Arkansas Tortious Interference Law: A Proposal for Change

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ARKANSAS TORTIOUS INTERFERENCE LAW: A PROPOSAL FOR CHANGE

I. INTRODUCTION

A store customer complains about the rude behavior of a salesclerk, and the store owner fires the clerk. A friend recommends that a manufacturer buy component parts from a supplier who uses recycled packaging products, and the manufacturer terminates her requirements contract with her current supplier. An employee, who is sexually harassed on the job, reports the harassment to his supervisor who fires the harasser. A salesperson makes a cold call on a rival’s customer, offering a similar product for a much lower price, and the customer decides to breach his contract with the rival, pay damages, and buy from the new company. The store customer, friend, employee, and salesperson in the above scenarios are prima facie liable for tortious interference with a contract or business expectancy under Arkansas law. This means that each of these “interferers” may be forced into court to “justify” his or her interference. The tortious interference claimant does not have to offer proof that the interference was in any way improper as part of his prima facie case; nor are there concrete rules that the defendants can use to establish that their interference was justified.

The interference torts must be limited in the growing trend toward expansion of tort liability. The torts have remained undefined, creating the danger that legitimate business practices may be deemed tortious under their broad definition. The purpose of this Comment is to encourage Arkansas courts to further define the tortious interference causes of action and to suggest areas for reform of the torts. Part Two provides a summary of tortious interference law throughout the United States, while Part Three summarizes current Arkansas tortious interference law. Following a discussion of current scholarship on the torts in Part Four, Part Five offers suggestions for reformulating the interference torts in Arkansas.

1. There are two interference torts—tortious interference with a contract and tortious interference with a business expectancy. The two are quite similar, and many courts have combined them into one broad cause of action. See, e.g., Smith v. Ocean State Bank, 335 So. 2d 641, 642 (Fla. Dist. Ct. App. 1976) (“The only material difference appears to be that in one there is a contract and in the other there is only a business relationship.”). For purposes of this comment, I will refer to them as the interference torts and distinguish them only where the difference is relevant to the discussion.
II. TORTIOUS INTERFERENCE LAW IN GENERAL

A. History of the Tort

Intentional interference claims are direct descendants of Roman laws that allowed an action against a person who physically injured any member of a household. In effect, the patriarch "owned" the household members, and an injury to one of them was an insult to the head of the family. As it began, the tort thus was analogous to an action in trespass.

The early British common law borrowed from Roman law in the master-servant cases, allowing a master whose servant was violently injured to sue the injurer for loss of services. As a result of the post-plague labor shortage, the cause of action later was expanded to include damages against a person who induced the plaintiff's servant to leave his employ. The early common law also provided landlords a remedy against anyone who induced their tenant to leave, even though the law provided no remedy against the tenants. This was the state of the law at the time that the Queen's Bench decided Lumley v. Gye, the case generally credited with creating the modern tortious interference action.

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2. Francis B. Sayre, Inducing Breach of Contract, 36 HARV. L. REV. 663, 663 (1923). Sayre's article is the preeminent authority regarding the early history of the interference torts.

3. Id.

4. Id. The cause of action was available only where the injurer used violence. Id.


6. See Sayre, supra note 2, at 663-65 for a discussion of the effect of the plague on this area of the common law.

7. Id. (noting that the master-servant and landlord-tenant cases actually were tortious interference with a business expectancy cases, pre-dating the tortious interference with a contract action recognized in Lumley v. Gye, 118 Eng. Rep. 749 (Q.B. 1853)).


9. See, e.g., Benjamin L. Fine, Comment, An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations, 50 U. CHI. L. REV. 1116, 1116 (1983) ("The modern history of interference torts begins with the celebrated case of Lumley v. Gye."). However, Mr. Dowling notes that 25 years prior to the Lumley decision, an American case, Aldridge v. Stuyvesant, 1 Hall 210 (N.Y. Sup. Ct. 1828), expanded the landlord-tenant cause of action to a situation in which an enforceable contract existed. Dowling, supra note 6, at 498-99. The Aldridge case has been overlooked by many commentators. Dowling, supra note 6, at 499 n. 85 (commenting that Aldridge was not mentioned in a 1924 article concerning tortious interference law in New York, the very state where it was decided).
Lumley extended the master-servant cause of action to cover exclusive personal service contracts, not just master-servant relationships. Later English cases further expanded the tort, relying on malice in procuring the breach of contract to create liability. By the end of the nineteenth century, however, courts had agreed that malice was no longer necessary in order to hold the defendant liable for tortious interference.

The Lumley rationale made its way into American common law, and all fifty states currently recognize a cause of action for tortious interference. Many of the largest awards in American commercial litigation resulted from tortious interference claims. Legal scholars from the early twentieth century through the present have argued that the limits of the interference torts are vague and largely undefined.

10. The defendant prevented an opera singer from performing at the plaintiff's theater. The primary issue was whether the singer was a "servant" within the meaning of the common law. However, the court found the defendant liable despite its determination that an opera singer was not a servant. See Sayre, supra note 2, at 667-68 (citing Lumley, 118 Eng. Rep. at 752-53).

11. Fine, supra note 9, at 1116. Temperton v. Russell, 1 Q.B. 715 (1893), made malicious interference with a contract or business expectancy actionable. Fine, supra note 9, at 1116.

12. Malice was defined as a desire to injure the plaintiff. For an excellent discussion of the malice requirement, see Sayre, supra note 2, at 672-86. See also 1 Harry D. Nims, The Law of Unfair Competition and Trademarks § 163 (3d ed. 1979).

13. Until 1989, Louisiana did not recognize the tort; however, in 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989), the state recognized a limited interference with a contract claim. The cause of action consists of five elements:

(1) The existence of a contract or legally protected interest between the plaintiff and the corporation;

(2) The corporate officer's knowledge of the contract;

(3) The corporate officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome;

(4) Absence of justification on the part of the officer;

(5) Causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.

Id. at 234. Louisiana courts have refused to extend the cause of action beyond the facts of 9 to 5 Fashions, Inc. See Guilbeaux v. Times of Acadiana, Inc., 661 So. 2d 1027, 1033 (La. Ct. App. 1995).

14. See, e.g., Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987) (awarding more than $10 billion in compensatory and punitive damages for tortious interference with a merger contract); see also Etek Awards Damages for Unfair Competition and Tortious Interference with Contracts, Computer Law., April 1992, at 37 (discussing an award which included punitive damages of $1.9 million).

15. See, e.g., Sayre, supra note 2, at 672. Decades after Sayre's article, the authors of the first Restatement of Torts noted that interference law had not "fully congealed" and was "still in its formative stages." Restatement (Second) of Torts, Introductory note to ch. 37, at 5 (1977). See also Jeffrey C. Estes, Expanding Horizons in the Law of Torts—Tortious Interference, 23 Drake L. Rev. 341 (1974); Harvey S. Perlman, Interference with Contract
courts have delineated the elements of the interference torts, the precise contours of those elements remain nebulous, to the dissatisfaction of most commentators.

B. Modern “Definitions” of the Tortious Interference Claim

All jurisdictions allow recovery for “intentional” interference with a contract, and most allow recovery for intentional interference with business relations. Most states have adopted a variation of the Restatement (Second) of Torts’s version of the interference with a contract tort, which requires the following elements: (1) a contract existed; (2) the defendant intentionally interfered with the performance of that contract; (3) the interference was improper; (4) the interference was the proximate cause of the breach or nonperformance of that contract; and (5) pecuniary damages resulted from the breach or nonperformance. Although the Restatement requires a valid contract for recovery, under a claim for intentional interference with a business expectancy, the non-existence of a contract is

16. See infra Part B of this Comment.
18. See supra note 13 regarding Louisiana’s limited version of the tort.
21. RESTATEMENT (SECOND) OF TORTS § 766 (1977) states the cause of action as follows:
One who intentionally and improperly interferes with the performance of a contract . . . 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.
The Restatement also imposes liability for interference with a party’s ability to perform its contractual duties. Id. § 766A.
22. This cause of action is also termed interference with prospective economic
no bar to recovery.23 Several issues plague the courts in this area of law. Among them are the required mental state for the tort, the types of interference that are deemed "improper," the burden of proof required, and the types of interests protected.

Most courts agree that the interference must be intentional,24 but they do not agree on a definition of intent. At least one court has ruled that knowledge of the existence of the contract or business expectancy is enough to establish liability,25 but the Restatement indicates that simple knowledge will not establish liability without a primary objective to interfere.26 Many states follow the Restatement definition, noting that if an action is done with knowledge or a substantial certainty that the interference will result, the interference is deemed intentional.27 Others require a specific intent to interfere.28

Early English and American cases required the plaintiff to prove malice on the part of the defendant in order to recover. According to the Restatement, the malice requirement, as stated by modern courts, does not require ill will, only "intentional interference without justification."29 The advantage or prospective contractual relations. A business expectancy is a business relationship "with the probability of future economic benefit." ABA Model Jury Instructions for Business Tort Litigation § 2.20 (1980). In this comment, I will refer to the tort as interference with a business expectancy.

23. The Restatement (Second) of Torts § 766B (1977) states as follows:
One who intentionally and improperly interferes with another's prospective contractual relation... is subject to liability to the other for the pecuniary harm resulting from 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.


24. Generally, negligence is not enough for liability. See Fowler V. Harper, Interference with Contractual Relations, 47 NW. L. Rev. 873, 884-93 (1953); but see J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979) (recognizing a negligent interference with prospective advantage claim); John C. Smith, Negligent Interference with Contract: Knowledge as a Standard for Recovery, 63 VA. L. Rev. 813 (1977) (stating that some courts have recognized a negligent interference claim).

Restatement has reformulated the malice requirement into an "improper" interference requirement. Some states have defined "improper" as wrongful means or actions taken with the objective to harm the defendant, but the Restatement lists factors that courts are to use in a balancing test to determine the propriety of the interference. The factors allow the jury to determine impropriety by weighing the interests of the defendant against those of the plaintiff and society as whole. Because the factors are not defined in concrete terms, they allow the jury to make decisions about the impropriety of a defendant's conduct based primarily on such subjective considerations as their feelings of affection or dislike for the defendant.

The Restatement allocates the burden of proof to the plaintiff, requiring proof that the interference was both intentional and improper. A majority of jurisdictions agree. However, in a minority of jurisdictions, including

30. Id. § 766. The first Restatement required proof that the defendant "purposely interfered" with the plaintiff's contract, but the second Restatement changed that requirement to "intentionally and improperly interfered." See id. § 766, Reporter's Note.
32. The factors are as follows:
   (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 § 767 (1977). Factor (g) concerns not only the personal relationship between the parties, but also the type of relation with which the defendant allegedly interfered, whether an existing or prospective contract.
33. Prosser and Keeton interpret the Restatement as placing the burden of proof on the plaintiff. Keeton et al., supra note 19, § 129 at 983-84. While the language of Restatement (Second) of Torts §§ 766 and 767 appears to place the burden of proof on the plaintiff, comment b to § 767 indicates that courts disagree regarding allocation of the burden of proof. The comment still advises the plaintiffs to allege both intentional and improper interference. Restatement (Second) of Torts § 767 cmt. b (1977).
Arkansas, the plaintiff is required only to show that a contract or business expectancy existed and the defendant intended to interfere with that interest.\textsuperscript{35} The burden of persuasion then shifts to the defendant to prove some "justification" for his or her actions as an affirmative defense to liability.\textsuperscript{36}

The intentional interference with business expectancy claim is subject to a broader range of justifications. For example, according to the \textit{Restatement}, one may interfere with a competitor's business expectancy, but not the competitor's contract, for the purpose of legitimate competition.\textsuperscript{37} However, some justifications apply to either type of intentional interference tort.\textsuperscript{38} For example, under the \textit{Restatement} formulation, no actor is held liable for the ramifications of giving truthful information or honest advice upon request\textsuperscript{39} or for asserting a bona fide legally protected claim of his or her own.\textsuperscript{40}

Courts also differ as to the requirement of an enforceable contract. Many jurisdictions, including Arkansas,\textsuperscript{41} allow a recovery for tortious interference with an unenforceable contract on an interference with business

\begin{footnotesize}
\begin{itemize}
\item[37.] \textit{See Restatement (Second) of Torts} § 768 (1977). \textit{See also} § 769 (stating that one who has a financial interest in a third person's business is privileged to interfere with the third person's business expectancy); § 771 (stating that one who acts with the purpose of influencing a third person's business policy is privileged to interfere with that person's business expectancy).
\item[38.] \textit{See, e.g.}, id. § 770 (one who is charged with the responsibility of a third person may cause that person not to perform a contract or not to continue a business expectancy if he or she acts to protect the welfare of that third person).
\item[39.] \textit{Id.} § 772. \textit{See infra} notes 164-68 and accompanying text for a brief discussion of the interaction of First Amendment protections and the interference torts.
\item[40.] \textit{Id.} § 773.
\item[41.] \textit{See} Fisher v. Jones, 311 Ark. 450, 844 S.W.2d 954 (1993).
\end{itemize}
\end{footnotesize}
expectancy theory. Others require the existence of a valid and enforceable contract for both theories. For example, New York does not allow a plaintiff to recover for interference with an unenforceable contract unless there is a showing of “wrongful means, unlawful restraint of trade, or lack of competitive motive.” In general, plaintiffs can also maintain a cause of action based on a contract that is terminable at will. Most of the litigation in this area is based on at will employment contracts.


43. See, e.g., Dolton v. Capitol Fed. Sav. & Loan Ass'n, 642 P.2d 21 (Colo. Ct. App. 1981) (denying interference claim based on a contract which was unenforceable under the statute of frauds); William S. Deckelbaum Co. v. Equitable Life Assurance Soc'y of the United States, 419 N.E.2d 228 (Ind. Ct. App. 1981) (stating that Indiana requires a valid existing contract as the basis for a claim, and the plaintiff cannot recover under a business expectancy claim); Malevich v. Hakola, 278 N.W.2d 541 (Minn. 1979) (stating that if essential terms are missing then there can be no interference with the contract).


C. The Special Case of Employment At Will

Many courts treat interference with employment at will cases as intentional interference with business expectancy claims, thus giving the defendants the benefit of expanded justifications. For example, competition is deemed a permissible justification for interference with a business expectancy.\(^{47}\) However, Arkansas law does not appear to allow this privilege in employment cases.\(^{48}\)

In jurisdictions like Arkansas, a strong commitment to the employment at will doctrine is inconsistent with allowing recovery for interference with an at will employment contract. Arkansas is an employment at will state, and without a contract for employment of a specified duration, the courts are emphatic that there can be no claim of wrongful discharge against an employer.\(^{49}\) Because of its commitment to the employment at will doctrine, the Arkansas Supreme Court will not imply a contract provision limiting an employer’s right to terminate his or her employee at will.\(^{50}\) Indeed, the court has recognized exceptions to the employment at will doctrine only for cases in which the employee is discharged (1) for refusing to violate a criminal statute; (2) for exercising a statutory right; (3) for complying with a statutory duty; and (4) in violation of the general public policy of the state.\(^{51}\) Allowing a tortious interference claim based upon an at will employment contract undermines the public policy of states such as Arkansas by allowing a “back door” claim for wrongful termination. Although an employee cannot sue his or her employer for wrongful termination, Arkansas allows the employee to sue the person who allegedly persuaded the employer to terminate the employment. Ironically, the employer has a right to terminate employment for any or no reason is protected from liability, while the person who gives the employer advice is held liable.\(^{52}\) If no liability arises from termination without the advice or encouragement of a third party, no liability should arise with that advice or

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47. Restatement (Second) of Torts § 768 (1977).
48. See infra note 82-83 and accompanying text.
50. Gladden v. Arkansas Children’s Hosp., 292 Ark. 130, 136, 728 S.W.2d 501, 505 (1987) (stating that the court would uphold an employment contract or personnel manual with an express provision limiting the employer’s right to discharge but would not imply such a provision); see also Proctor v. East Cent. Ark. EOC, 291 Ark. 265, 724 S.W.2d 163 (1987).
If employment at will states like Arkansas want to allow a cause of action for wrongful termination, they should allow employees to sue the employers themselves. Otherwise, the courts should not allow plaintiffs to disguise a wrongful termination suit as a tortious interference claim.

In addition, employers who have the power to terminate an employee at will should have no claim against someone who hires away their employees unless the third party uses illegal or tortious means to do so. To allow an employer to sue for tortious interference with an at will employment situation provides the employer the protection of a "contract" without contractual duties or liability.

III. TORTIOUS INTERFERENCE LAW IN ARKANSAS

Arkansas can trace its tortious interference cause of action to an 1897 case, Dale v. Hall, which held that a tenant in common was liable to his co-tenant for wrongfully inducing lessees to leave before the expiration of their lease. Building on the Dale decision, the Arkansas Supreme Court allowed its first "tortious interference" claim in Mahoney v. Roberts. Roberts, the plaintiff, and Mahoney, the defendant, were partners who agreed to dissolve their partnership. For consideration of $500, Mahoney agreed not to compete with Roberts in their hometown. According to the court, Mahoney then "conspired" to do business under his son's name, Frank Collins. Because Collins and Mahoney's wife had assisted Mahoney in his breach of the covenant not to compete, Roberts sued them for tortious interference with his contract. To establish liability, the court required Roberts to prove that the assistance of Mrs. Mahoney and Collins was given

53. Of course, if the third party interferes with the employment relationship by illegal or independently tortious means, the employee should have the right to pursue independent claims against the party.


55. See, e.g., Eggleston v. Phillips, 838 S.W.2d 80, 82 (Mo. Ct. App. 1992) (finding that a claim of tortious interference with an employment at will relationship is the equivalent of a wrongful discharge action); Miller v. Richman, 592 N.Y.S.2d 201, 202 (N.Y. App. Div. 1992) ("Plaintiff cannot circumvent the employment at will rule by asserting causes of action for defamation, injurious falsehood and tortious interference with her employment.").

56. See Defco v. Decatur Cylinder, Inc., 595 So. 2d 1329, 1331-32 (Ala. 1992) (allowing no claim for hiring another company's at will employees in the absence of a covenant not to compete).

57. 64 Ark. 221, 41 S.W. 761 (1897).

58. Id. at 223-26, 41 S.W. at 761-62.

59. 86 Ark. 130, 110 S.W. 225 (1908).

60. Id. at 136, 110 S.W. at 227.
with the intent to injure [Roberts]" or "for the purpose of obtaining some benefit for themselves at [Robert's] expense, or . . . to his injury.\textsuperscript{61}

Mahoney, his wife, and his son were together held liable for $475 in damages.\textsuperscript{62}

Since Mahoney, the Arkansas Supreme Court has steadily expanded the tort. Currently, in order to prove a \textit{prima facie} case of tortious interference with a contract or business expectancy, a plaintiff must prove the following elements: (1) the plaintiff has a valid contract or business expectancy; (2) the defendant knew of the contract or business expectancy; (3) the defendant intentionally interfered with and induced the breach or termination of the contract or expectancy; and (4) the interference damaged the plaintiff.\textsuperscript{63}

In order to prove the first element in a tortious interference with a contract claim, the plaintiff must prove the existence of a valid, enforceable contract.\textsuperscript{64} However, even if the plaintiff has no cause of action for breach of contract against the terminating party, a defendant who induced the termination, nevertheless, may be held liable for tortious interference with the contract.\textsuperscript{65} Thus, a defendant may be held liable for tortious interference with a terminable at will employment contract.\textsuperscript{66} In addition, the plaintiff can maintain an interference with a business expectancy claim even though the underlying contract is ruled invalid.\textsuperscript{67} The second element simply requires actual knowledge of the contract or business expectancy at the time the defendant committed the interfering conduct.\textsuperscript{68}

In addition, the plaintiff must show, by a preponderance of the evidence, that because of the defendant's intentional conduct, a contract between the plaintiff and a third party which would otherwise have been performed was not performed or was made more burdensome. This necessarily encompasses a causation requirement. For example, in \textit{Jim Orr & Associates, Inc. v. Waters},\textsuperscript{69} the trial court ruled that Jim Orr and Associates suffered no damages because of the defendant's interference. The plaintiff, Waters, sold his life insurance business to Jim Orr and

\textsuperscript{61.} \textit{Id.} at 139, 110 S.W. at 228.
\textsuperscript{62.} \textit{Id.} at 135, 110 S.W. at 227.
\textsuperscript{63.} Mid-South Beverages, Inc. v. Forrest City Grocery Co., 300 Ark. 204, 205, 778 S.W.2d 218, 219 (1989) (citing Walt Bennett Ford v. Pulaski County Special Sch. Dist., 274 Ark. 208, 214, 624 S.W.2d 426, 429 (1981)).
\textsuperscript{64.} See \textit{Fisher v. Jones}, 311 Ark. 450, 455, 844 S.W.2d 954, 957 (1993).
\textsuperscript{65.} \textit{Mason v. Funderburk}, 247 Ark. 521, 528, 446 S.W.2d 543, 547 (1969).
\textsuperscript{66.} \textit{Id.} See also \textit{supra} notes 47-56 and accompanying text discussing employment at will contracts.
\textsuperscript{67.} \textit{Fisher}, 311 Ark. at 455, 844 S.W.2d at 957.
\textsuperscript{68.} \textit{Id.} at 455-56, 844 S.W.2d at 957-58; United Bilt Homes, Inc. v. Sampson, 310 Ark. 47, 51, 832 S.W.2d 502, 504 (1992).
\textsuperscript{69.} 299 Ark. 526, 773 S.W.2d 99 (1989).
Associates. Waters’s former business manager, Brown, remained with the company after it was sold. While in Jim Orr’s employment, Brown wrote letters to various life insurance agents asking that they sign a statement saying David Huso was their “agent of record.” A dispute arose between Waters and Jim Orr, and Waters filed suit. Jim Orr filed a third party complaint against Brown and Huso for tortious interference with its agents’ contracts. The Arkansas Supreme Court ruled that Orr had suffered no damages since all of the agents who terminated their contracts said they did so because of dissatisfaction with Orr’s services.\textsuperscript{70} Cases such as \textit{Jim Orr} and others indicate that “but for” causation is required.\textsuperscript{71} In Arkansas, breach of the underlying contract is not necessary, however, even in a tortious interference with a contract claim. Liability may attach if the “contract performance is partly or wholly prevented, or made less valuable, or more burdensome by the defendant’s unjustified conduct.”\textsuperscript{72}

No Arkansas cases have addressed the required intent in the interference context. A federal court applying Arkansas law, however, required evidence that the defendant desired to harm the plaintiff or knew his or her actions were reasonably certain to result in the breach or termination of the contract or expectancy.\textsuperscript{73} Originally, malice was an essential part of the plaintiff’s case in the intentional interference with a contract claim. Later cases did away with the malice requirement; the plaintiff must no longer prove an improper motive or bad faith.\textsuperscript{74} According to a recent case, Arkansas requires that the interference be “improper” in order to be actionable, but the defendant has the burden of proving the propriety of his actions.\textsuperscript{75} The court in \textit{Fisher v. Jones} favorably quoted section 767 of the \textit{Restatement (Second) of Torts}, which lists the factors to determine if an interference is improper; however, the court provided no analysis of the

\textsuperscript{70} \textit{Id.} at 531, 773 S.W.2d at 102.

\textsuperscript{71} \textit{See, e.g.}, Duncan v. Foster, 271 Ark. 591, 609 S.W.2d 62 (1980); Eagle Properties, Inc. v. West & Co., 242 Ark. 184, 412 S.W.2d 605 (1967).

\textsuperscript{72} \textit{United Bilt Homes, Inc.}, 310 Ark. at 52, 832 S.W.2d at 504; \textit{see also} Mason v. Funderburk, 247 Ark. 521, 446 S.W.2d 543 (1969) (discussing tortious interference with employment at will relationship). Termination of an at will contract will never result in an action for breach against the terminating party, yet Arkansas courts recognize an action against third parties for tortious interference with an at will contract.

\textsuperscript{73} City Nat’l Bank v. Unique Structures, Inc., 929 F.2d 1308, 1316 (8th Cir. 1991).

\textsuperscript{74} Walt Bennett Ford, Inc. v. Pulaski County Special Sch. Dist., 274 Ark. 208, 214A, 624 S.W.2d 426, 429 (1981) (supplemental opinion upon denial of petition for rehearing).

\textsuperscript{75} \textit{See} Fisher v. Jones, 311 Ark. 450, 458-59, 844 S.W.2d 954, 959 (1993). A fair reading of the \textit{Fisher} case indicates that a defendant is responsible for showing the propriety of his conduct by proving either that his conduct was “proper” or “privileged.” \textit{See id.} One might assume that once a defendant makes a showing of propriety or privilege, the burden of persuasion on the issue of impropriety then shifts to the plaintiff, but the cases do not state this rule.
factors and did not apply them to the facts of the case. The Fisher case is the only Arkansas case which cites this Restatement section; thus, there is no indication of how Arkansas courts will apply the factors. It appears that a defendant must prove his interference was "proper" as an affirmative defense to the tortious interference claim by using these malleable factors.

In addition to proving his interference was proper, a defendant may also argue that his interference was justified or privileged. Arkansas recognizes a privilege to interfere with the contractual or business relations of another in order to protect a third party for whom the interferer is responsible. In Conway Corp. v. Construction Engineers, Inc., the defendant's employees investigated the plaintiff and received negative reports on his work. Based on this investigation, they advised the company's board not to award a construction contract to the plaintiff, and the board followed that advice. The court found this interference privileged because the employees were acting to protect their employer.

In Stebbins & Roberts, Inc. v. Halsey, the Arkansas Supreme Court ruled that a defendant who is acting to protect his own financial interest is privileged to prevent the performance of another's contract if it threatens this interest. The Stebbins & Roberts case is also the only Arkansas case which addresses the privilege of competition. In it, the court noted that an "existing contract takes precedence over any interest in unrestricted competition." Thus, Arkansas obviously does not recognize a competition privilege for interference with an existing contract. Likewise, Arkansas has not yet recognized a competition privilege for interference with a business expectancy, although the supreme court has not expressly rejected the privilege.

IV. SCHOLARSHIP ON THE INTERFERENCE TORTS

The academic commentary on the interference torts generally concerns two categories—contracts and business expectancies as property interests and the economic consequences of the interference torts. Many commentators focus on the issue of a contract as a property right, and in fact, many courts agree that, at least in the tortious interference context, a contract right

76. See id. at 458-59, 844 S.W.2d at 959.
77. Walt Bennett Ford, 274 Ark. at 214-B, 624 S.W.2d at 430.
78. 300 Ark. 225, 782 S.W.2d 36 (1989).
79. Id. at 906, 582 S.W.2d 266 (1979).
80. Id. at 906, 582 S.W.2d 266 (1979).
81. Id. at 906, 582 S.W.2d at 267 (quoting PROSSER, TORTS § 129 (4th ed. 1971)).
82. Id. (quoting PROSSER, TORTS § 129 (4th ed. 1971)).
Richard Epstein, for example, argues that the interference with a contract tort fits within the framework of "torts governing the takings of property." He analyzes each element of the tortious interference claim in terms of the property concept of "ostensible ownership," arguing that the concept of notice is the key to determining whether an interferer should be held liable.

Benjamin Fine takes a unique approach to the interference torts by comparing them to the law involving the pursuit of wild animals. He discusses two "intermediate" levels of property rights; the first he analogizes to tortious interference with a business expectancy. The hunter who is merely pursuing wild animals has no property right in the animal itself; the hunter does have a right, however, to "free pursuit" of the animal. Therefore, anyone who wrongfully interferes with the hunter's free pursuit should be liable for that interference. The only interferers who escape liability in the hunting hypothetical are other hunters pursuing the same animal "by means not otherwise tortious." This theory of liability is similar to a claim for tortious interference with a business expectancy.

Second, after the hunter has acquired "physical control" over the animal, she has the right of "exclusive pursuit." This situation is

85. See id. at 21-29.
86. Id. at 2-3. The "ostensible ownership" issue arises when the possessor of property behaves as if she owned the property and enters into a transaction with a third party. The third party is protected in this circumstance only if he had notice that the possessor was not the owner. Id. Presumably, under Epstein's model, mere knowledge of the contract's existence would be a sufficient basis upon which to impose liability upon the interferer.
87. Fine, supra note 9, at 1124.
89. Fine, supra note 9, at 1128-29.
90. Fine, supra note 9, at 1128.
91. Fine, supra note 9, at 1136. In order to be held liable, the interferer must know of the existence of the expectancy and have no commercial justification for her interference. Fine, supra note 9, at 1136.
92. Fine, supra note 9, at 1129-30. Fine uses whaling cases to illustrate this concept. Once the whale is harpooned, the sailors acquired an exclusive right to finish the job of killing the whale. Anyone who interfered with that right was liable for interference with the killing. Fine, supra note 9, at 1130 (citing Littledale v. Smith, 127 Eng. Rep. 826 (York Assizes 1788); Hogarth v. Jackson, 172 Eng. Rep. 271 (C.P. 1827)).
analogous to the businessperson who has entered into a contract with another. While, under Fine’s theory, the contract does not give a party a property interest in the contract’s performance, it gives the party an “exclusive right to pursue that performance free from interference.”

While Epstein and Fine identify a theoretical basis for the interference torts in property law, Dan Dobbs rejects the contract as property analysis. According to Dobbs, making a contract into a property right is fundamentally unfair because it allows the contracting parties to bind others to an agreement they created. “[I]f A and B may by a legal action between them in court or in a contract proscribe legal rights of T, then something is very wrong in the state of the law.” Dobbs argues that a transfer of property rights does not affect the rights of third parties with regard to that property because third parties’ rights regarding property are always constrained and no new legal constraints are created by the transfer. In contrast, if contracts are treated as property, each new contract creates a new constraint on third parties.

Dobbs also rejects the notion that contracts are the equivalent of intangible property rights such as copyrights and patents. The primary difference is that while intangible property rights may not be taken and used by another, no third party is prevented from negotiating within the market regarding the use of that property. Thus, the third party’s freedom of action within the market is not inhibited.

The property commentators do not argue that a contract is actually the equivalent of property; they merely contend that property law provides a more appropriate framework for justifying the tortious interference torts. As any first year law student knows, there is a difference between contracts and property. Posner and Landes might define the difference in terms of “property rights” versus “liability rules.” Under Posner and Landes’s somewhat simplistic, but useful, definitions, one who owns a property right has the right to prevent anyone from using or enjoying that property regardless of the third party’s justification, and, with some notable

93. Fine, supra note 9, at 1137.
94. Dobbs, supra note 17, at 350-56.
95. Dobbs, supra note 17, at 350-51.
96. Dobbs, supra note 17, at 350-51.
97. Dobbs, supra note 17, at 350-51. According to the contract as property theory, when X agrees to buy widgets from Y, Z will no longer have the right to make X a better deal on widgets.
98. Dobbs, supra note 17, at 352-53.
100. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 29-31 (1987). While Posner and Landes do not contrast property rights with contract rights, their definitions may be applied to the contract/property distinction.
exceptions, without regard to society's best interest. A liability rule does not give one the right to "exclude" others; it merely provides a right to seek damages after some harm has occurred. The authors use an example of a pedestrian who is run down by a car. The pedestrian has no right to prevent the car from hitting her, so she has no property right in the freedom from injury. She has a liability right, however, to seek compensation for her injuries after she is run over.

A contract, by definition, is merely a promise for which the law provides some protection in the form of a remedy for its breach. Therefore, it seems to fit best under Posner and Landes's "liability rule" as opposed to a "property right." A contract right is based on the parties' consent to constrain their own freedom, while the foundation of a property right is the ability to constrain others without regard to their consent.

The debate over whether a contract is a property right may be more semantics than substance. The answer as to whether a contract is a property interest lies in the context. In the tortious interference context, the protection a contract is given makes a it closely akin to a property right. This observation, however, offers no solution regarding how, or whether, to limit the interference torts. While the property/contract debate seems best suited for determining whether there should be protection at all, the economic efficiency analysis lends itself to a discussion of the limits of that liability.

If it is appropriate to treat a contract as a property interest worthy of protection under the tort law, then the limits of that protection must be clear in order to promote economic efficiency. The contract is protected in order to provide some stability in the market place because if market participants

101. Id.
102. Id.
103. Id. at 30.
104. Restatement (Second) of Contracts § 1 defines a contract as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981). Black's Law Dictionary defines a contract as "a promise or set of promises constituting an agreement between the parties that gives each a legal duty to the other and also the right to seek a remedy for the breach of those duties." Black's Law Dictionary 224 (Abridged 6th ed. 1991).
105. Note, however, that Posner and Landes contend that only the invasion of a property right gives rise to the right to collect punitive damages. Posner & Landes, supra note 100, at 30. This statement leads to the somewhat confusing conclusion, under the Posner/Landes analysis, that while a contract is not property, the right to prevent others from interfering with that contract may be a property right. Curiously, the law seems to give the right to avoid interference more protection than the contract itself.
cannot count on contracts to remain stable, then the market becomes weak and fails. However, the market also requires some "freedom of movement" for its participants in order to remain strong. Obviously, freedom of choice is essential in a capitalist economy where competition reigns supreme. The issue becomes then, how to come to a balance between the two seemingly polarized needs of the market—individual freedom and stability of relationships.

Economic efficiency theorists are concerned primarily with the potential for the interference torts to undermine the Posnerian model of economically efficient breaches. A breach of contract is efficient when the breaching party is able to pay full damages to the other party, yet still gain economically from the breach. When X and Y sign a contract for the sale of goods or services, one can assume that their agreement is the best deal either one could find because if there had been a better deal available, then one of them would have taken it. If, after signing the contract, X receives information that another party, Z, will pay more for the goods or services, then X will decide to breach the contract with Y only if the new transaction with Z will give her enough money to pay contract damages to Y and still enjoy a profit on the sale. Through this process, society receives a great benefit because its resources flow to those who value them the most, and other market participants will not be hurt by the reallocation of those resources as long as the promisee, Y in the above hypothetical, receives compensatory damages for the promisor's breach.

The efficient breach theory makes the incorrect assumption that there are no transaction costs, such as the expenses of litigating or settling the breach of contract issue, involved in the above hypothetical. It also assumes that a party's general reputation within the business community will withstand frequent decisions to breach contracts, no matter how efficient those decisions may be. Despite these problems underlying the theory, the decisions that American law makers have made regarding the appropriate measure of contract damages follow the efficiency theory. And, although commentators sometimes disagree about which combination of damage

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108. For a basic discussion of the efficient breach concept, see Majorie Kornhauser, An Introduction to the Economic Analysis of Contract Remedies, 57 U. Colo. L. Rev. 683 (1986).
109. According to Justice Holmes, a contract is merely a "prediction that if a man does or omits certain things he will be made to suffer in this way or that by judgment of the court." Oliver Wendell Holmes, Jr. The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897), quoted in Dowling, supra note 6, at 506. The overwhelming majority of courts decline to award punitive damages for a breach of contract. J. Calamari & J. Perillo, The Law of Contracts 520 (2d ed. 1977).
awards is the most efficient,\textsuperscript{110} virtually all accept the goal of economic efficiency as a primary objective in the law of contract damages.\textsuperscript{111}

One can also apply the efficiency theory to business expectancies. If the business relationship satisfies the business needs of the two people or entities involved and "maximizes" each party's "expected gains," then the relationship will continue.\textsuperscript{112} The market is strengthened by strong and efficient business relationships, and the termination of inefficient relationships serves the same purpose within the market as the termination of inefficient contracts.\textsuperscript{113}

According to Harvey Perlman, "[i]f allocational efficiency is the objective of contract law, legal rules should encourage persons to search for and to take advantage of more highly valued uses for resources under their command."\textsuperscript{114} Tortious interference liability works counter to the efficient breach theory by discouraging third parties from offering better deals to those who have already entered into contracts.\textsuperscript{115} Inducer liability adds a transaction cost to the decision of whether to offer another a more advantageous business opportunity. Just as attorneys' fees, costs of litigation, and damage to reputation impacted the breaching party's decision to breach, inducer liability prevents the "economic efficiency ideal" from working effectively in the "real" business world. The impact can be enormous because the interference torts can lead to awards of punitive damages.

Gary Myers argues that penalties for tortious interference are "unreasonable unless every breach [of contract] is viewed as undesirable."\textsuperscript{116} A breach of contract may seem "immoral" to some people, but it remains a necessary aspect of the efficient allocation of resources in a capitalist market

\begin{itemize}
\item \textsuperscript{111} See authorities cited at supra note 110 and John H. Barton, \textit{The Economic Basis of Damages for Breach of Contract}, 1 J. LEGAL STUD. 277 (1972).
\item \textsuperscript{112} Perlman, supra note 15, at 89-90. "Only when some more advantageous opportunity arises will a party sever or avoid the relationship." Perlman, supra note 15, at 90.
\item \textsuperscript{113} Perlman, supra note 15, at 90.
\item \textsuperscript{114} Perlman, supra note 15, at 82-83.
\item \textsuperscript{115} Perlman, supra note 15, at 83. "Contract rules seem designed to facilitate breach where efficiency gains result; the inducer liability rule, in contrast, seems designed to reduce the number of such breaches and thus runs counter to a plausible objective of contract doctrine." Perlman, supra note 15, at 83.
\item \textsuperscript{116} Myers, supra note 17, at 1119.
\end{itemize}
economy. Furthermore, as Myers argues, instead of imposing inducer liability, awarding specific performance for every breach of contract is a far better method of deeming all breaches undesirable.\textsuperscript{117} Implementing this solution essentially prohibits any party from breaching his contract. Perhaps those who advocate treating contracts as property would find this solution palatable.\textsuperscript{118}

Contrary to the arguments of Dobbs and Myers, Donald Dowling argues that the presence of tortious interference liability will encourage all breaches, efficient and inefficient, because the breaching party knows that the inducer is just as likely to get sued as she.\textsuperscript{119} Because the tortious interference claim, presumably, was designed to discourage breaches, this result is undesirable in the context of both contract and tort law. Dowling uses his theory to argue the somewhat unusual proposition that tortious interference with contract claims should be disallowed entirely.\textsuperscript{120}

Perhaps the most practical application of the “efficient breach” theory to the interference torts is found in two pages of Dan Dobbs’s 1980 article.\textsuperscript{121} For Dobbs, the efficient breach theory is useful primarily because it reenforces the notion that some breaches are good for society, and, therefore, not all breaches should result in liability for tortious interference.\textsuperscript{122} Dobbs proposes to limit liability for interference to those cases where “wrongful means” are employed.\textsuperscript{123}

In the discussion of society’s interest in the efficient allocation of resources, one must not overlook society’s interest in promoting the stability of contractual relationships. In a capitalist market, participants must be able to depend on the stability of their contracts in order to facilitate “bargained

\textsuperscript{117} Myers, supra note 17, at 1120.

\textsuperscript{118} If, as Posner and Landes suggest, ownership of “property” gives one the right to prevent any harm to that property, then awarding specific performance for every breach would be consistent with the notion of contract as property.

\textsuperscript{119} Dowling, supra note 6, at 508. Dowling concludes that potential tort liability will not discourage interferers from offering more advantageous business opportunities because the number of “successful interference cases in society is probably low enough to make the odds of any single plaintiff filing a claim too idiosyncratic to measure.” Dowling, supra note 6, at 508. This may no longer be the case ten years later. Judging from the amount of new case law in existence, tortious interference claims are on the rise.

\textsuperscript{120} Dowling, supra note 6, at 514-19.

\textsuperscript{121} Dobbs, supra note 17, at 360-61.

\textsuperscript{122} Dobbs, supra note 17, at 361.

\textsuperscript{123} Dobbs specifically defines “wrongful means” in his recommendations for limiting the interference torts. Dobbs, supra note 17, at 365-76. Among the “wrongful means” are acts which are independently tortious, “non-tortious misconduct” such as duress, undue influence, and breach of fiduciary duty, and “misuse of economic power” through boycotts or restraints of trade. Dobbs, supra note 17, at 365-68.
for exchanges" within the economy. According to John Danforth, contract remedies do not discourage breaches; they merely compensate for them after they have occurred. Thus, the presence of the interference with a contract tort provides a necessary deterrent absent in conventional contract law.

The law in California emphasizes the protection of market stability. California treats tortious interference with a contract as a subcategory of "tortious interference with prospective gain." Defendants are held liable for all foreseeable harm which results from their actions; the California courts have even recognized a cause of action for negligent interference with a prospective advantage. In California, the courts use tortious interference law to "insur[e] a minimal level of ethical behavior in the marketplace." The California approach may provide market stability at the expense of competition, which is inhibited by "restrict[ing] free[dom of] movement in the marketplace." There is a fundamental tension between stability of contractual and business relations and freedom of competition. Breaches that occur as a result of interference through "improper means" or with "improper motives" promote inefficient reallocation of resources because it is the wrongful act, not the market itself, which causes the reallocation. In contrast, breaches that occur through proper means or with proper motive are efficient. The breacher makes her decision to breach based on market considerations and is not coerced into the decision by the wrongful act of another. Wrongful interference distorts the market.

125. Id. at 1511.
126. Id.

Tort protection against interference with contract promotes society's interest in commercial stability in two areas not adequately protected by the existence of traditional remedies against breach. First, and most obviously, the tort may encourage the formation of some contracts by giving a promisee's interests added protection. Second, and most importantly, the mere existence of tortious interference liability articulates society's interest in contractual integrity, and thus augments the extent to which existing contracts will appear reliable and will tend to structure a market economy.

Id. at 1511 (internal citations omitted).
127. Telfer, supra note 17, at 407.
129. Telfer, supra note 17, at 411.
V. REFORMULATING THE TORT IN ARKANSAS

The arguments of the economic efficiency theorists are convincing. Competition, as the basis for the American market economy, should have extensive protection under the laws. While some interference liability may be necessary to promote ethical practices in the market and to ensure stability of business relationships, the interference torts, as they are currently formulated in states like Arkansas, have too much potential to stifle competition.

Consider the following hypothetical. Sam uses a large quantity of widgets in her business and always buys them from the XYZ Widget Store. I sell widgets, and I am aware that Sam needs them. I know that she must be buying widgets from someone because she is using them in her business; nevertheless, I come into Sam's office and offer her the widget deal of a lifetime. I can sell her widgets for a lower price than any other widget manufacturer in America.\(^\text{131}\) Having no contract with the XYZ Widget Store, Sam decides to buy widgets from my company, the Widgets-4-U Corporation. For this action, even though I have induced Sam to do nothing illegal and have used no wrongful means to induce her action, I am \textit{prima facie} liable in Arkansas.\(^\text{132}\) If the state recognizes competition as a justification for interference, the XYZ Widget Store may not succeed on its claim.\(^\text{133}\) However, if this claim arises in a state such as Arkansas which makes intentional interference \textit{prima facie} actionable, the XYZ Widget Store will be able to force me into expensive litigation to prove my competitive motive and to disprove any other motive I might have.\(^\text{134}\) Furthermore, even though under Arkansas law, I am not liable if my interference is "proper," the case law does not define proper in concrete terms. Because I have no notice of the types of interference that are "improper," I have no way to conform my actions to avoid liability completely unless I avoid soliciting potential customers in the market.

In order to avoid the problems illustrated by the above hypothetical, Arkansas should modify its tortious interference cause of action in two ways. First, it should require the plaintiff to plead and prove improper

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131. Assume, for purposes of this hypothetical, that I am truthful as we are not discussing fraud or any other independently tortious means.

132. See elements of the \textit{prima facie} case in Arkansas, \textit{supra} notes 63-82 and accompanying text.

133. Arkansas has not recognized the competition privilege. \textit{See supra} notes 80-82 and accompanying text.

134. \textit{See RESTATEMENT (SECOND) OF TORTS} § 768 (1977) (implying that good faith is necessary for the competition privilege). If I hate the XYZ Widget Company and wish to take their business, I, apparently, lose this privilege to interfere.
interference as part of its *prima facie* case. In addition, no interference should be improper unless it involves illegal, tortious, or unethical conduct.

A. Burden of Proof

As noted in Part II of this Comment, Arkansas is one of a minority of states that make intentional interference *prima facie* actionable.\(^{135}\) Arkansas should join the majority of jurisdictions that require a plaintiff to plead and prove improper or unjustified actions in order to establish a *prima facie* case.\(^{136}\) Freedom of movement within the market is essential to a thriving capitalist economy. However, this freedom must be, and is, limited by legal rules regulating misuse of economic power. Other business torts regulating abuse of power include civil conspiracy, misappropriation of trade secrets, trade disparagement, and antitrust violations.\(^{137}\) The interference torts, which were created when very little regulation of business existed, should be refined in light of our modern competitive market. The *prima facie* case should require proof of some abuse of power within the marketplace.

If interference with contracts or business relationships was ever considered wrongful per se, that perception is no longer the case. Logically, within a competitive marketplace, businesspeople and business entities must seek to maximize the gains they receive from all transactions and relationships. Therefore, to treat the very act of intentional interference as wrongful runs counter to the foundation of capitalism. As the Supreme Court of Utah stated in *Leigh Furniture and Carpet Co. v. Isom*,\(^{138}\) "[T]he prima facie-tort

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137. See Howard W. Walker, *Interference with a Prospective Business Relationship: An Old Tort for the New Marketplace*, 35 BAYLOR L. REV. 123, 128-136 (1983) (discussing the interrelationship between these business torts and the claim of tortious interference). Walker recommends that plaintiffs combine existing business torts with tortious interference actions because "damages [for tortious interference] have no limit and often the punitive recovery will be greater than the compensation for the actual harm." *Id.* at 139.

138. 657 P.2d 293 (Utah 1982).
approach... makes actionable all sorts of contemporary examples of otherwise legitimate persuasion...[It] requires too little of the plaintiff."

The "prima facie tort" approach may cause the unfair result of requiring a plaintiff to justify any act of successful competition within the marketplace. Furthermore, the defendants may have trouble proving a justification for their interference given the uncertainty which surrounds the tort and its defenses.

Even assuming that many defendants will be able to prove their justification, the Arkansas rule is still fundamentally unfair because "to impose a potential for liability is to impose the cost of defending legal actions." Litigation costs, legal fees which arises even if the tortious interference claims are settled, and the potential costs of punitive damages in the event of a plaintiff's verdict result in additional barriers to efficient allocation of resources. The additional costs deter efficient breaches and discourage the termination of inefficient business relationships. The prima facie imposition of liability for non-wrongful interference is also illogical in relation to the notion that all individuals are autonomous. For example, if an individual has the capacity to make a contract, and the individual then decides to breach that contract, one might question whether the person who advised the breach is liable for the decision. Surely the entity that decided to breach is responsible for this decision. Shifting the blame to the

139. Id. at 303. The court listed several "examples of otherwise legitimate persuasion": "efforts to persuade others not to eat certain foods, use certain substances, engage in certain activities, or deal with certain entities." Id. Indeed, under the Arkansas formulation of the tort, the following would be prima facie actionable: A father with two small children is angry about a certain violent television program broadcast at 7:00 p.m. He organizes a group of like-minded parents, and they form a protest group. Knowing that the advertisers have contracts with the network, the group nevertheless sends letters to all of the advertisers who show commercials during the television program, stating that if the advertisers continue to support the television program, the parents will boycott their products. If the advertisers decide to breach their contracts with the network, the group of parents is prima facie liable.

Of course, imposing liability in this instance may bring up First Amendment issues. See infra notes 164-68 and accompanying text. Under Arkansas's current formulation of the tort, however, these parents could find themselves paying large legal fees to defend a tortious interference suit.

140. See Dobbs, supra note 17, at 356-57. "Perhaps we should consider it unfair or unjust to impose even possible liability upon a defendant when the chance that he is legally responsible is minuscule, since to impose a potential for liability is to impose the cost of defending legal actions."

141. See Myers, supra note 17, at 1110.
142. Dobbs, supra note 17, at 357.
143. See supra notes 107-30 and accompanying text.
144. See Dobbs, supra note 17, at 358-59.
inducer implies that the entity lacked the capacity to decide to breach even though it had the capacity to contract in the first place.  

However, if the interferer used illegal, tortious, or unethical conduct in order to induce the breach, holding the interferer liable does not question the breaching party's autonomy at all. The entity has the capacity to determine whether to breach a contract if the market and all market participants function in a proper way. If the proper functioning of the market is undermined by the interferer's wrongful conduct, then the entity cannot be expected to make a logical, informed decision. Requiring the plaintiff to prove that the defendant's interference was improper gives some assurance that only those actions which injure the plaintiff, individually, and the market, as a whole, will result in a lawsuit.

B. Refining the Definition of "Improper Interference"

In addition to shifting the burden of proof, Arkansas should offer litigants a concrete definition of "improper interference." Litigation in the face of such a fluid definition as that offered by the Restatement (Second) of Torts' gives juries too little guidance in the improper determination thereby allowing personal prejudice into the deliberation process. In defining improper interference, many states follow the balancing approach of the Restatement. Some states allow the plaintiff to establish liability through proof that the defendant acted with an improper purpose to harm the defendant or by wrongful means. Others seem to require an improper motive to cause the breach or termination in order to establish tortious

145. See Dobbs, supra note 17, at 358-59.
147. Commenting on the lack of guidance offered by the Restatement formulation, Dobbs noted, "[t]he problem with the interference 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." Dobbs, supra note 17, at 346 & n. 52.
interference liability. Still other states offer their own formulations of "improper," which are as opaque as the Restatement factors.

The better approach is taken by a few states that offer more concrete definitions of improper. Among those states, Oregon and South Carolina stand out as providing the most concrete and complete definitions of improper. South Carolina requires proof of improper methods or purpose for the tortious interference with a business expectancy claim and proof of absence of justification for an interference with a contract claim; it is

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150. See Frontier Cos., Inc. v. Jack White Co., 818 P.2d 645 (Alaska 1991) (holding that the defendant must induce breach through wrongful conduct and must have intended breach to result); Winkler v. V.G. Reed & Sons, Inc., 619 N.E.2d 597, 600 (Ind. Ct. App. 1993) (holding that the defendant's actions must have been "malicious[ly] and exclusively directed to the injury and damage of another" to establish liability).

151. See, e.g., Printing Mart-Morristown v. Sharp Elecs. Corp., 563 A.2d 31, 40 (N.J. 1988) (defining unjustified as conduct that is "not right and would not be sanctioned by the 'rules of the game'"); Privette v. University of North Carolina at Chapel Hill, 385 S.E.2d 185, 190 (N.C. Ct. App. 1989) (defining without justification, in the context of an interference with employment claim, as "motives . . . 'not reasonably related to the protection of a legitimate business interest' of the defendant").

152. E.g., Connecticut requires "tortious conduct" for recovery and states that this requirement may be established by proof of "fraud, misrepresentation, intimidation or molestation . . . or [proof] that the defendant acted maliciously." Robert S. Weiss & Assocs., Inc. v. Wiederlight, 546 A.2d 216, 222-23 (Conn. 1988).


153. South Carolina defines "[m]ethods of interference considered improper [as] those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules . . . [or methods that] violate an established standard of a trade or profession, or involve unethical conduct." Love v. Gamble, 448 S.E.2d 876, 883 (S.C. Ct. App. 1994). The Oregon formulation provides that the plaintiff must prove that the defendant acted with motive or means that were wrongful "by reason of a statute or other regulation, or a recognized rule of common law, or . . . an established standard of a trade or profession." Top Serv. Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365, 1371 (Or. 1978); Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp., 882 P.2d 637, 644 (Or. Ct. App. 1994). The Top Service court provided further examples of improper means including "violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." Top Service, 582 P.2d at 1371 n. 11.

154. Crandall Corp. v. Navistar Int'l Transp. Corp., 395 S.E.2d 179, 180 (S.C. 1990). If there are two purposes, then the improper purpose must be the predominant purpose. Id.

not clear from the case law whether the two elements are equivalent. Oregon requires proof of a wrongful means or an improper objective for both a business expectancy and contract claim. To avoid confusion, the Oregon requirement of improper motive or means for both torts is preferable. By adopting a rule requiring proof that the defendant violated a statute, regulation, common law rule, or established professional or ethical standard, Arkansas courts can establish concrete standards for business entities. To plan and function within a competitive market, these entities must know, with some specificity, the conduct that will result in liability. In addition, providing a more objective standard will help juries avoid unintentionally injecting personal bias into deliberation. Finally, the Oregon and South Carolina definitions of improper contain sufficient flexibility to adequately protect the stability of contractual and business relations. By proving the existence and violation of an established professional or ethical standard, plaintiffs can sue for tortious interference even in the absence of other remedies against the interferer. No independent statutory or common law violation is necessary to establish liability.

Although the Oregon and South Carolina formulations allow liability based on improper means or motive, Arkansas should not adopt the wrongful motive prong of the "improper" determination. All competing businesses or employees are likely to harbor some negative feelings toward their rivals. As a matter of practicality, because at least some animosity may be involved in virtually any interference, the courts will be put in a position of judging which motive was the dominant one in the decision to interfere or basing liability on the very existence of the improper motive, no matter how slight. If an entity takes an action, otherwise proper, solely for the purpose of interfering with the contract of its rival, there is no satisfactory reason for holding that entity civilly liable. A lawful act should

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Ct. App. 1994). The plaintiff bears the burden of proof. Id.
156. Willamette Dental Group, 882 P.2d at 644.
158. Although the concept of damages is beyond the scope of this comment, this author also advocates the Oregon rule requiring the plaintiff to prove damages "beyond the fact of interference itself." Willamette Dental Group, 882 P.2d at 644. This effectively requires the plaintiff to mitigate her damages by pursuing a breach of contract action against the breaching party and to prove, with specificity, the damages resulting from any interference.
159. Many commentators advocate doing away with liability based solely upon interference for a wrongful purpose. See, e.g., Dobbs, supra note 17, at 347-50; Myers, supra note 17, at 1126-35.
160. Myers, supra note 17, at 1131.
not become unlawful solely because of its motive. Furthermore, a plaintiff attempting to prove wrongful motive likely will resort to circumstantial proof of wrongful conduct to do so, making proof of improper intent redundant. Resting liability on an improper purpose alone also establishes liability based on more subjective criteria than even the Restatement factors provide.

Establishing some degree of wrongful conduct in a tortious interference claim might also avoid an as yet insufficiently explored issue of the First Amendment's application to the tort. The Court of Appeals for the Eighth Circuit recently held that the First Amendment was a valid defense to claims of tortious interference in the context of a labor dispute. However, in the past twenty years, the United States Supreme Court has extended protection to commercial speech in several contexts. Tortious interference liability has the potential to chill commercial speech. Although the Restatement (Second) of Torts takes the position that a tortious interference claim may not be based upon the "dissemination of truthful information," several courts have based liability on persuasion to breach alone, without requiring

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162. See Myers, supra note 17, at 1131-32 & n. 178 (quoting Justice Cooley's famous admonition that "malicious motives make a bad case worse, but they cannot make that wrong which is in its essence lawful").

163. According to Dobbs, this may result in verdicts based on an assessment of character or personality. Dobbs, supra note 17, at 348.

164. Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local, 39 F.3d 191, 196 (8th Cir. 1994) (noting that "the malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements" so that the "plaintiff may not avoid the protection afforded by the Constitution and federal labor law merely by the use of creative pleading.").


166. RESTATEMENT (SECOND) OF TORTS § 772(a) (1977). Note, however, that the comments to § 772 list three requirements for the honest advice privilege: (1) the advice must be furnished in response to a request; (2) the speaker must give advice within the scope of the request; and (3) the advice must be honest. Id. § 772 cmt. c. Honesty, under section 772, means good faith. Id. § 772 cmt. e.

Arkansas recognizes a conditional privilege to make defamatory statements regarding another if the "circumstances induce a correct or reasonable belief" that the statements affect the third party's interest and the person making the statements has a duty to communicate these concerns to the third party. Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 307, 634 S.W.2d 135, 136-37 (1982) (citing RESTATEMENT (SECOND) OF TORTS § 595 (1981)). The courts have not applied this privilege in a tortious interference context.
a false statement.\textsuperscript{167} Given the extensive Constitutional protections of free speech, the United States Supreme Court eventually may require that the state justify its restriction of the free flow of commercial information in the tortious interference context. Requiring proof of wrongful conduct that manipulates the market might help make tortious interference law consistent with free speech protections.\textsuperscript{168}

VI. CONCLUSION

The Arkansas formulation of the interference torts must be updated in light of America's modern, competitive economy. To insure freedom of movement within the economy and encourage the efficient allocation of resources, Arkansas should require the plaintiff to bear the burden of proving improper interference by the defendant. Furthermore, in order to offer concrete guidelines for those trying to avoid liability and to aid juries in making fair decisions while maintaining necessary flexibility in the tort's definition, Arkansas should adopt the Oregon and South Carolina definitions of "improper means." These definitions would require a violation of a statute, regulation, common law rule, standard of the trade or profession, or ethical rule in order to establish liability. However, no liability should result solely from lawful interference for an improper purpose.

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\textsuperscript{168} See id. at 96. Johnson quotes \textit{Prosser \& Keaton on Torts} for the proposition that "[t]here is a question whether the First Amendment . . . might restrict liability to those [tortious interference] cases in which some degree of personal fault . . . [is] shown." \textit{Id.} (quoting \textit{PROSSER \& KEATON ON TORTS} at 988).