case, a defendant in a mortgage foreclosure suit raised an affirmative defense of tortious interference based on the fact that the plaintiff bank had contacted tenants of the property prior to the appointment of a receiver and directed the tenants to stop paying rent to the defendant.<sup>98</sup> The Illinois Appellate Court First District held that the trial court did not err in granting summary judgment to the plaintiff because the defendant had not shown a factual basis to support the elements of tortious interference because there was no evidence that the defendant was damaged by the

alleged tortious interference by the plaintiff or even that the tenants broke their contract with the defendant by not paying rent.<sup>99</sup>

Punitive damages are also recoverable in tortious interference cases, if the plaintiff can prove that the defendant's motivation was malicious and ill-willed. It is not presumed that a defendant's intentional actions will justify punitive damages. The circuit court must determine whether to submit the issue of punitive damages to the jury.

In *Koehler v. Packer*, the court ruled that the circuit court did not err by submitting the issue of whether punitive damages were recoverable in plaintiff's intentional interference with contractual relations to the jury where plaintiff established a prima facie case for punitive damages.<sup>100</sup> The court held:

The circuit court did not err in submitting the issue of punitive damages to the jury in this case. As the court noted in its order denying the individual defendants' motions for summary judgment, plaintiff had "submitted evidence that the [i]ndividual [d]efendants conspired to terminate his employment as a result of his intention to reveal financial irregularities and other potentially unscrupulous business practices committed by them," that these defendants "operated in bad faith, to protect their own interests and to harm [plaintiff]," and that "their actions were adverse to the company's interests."<sup>101</sup>

The court also rejected defendants' argument that "punitive damages should not be allowed where the same conduct provides the basis for compensatory damages" and thus subjected them to "double punishment for the same conduct."<sup>102</sup> The court held:

Where an award of punitive damages is based on misconduct going above and beyond that required to establish the underlying tort, this problem does not arise. Such is the case here, where the wrongful conduct that plaintiff must establish to recover on a claim for tortious interference with contract—the "intentional and unjustified inducement of a breach of the contract"—does not rise to the level of, and is not coextensive with, the outrageous conduct evincing a "high degree of moral culpability" that is required for an award of punitive damages. The award of punitive damages in this case therefore did not improperly subject the individual defendants to double punishment for the same conduct.<sup>103</sup>

## VI. Tortious Interference in Non-Traditional "Commercial" Matters

While not directly involving a "contract" or "business relation," there are other "intentional interference" causes of action that are similar in purpose and thus instructive. One is "intentional interference with inheritance."<sup>104</sup> A tort claim for intentional interference with inheritance is defined as "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."<sup>105</sup> This tort does not contest the validity of the will, but rather is a personal action directed at an individual tortfeasor.<sup>106</sup>

Discussing a claim for intentional interference with inheritance, the Illinois Supreme Court explained that:

Although some of the evidence may overlap with a will contest proceeding, a plaintiff filing a tort claim must establish the following distinct elements: (1) the existence of an expectancy; (2) defendant's intentional

interference with the expectancy; (3) conduct that is tortious in itself, such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages. The remedy for a tortious interference action is not the setting aside of the will, but a judgment against the individual defendant, and, where the defendant has himself received the benefit of the legacy, a constructive trust, an equitable lien, or “a simple monetary judgment to the extent of the benefits thus tortiously acquired.” Thus, a tort claim for intentional interference with an expectancy is not a “petition \* \* \* to contest the validity of the will” under the plain statutory language of section 8-1.<sup>107</sup>

In *Robinson v. First State Bank of Monticello*, the Illinois Supreme Court upheld the dismissal of the plaintiffs’ claims for tortious interference with inheritance against an attorney who helped his client draft a new will.<sup>108</sup> In *Robinson*, a decedent’s heirs brought an action for tortious interference with inheritance expectancy against an attorney who they alleged induced the decedent to execute a will and codicil that had the effect of disinheriting the plaintiffs.<sup>109</sup> Prior to bringing the action for tortious interference with inheritance expectancy, the will had been admitted to probate and the plaintiffs had engaged an attorney to determine whether they should file a will contest.<sup>110</sup> The plaintiffs did not file the will contest, instead settling their dispute regarding the validity of the will and allowing the statutorily prescribed period in which to contest the will to expire.<sup>111</sup> The Illinois Supreme Court held that under these circumstances, it would not recognize a tort for intentional interference with inheritance expectancy.<sup>112</sup>

However, in *Bjork v. O’Meara*, the Illinois Supreme Court reversed the dismissal of the plaintiff’s (a friend of the decedent) claim against the defendant (another friend of the decedent) alleging intentional interference with a testamentary expectancy as time-barred under the limitation period governing will contests.<sup>113</sup> In that case, the court allowed the claim to proceed, noting that the six-month limitation period for will contests established in 755 ILCS 5/8-1 of the Probate Act did not expressly limit a tort action for intentional interference with a testamentary expectancy.<sup>114</sup> The court noted that under certain circumstances, however, Illinois courts have prohibited the cause of action where a plaintiff forgoes an opportunity to file a tort claim within the six-month limitation period for a will contest. In *Bjork*, the court concluded that the probate proceedings did not provide “meaningful relief” to plaintiff because his tort claim did not in any way seek to invalidate the will.

In *Phelps v. Land of Lincoln Legal Assistance Foundation, Inc.*, plaintiffs actually filed an action contesting the will, but they chose to settle that action short of reaching the merits of their contentions regarding the invalidity of the will.<sup>115</sup> As a result, the will was admitted to probate, thereby establishing its validity.<sup>116</sup> In that case, the claim for tortious interference with inheritance expectancy against the attorney was dismissed because the heirs did not avail themselves of the relief provided under the Probate Act.

In *In re Estate of Ellis*, the Illinois Supreme Court upheld a cause of action for tortious interference with inheritance expectancy filed against a pastor.<sup>117</sup> In that case, a charitable organization was named as a beneficiary of the decedent’s will executed in 1964.<sup>118</sup> In 1999, the decedent executed a new will that left her entire estate to her pastor. After the decedent died, her 1999 will was admitted to probate.<sup>119</sup> The plaintiff charitable organization did not learn of its interest in the decedent’s 1964 will until nearly three years after the decedent’s death.<sup>120</sup> The plaintiff then filed a claim for intentional interference with inheritance expectancy against the decedent’s pastor, alleging that but for the pastor’s intentional scheme to exercise undue influence over the decedent and abuse his position of trust, the plaintiff would be the sole beneficiary of the decedent’s estate.<sup>121</sup> In addition, the plaintiff alleged that the pastor induced the decedent to buy him gifts during her lifetime and sought recovery of these *inter vivos* gifts as well.<sup>122</sup>

The plaintiff was allowed to proceed with its tort claim because a will contest proceeding under the Probate Act was not available to it and, therefore, it could not be said that the plaintiff voluntarily relinquished an opportunity to follow that required procedural course.<sup>123</sup> In addition, the *Ellis* court found that a will contest would not have provided the plaintiff with complete relief, since the plaintiff sought recovery for *inter vivos* transfers of property.<sup>124</sup>

As explained in *In re Estate of Luccio*, if a proceeding under the Probate Act is “available” to a litigant, such that he is “aware” of his legacy and has an opportunity to proceed under the Probate Act and obtain complete relief, but chooses not to, instead agreeing to take no action in probate in exchange for a settlement, then he cannot later bring a separate action for intentional interference with inheritance expectancy.<sup>125</sup>

## VII. Tortious Interference Claims Involving Attorneys

Generally, a client may discharge an attorney at any time, with or without cause.<sup>126</sup> However, attorneys should beware not to induce unjustifiable interference by third parties in business relationships between attorneys and clients. The focus is not necessarily on the conduct of the client in terminating the relationship, but on the conduct of the party inducing the breach or interfering with the expectancy. Courts have held third party inducement of breaches of contract or unjustifiable interference by third parties in attorney-client relationships actionable in numerous cases.<sup>127</sup>

As the Illinois Supreme Court has noted: “Unlike the actions involved in the cases recognizing the client’s right of discharge, the plaintiff’s claim here is directed not at the client, but at the party allegedly responsible for causing the termination of the relationship. Moreover, to prevail on the claim, a plaintiff must show not merely that the defendant has succeeded in ending the relationship or interfering with the expectancy, but ‘purposeful interference’—that the defendant has committed some impropriety in doing so.”<sup>128</sup>

An unpublished case in 2015 is one of the more interesting and illustrative cases involving a discovery battle for records and a subsequent claim for tortious interference of business relations and prospective economic advantage. The facts in *Forza Techs., LLC v. Premier Research Labs, LP* are typical of a breach of contract case, and the actions of the defense attorneys not surprising if not expected.<sup>129</sup>

The plaintiff contracted with the defendants to manufacture plaintiff’s nutritional supplement products and paid approximately \$500,000 for an initial supply.<sup>130</sup> The products were delivered late, had inaccurate labels, and were allegedly contaminated with a banned substance. Thereafter, the plaintiff filed a lawsuit against the defendants in the federal district court for fraud and breach of contract.<sup>131</sup> “During discovery, the defendants issued 28 subpoenas *duces tecum* to non-party witnesses. On April 5, 2013, the defendants served subpoenas on 14 additional third parties, requesting the production of certain documents within 21 days. On May 31, 2013, defendants served subpoenas on an additional nine third parties, giving them 10 days to produce documents.”<sup>132</sup> On June 5, 2013, the plaintiff filed a motion to quash the subpoenas, which the court denied without prejudice.<sup>133</sup>

Rather than amending its motion to quash, the plaintiff brought a case in the circuit court against all defendants and their attorneys for (1) abuse of process and (2) tortious interference with business relations and prospective economic advantage.<sup>134</sup> The plaintiff claimed defendants improperly issued the subpoenas to damage the plaintiff’s business reputation and to force the plaintiff out of business.<sup>135</sup> The plaintiff “alleged that as a result of the defendants’ misconduct, it suffered damages including loss of business, reputation, and opportunity, and damages to its standing and reputation” and sought compensatory and punitive damages.<sup>136</sup>

The circuit court dismissed the plaintiff's original complaint pursuant to section 2-615, finding that it did not allege sufficient facts to support the asserted causes of action, and the plaintiff filed an amended complaint adding a few factual assertions.<sup>137</sup> In the amended complaint, the plaintiff reasserted its claims for abuse of process and tortious interference with business relations and prospective economic advantage.<sup>138</sup> The plaintiff alleged that although the subpoenas "appear to be proper in form and an appropriate use of the discovery process," the defendants issued them to drive the plaintiff out of business.<sup>139</sup>

The plaintiff's "claims rested on the premise that the defendants issued their 'avalanche' of subpoenas to damage the plaintiff's reputation and burden its 'customers, suppliers, manufacturers, sponsors, vendors, potential investors, associates and competitors' with production expenses, causing them to view their relationship with the plaintiff as costly."<sup>140</sup> The plaintiff highlighted the fact that the defendants did not timely serve nine of the 28 subpoenas on the plaintiff or its lawyers and may have "deliberately concealed" them, which the plaintiff claimed was sufficient to show the defendants' malicious intent in issuing and serving the subpoenas.<sup>141</sup>

In its abuse of process claim, the plaintiff alleged the defendants abused the legal process by serving the 28 subpoenas for purposes outside the legal process, including to: "(1) destroy the plaintiff's relationship with potential manufacturers, customers, sponsors, suppliers and investors; (2) prevent the plaintiff from obtaining management, investments, financing and sales; (3) coerce the plaintiff into abandoning its business; and (4) influence witnesses to give false testimony."<sup>142</sup> The plaintiff also claimed that one defendant "told litigants in other cases that 'his ultimate goal [was] to destroy [plaintiff] \* \* \* and its business through his superior economic resources' . . . [and that] 'he has more money than Forza and its principals and that \* \* \* whoever spends the most money will normally be able to eliminate competition by driving potential competitors out of business.'"<sup>143</sup> Overall, the plaintiff alleged that the defendants' true motive was apparent through the number of subpoenas and entities served, the truncated deadlines for responding, the untimeliness of some subpoenas, and the allegedly duplicative and irrelevant nature of the documents sought.<sup>144</sup>

In the tortious interference with business relations and prospective economic advantage count, the plaintiff alleged it had valid and established business relationships with its customers, suppliers, sponsors, and others and that the defendants knew of these relationships and knowingly interfered with and attempted to destroy them by issuing the subpoenas.<sup>145</sup> Further, the defendants did this knowing of the plaintiff's reasonable expectation of maintaining its business relationships. As a result, the plaintiff alleged it "lost substantial future business opportunities," and defendants' actions "permanently and irreparably injured plaintiff and have effectively destroyed its business."<sup>146</sup>

The circuit court dismissed the plaintiff's amended complaint without prejudice pursuant to section 2-615, finding the plaintiff's abuse of process claim did not allege sufficient facts showing defendants issued subpoenas for any purpose beyond obtaining discovery to defend against the plaintiff's claims.<sup>147</sup> The circuit court found that the number of subpoenas and the time the subpoena respondents were given to respond to them did not establish an improper purpose or ulterior motive, and also found that the plaintiff insufficiently pled a cause of action for tortious interference with business relations and prospective economic advantage.<sup>148</sup>

Though the circuit court granted the plaintiff leave to file another amended complaint, instead of doing so, the plaintiff moved for a final order so it could appeal the dismissal and the circuit court granted the motion and entered a final order dismissing the amended complaint with prejudice.<sup>149</sup> The plaintiff then filed an appeal to the Illinois Appellate Court First District.

In affirming the circuit court's ruling, the appellate court found that in its tortious interference count, the plaintiff alleged in a conclusory fashion the elements of the tort with no specific facts supporting each element.<sup>150</sup> The appellate

court found that it was unclear from the plaintiff’s amended complaint that the defendants had done anything constituting tortious interference outside of issuing the subpoenas—a process which the plaintiff admitted “appear[s] to be proper in form and an appropriate use of the discovery process.”<sup>151</sup> Further, the appellate court held that the plaintiff’s allegations as to the remaining elements were conclusory statements unsupported by any facts. Thus, the appellate court affirmed the circuit court’s dismissal of the plaintiff’s cause of action for tortious interference with prospective economic advantage.<sup>152</sup>

## Conclusion

Tortious interference claims are a powerful tool in business litigation, as long as the litigant can properly plead and prove, in good faith, each required element. The prosecution of a tortious interference claim is not easy. One willing to tackle a claim of interference with contracts, business relations, or prospective economic opportunities must realize that the claim is against the public policies of free market competition and the unlawful restraint of trade. That said, the difference between legitimate competition and unlawful interference can be clear, and a valid and well pleaded claim for tortious interference is the only weapon available to recover lost profits and stop unfair and sometimes malicious behavior.

## (Endnotes)

<sup>1</sup> This type of action dates back to 1853 in England. The historical background of this tort can be found in the Restatement (Second) of Torts § 766. RESTATEMENT (SECOND) OF TORTS: INTENTIONAL INTERFERENCE WITH PERFORMANCE OF CONTRACT BY THIRD PERSON § 766 (1979).

<sup>2</sup> See also RESTATEMENT (SECOND) OF TORTS: INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATION § 766B (1979).

<sup>3</sup> See also RESTATEMENT (SECOND) OF TORTS, *supra* n. 1, § 766.

<sup>4</sup> A representation is fraudulent when, to the knowledge or belief of its utterer, it is false in the sense in which it is intended to be understood by its recipient. *Miller v. Lockport Realty Grp., Inc.*, 377 Ill. App. 3d 369, 377 (1st Dist. 2007).

<sup>5</sup> 15 U.S.C. § 14.

<sup>6</sup> 15 U.S.C. § 2.

<sup>7</sup> 15 U.S.C. §§ 41-58.

<sup>8</sup> The Restatement (Second) of Torts, § 767, Factors in Determining Whether Interference Is Improper, provides:

In determining whether an actor’s conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(a) the nature of the actor’s conduct,

(b) the actor’s motive,

- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

RESTATEMENT (SECOND) OF TORTS: FACTORS IN DETERMINING WHETHER INTERFERENCE IS IMPROPER 767 § (1979).

- <sup>9</sup> *Voyles v. Sandia Mort. Corp.*, 196 Ill. 2d 288 (2001); *Miller*, 377 Ill. App. 3d at 374; *Soderlund Bros., Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 615 (1st Dist. 1995).
- <sup>10</sup> *Miller*, 377 Ill. App. 3d at 373 (citing *Belden Corp. v. Internorth, Inc.*, 90 Ill. App. 3d 547, 551 (1st Dist. 1980)).
- <sup>11</sup> *Miller*, 377 Ill. App. 3d at 373.
- <sup>12</sup> *Prudential Ins. Co. of Am. v. Van Matre*, 158 Ill. App. 3d 298, 305 (5th Dist. 1987).
- <sup>13</sup> *Prudential Ins. Co. of America*, 158 Ill. App. 3d at 305.
- <sup>14</sup> *Douglas Theater Corp. v. Chi. Title & Trust Co.*, 288 Ill. App. 3d 880, 888-89 (1st Dist. 1997).
- <sup>15</sup> *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 862 (1st Dist. 2008).
- <sup>16</sup> *Davidson v. Schnieder*, No. 10 C 2101, 2014 WL 656780, at \*6 (N.D. Ill. Feb. 20, 2014).
- <sup>17</sup> *Koehler v. Packer Grp., Inc.*, 2016 IL App (1st) 142767, ¶ 42 (citing *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 154-55 (1989)); see also *Schott v. Glover*, 109 Ill. App. 3d 230, 234 (1st Dist. 1982); *Salaymeh v. Interqual, Inc.*, 155 Ill. App. 3d 1040, 1044-45 (5th Dist. 1987).
- <sup>18</sup> *Peppercorn 1248, LLC v. Artemis DCLP LLP*, 2016 IL App (1st) 143791-U, ¶ 113.
- <sup>19</sup> *Du Page Aviation Corp. v. Du Page Airport Auth.*, 229 Ill. App. 3d 793, 803 (2d Dist. 1992); *Suhadolnik v. City of Springfield*, 184 Ill. App. 3d 155, 184 (4th Dist. 1989); *Parkway Bank & Trust Co. v. City of Darien*, 43 Ill. App. 3d 400, 402-03 (2d Dist. 1976).
- <sup>20</sup> *Du Page Aviation Corp.*, 229 Ill. App. 3d at 803-04.
- <sup>21</sup> *Id.* at 804. See also *Willcutts v. Galesburg Clinic Ass'n*, 201 Ill. App. 3d 847, 851 (3d Dist. 1990); *Galinski v. Kessler*, 134 Ill. App. 3d 602, 607 (1st Dist. 1985); and *Parkway Bank & Trust Co.*, 43 Ill. App. 3d at 402-03.
- <sup>22</sup> *Du Page Aviation Corp.*, 229 Ill. App. 3d at 804.
- <sup>23</sup> *Douglas Theater Corp.*, 288 Ill. App. 3d at 884; *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 43.
- <sup>24</sup> *Vickers v. Abbott Labs.*, 308 Ill. App. 3d. 393, 411 (1st Dist. 1999).
- <sup>25</sup> *Mittelman v. Witous*, 135 Ill. 2d 220, 249 (1989).

<sup>26</sup> *Mittelman*, 135 Ill. 2d at 249; *see also Frierson v. Univ. of Chi.*, 2015 IL App (1st) 151176-U, ¶ 16.

<sup>27</sup> *Koehler*, 2016 IL App (1st) 142767, ¶ 43.

<sup>28</sup> *Id.* ¶ 44.

<sup>29</sup> *Id.* ¶ 46.

<sup>30</sup> *Id.* ¶ 48.

<sup>31</sup> *Id.* ¶ 47 ¶ internal citations omitted.

<sup>32</sup> *Id.* ¶ 51.

<sup>33</sup> *Koehler*, 2016 IL App (1st) 142767, ¶ 51 (emphasis in original).

<sup>34</sup> *Gardner Denver, Inc. v. Nat'l Indem. Co.*, 2015 IL App (4th) 140713-U, ¶ 21.

<sup>35</sup> *Id.* ¶ 2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ¶ 3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* ¶ 5.

<sup>40</sup> *Gardner Denver, Inc.*, 2015 IL App (4th) 140713-U, ¶ 5.

<sup>41</sup> *Id.* ¶ 6.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* ¶ 7.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Gardner Denver, Inc.*, 2015 IL App (4th) 140713-U, ¶ 8.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* ¶ 9.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* ¶ 10.



<sup>52</sup> *Gardner Denver, Inc.*, 2015 IL App (4th) 140713-U, ¶ 11.

<sup>53</sup> *Id.* (emphasis in original).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* 15. ¶

<sup>58</sup> *Gardner Denver, Inc.*, 2015 IL App (4th) 140713-U, ¶¶ 16, 19.

<sup>59</sup> *Id.* 19. ¶

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* 21 ¶ (internal citation omitted) (citing *In re Estate of Albergo*, 275 Ill. App. 3d 439, 447 (2d Dist. 1995) (quoting RESTATEMENT (SECOND) OF TORTS § 772 (1965))).

<sup>62</sup> *Gardner Denver, Inc.*, 2015 IL App (4th) 140713-U, ¶ 22.

<sup>63</sup> *Id.* ¶ 25 (internal citations omitted).

<sup>64</sup> *Id.* ¶ 27.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* ¶ 28.

<sup>67</sup> *Id.*

<sup>68</sup> *Gardner Denver, Inc.*, 2015 IL App (4th) 140713-U, ¶ 29.

<sup>69</sup> *Id.* 29. ¶

<sup>70</sup> *Id.* 30. ¶

<sup>71</sup> *Id.*

<sup>72</sup> *Poulos v. Lutheran Soc. Servs. of Illinois, Inc.*, 312 Ill. App. 3d 731, 745 (1st Dist. 2000); *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill. App. 3d 638, 656 (1st Dist. 1989).

<sup>73</sup> *Gen. Motors Corp. v. State Motor Vehicle Review Bd.*, 224 Ill. 2d 1, 15 (2007).

<sup>74</sup> *Id.* (quoting *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 615 (1st Dist. 1995)).

<sup>75</sup> RESTATEMENT (SECOND) OF TORTS § 768 (1979); *see also Chi. Brick & Stone, Ltd. v. Ferenc*, 2012 IL App (1st) 10326-U, ¶-34 ¶

.46

<sup>76</sup> *Schott v. Glover*, 109 Ill. App. 3d 230, 234 (1st Dist. 1982); *Swager v. Couri*, 77 Ill. 2d 173, 190 (1979).

<sup>77</sup> *Swager*, 77 Ill. 2d at 190.

<sup>78</sup> *Schott*, 109 Ill. App. 3d at 234.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 235.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 234-35. *See also Gold v. Vasileff*, 160 Ill. App. 3d 125, 128 (5th Dist. 1987) (attorney cannot be subject to liability for tortious interference with contractual relationship based on attorney's advice to client that client need not perform contractual obligations, even if attorney's advice is incorrect and may subject his client to liability)); *but see HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 172 Ill. App. 3d 718, 729-30 (5th Dist. 1988).

<sup>84</sup> *Salaymeh v. Interqual, Inc.*, 155 Ill. App. 3d 1040, 1046 (5th Dist. 1987).

<sup>85</sup> RESTATEMENT (SECOND) OF TORTS, § 586 (1977); *Golden v. Mullen*, 295 Ill. App. 3d 865, 869 (1st Dist. 1997).

<sup>86</sup> RESTATEMENT (SECOND) OF TORTS, § 586 cmt. a (1977).

<sup>87</sup> *Id.*

<sup>88</sup> *Golden*, 295 Ill. App. 3d at 870 (citing *Macie v. Clark Equip. Co.*, 8 Ill. App. 3d 613, 615 (1st Dist. 1972)).

<sup>89</sup> *Conditioned Ocular Enhancement, Inc. v. Bonaventura*, 458 F. Supp. 2d 704, 708 (N.D. Ill. 2006) (citing *Zdeb v. Baxter Int'l, Inc.*, 297 Ill. App. 3d 622, 629 (1st Dist. 1998)).

<sup>90</sup> *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 647 (7th Cir. 1983) (citing *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 822 (2d Dist. 1978) (noting that Illinois law prohibits a plaintiff from basing a cause of action for tortious interference with business opportunity on the wrongful filing of a lawsuit)).

<sup>91</sup> *Santucci Constr. Co. v. Baxter & Woodman, Inc.*, 151 Ill. App. 3d 547, 553 (2d Dist. 1986); *HPI Health Care Servs., Inc.*, 172 Ill. App. 3d at 729.

<sup>92</sup> *Koehler*, 2016 IL App (1st) 142767, ¶ 64 (citing *Reuben H. Donnelley Corp. v. Brauer*, 275 Ill. App. 3d 300, 313 (1st Dist. 1995) and RESTATEMENT (SECOND) OF TORTS § 774A(1) (1979)).

<sup>93</sup> RESTATEMENT (SECOND) OF TORTS § 774A(2).

<sup>94</sup> *Berlant v. Goldstein*, 2016 IL App (2d) 151176-U, ¶¶ 67, 69.

<sup>95</sup> *Berlant*, 2016 IL App (2d) 151176-U, ¶ 14.

<sup>96</sup> *Id.* 63-62 ¶¶

<sup>97</sup> *Bank Fin., FSB v. Brandwein*, 2015 IL App (1st) 143956, ¶ 46.

<sup>98</sup> *Bank Fin., FSB*, 2015 IL App (1st) 143956, ¶ 46.

<sup>99</sup> *Id.*

<sup>100</sup> *Koehler*, 2016 IL App (1st) 142767, ¶ 90.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* ¶ 92.

<sup>103</sup> *Id.* ¶ 93 (internal citations omitted).

<sup>104</sup> *DeHart v. DeHart*, 2013 IL 114137, ¶ 38; *Wieser v. Heinol*, 2014 IL App (1st) 132859-U, ¶ 6.

<sup>105</sup> RESTATEMENT (SECOND) OF TORTS: INTENTIONAL INTERFERENCE WITH INHERITANCE OR GIFT §774B.

<sup>106</sup> *Id.* See also *Marshall v. Marshall*, 547 U.S. 293, 312 (2006) (the tort claim “seeks an *in personam* judgment against [the defendant], not the probate or annulment of a will.”).

<sup>107</sup> *In re Estate of Ellis*, 236 Ill. 2d 45, 52 (2009) (internal citations omitted).

<sup>108</sup> *Robinson v. First State Bank of Monticello*, 97 Ill. 2d 174, 185-86 (1983).

<sup>109</sup> *Robinson*, 97 Ill. 2d at 183.

<sup>110</sup> *Id.* at 184.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Bjork v. O’Meara*, 2013 IL 114044, ¶ 35.

<sup>114</sup> *Bjork*, 2013 IL 114044, ¶¶ 25, 33.

<sup>115</sup> *Phelps v. Land of Lincoln Legal Assistance Found. Inc.*, 2016 IL App (5th) 150380, ¶¶ 33-34.

<sup>116</sup> *Phelps*, 2016 IL App (5th) 150380, ¶ 4; also see *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 24 (citing *Robinson*, 97 Ill. 2d at 184).

<sup>117</sup> *In re Estate of Ellis*, 236 Ill. 2d at 48.

<sup>118</sup> *Id.* at 47.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 56.

<sup>122</sup> *Id.* at 56-57.

<sup>123</sup> *In re Estate of Ellis*, 236 Ill. 2d at 56.

<sup>124</sup> *Id.* at 56.

<sup>125</sup> *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 29; *see also DeHart v. DeHart*, 2013 IL 114137, ¶ 39; *Bjork*, 2013 IL 114044 ¶ 25.

<sup>126</sup> *Balla v. Gambro, Inc.*, 145 Ill. 2d 492, 503 (1991); *In re Estate of Callahan*, 144 Ill. 2d 32, 37-38 (1991); *Rhoades v. Norfolk & Western Ry. Co.*, 78 Ill. 2d 217, 227-28 (1979).

<sup>127</sup> *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 484, (1998).

<sup>128</sup> *Dowd & Dowd, Ltd.*, 181 Ill. 2d at 484-85 (citing RESTATEMENT (SECOND) OF TORTS § 766B cmt. a (1979) (“In order for the actor to be held liable, this section requires that his interference be improper.”); *Mittelman*, 135 Ill. 2d at 251; *La Rocco v. Bakwin*, 108 Ill. App. 3d 723, 730 (2d Dist. 1982).

<sup>129</sup> *Forza Techs., LLC v. Premier Research Labs, LP*, 2015 IL App (1st) 142640-U, ¶ 2.

<sup>130</sup> *Id.* ¶ 4.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* ¶ 5.

<sup>134</sup> *Id.*

<sup>135</sup> *Forza Techs., LLC*, 2015 IL App (1st) 142640-U, ¶ 5.

<sup>136</sup> *Id.* 6.-5 ¶¶

<sup>137</sup> *Id.* 6. ¶

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Forza Techs., LLC*, 2015 IL App (1st) 142640-U, ¶ 6. The plaintiff also alleged that many of the documents sought through the subpoenas were irrelevant to the breach of contract claim, some sought privileged documents, and that one defendant threatened actual and potential witnesses in an effort to coerce favorable testimony for defendants. *Id.*

<sup>142</sup> *Id.* ¶ 7.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ¶ 8.

<sup>146</sup> *Id.*

<sup>147</sup> *Forza Techs., LLC*, 2015 IL App (1st) 142640-U, ¶ 9.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* ¶ 10.

<sup>150</sup> *Id.* ¶ 23.

<sup>151</sup> *Id.* ¶ 6.

<sup>152</sup> *Id.* The appellate court also held that the plaintiff failed to show how the defendants' mere issuance of the subpoenas in defending a federal lawsuit brought by the plaintiff constituted an ulterior motive sufficient to state an abuse of process claim, especially where the plaintiff had raised, but failed to pursue, a motion to quash the subpoenas with the federal district court, which had the inherent authority to monitor and regulate the discovery in the litigation pending before it.

### About the Author

**Mark J. McClenathan**, *Heyl, Royster, Voelker & Allen, P.C.* Mr. McClenathan has handled commercial and civil litigation in state courts in more than 19 counties in northern Illinois and in the Northern District of Illinois federal court. He has also represented municipalities and individual clients before various governmental bodies. Prior to joining Heyl Royster, he worked for the legal department of the Defense Logistics Agency (Defense Contract Services) of the Department of Defense in Chicago, and the legal departments of Land O'Lakes, Inc. and 3M Corporation.

### About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at [www.iadtc.org](http://www.iadtc.org) or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, [idc@iadtc.org](mailto:idc@iadtc.org).