Welcome to this podcast on Tortious Interference brought to you by CALI. I am Professor Scott J. Burnham.

Contracts generally involve two parties. This podcast discusses one of the ways that contracts involve third parties. The topic of Tortious Interference involves one of the parties to the contract claiming that a third party wrongfully interfered with the contract by inducing the other party to breach.

You won’t find the topic of tortious interference in most first-year Contracts courses because the claim is in tort rather than in contract. You won't even find it in a lot of Torts courses because it’s a so-called business tort that is not usually covered in the first year. Nevertheless, it is a concept that practitioners should be familiar with.

In addition to arising when a third party induces a party to breach a contract, it can also arise before the contract is formed, when the third party interferes with the formation of a contract. That was the case with a claim for tortious interference that resulted in one of the biggest judgments in American history – the $10 billion judgment against Texaco when Texaco was found to have induced Getty Oil not to form a contract with Pennzoil.

The rule for when tortious interference arises after a contract has been formed can be found in Restatement (Second) of Torts § 766 Intentional Interference with Performance of Contract by Third Person:

**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.**

Of course, the injured party could go after the breaching party for breach of contract, but they often go after the third party for inducing the breach, because that party may have a deeper pocket. A good example of that situation is found in the movie *The Insider*, which was based on real events.Jeffery Wigand was an employee of Brown & Williamson Tobacco Company. Under his employment contract, he promised Brown & Williamson that he would not reveal corporate secrets. He allegedly breached that contract by talking to the CBS program *60 Minutes*. So Brown & Williamson had a claim against Wigand for breach of contract, but instead they threatened to sue CBS for inducing Wigand to breach that contract.

In the movie, one of the *60 Minutes* producers says, “Interfere, that's what we do – we get people to talk.” That's a good example of the usual defense to tortious interference. The interference has to be improper, which is probably the hardest thing to prove in a case of tortious interference. Restatement (Second) of Torts § 767 has a number of factors for determining whether an interference is improper. They include “the social interests in protecting the freedom of action of the actor and the contractual interests of the other.” If you look at the illustrations in that Restatement section you will find that there is a very fine line between unlawful and permissible interference.

For example, if a business tries to induce a party to break a contract with a competitor and go with their business because their prices are lower, the defense is that it is not improper but healthy competition, the basis of the free market system. Similarly, a lawyer might give a client advice that leads the client to break a contract. The other party to the contract might bring a tortious interference claim against the lawyer and the defense would be that the interference was justifiable: that is what lawyers do – we tell the client what the risks are so they can make an economic decision whether to breach or not. The defense would likely be successful because lawyers are privileged to give that kind of advice to clients.

In an interesting Montana case, *Phillips v. MEA,* Phillips was an employee of MEA, which was a corporation. When MEA discharged him, he claimed it was a wrongful discharge and in addition to suing the corporation for breach of contract for firing him, he sued the directors of the corporation, claiming it was tortious interference when they induced the corporation to discharge him. The court held that the interference was justifiable. That is what directors are supposed to do – they take actions on behalf of the corporation, and it can be in the best interests of the corporation to break a contract. The exception would be if the directors had not acted in good faith; if they had done it maliciously, then it could be tortious interference.

Let’s briefly review this podcast. At this point, you should be able to identify when a party to a contract may have a claim against a third party for tortious interference and what the defenses of the third party who interfered might be.

I hope you’ve enjoyed this podcast on Tortious Interference.

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