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INTERFERENCE WITH PROSPECTIVE GAIN: MUST THERE BE A CONTRACT?

This Comment examines the nature of the relationship required to establish a cause of action for interference with prospective economic gain. This area of law has seen a remarkable increase in the number of cases being litigated. Jurisdictions have reached differing conclusions with respect to the importance of the existence of an enforceable contract as a basis for the establishment of liability. Illustrative of this conflict are the approaches adopted in California and New York. This Comment will briefly discuss the history behind this cause of action, as well as look at possible explanations for the differing viewpoints. The positions taken by California and New York will be explained and contrasted. The Comment will conclude with an evaluation of these viewpoints and conclude that the California approach, where liability is not dependent on the existence of a contract, is better suited to the modern commercial setting.

INTRODUCTION

Litigation based on interference with prospective economic advantage has increased in recent years.1 Despite this increase, courts continue to perceive this area of law as one which is still developing, the principles of which remain vague.2 A typical case involves a third party who intentionally acts to interfere with a potential or actual relationship between two or more persons which would have resulted in economic gain. Liability has been found in a wide variety of situations. This can be attributed to the fact that many different market interactions give rise to this tort.3

Courts in various jurisdictions, sometimes even those within a single jurisdiction, take opposing views regarding intentional interference with prospective economic advantage. Jurisdictions differ substantially with respect to the kind of relationship considered sufficient to serve as a basis for a claim as well as the nature of the interest which this cause of action protects. This Comment examines the interests which should be protected by this developing tort theory through a comparison and evaluation of how two states, New York and California, have viewed the problem.

Recently, the New York Court of Appeals set forth rather stringent requirements for recovery absent an enforceable contract. The court placed strong emphasis on protecting society’s interest in competition. Furthermore, the court held that the presence of a contract, rather than mere expectation, was the most significant factor in determining what type of acts would support a tort cause of action.

In contrast, California courts have consistently held that liability is not dependent on the existence of a contract. Instead these courts seek to protect the relationship developed between parties irrespective of the enforceability or existence of an underlying agreement.

**EXPLANATIONS FOR CONTRASTING VIEWS**

At least two explanations may be found for the opposing viewpoints of New York and California. First, this contrast is explained by the fact that intentional interference is a tort cause of action which arises in a commercial setting. Commercial activities, however, are usually considered to be governed by contract law.

Generally, the fundamental difference between tort and contract

7. *Id.* at 190, 406 N.E.2d at 448.
8. In discussing this aspect of the tort, the New York Court of Appeals stated: The distinction . . . reflects a recognition of the difference in the two situations in the relationship of the parties and in the substance and quality of their resulting interests; greater protection is accorded an interest in an existing contract (as to which respect for individual contract rights outweighs the public benefit to be derived from unfettered competition) than to the less substantive, more speculative interests in a prospective relationship (as to which liability will be imposed only on proof of more culpable conduct on the part of the interferer).

*Id.* at 191, 406 N.E.2d at 449.
lies in the nature of the rights protected. Contract duties arise out of voluntarily assumed obligations between the parties.\(^\text{10}\) The contract not only creates obligations; it limits them as well. This is often described as risk allocation.\(^\text{11}\) Damages under contract law are intended to compensate the injured party but are limited by the expectation interest created within the contract.\(^\text{12}\)

Tort law, on the other hand, is based on duties imposed by society. These duties are based primarily upon social policy, not necessarily upon the will or intent of the parties.\(^\text{13}\) They are designed to protect an individual's interest in freedom from various types of harm.

An expansive gray area exists where tort and contract law overlap, where contractual obligations and tort based duties arise concurrently.\(^\text{14}\) Modern products liability cases illustrate this overlap. Intentional interference cases also arise in this gray area where tort law is applied to protect a private relationship intended to produce an economic advantage.

As noted above, although the contract aspects involved are important, claims for interference with prospective advantage, or for interference with contract, are tort theories of recovery.\(^\text{15}\) Regardless of the value which an individual jurisdiction places on the underlying relationship, it is generally agreed that the actionable wrong lies in the inducement to break the contract or to sever the relationship.\(^\text{16}\) Specifically, the principle upon which this tort rests has been stated by one court as "[e]veryone has the right to establish and conduct a lawful business and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded."\(^\text{17}\)

Secondly, the conceptual difference between intentional interference and more traditional intentional torts such as battery, conversion, or defamation also helps to explain the opposing viewpoints. With traditional intentional torts, the act is usually considered

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10. A. Corbin, Corbin on Contracts § 1 (1952).
11. Id. § 598 (1952).
wrongful in itself. Society has determined that acts such as striking others, taking their property, or defaming their reputation are unacceptable forms of behavior. 18

With respect to an intentional interference claim, the action generally arises due to a competitive act in the marketplace which causes one person an economic loss. In our economy, competitive acts are often encouraged and rarely considered to be wrongful in and of themselves. Usually, courts see a need to balance the protection of one party's interest in the future enjoyment of economic gain against society's concern that competition be unhampered and the interfering party's right to freedom of action be protected. 19

**Historical Development**

Protection against interference with business relations has been described as largely a twentieth century development; 20 however, tort claims for wrongful interference with economic relationships have an ancient lineage. 21 This theory's history can be traced to early Roman law dealing with interference with members of another's household. 22 Later in 1349, with the Ordinance of Labourers, 23 English law created protection from interference with one's workmen. 24

The protection against interference with an existing contract for personal services dates from a famous English case, *Lumley v. Gye.* 25

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19. *See, e.g.,* Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 35, 112 P.2d 631, 632 (1941) which holds, "[J]ustification exists when a person induces a breach of contract to protect an interest that has a greater social value than insuring the stability of the contract."](Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 35, 112 P.2d 631, 632 (1941))

22. In early Roman law the male head of the household was entitled to bring an action for violent acts committed against, or for insults directed at, his wife, children, slaves, or other members of the household. In fact, for some time he was the only person entitled to bring the action for recovery. Sayre, *Inducing Breach of Contract,* 36 Harv. L. Rev. 663 (1922).
23. 23 Edw. 3 (1349); *see also* Statute of Labourers, 35 Edw. 3, cited in Sayre, *supra* note 22, at 665.
24. The Ordinance, and later the Statute, were passed in response to the shortage of workers caused by the Great Plague. These laws gave the master an action against a third person who, by nonviolent means, enticed the master's servant to leave his employ. Early common law in England had previously recognized a cause of action where actual violence injured another's servant causing the master economic loss. *Id.*
25. 118 Eng. Rep. 749 (Q.B. 1853). This case involved a contract between Lumley, the owner of a theater, and Johanna Wagner, a well known opera singer. The defendant, an owner of a rival theater, had induced Wagner to breach her contract with
Later, this protection was extended to contracts in general by Temperton v. Russell.\textsuperscript{26} In the United States,\textsuperscript{27} tort liability for interference with existing contracts has been accepted in all but one state.\textsuperscript{28} Expansion of this tort has led to recognition in some states of an action for interference with prospective advantage where liability is not always dependent on the existence of an enforceable contract.\textsuperscript{29}

Although expansion of this tort was certainly predictable,\textsuperscript{30} this expansion has met with frequent criticism.\textsuperscript{31} In the absence of a valid, enforceable contract, Indiana refuses to recognize an action for interference with a prospective advantage.\textsuperscript{32} New York limits liability where no contract exists to situations where the means used to

\textsuperscript{26} Q.B. 715 (1893). In addition to extending liability to contracts for goods as well as services, this case also indicated that prospective contracts deserved protection. The plaintiff, a mason and builder, often worked in defiance of rules laid down by an early union. The union induced a customer of the plaintiff to break an existing contract for the purchase of building materials. The defendant also induced potential customers of the plaintiff not to buy materials from him. The court imposed liability on the defendant for these actions.


\textsuperscript{30} New tort causes of action are being recognized constantly; the mere fact that a claim is novel will not operate by itself to bar recovery. See Smith v. Superior Court, 151 Cal. App. 3d 491, 496, 198 Cal. Rptr. 829, 832 (1984). Among the leaders in the effort to expand tort liability has been the California Supreme Court. See generally Levy & Ursin, Tort Law in California: At the Crossroads, 67 Calif. L. Rev. 497 (1979). The authors note, "[T]he unabashed judicial creativity exhibited by the court in establishing new avenues of tort recovery led to its emergence as the most influential state supreme court." Id. at 497. The common aspect found in all emerging torts, the unreasonable interference with the interests of others (See W. Prosser, supra note 13, at § 1) is easily applicable to the tort of interference with prospective economic advantage.

\textsuperscript{31} See generally Note, Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity, 81 Col. L. Rev. 1491 (1981); Dobbs, Tortious Interference With Contractual Relationships, 34 Ark. L. Rev. 335 (1981); Perlman, supra note 5.

\textsuperscript{32} E.g., William S. Deckelbaum Co. v. Equitable Life Assurance Soc'y, 419 N.E.2d 228, 232 (Ind. 1981).
interfere are themselves inherently tortious. Some commentators suggest that this so-called "unlawful means test" be applied in all cases, whether the relationship is represented by a contract or is merely prospective.

Those who seek to limit the application of this tort emphasize the need to protect contractual stability. They would balance the interest found in protection from interference against the desire to keep the marketplace open to competition and the need to preserve the integrity of contracts.

Other jurisdictions, such as California, recognize a need to protect more than society's interest in contractual integrity. These courts seek to protect an individual's interest against unjustified interference, regardless of the existence of an enforceable agreement. In California, the types of commercial interests receiving tort protection have greatly increased in recent years. Expansion has progressed from protecting only existing contracts, to protection of all existing or prospective relationships, and even to protection from negligent interference.

34. See, e.g., Perlman, supra note 5; Dobbs, supra note 31.
38. Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941).
40. J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979). Although there is some authority which states that the holding in J'Aire should be limited to third-party-beneficiary status (see Devoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340, 1349 (9th Cir. 1980); Note, supra note 31, at 1522) the opinion clearly indicates that the court was relying on a broader tort-based theory. The plaintiff, who operated a restaurant in space rented from the Sonoma county airport, had been negligently tardy in finishing the work. Due to this unreasonable delay, the restaurant lost profits because of its diminished business volume. In an opinion written by Chief Justice Bird, the court stated:

Where the risk of harm is foreseeable, as it was in the present case, an injury to the plaintiff's economic interests should not go uncompensated. . . . Whether one owes a duty to another must be decided on a case-by-case basis, every case is governed by the rule of general application that all persons are required to use ordinary care to prevent others from being injured as a result of their conduct.

CALIFORNIA'S LIBERAL APPROACH

In California the existence of a contract is not a prerequisite to the bringing of suit. California's expansive approach is demonstrated by the fact that interference with contract is treated as a subcategory of the broader tort of interference with prospective gain. Rather than categorizing the two as separate torts, the California courts treat the elements of both forms of interference in a similar manner, recognizing that the existence of a legally binding agreement is not a *sine qua non* to the maintenance of a suit.

The origin of California's present approach can be traced to Chief Justice Traynor's opinion in *Imperial Ice Co. v. Rossier* where the California Supreme Court, in a unanimous decision, first adopted the cause of action for intentional interference with contract. Chief Justice Traynor believed that although protection from interference was warranted, it was not absolute. Occasionally, interference might be justified if it served a greater social utility than protection of contractual stability. Absent this justification, the protection of a plaintiff's economic interest represented by the contract would prevail.

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42. *Id.* at 823, 537 P.2d at 870, 122 Cal. Rptr. at 749. "Both the tort of interference with contract relations and the tort of interference with prospective contract or business relations involve basically the same conduct on the part of the tortfeasor." *Id.* quoting Builders Corp. of America v. United States, 148 F. Supp. 482, 484 n.2 (N.D. Cal. 1957).
43. 18 Cal. 2d 33, 112 P.2d 631 (1941). In this case, the plaintiffs were assignees of a contract which provided that another ice distributor, S.L. Coker, the former owner of the business, would not compete in a certain area. The defendant, Rossier, induced Coker to breach this contract and begin selling ice in the restricted area. An action was brought for an injunction to restrain Coker from violating the contract and to restrain Rossier from inducing the breach.
44. *Id.* at 39, 112 P.2d at 633.
45. Interestingly, Chief Justice Traynor's influence can be felt in this tort's later development in much the same way as his influence continues to dominate the products liability field. In his famous concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 250 P.2d 453, 458 (1944), the policy goals which were to serve as the basis for adopting strict liability, risk allocation and loss distribution (the "twin towers" of strict liability) were set forth. As with his opinion in *Escola*, Traynor's opinion in *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P.2d 631 (1941), remains an important milestone in California tort law and is still the foundation of California tort law in the interference field. See Rickel v. Schwinn Bicycle Co., 144 Cal. App. 3d 648, 658, 192 Cal. Rptr. 732, 739 (1982).
47. *Id.* at 34, 112 P.2d at 633.
48. *Id.*
Once accepted, the tort of interference with contract grew to encompass protection of relationships or expectations not represented by a legally binding agreement. In 1953 a California appellate court alluded to the possibility of a claim based on a prospective agreement if the alleged interference were unjustified. The claim was rejected in this particular case because the court found that the defendants were not acting in a wrongful manner. However, the court indicated that had the defendant's actions been illegitimate an action would be maintainable.

In another appellate level case, in an opinion written by then future supreme court Justice Tobriner, the court reasoned that if prospective relationships deserved protection, so did existing relationships where the parties' expectancies were the subject of an unenforceable contract. In this case, Tobriner held that a relationship defective due to a violation of the statute of frauds could serve as the basis for a claim based on intentional interference.

The California Supreme Court formally adopted the expansion toward protecting prospective relationships in 1975. Although the elements of this tort remain rather vague, it has gained widespread acceptance and undergone rapid development since its first recognition. This expansion can be explained by the fact that California courts are willing to acknowledge that in a modern world such as ours, more of what society values is represented by "probable expectancies," and that courts must do more to discover, define, and protect these expectancies.

In pursuit of this goal, some courts have held that a plaintiff need only demonstrate a reasonable probability that a contract would have resulted or that a profit would have been made but for the defendant's actions. In one case, liability was imposed for interfer-

50. Masoni v. Board of Trade, 119 Cal. App. 2d 738, 741, 260 P.2d 205, 207 (1953). This case dealt with an action brought against a trade association that advised the plaintiff's creditors not to compromise on the plaintiff's debts and sought assignment of the debts.
51. Id. at 743, 260 P.2d at 209. The court found that the collection agency's actions were justifiable and therefore not tortious.
53. Id. at 38, 12 Cal. Rptr. at 321.
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ence with prospective employment, through the electoral process, even though there was no assurance that the plaintiff would have won the election and gained employment. In this case, the court stressed the need to protect an individual's right to an opportunity to obtain an economic advantage through employment.

California, the First Restatement of Torts, and other jurisdictions treat the tort of intentional interference with prospective advantage as though it were a prima facie tort, subject to the affirmative defense of privilege or justification. Under this approach, the plaintiff must prove the defendant's culpable intent and the proximate causation of damages. If the defendant asserts an affirmative defense, the burden of proof is placed on the defendant to demonstrate that the conduct was proper under the circumstances.

The unjustifiability or wrongfulness of the defendant's acts which create liability can be based on the methods used and/or the purpose or motive behind the acts. Thus, a cause of action will lie where the defendant intentionally interferes with the plaintiff's right to pursue a lawful business, either by unlawful means or by means otherwise lawful which are undertaken for unacceptable motives.

In actions for interference with prospective advantage, as well as for interference with contract, the claimed justification generally focuses upon the alleged privilege of free enterprise and fair competition. However, a claim that the defendant merely acted in a competitive manner rarely discharges liability in and of itself, since the means used to compete are examined as well as the motive or pur-

58. Gold v. Los Angeles Democratic League, 49 Cal. App. 3d 365, 122 Cal. Rptr. 732 (1975). In Gold, a candidate for elected office filed suit against a political organization. The organization had circulated a pamphlet urging voters to "vote Democratic" and listed as a Democratic candidate for city controller a person who was actually a Republican. The plaintiff was endorsed by the Democratic Party. The court held that the intentional publication of false and misleading statements could be a basis for a cause of action. Id. at 371, 122 Cal. Rptr. at 736.

59. Id. at 375, 122 Cal. Rptr. at 739.


pose. Accordingly, the nature, means, and motivation of the defendant's interference are balanced against the importance of protecting the plaintiff's interest in realizing reliable expectations.65

This balance of competing values currently used to evaluate a claim of interference with prospective gain can be traced to Chief Justice Traynor's decision in *Imperial Ice Co. v. Rossier.*66 This case and its progeny suggest that California courts see a need to protect more than the stability of a contract.67 Courts have used the balance of interests approach to justify protecting society's interest in insuring a minimal level of ethical behavior in the marketplace.68

**NEW YORK'S RESTRICTIVE APPROACH**

In many ways, California's approach resembles the prima facie tort doctrine espoused in New York. The prima facie tort, a distinct cause of action, involves otherwise lawful acts which do not give rise to an action for some other tort. These acts must be done maliciously, with the intent to harm the plaintiff and cause special damages.69 This doctrine imposes liability for any unjustified, intentionally caused injury and it is best expressed by Lord Bowen's assertion in *Mogul Steamship Co. v. McGregor, Gow & Co.*70 that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in the person's property or trade, is actionable if done without just cause or excuse."71

Justice Holmes led the drive for acceptance of this doctrine in the United States.72 The doctrine was applied to a variety of cases and issues at the beginning of this century.73 Although application of this

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66. 18 Cal. 2d 33, 122 P.2d 631 (1941).
67. See, e.g., De Voto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340, 1350 (9th Cir. 1980) in which the Ninth Circuit Court of Appeals applying California law, stated that the cause of action for interference with prospective economic gain "tends to restrain impermissible behavior in the marketplace between competitors; it sets forth the ground rules of competition to confine business rivalry within acceptable bounds of conduct."
71. *Id.* at 613.
72. See Holmes, *Privilege, Malice and Intent,* 8 HARV. L. REV. 1 (1894). See also Aikens v. Wisconsin, 195 U.S. 194, 204 (1904) in which Justice Holmes stated that "primafacie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape."
73. *E.g.*, Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900) (chastising labor
doctrine was met with criticism, the New York Court of Appeals gave new life to this concept in 1946\textsuperscript{74} when the court formally approved the principles laid down by Lord Bowen and Justice Holmes.\textsuperscript{75}

Although New York courts are given credit for reviving and establishing the prima facie doctrine in the United States, these same courts have added certain rules and procedures which restrict its use. An example of these restrictions are the rules laid down concerning the malice requirement. While many cases define malice as the knowing violation of another's legal rights,\textsuperscript{76} it is well established in New York that in order for the prima facie tort doctrine to apply, the plaintiff must show that the defendant was solely motivated by ill will toward him.\textsuperscript{77} Specifically the plaintiff must plead and prove that the defendant's conduct was caused by "disinterested malevolence,"\textsuperscript{78} or a "malicious [motive] unmixed by any other and exclusively directed to injury and damage of another."\textsuperscript{79}

In a typical case of interference with economic advantage, the defendant's actions are not motivated solely by a desire to injure another. Although this might be one reason for a defendant's actions, other motives such as increased profits are often involved. At least one commentator has criticized confinement of the prima facie tort doctrine to instances of personally directed, purely evil motivation. This commentator believes that such a restriction virtually embalms the doctrine, eliminating its application in those areas where it could be most useful.\textsuperscript{80}

The stringent malice requirement is not the only limiting factor imposed by the New York courts. The requirement of special dam-

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  \item \textsuperscript{74} Advance Music Corp. v. American Tobacco Co., 292 N.Y. 79, 70 N.E.2d 401 (1946).
  \item \textsuperscript{75} See generally Brown, \textit{The Rise and Threatened Demise of the Prima Facie Tort Principle}, 54 Nw. U. L. Rev. 563, 566 (1959).
  \item \textsuperscript{78} American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358 (1921).
  \item \textsuperscript{79} Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923).
  \item \textsuperscript{80} Brown, \textit{supra} note 75, at 569.
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ages and the strict interpretation given the doctrine’s elements have further limited its usefulness.

In New York, if a plaintiff is unable to meet the requirements of the prima facie tort doctrine, his available options will depend upon the nature of the relationship with which the defendant interfered. As a general rule, a competitor will never be liable for interference with a prospective economic advantage which is not represented by a valid contract unless the defendant used improper means. However, if the relationship is represented by such a contract, either the presence of improper means or an improper purpose establishes liability.

When New York courts were first presented with claims for interference with contracts, liability was rejected where the means used were not inherently tortious. The first cases to accept liability without requiring the use of such means required the plaintiff to show that the defendant was solely motivated by a desire to harm the plaintiff. Soon, the interpretation of malice was liberalized to establish liability where the defendant merely had knowledge that interference with a legal right would result; it was no longer required that the defendant harbor actual ill will or an intent to injure.

The transition from an inquiry into the defendant’s motive to one into the knowledge of the existence of another’s legal right is central to the New York Court of Appeal’s decision in Guard-Life Corp. v. S. Parker Hardware Mfg. Corp. In this case, a claim for tortious interference was denied where the relationship with which the defendant interfered was the subject of a contract unenforceable due to lack of mutuality. The court held that tort liability must depend on the worth and significance of the objective interest sought to be protected by the plaintiff.

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81. Id. at 570. The requirement of special damages is a major hurdle to be overcome if a cause of action is to succeed. A mere allegation that there has been a decline in business is insufficient. The pleadings must show “specifically and with particularity the items of loss claimed . . . giving the names of employers, customers, or others who are claimed to have taken their business away from the plaintiff.” Rager v. McCloskey, 305 N.Y. 75, 81, 111 N.E.2d 214, 217 (1953).
83. Id. at 288, 406 N.E.2d at 448.
84. Ashley v. Dixon, 48 N.Y. 430 (1872); Rice v. Manley, 66 N.Y. 82 (1876).
86. Lamb v. S. Cheney & Son, 227 N.Y. 418, 420, 125 N.E. 817, 818 (1920).
88. Id. at 195, 406 N.E.2d at 451. The controversy centered around a five-year agreement for the exclusive distributorship of various kinds of locks. The contract was found unenforceable by Japanese arbitration, a holding which the New York court adopted as res judicata.
89. The Guard-Life majority relied on the RESTATEMENT (SECOND) OF TORTS §§ 766-768 (1979), which defines an actionable interference as one which is both intentional and “improper.” To determine if the interference is improper, seven listed factors, in-
The *Guard Life* majority reasoned that because there is no guarantee of future performance with unenforceable or prospective contracts, such contracts deserve only limited protection.\(^9\) In contrast to the California view, where the burden is on the defendant to justify his actions once the plaintiff proves intentional interference, the emphasis in New York is on the nature of the relationship. The significance of this split in authority can best be demonstrated by examining how the two approaches would affect a common case.

**Contrasting Views Illustrated**

In *Lowell v. Mothers Cake & Cookie Co.*,\(^9\) the plaintiff, a trucking firm, performed services for the defendant for five years pursuant to an oral contract. This work amounted to approximately forty percent of the firm's revenue. The owners of the trucking firm sought to sell the firm and received offers from several prospective purchasers. One of these prospects offered $200,000, conditioned on the continued business with the defendant. The defendant intentionally interfered with the consummation of this agreement by informing the prospective purchaser that its contract with the plaintiff would be terminated if the trucking firm were sold to a third party. The pur-

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\(^9\) 50 N.Y.2d at 193, 406 N.E.2d at 449.

pose behind this interference was to enable the defendant to purchase the company at a low price by discouraging potential buyers and depressing the purchase price substantially. Apparently the plan worked; the owners sold the trucking firm to the defendants for only $17,400.92.

The California Court of Appeal held that sufficient facts existed to establish a cause of action for intentional interference with prospective advantage.93 Furthermore, the court held that, once the trucking firm established interference and damages, the defendant had to show justification or privilege to escape liability.94 The defendants contended that their actions were justified because the means used to interfere were not improper. The court rejected this argument and emphasized that either improper means or improper motives were sufficient to establish a cause of action.95

The court held that the determination of whether a defendant’s actions are privileged or justified is a factual issue which should be decided by balancing the importance of various policy factors.96 Additionally, certain special privileges reserved for competitors or other persons with financial interests were not found to be present.97

Had this case arisen under New York law, it is unlikely that the court would have found that a cause of action had been stated. The first issue addressed would have been the kind of advantage with which the defendant interfered. In Lowell, the relationship was not a binding contract, but a potential contract between a seller and purchaser. Accordingly, a cause of action in New York would only exist if the defendant used improper means,98 or if the defendant’s conduct was motivated by “disinterested malevolence.”99

In Lowell, the means used to interfere were neither improper nor illegal. No agreement existed between the defendant and the truck-

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92. Id. at 19, 144 Cal. Rptr. at 669.
93. Id. at 22, 144 Cal. Rptr. at 670.
94. Id. at 18, 144 Cal. Rptr. at 668.
95. Id. at 20, 144 Cal. Rptr. at 669. “Even if the means used by the defendant are entirely lawful, intentional interference with prospective economic advantage constitutes actionable wrong if it results in damage and the defendant’s conduct is not excused by a legally recognized privilege or justification.” Id. (emphasis in original).
96. Among the factors to be balanced are the objectives of the interferer, the importance of the interest interfered with, the nature of the actor’s conduct, and the relationship between the parties. Id. at 20-21, 144 Cal. Rptr. at 670.
97. Relying on the RESTATEMENT (SECOND) OF TORTS § 768 the court held that competitors have certain privileges which enable them to compete fairly without fear of legal consequences. However, the defendants in this particular case were not in fact competitors, since they were engaged in entirely different businesses. Likewise, privileges carved out for persons with a “financial interest” in the business with which the defendant interfered were not present since the court held that these interests are “in the nature of an investment,” a situation which was not present in this case. Lowell v. Mother’s Cake & Cookie Co., 79 Cal. App. 3d 13, 21, 144 Cal. Rptr. 664, 670 (1978).
98. See supra text accompanying notes 82-90.
99. See supra text accompanying notes 77-81.
ing firm to continue business in the future. The agreement was terminable at will and it would have been entirely proper for the defendant to terminate the relationship if the business were sold. Furthermore, the actions taken by the defendant in informing others of its rights and intentions were not improper because these statements were in fact true.\footnote{100}

Additionally, it is unlikely that the defendant in this case was motivated solely out of spite or ill will toward the trucking firm. Instead, the defendant was probably motivated, at least in part, by a desire to increase its own economic advantage. Because the defendant's actions were not malicious, "unmixed with any other motive,"\footnote{101} the prima facie tort doctrine as now applied in New York would be useless to the owners of the trucking firm. It seems clear, given decisions such as \textit{Guard-Life},\footnote{102} that no cause of action would exist in New York for actions such as those found actionable by California in \textit{Lowell}.

\textbf{RESTRICTIVE VIEW LACKS MERIT}

The positions taken by New York and California illustrate the contrasting views of this tort. Although jurisdictions such as New York may claim to extend protection to all prospective advantages,\footnote{103} in practice they do not. Faced with advantages which are merely prospective, these courts require that the means used to interfere be inherently tortious.

This line of reasoning greatly restricts liability. It makes interference with potential advantage more of a measure of damages for other tortious acts, such as physical violence, misrepresentation, or slander, rather than recognizing it as an independently tortious act itself.

These restrictions reflect the belief that the interests found in preserving the importance of contracts as well as maintaining a competitive marketplace are greater than that of protecting a non-contractual expectation. Specifically, these restrictions are a reaction to the feared consequences of making it too easy for plaintiffs to recover under the more expansive approach adopted in California.\footnote{104} By re-

\footnote{100. Lowell v. Mother's Cake & Cookie Co., 79 Cal. App. 3d 13, 20, 144 Cal. Rptr. 664, 669 (1978).}
\footnote{101. \textit{See supra} text accompanying notes 77-79.}
\footnote{103. Perlman, \textit{supra} note 4, at 91 n.130.}
\footnote{104. When the Utah Supreme Court rejected the more expansive view taken by}
quiring the plaintiff to show improper means, it is readily apparent to courts adopting the restrictive view that the defendant is culpable and that liability is appropriate.

Although the test adopted by the restrictive view is seemingly easy to apply, it fails to consider the ethical precept which is at the heart of this tort. This precept, recognized by the three-judge dissent in *Guard-Life*, states that, although society does in fact encourage competition, there must be at least a minimal level of ethical behavior in the marketplace.¹⁰⁵

The inclusion of prospective relationships under the umbrella which protects contracts from wrongful interference does not, as one commentator has suggested, reduce the importance of contracts to society.¹⁰⁶ Instead, expansion merely provides plaintiffs protection from wrongful or unjustifiable interference with their pursuit of economic gain. The fact that our society encourages competitive behavior does not mean that society favors all forms of competition pursued for any reason or motive. Market ethics demand that when one person's right to prospective gain is interfered with, the interference must somehow be justified. The absence of an enforceable contract does not constitute sufficient reason to allow wrongful behavior to continue without compensating the injured party.

If society were truly interested in encouraging economic competition at all costs, the tort of contractual interference would never have developed in the first place. Instead, the law would have allowed competition to go on unchecked, leaving injured parties to seek relief through a breach of contract action, if any relief were available at all.¹⁰⁷

Rather than following this path of noninvolvement, the law has decided to enforce certain market morals. These morals are deemed worthy of societal protection, and when violated, deserve a remedial

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¹⁰⁶ Note, *supra* note 31, at 1491. The reduction of the integrity of contracts does not flow from the extension of protection to prospective relationships and to prospective gain. The purpose behind expansion of this tort is to protect plaintiffs in the transaction of their business from unreasonable interference with their expectancies. Protecting unformalized relationships does not reduce the need for the creation of contracts. Contracts are still needed to enforce agreements between the parties in a particular relationship. Furthermore, contracts would remain the best guarantee of future performance and future gain. Extension of this tort protects all individuals from behavior which is unfair and unjust, behavior which society does not encourage or condone.

action in tort.\textsuperscript{108} This enlightened approach recognizes that more than society's interest in contractual stability is at stake. Active court participation signals that the issue encompasses more than a mere balancing of contract rights with freedom to compete. Society's weighty interest in enforcing market ethics must also be considered.\textsuperscript{109}

California's approach protects the plaintiff from unjustified and wrongful acts. Instead of concentrating solely on the formality of the plaintiff's agreement or relationship, it looks at the nature of the defendant's actions and motives.\textsuperscript{110} It is unrealistic and unfair to adopt a viewpoint which allows unjustifiable actions to occur, simply because the relationship is not represented by a formal agreement. Because of the greater protection offered by the expansive approach adopted by California, it is superior to that adopted by New York.

The fallacy with New York's line of reasoning is that it places too many restrictions on a tort which could protect countless individuals from great harm and which provides a suitable remedy to aggrieved parties who were previously left uncompensated. Although critics of its expansion may fear excessive restraints on competition, this same expansion can protect an individual who is pursuing legal gain from unfair or unjust competition, such as that in Lowell.\textsuperscript{111}

How much protection should be extended to prospective economic or commercial relationships is essentially a policy question. The ben-


\textsuperscript{109} Id.

\textsuperscript{110} Although California's approach is more expansive than that of New York, the plaintiff is still required to present proof of the defendant's culpable intent. In a recent decision, the California Supreme Court dealt with the intent requirement behind a claim for interference with contract. The mere showing that the defendant interfered with a prospective gain will not automatically require the trier of fact to conclude that the defendant's intent is culpable. However, the court did hold that the trier of fact may infer intent from such interference. Although this case dealt with a relationship represented by an enforceable contract, the court reiterated that the same standards would apply for prospective relationships. It further stated that the ultimate test for liability, regardless of the nature of the underlying agreement, would in all likelihood turn on the purpose or motive behind the defendant's actions. See Seaman's Direct Buying Service, Inc. v. Standard Oil Co. of California, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

\textsuperscript{111} The arguments that expansion of tort liability would open the courthouse door to possible fraudulent claims or that courts would be unable in the future to delineate the area of liability are not new. The California Supreme Court was faced with similar issues when it expanded liability for emotional distress in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). In Dillon, the court stated, "The argument that 'there is no point at which such actions would stop' is no more plausible today than when it was advanced in Winterbottom v. Wright (1842) 10 H & W 109, 111." Id. at 743, 441 P.2d at 451, 69 Cal. Rptr. at 82.
efits of allowing intentional acts which interfere with another’s potential gain must be weighed against the various harms these actions cause. Whether a defendant’s interference is justified may be determined by balancing the importance, both social and private, of the actor’s conduct and the relationship between the parties.¹¹²

The question central to the resolution of an interference case is “whether the actor’s conduct was fair and reasonable under the circumstances.”¹¹³ Unjust and contradictory decisions result when courts establish liability for unfair and unreasonable behavior which interferes with an actual contract, while denying liability for unfair and unreasonable interference with prospective advantage not represented by a contract. The presence of a valid contract may in fact be one of many important factors to weigh in an individual case to determine liability; however, its existence should not be a prerequisite to recovery. Allowing recovery for some unjustified interference while denying it for others, based solely on the existence of a contract, is a misguided, unsatisfactory approach.

Of course not all acts of interference are unjustified or support the establishment of liability.¹¹⁴ As Chief Justice Traynor pointed out, at times there may be a larger social value in permitting the interference than in protecting the prospective gain.¹¹⁵ Defendants may be able to prove that their actions were justified. Fair competition is one possible justification.¹¹⁶ Nevertheless, many acts of interference which involve prospective advantages cannot be justified and deserve a tort remedy despite the absence of contractual obligations.

CONCLUSION

By allowing recovery for interference with prospective advantages, courts neither undermine the stability of contracts nor assault the competitive nature of our economy. Instead, these courts help to preserve ethical behavior in the marketplace. As society changes and grows more complex, it becomes more apparent that a large part of what we value does in fact depend upon “probable expectancies,” not all of which are represented by a contract, yet deserve protection nonetheless. Based upon these ideals, the approach taken by California, regarding the necessity of a contract in order to bring suit, is

¹¹⁵. See supra text accompanying notes 43-48.
¹¹⁶. See supra text accompanying notes 64-65.
better able to insure the survival of these expectancies in a commercial field which is predominantly run on unfettered competition.

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