UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

41st Annual Page Keeton Civil Litigation Conference

November 2-3, 2017
Austin, TX

TEXAS BUSINESS TORTS: RECENT DEVELOPMENTS IN CLAIMS AND REMEDIES

Karen C. Burgess

Co-author:
Stacy Rogers Sharp

Author Contact Information:
Karen C. Burgess
Richardson + Burgess LLP
Austin, TX

kburgess@richardsonburgess.com
512.482.8808

Co-author Contact Information:
Stacy Rogers Sharp
Richardson + Burgess LLP
Austin, TX

ssharp@richardsonburgess.com
512.482.8808

TEXAS BUSINESS TORTS:
RECENT DEVELOPMENTS IN CLAIMS AND REMEDIES

In business disputes, not all misconduct can be pinned to a breach of a contract between the parties. Even where a case involves a valid contract claim, a tort theory allows the plaintiff to extend liability to additional parties, opens up the possibility of exemplary damages, and offers a wider range of remedies. This article covers significant recent developments in tort litigation between businesses, analyzing the latest Texas cases concerning (I) substantive causes of action that are likely to appear in a commercial case, (II) derivative liability for those claims, and (III) the remedies available to business entities in tort cases.

I. Developments in Business Tort Causes of Action

A. Tortious Interference

A classic business tort is tortious interference with either an existing contract or with prospective business relations. The Texas Supreme Court recently rejected a claim for tortious interference with an inheritance, over a dissenting opinion, confirming by its reasoning that these are the only two tortious interference claims cognizable in Texas. *See Kinsel v. Lindsey*, 15-0403, 2017 WL 2324392, at *10 (Tex. May 26, 2017).

1. Competitive interference with at-will contracts

Recent cases have proven there is a fine line between healthy competition and tortious interference. Between competitors, the claim can arise in several contexts, including interference with client, vendor, governmental, or employee contracts. Some lower court and federal cases have therefore recognized some form of a "competitor's rule." *E.g. Caller-Times Pub. Co., Inc. v. Triad Commun'cs, Inc*., 855 S.W.2d 18, 23 (Tex. App.—Corpus Christi 1993, no writ). The competitor's rule is an affirmative defense that allows companies to lure clients or employees away from their competitors as long the contract being dissolved is at-will and the interference ***is not independently unlawful.*** *See Kadco Contract v. Dow Chem. Co.,* 198 F.3d 241, *3 (5th Cir. 1999) (not designated for publication) (applying affirmative defense of justification to at-will contracts); *Schlumerger Tech. v. Coil Tubing Solutions,* 103 F. Supp. 846, 851 (S.D. Tex. 2015).

An "independently unlawful" showing has long been required as part of the plaintiff's prima facie case in tortious-interference suits ***not involving*** an existing contract. The Texas Supreme Court's formulation of the two differing standards appears clear enough: "Tortious interference with a prospective business relationship requires a finding that the defendant engaged in independently tortious or unlawful conduct; ***interference with an existing contract does not***." *El Paso Healthcare Sys., Ltd. v. Murphy*, 518 S.W.3d 412, 421 (Tex. 2017) (emphasis added).

The Texas Supreme Court has not added the extra hurdle of proving "independently unlawful" conduct in the plaintiff's prima-facie case simply because the existing contract is terminable at will. Neither has it held that lack of independently unlawful conduct is a valid affirmative defense or recognized any other version of the competitor's rule. The justification defense recognized by the Court generally applies where the interfering conduct "is merely the

defendant's exercise of its own contractual rights." *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 53 (Tex. 2017).

In *El Paso Healthcare Systems*, the Court had an opportunity to clarify the standard for tortious interference with at-will contracts. In that case, a hospital was found by the jury to have tortiously interfered with an existing at-will oral contract between a medical practice and a nurse. *See* 518 S.W.3d at 421. The hospital's briefing asked the Court "to eliminate confusion over what law applies to tortious interference claims that involve mutually non-binding, at-will business relationships, and to confirm that such claims are governed by the law applied to tortious interference with prospective contracts." Pet.'s Br., *El Paso Healthcare Sys.*, 15-0575, *49 (Tex. May 2, 2016). The Court declined to do so. The Court first confirmed the rule that tortious interference with an existing contract requires no finding of independently wrongful conduct. *El Paso Healthcare Sys., Ltd.*, 518 S.W.3d at 421. But it then held on the case's facts that the Hospital–Defendant had not interfered with any "legal rights under the contract" because the medical practice was not obligated to offer the nurse any shifts. *Id.*

Though this result suggests the Court may no longer recognize tortious interference with at-will contracts, the opinion altogether failed to meaningfully distinguish its past precedent, which explicitly held that "the terminable-at-will status of a contract is no defense to an action for tortious interference with its performance." *Id.* at n.6 (quoting *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 691 (Tex. 1989) and citing *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660 (Tex. 1990).) In a footnote, the Court disregarded those two past cases as having "involved claims for interference with prospective business relations"—but a reading of those cases leaves that reasoning in doubt. In *Juliette Fowler,* in fact, the Court explicitly listed the types of contracts that are protected by tortious-interference claims, including "contracts with fixed terms, ***terminable-at-will contracts and prospective business relations***." 793 S.W.2d at 666 (emphasis added).

After *El Paso Healthcare,* plaintiffs in cases involving competitors or other interference with existing at-will contracts should (1) show that the conduct was independently wrongful, where the facts allow it; but, if not, (2) identify specific legal rights under the contract, even if at-will, that were affected by the defendant's interference; and (3) liken the facts of the case to the Court's past precedent recognizing at-will contracts as protected from interference; while (4) distinguishing the facts of *El Paso*. The Court in *El Paso* was surely swayed by the oral, noncommittal nature of the agreement between the parties in that case. In a commercial case, a third party's interference that prompts formal termination of a written, binding contract—even if mutually terminable at will—may receive different treatment.

2. The role of the litigation defense in demand letters among competitors

It is one thing to send a demand letter to your competitor complaining of its conduct. But sending a demand letter ***to a third party that affects your competitor*** may amount to tortious interference. Under settled law, a demand letter, even to someone not involved in the proposed litigation, has been protected by the litigation privilege provided the letter bears only "some relation" with that litigation. *BancPass, Inc. v. Highway Toll Admin., L.L.C.*, 863 F.3d 391, 403–04 (5th Cir. 2017) (citing *Thomas v. Bracey*, 940 S.W.2d 340, 343 (Tex. App.—San Antonio 1997,

Title search: Texas Business Torts: Recent Developments in Claims and Remedies

First appeared as part of the conference materials for the
41st Annual Page Keeton Civil Litigation Conference session
"Business Torts and Damages"