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TENDER OFFER LITIGATION AND STATE LAW

MARK J. LOEWENSTEIN†

The recent spate of hostile takeover battles has focused attention and criticism on the federal securities laws. Most claims of defeated offerors and disappointed shareholders have been based on sections 14(e) and 10(b) of the Securities Exchange Act of 1934. The United States Supreme Court, however, has limited such federal remedies and suggested that plaintiffs bring state-law actions for interference with a prospective economic advantage. Professor Loewenstein discusses this tort, which has not been used widely in this context, and reviews the tort's traditional elements, its formulation in the Restatement (Second) of Torts, and its recent treatment by state courts. He concludes that interference with a prospective economic advantage could provide an effective remedy in tender offer litigation, although certain defenses, if broadly interpreted, may be obstacles to recovery.

In the aftermath of a contested takeover battle, defeated bidders and disappointed shareholders frequently turn to the federal courts to remedy their perceived losses.¹ Often they base a cause of action on section 14(e)² of the Securi-

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1. See, e.g., *Ozofsky v. Zipf*, 645 F.2d 107 (2d Cir. 1981) (suit by target shareholders against successful bidder); *Panter v. Marshall Field & Co.*, 486 F. Supp. 1168 (N.D. Ill. 1980), *aff'd*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (suit by target shareholders against target management); *Piper v. Chris-Craft Indus.*, 337 F. Supp. 1128 (S.D.N.Y. 1971) (suit by defeated bidder against target management, rival bidder, and target's investment banker), *aff'd in part and remanded in part*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973), 384 F. Supp. 507 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 516 F.2d 172 (1975), *rev'd*, 430 U.S. 1 (1977).

2. 15 U.S.C. § 78n(e) (1982). Section 14(e) provides:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Each of the cases cited *supra* note 1 was brought under § 14(e). A count based on rule 10b-5, 17 C.F.R. § 240.10b-5 (1983), frequently is included in the complaint. See, e.g., *Berman v. Gerber Prods.*, 454 F. Supp. 1310 (W.D. Mich. 1978). Rule 10b-5, promulgated by the Securities and Exchange Commission (SEC) pursuant to § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1982), prohibits fraud in connection with the purchase or sale of any security; § 14(e) similarly prohibits fraud in connection with any tender offer. Although § 14(e) and rule 10b-5 differ in language, purpose, and legislative history, the courts have interpreted them *in pari materia*. In *Dyer v. Eastern Trust & Banking Co.*, 336 F. Supp. 890 (D. Me. 1971), the court noted that "[a] sensible and coherent interpretation of the provisions of the two statutes mandates implication of a damage remedy under Section 14(e) corresponding to that available under Section 10(b). There is every reason to believe that Congress intended the remedies to be similar." *Id.* at 914. See generally Loewenstein,

ties Exchange Act of 1934 (Exchange Act),³ a section that was added to the Exchange Act with the enactment of the Williams Act in 1968.⁴ Section 14(e) is an antifraud provision that relates specifically to tender offers, but does not contain an express private right of action for damages. A United States Supreme Court opinion,⁵ several lower federal court decisions,⁶ and various scholars,⁷ however, have discussed whether a private right of action should be inferred from section 14(e).

In its 1977 *Piper v. Chris-Craft Industries*⁸ decision the Supreme Court held that a defeated tender offeror did not have standing to maintain an implied cause of action for damages under section 14(e).⁹ The Court, however, expressly reserved the question whether the shareholder-offerees of the target corporation would have standing.¹⁰ Although the lower federal courts have continued to recognize implied private rights of action under section 14(e) on behalf of shareholder-offerees¹¹ and others,¹² *Chris-Craft* and other Supreme Court cases¹³

Section 14(e) of the Williams Act and the Rule 10b-5 Comparisons, 71 GEO. L.J. 1311, 1319 (1983) (questioning this conclusion).

3. Pub. L. No. 73-291, 48 Stat. 404 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1982)).

4. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982)). The Williams Act originally was titled "An Act Providing for Full Disclosure of Corporate Equity Ownership of Securities Under the Securities Exchange Act of 1934." The Act was passed in response to an increasing number of cash tender offers and the abuses perceived in those transactions. See S. REP. NO. 550, 90th Cong., 2d Sess. 2-3, reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2811, 2812. The Act added a new § 13(d) to the Exchange Act, requiring certain disclosures by persons who acquire more than 10% (later amended to 5%) of any registered equity security, and a new § 14(d), requiring that certain disclosures be made in connection with a tender offer. In addition, the Act added a new § 13(e) to regulate purchases by an issuer of its own securities, a new § 14(f) to require certain disclosures of specified changes in the board of directors of an acquired company, and a new § 14(e) to extend broad antifraud rules to all tender offers.

5. *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977).

6. *E.g.*, *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366, 372 (6th Cir. 1981) (tender offeror has standing under § 14(e) to seek injunctive relief); *Lowenschuss v. Kane*, 520 F.2d 255, 267 (2d Cir. 1975) (tendering shareholders have standing under § 14(e) to seek damages from tender offeror); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 946 (2d Cir. 1969) (target has standing under § 14(e) to seek injunctive relief against tender offeror); *O'Connor & Assocs. v. Dean Witter Reynolds, Inc.*, 529 F. Supp. 1179, 1193 (S.D.N.Y. 1981) (option trader has standing under § 14(e) to maintain action against "tippees" who purchased call options from plaintiff knowing that tender offer for shares subject to call option was imminent); *Petersen v. Federated Dev. Co.*, 387 F. Supp. 355, 359 (S.D.N.Y. 1974) (nontendering offeree-stockholder has standing under § 14(e) to assert claims for damages and injunctive relief against tender offeror).

7. *E.g.*, *Loewenstein*, *supra* note 2; *Pitt, Standing to Sue Under the Williams Act After Chris-Craft: A Leaky Ship on Troubled Waters*, 34 BUS. LAW. 117 (1978); *Comment, An Implied Private Right of Action Under the Williams Act: Tradition vs. Economic Reality*, 77 NW. U.L. REV. 316 (1982).

8. 430 U.S. 1 (1977).

9. *Id.* at 42.

10. *Id.* at 42 n.28.

11. *E.g.*, *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1281 & n.7 (9th Cir. 1982); *Osofsky v. Zipf*, 645 F.2d 107, 110 (2d Cir. 1981).

12. *E.g.*, *O'Connor & Assocs. v. Dean Witter Reynolds, Inc.*, 529 F. Supp. 1179, 1193 (S.D.N.Y. 1981) (cause of action available to option traders).

13. See *Jackson Transit Auth. v. Transit Union*, 457 U.S. 15, 29 (1982) (no implied federal cause of action exists for breaches of § 13(c) of the Urban Mass Transportation Act of 1964); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (implied right of action denied under Federal Water Pollution Control Act and Marine Protection, Research, and Sanctuaries Act); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (private action

suggest a different result.¹⁴

The trend of the Supreme Court opinions clearly has been to limit the scope of the federal securities laws, particularly when a state cause of action appears to be available to the plaintiff.¹⁵ The *Chris-Craft* Court noted, as had the United States Court of Appeals for the Second Circuit,¹⁶ that a plaintiff might have a state-law cause of action for interference with "a prospective commercial advantage."¹⁷ Partly for this reason, the Court denied *Chris-Craft* an implied federal cause of action.¹⁸

Despite this suggestion, there are few reported decisions in which a defeated bidder or disappointed shareholder has brought suit for interference with a prospective commercial advantage.¹⁹ Such actions are not preempted, since section

for contribution from conspirators denied under federal antitrust laws); *California v. Sierra Club*, 451 U.S. 287, 298 (1981) (private action for injunctive relief denied under the Rivers and Harbors Appropriation Act of 1899); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 98 (1981) (private action for contribution denied under Equal Pay Act of 1963 and Title VII of Civil Rights Act of 1964); *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 784 (1981) (private action for back wages denied under Davis-Bacon Act); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) (private damage action denied under § 206 of Investment Advisors Act of 1940; equitable relief held available under § 215 of Act); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 567 (1979) (private damage action denied under § 17(a) of Exchange Act); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (private action for declaratory and injunctive relief denied under § 1302 of Indian Civil Rights Act of 1968). *But see* *Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3232 (1983) (private cause of action recognized for violations of Title VI of the Civil Rights Act of 1964, but only limited injunctive relief should be granted for unintentional violations of the statute); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) (private action inferred under Commodity Exchange Act); *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) (private action to enforce Title IX recognized). *See generally* Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981) (arguing that courts must allow private claims as compensation for those who have suffered "substantial individual injuries" and disallow claims without "compensatory value to individuals"); Schneider, *Implying Private Rights and Remedies Under the Federal Securities Acts*, 62 N.C.L. REV. 853 (1984) (emphasis on applying narrow definition of congressional intent restricts traditional Supreme Court exercise of power to determine availability of remedies or standing).

14. The Supreme Court has announced that it will recognize an implied private right of action only when Congress intended it to do so. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). As an aid in discerning congressional intent, the Court often applies the four-factor test of *Cort v. Ash*, 422 U.S. 66, 78 (1975) (remedy available if plaintiff is a member of class for whose especial benefit the statute was enacted, if there is an indication of legislative intent—express or implied—to create a private remedy, if implication of a private remedy is consistent with legislative scheme, and if the cause of action is not one traditionally relegated to state law). In only one case, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), however, has an application of the *Cort* factors resulted in the finding of an implied cause of action. The Court's reluctance to infer private rights of action and the lack of any significant legislative history indicating that Congress intended private enforcement of § 14(e) make it doubtful that the Court would infer a private remedy. *See* Loewenstein, *supra* note 2, at 1313-30.

15. The availability of a state remedy for breach of fiduciary duty was a factor in the Court's decision to limit the scope of rule 10b-5 in *Santa Fe Indus. v. Green*, 430 U.S. 462, 478-79 (1977).

16. The United States Court of Appeals for the Second Circuit recognized the potential for a state cause of action in an earlier decision in the same litigation. *Chris-Craft Indus. v. Piper Aircraft Corp.*, 480 F.2d 341, 360 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

17. *Chris-Craft*, 430 U.S. at 40-41.

18. *Id.* In this portion of the opinion the Court applied the fourth prong of the test established in *Cort v. Ash*, 422 U.S. 66 (1975)—whether "the cause of action [is] one traditionally relegated to state law." *Id.* at 78.

19. Damages were sought on an interference with prospective economic advantage theory in *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981). Jurisdiction over this claim was based on pendant jurisdiction. Injunctive relief was sought in *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636 (E.D. Wis. 1977); *Jewelcor, Inc. v. Pearl-*

28 of the Exchange Act states that the Act's remedies supplement all other remedies that may exist at law or in equity.²⁰ Moreover, a state remedy would not conflict with federal regulation of tender offers;²¹ indeed, state remedies for securities fraud long have coexisted with federal remedies, often with a lower standard of proof for the plaintiff.²² Thus, plaintiffs apparently use the state remedy infrequently because they perceive it as somehow inadequate. This Article explores the tort of interference with a prospective commercial advantage—or, as it is more often called, interference with a prospective economic advantage²³—arising from a contested tender offer and concludes that the tort might provide relief denied under federal law, but only after significant difficulties are overcome.

A possible interference tort can arise in several different ways in a takeover contest. Three common ways are:

1. Plaintiff makes a tender offer that is defeated by a rival bidder, whose success is attributable partially to its violations of the federal securities laws. Plaintiff sues the rival bidder.²⁴
2. Plaintiff makes a tender offer that is defeated by target management's defensive maneuvers, which do not violate the federal securities laws. Plaintiff sues target management.²⁵
3. Plaintiff is a shareholder in a company that is the subject of a hostile tender offer. Target management, without violating the federal securities laws, defeats the bid. Plaintiff sues target management.²⁶

These hypothetical examples do not exhaust either the ways in which a

man, 397 F. Supp. 221 (S.D.N.Y. 1975); *Belden Corp. v. InterNorth, Inc.*, 90 Ill. App. 3d 547, 413 N.E.2d 98 (1980). Courts other than the *Chris-Craft* Court also have suggested the appropriateness of a state remedy. See, e.g., *Schreiber v. Burlington N., Inc.*, 568 F. Supp. 197, 205 (D. Del. 1983), *aff'd*, 731 F.2d 163 (3d Cir. 1984); *Rediker v. Geon Indus.*, 464 F. Supp. 73, 82 (S.D.N.Y. 1978); see also *H.K. Porter Co. v. Nicholson File Co.*, 482 F.2d 421, 424 (1st Cir. 1973) ("Tortious interference with a 'prospective advantage' or inducement not to enter into a contract are wrongs [that under common law give rise to an action for damages].").

20. 15 U.S.C. § 78bb (1982).

21. It might be argued that the possibility of a punitive damage award in a state tort action, see *infra* note 66, runs counter to the regulatory scheme of the Williams Act and that therefore the state remedy is preempted by federal law. The Williams Act, however, does not provide an express cause of action for damages, and there is no indication in the legislative history that Congress intended to preempt state remedies that might reach conduct in the tender offer context. Moreover, a punitive damage award in a state action would not conflict either with Congress' intent to protect shareholders confronted with a tender offer or with the regulatory scheme of the Williams Act. Cf. *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984) (holding that the Atomic Energy Act of 1954 did not preempt state statute permitting punitive damages in a common-law tort action for contamination by plutonium).

22. See L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 899 (1983).

23. Numerous other labels appear in decisions and the literature. See, e.g., W. PROSSER & W. KEETON, *LAW OF TORTS* § 129 (W. Keeton 5th ed. 1984) ("interference with contractual relations"); *RESTATEMENT (SECOND) OF TORTS* § 766B (1965) ("interference with prospective contractual relation"); Annot., 6 A.L.R. 4TH 195-241 (1981) ("interference with prospective contractual relationships").

24. See, e.g., *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977).

25. See, e.g., *Jewelcor, Inc. v. Pearlman*, 397 F.Supp. 221 (S.D.N.Y. 1975).

26. See, e.g., *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

tender offer might be defeated or the possible applications of the interference tort in this area, but they are representative of many, if not most, post-tender offer damage suits.²⁷ The legal issues that arise in these cases are typical of the issues that arise in many other situations: What type of conduct is actionable? Does the defendant have a privilege allowing him to act in a particular way? If so, are there limits on the scope of this privilege? Before addressing these issues, it is useful to discuss briefly the interference tort.

I. INTRODUCTION TO THE TORT OF INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE

As a preliminary matter, the tort of interference with a prospective economic advantage must be distinguished from its first cousin, the tort of interference with contract.²⁸ The latter presupposes the existence of a contractual relationship between the plaintiff and a third party, whereas the former involves the plaintiff's mere economic expectancy. Arguably, a tender offer may involve

27. In a number of cases, shareholder claims under § 14(e) against target management have failed. The claims essentially have alleged breaches of fiduciary duty, which most courts have concluded are not actionable under § 14(e). See *Atchley v. Qonaar Corp.*, 704 F.2d 355 (7th Cir. 1983); *Bucher v. Shumway*, 622 F.2d 572 (2d Cir.), cert. denied, 449 U.S. 841 (1980); *Abella v. Universal Leaf Tobacco Co.*, 546 F. Supp. 795 (E.D. Va. 1982); *In re Sunshine Mining Co. Sec. Litig.*, 496 F. Supp. 9 (S.D.N.Y. 1979); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349 (N.D. Tex. 1979); *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310 (W.D. Mich. 1978).

28. These two torts originated several centuries ago. See W. PROSSER & W. KEETON, *supra* note 23, § 129. The tort of interference with contract finds its modern origins in *Lumley v. Gye*, 2 Ellis & Blackburn 216, 118 Eng. Rep. 749 (1853). In *Lumley* the Court of Queen's Bench recognized a cause of action against one who enticed an employee, in this case a famous opera singer, to breach her contract with plaintiff. *Lumley* was a watershed case in the development of the tort of interference with contractual relations and was followed 40 years later by *Temperton v. Russell*, [1893] 1 Q.B. 715. *Temperton* extended the *Lumley* rule to interference with prospective contractual relations.

Although the facts in *Temperton* are somewhat unclear, it appears that defendants, who were trade unionists, wanted plaintiff, a supplier of building materials, to stop supplying materials to builders who employed nonunion laborers. To accomplish this end, defendants struck and threatened to strike against employers who dealt with plaintiff. The Queen's Bench Division upheld a jury verdict in favor of plaintiff on two separate causes of action: one for interference with contract and the other for conspiracy to induce certain persons not to enter into contracts with plaintiff. With respect to the second cause of action, the court may have decided only that it was unlawful to conspire to interfere with prospective economic relations; perhaps absent a conspiracy no cause of action would have existed. The case, however, has been interpreted more broadly, probably because of Lord Esher's broad dictum that there is no real difference between forcing someone to break a contract with plaintiff and forcing someone not to enter into a contract with plaintiff. *Id.* at 728.

In addition to legitimizing the tort of interference with prospective economic relations, Lord Esher's *Temperton* opinion has had a lasting impact on the elements of the cause of action. *Temperton* is one of a series of cases in which the English courts discussed whether a defendant's motive should affect the determination of the lawfulness of his actions. Lord Esher believed it should; thus, motive was a critical factor in the *Temperton* cause of action.

In *Bowen v. Hall*, 6 Q.B.D. 333 (1881), Lord Brett opined that, although merely persuading one to breach a contract is not by itself unlawful, it becomes unlawful if the persuader did so either to injure the plaintiff or to benefit himself. Not all of Lord Brett's colleagues on the bench agreed with him, and not surprisingly, a similar difference of opinion developed in early American cases. Compare *Passaic Print Works v. Ely & Walker Dry-Goods Co.*, 105 F. 163 (8th Cir. 1900) (ill will cannot transform a legal act into an illegal one) with *Doremus v. Hennessy*, 62 Ill. App. 391 (1895), *aff'd*, 176 Ill. 608, 52 N.E. 924 (1898) (court focused on defendant's malicious motive).

either or both torts. When the bidder makes an offer²⁹ (or possibly even before),³⁰ it has created for itself a prospective economic advantage. If that advantage is interfered with unlawfully, the common-law tort of interference with a prospective economic advantage may be invoked. Furthermore, when an offeree tenders securities to the bidder pursuant to the offer, a contract is created between the bidder and the tendering offeree.³¹ If an unlawful interference occurs, causing the tendering security holder to withdraw the securities, the bidder arguably has an action for tortious interference with contract or contractual relations. Courts generally are much less receptive to certain defenses, such as competition, when the interference is with a contract as opposed to interference with an expectancy.³²

Despite the existence of such a contract between the bidder and the tendering security holder, the courts are unlikely to deem interference with a tender offer to be interference with contract, regardless of when the interference occurs.³³ The "contract" between the bidder and the tendering security holder is analogous to an "at-will" contract,³⁴ which the courts generally have treated more like an expectancy than a contract in this context.³⁵ Therefore, this Arti-

29. For the mechanics on how an offer is made, see § 14(d) of the Exchange Act, 15 U.S.C. § 78n(d) (1982) and Regulation 14D, 17 C.F.R. § 240.14d-1 to 14d-101 (1984).

30. Arguably, the bidder has an expectation of an economic advantage after the target has been identified, the financing has been arranged, and the feasibility of the takeover has been determined. *But see infra* notes 43-50 and accompanying text.

31. In the "typical" tender offer, the bidder offers to purchase the target's securities at a specified price, subject to certain terms and conditions enumerated in its "Offer to Purchase" clause. Security holders who wish to accept the offer do so by tendering their shares. Although the ultimate purchase may be, and usually is, subject to certain conditions, a "contract" comes into existence when the security holders accept the offer. *See Lowenschuss v. Kane*, 520 F.2d 255, 264-65 (2d Cir. 1975).

32. *See, e.g., Ulan v. Vend-A-Coin, Inc.*, 27 Ariz. App. 713, 558 P.2d 741 (1976) (defense of competition successful; court held that plaintiff did not have enforceable contract right); *Heavener, Ogier Servs. v. R.W. Fla. Region, Inc.*, 418 So. 2d 1074 (Fla. Dist. Ct. App. 1982) (injunction against defendant sustained on finding that plaintiff, who alleged interference with existing contracts, was likely to win on the merits despite fact that defendant was an active competitor); *Anderson v. Dairyland Ins. Co.*, 97 N.M. 155, 637 P.2d 837 (1981) (defendant successfully asserted lack of improper motive as defense to plaintiff's allegation of tortious interference with an expectancy); *RESTATEMENT (SECOND) OF TORTS* § 766 comment b (1965).

33. *Cf. supra* notes 16-17 and accompanying text (both appellate courts in *Chris-Craft* implied that this state-law cause of action might exist).

34. Under an at-will agreement, either party may terminate the contract at any time without liability. *See Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 304-05, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983) (employer has right to terminate at-will employment contract even if he acts in bad faith).

35. The law is summarized in *W. PROSSER & W. KEETON, supra* note 23, at 995-96.

[T]he overwhelming majority of the cases have held that interference with . . . contracts terminable at will is actionable, since until it is terminated the contract is a subsisting relation, of value to the plaintiff, and presumably to continue in effect. The possibility of termination does, however, bear upon the issue of the damages sustained, and it must be taken into account in determining the defendant's privilege to interfere. Thus a contract at will is usually not protected when the defendant's interference with it is based on any legitimate business purpose and no improper means is used, as where one employer hires away employees of another whose contracts are terminable at will.

See Memorial Gardens, Inc. v. Olympian Sales & Management, 661 P.2d 296 (Colo. App. 1982) (protection afforded contract terminable at will is limited and is to be determined on a case-by-case basis); *Heavener, Ogier Servs. v. R.W. Fla. Region, Inc.*, 418 So. 2d 1074, 1077 (Fla. Dist. Ct. App.

cle will focus primarily on the tort of interference with a prospective economic advantage as it relates to tender offers.

It is no easy matter to state the elements of the tort of interference with a prospective economic advantage because they differ from jurisdiction to jurisdiction.³⁶ In addition, the courts still are making judgments on some basic issues.³⁷ Two fundamental requirements, however, are that the plaintiff have a reasonable expectancy of achieving an economic advantage and that the defendant harm the plaintiff by interfering with this expectancy. A full historical review of the tort is unnecessary;³⁸ its three modern formulations are labeled here as the traditional approach,³⁹ the Restatement Second approach,⁴⁰ and the Oregon approach.⁴¹ Several issues common to all three approaches will be discussed in the context of the traditional formulation.

II. THE TRADITIONAL FORMULATION OF THE TORT OF INTERFERENCE WITH A PROSPECTIVE ECONOMIC ADVANTAGE

The traditional formulation of the tort consists of these elements: (1) intentional interference by the defendant, (2) with an economic expectancy of the plaintiff, (3) of which the defendant knew or should have known, (4) resulting in the expectancy being lost, (5) and the plaintiff being damaged.⁴²

In post-tender offer litigation, the plaintiff easily could satisfy the first three elements of the traditional approach. First, the rival bidder in the first hypothetical and target management in the second and third hypotheticals take action for the express purpose of defeating the hostile offer and, thus, commit "intentional interference." Second, the plaintiff's expectancy—acquiring the target in the first two hypotheticals and selling shares to the bidder in the third—is evident. Last, the rival bidder or target management obviously is aware of the plaintiff's expectancy since that expectancy motivated the interference.

1982) (defendant privileged to compete for contract terminable at will, but plaintiff's expectancy outweighs defendant's "purely malicious motive").

36. Compare *Calbom v. Knudtzon*, 65 Wash. 2d 157, 396 P.2d 148 (1964) (defendant bears burden of proof on justification) with *Rickel v. Schwinn Bicycle Co.*, 144 Cal. App. 3d 648, 192 Cal. Rptr. 732 (1983) (plaintiff bears burden of proof); compare *Donovan Constr. Co. v. General Elec. Co.*, 133 F. Supp. 870 (D. Minn. 1955) (interference must be intentional) with *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979) (recovery allowable for negligent interference); compare *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636 (E.D. Wis. 1977) (manner of interference must be independently unlawful) with *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 144 Cal. Rptr. 664 (1978) (action for interference with prospective economic advantage may lie even if the means used by defendant were entirely lawful).

37. In *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982), the Utah Supreme Court modified the elements necessary to state an interference cause of action. Similarly, the Oregon Supreme Court recently reconsidered the elements of tortious interference with a prospective economic advantage in *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365 (1978).

38. For a brief historical review, see W. PROSSER & W. KEETON, *supra* note 23, at 979-82 and authorities cited therein.

39. See *infra* notes 42-127 and accompanying text.

40. See *infra* notes 128-39 and accompanying text.

41. See *infra* notes 140-49 and accompanying text.

42. See *Estes, Expanding Horizons in the Law of Torts—Tortious Interference*, 23 *DRAKE L. REV.* 341, 343 (1974) (setting forth a similar formulation of the elements of the tort).

The last two elements, however, are not as easy to establish: the plaintiff must prove that the offer would have succeeded absent the interference—and that the interference *caused* the lost expectancy—and must establish damages. Furthermore, other issues central to the interference tort generally must be resolved: Is proof of malice a necessary element of a plaintiff's case? What justifications or defenses are available to the defendant? Must the manner of interference be independently wrongful?

A. Plaintiff's Expectancy and Causation

In each of the hypotheticals, a plaintiff's success arguably will depend on his ability to prove that the bid would have succeeded. The plaintiff, however, should not be required to prove with certainty that the offer would have been successful; rather, he should have to demonstrate only a *reasonable probability* that, but for the defendant's interference, the offer would have been successful and the plaintiff's expectancy would have been realized.⁴³ When a defendant's conduct is particularly objectionable, the plaintiff should be excused from proving even a reasonable probability.⁴⁴

The reasonable probability standard may be difficult to apply when the interference occurs before the offer is formally made⁴⁵ or after the offer is made but before the minimum number of shares that the bidder is seeking have been tendered.⁴⁶ This standard developed largely from simple cases, such as those in which the defendant interfered with the plaintiff's negotiations with a third party,⁴⁷ who then can attest to the likelihood of the plaintiff's success. No similar testimony is available in the context of a tender offer.

In *Professional Investors Life Insurance Co. v. Roussel*⁴⁸ the United States District Court for the District of Kansas granted defendant's motion for summary judgment on an interference claim because plaintiff, who was planning a hostile offer, did not demonstrate the requisite business relationship with the target stockholders. Plaintiff had not made its offer and, therefore, did not have "sufficient expectation of future stock purchases to support a claim of a prospective business advantage."⁴⁹ This case suggests that when the plaintiff is a bidder, it at least must make its offer to satisfy this element of the tort.⁵⁰

43. *Tose v. First Pa. Bank, N.A.*, 648 F.2d 879, 898 (3d Cir.), cert. denied, 454 U.S. 893 (1981) (applying Pennsylvania law); *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 208, 412 A.2d 466, 471 (1979); *Cooper v. Steen*, 318 S.W.2d 750 (Tex. Civ. App. 1958); see also *Estes*, supra note 42, at 346 (proof of ultimate outcome of claimant's business relationship, in absence of interference, need only rise to level of "reasonable assurance or probability," not absolute certainty).

44. See *infra* notes 58-60 and accompanying text.

45. See, e.g., *Panther v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); *Lewis v. McGraw*, 619 F.2d 192 (2d Cir.), cert. denied, 499 U.S. 951 (1980); *Professional Investors Life Ins. Co. v. Roussel*, 528 F. Supp. 391 (D. Kan. 1981).

46. See, e.g., *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977).

47. E.g., *Cooper v. Steen*, 318 S.W.2d 750 (Tex. Civ. App. 1958).

48. 528 F. Supp. 391 (D. Kan. 1981).

49. *Id.* at 399.

50. In *Panther v. Marshall Field & Co.*, 646 F.2d 271, 283-85 (7th Cir.), cert. denied, 454 U.S. 1092 (1981), however, an expectancy was found when Carter Hawley Hale (CHH) approached the board of Marshall Field & Co. (Field) in December 1977, proposed a friendly merger, and on Febru-

Even when the offer is made, however, the plaintiff must satisfy the difficult burden of demonstrating that the offer would or might have succeeded. In its 1973 decision in *Chris-Craft Industries v. Piper Aircraft Corp.*⁵¹ the United States Court of Appeals for the Second Circuit⁵² recognized a private damage action under section 14(e) of the Exchange Act on behalf of a defeated tender offeror. Although this aspect of the decision eventually was reversed by the Supreme Court,⁵³ the appellate court's views on causation remain instructive.

Chris-Craft complained that the Piper family (target management), Bangor Punta (a rival bidder), and First Boston Corporation (Piper's investment banker) all violated section 14(e) of the Exchange Act by making various misrepresentations to the Piper shareholders that caused them to reject Chris-Craft's bid and accept Bangor Punta's offer. The court of appeals determined that all three defendants violated section 14(e), but agreed with the district court's findings that Chris-Craft "failed to show with reasonable certainty that it would have obtained a controlling position in Piper had it not been for the violations of the securities laws"⁵⁴ Nevertheless, the court went on to hold in effect that Chris-Craft did not have to meet a reasonable certainty test. Rather, because of the practical difficulties that Chris-Craft would face in proving that the individual Piper shareholders relied on defendants' misrepresentations, Chris-Craft only needed to prove constructive reliance—if the misrepresentations were material and the solicitations that contained the misrepresentations were a substantial factor in the outcome of the contest, reliance would be presumed.⁵⁵ Because this test was satisfied, the court of appeals simply presumed that the Piper shareholders would not have accepted the Bangor Punta offer *but for* its misrepresentations.

ary 1, 1978, publicly announced CHH's intention to make an exchange offer, subject to certain conditions, for Field's stock. Following this announcement, Field made a "defensive acquisition" that would pose antitrust problems for CHH if its offer were successful. On February 22, 1978, CHH announced the withdrawal of its proposed offer because "the expansion program announced by Marshall Field since February 1st has created sufficient doubt about Marshall Field's earning potential to make the offer no longer in the best interests of Carter Hawley Hale's shareholders." *Id.* at 281 (quoting CHH press release dated Feb. 22, 1978). The shareholders' suit alleged, among other things, that the Field directors tortiously interfered with their prospective economic advantage. The appellate court affirmed the trial court's directed verdict for defendants on the interference claim, agreeing that plaintiffs had failed to demonstrate that defendants' behavior was improper or that they acted with malice. *Id.* at 298-99. Neither court, however, based its decision on plaintiffs' failure to prove causation. It is possible that the courts chose not to cite this reason for the directed verdict because other more convincing grounds existed. It also is possible to argue, however, that the plaintiff should be excused from proving causation when the defendant's conduct is particularly egregious. See *infra* notes 58-60 and accompanying text.

51. 480 F.2d 341 (2d Cir. 1973), *rev'd*, 430 U.S. 1 (1977).

52. This decision was the second of three decisions that the United States Court of Appeals for the Second Circuit rendered in this litigation. The other two were *Chris-Craft Indus. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970), and *Chris-Craft Indus. v. Piper Aircraft Corp.*, 516 F.2d 172 (2d Cir. 1975), *rev'd*, 430 U.S. 1 (1977).

53. *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 42 (1977).

54. *Chris-Craft*, 480 F.2d at 373.

55. *Id.* at 373-77. The appellate court employed principles announced by the Supreme Court in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). *Mills* involved nondisclosure in a proxy solicitation and *Affiliated Ute* involved nondisclosure in a purchase of securities. In each case, the Court established presumptions of reliance "to avoid an overly difficult burden of proof." *Chris-Craft*, 480 F.2d at 374.

This aspect of the decision, of course, did not involve the interference tort, but instead involved an interpretation of section 14(e). The court stated that it was giving an expansive reading to section 14(e) to implement the legislative purpose of the section—the protection of investors.⁵⁶ Because the interference tort is intended to ensure fair competition,⁵⁷ the court's approach could be applied similarly to assist tort plaintiffs in establishing causation. A plaintiff whose reasonable economic expectancies are interfered with unfairly should not be deprived of relief merely because it is difficult to prove with some degree of certainty that the defendant's conduct precluded realization of the expectancy. Unless the plaintiff is excused from meeting such a heavy burden, the defendant would benefit, without risk of liability, from its own wrongdoing.⁵⁸ The presumption of causation articulated in *Chris-Craft*, which arises when the defendant's unlawful conduct is significant in relation to the transaction, is an appropriate presumption in tortious interference cases.

A similar presumption is used by the courts in labor law. If an employer has committed unfair labor practices that had "the tendency to undermine majority strength and impede the election processes,"⁵⁹ a court may circumvent the employee elections process and order the employer to bargain with the union. The complaining union in such a case is not required to prove that it would have won the election; it merely must demonstrate that the employer's conduct tainted the election process.⁶⁰ A bargaining order issued on such a showing both remedies the damage to the process and deters future misconduct.⁶¹ Detering misconduct, of course, means that a competing interest is sacrificed—here, the employer's and employees' rights to an election are lost. Similarly, if the presence of egregious interference with a tender offer obviates the necessity of proving causation, another competing interest is sacrificed—a defendant may be held accountable for damages even though there is some doubt that its conduct caused the loss. The deterrent effect, however, justifies this result.

B. Damages

The measurement of damages from tortious interference also has varied widely;⁶² in fact, the difficulty of measuring damages may account, in part, for

56. *Chris-Craft*, 480 F.2d at 361.

57. See W. PROSSER & W. KEETON, *supra* note 23, at 956 ("Though trade war may be waged ruthlessly to the bitter end, there are certain rules of conduct which must be observed.").

58. Few legal principles are established more firmly than that one should not benefit from his own wrongdoing. See *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329, 331 (Me. 1978).

59. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969); see Comment, *Employer Knowledge of Union Strength as a Basis for Bargaining Orders in the Absence of Unfair Labor Practices or Elections*, 1971 U. ILL. L.F. 731.

60. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969).

61. Other rules, such as the exclusionary rule in criminal proceedings, also are analogous. When the exclusionary rule is applied, probative evidence is made unavailable to the fact finder. Thus, the courts must choose between two competing interests, one of which is deterring misconduct.

62. RESTATEMENT (SECOND) OF TORTS § 774A (1965) sets forth the measure of damages for interference with contract and interference with prospective contractual relations without distinguishing between the two. The cases cited *infra* notes 63-65 similarly do not draw a distinction. See

the small number of interference cases brought. Some courts, measuring damages in a manner similar to that used in a breach of contract action, have limited plaintiffs' recoveries to the benefit of their lost bargains.⁶³ Other courts, emphasizing that tortious interference is an intentional tort, have held that plaintiffs are entitled to recover all damages resulting from the interference.⁶⁴ Still other courts have limited damages to those proximate to the injury about which complaint is made, as in negligence actions.⁶⁵ Punitive damages also have been awarded in appropriate cases.⁶⁶

These various standards can be applied easily in a garden variety interference case. Suppose a real estate broker loses a commission because the defendant interfered with a prospective sale. The amount of the lost commission generally is a good approximation of damages,⁶⁷ punitive damages may be added. When the interference causes a multimillion dollar tender offer to fail, however, the traditional measures of damages suddenly become inadequate. Nevertheless, in such difficult cases a reasonable damage formula or other appropriate relief often can be suggested.

If the defeated bidder is left holding a substantial block of the target's stock at the end of the contest, and the value of that stock has declined because the shares were purchased at a premium, the defeated bidder may base recovery on the diminished value of the shares. Essentially, Chris-Craft faced this situation after its unsuccessful bid for Piper Aircraft. When the dust settled after that contest, Chris-Craft held 697,495 shares, or approximately forty-two percent of the outstanding Piper shares. Bangor Punta, the successful bidder, acquired 839,306 shares, or approximately fifty-one percent. Chris-Craft paid an average of \$63.98 per share, which was a substantial premium above the market price. The economic justification for a premium—that the shares would become "control shares"—was lost when Bangor Punta prevailed.

In Chris-Craft's section 14(e) claim, the court of appeals held that Chris-Craft's block of shares should be revalued on the basis of what it would bring in a public offering.⁶⁸ Expert testimony indicated that the earliest time a public

generally W. PROSSER & W. KEETON, *supra* note 23, at 1002-04 (discussing various measures of damages in cases involving interference with contract).

63. *E.g.*, Baker v. Dennis Brown Realty, Inc., 121 N.H. 640, 433 A.2d 1271 (1981); Leibovitz v. Central Nat'l Bank, 75 Ohio App. 25, 60 N.E.2d 727 (1944); Island Air, Inc. v. LaBar, 18 Wash. App. 129, 566 P.2d 972 (1977); *see also* Estes, *supra* note 42, at 352-53 ("[T]he courts have applied differing measures where the action is based upon inducing breach of contract. One line of authorities holds that a contract measure should be used . . .").

64. *E.g.*, Rite Aid Corp. v. Lake Shore Inc., 298 Md. 611, 618-22, 471 A.2d 735, 739-40 (1984); *see* RESTATEMENT (SECOND) OF TORTS § 774A (1965).

65. *E.g.*, Cherberg v. Peoples Nat'l Bank, 88 Wash. 2d 595, 564 P.2d 1137 (1977).

66. *E.g.*, Manufacturing Research Corp. v. Greenlee Tool Co., 693 F.2d 1037 (11th Cir. 1982); Nodak Oil Co. v. Mobil Oil Co., 533 F.2d 401 (8th Cir. 1976); Bolz v. Myers, 651 P.2d 606 (Mont. 1982); *see also* Estes, *supra* note 42, at 353 ("Punitive or exemplary damages can be recovered in an action for tortious interference just as in any other intentional tort situation."). In *Nappe v. Anschelwitz, Barr, Ansell & Bonello*, 97 N.J. 37, 477 A.2d 1224 (1984), the court held that awarding compensatory damages was not prerequisite to awarding punitive damages for an intentional tort.

67. *Leslie Blau Co. v. Alfieri*, 157 N.J. Super. 173, 384 A.2d 859 (App. Div. 1978).

68. *Chris-Craft Indus. v. Piper Aircraft Corp.*, 516 F.2d 172, 185-90 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1 (1977).

offering could have been held after the contest ended was some three months later, at which time the public offering price was approximately \$27.00 per share.⁶⁹ The court accepted this testimony and fixed damages at \$36.98 per share (the difference between \$63.98 and \$27.00), a total of \$25,793,365 for Chris-Craft's block of 697,495 shares.⁷⁰

Although *Chris-Craft* involved section 14(e) of the Exchange Act and ultimately was reversed when the Supreme Court held that Chris-Craft did not have standing to maintain a private damage action under section 14(e),⁷¹ the appellate court's method of calculating damages could be applied in tort cases. The court awarded Chris-Craft the damages that resulted proximately from the interference; it avoided any inquiry into what Chris-Craft lost by not gaining control. Such an inquiry would have required "valuing the hypothetical premium that [Chris-Craft's] holdings would have commanded from a hypothetical buyer in a hypothetical sale,"⁷² a calculation that the court recognized was "'well-nigh an impossible task.'" ⁷³

The *Chris-Craft* court was able to avoid that nearly impossible task because it had a suitable alternative. That alternative disappears when, as a result of an unlawful interference, the bidder withdraws from the contest without holding any or holding only a small number of shares of the target.⁷⁴ In those instances, a defeated bidder may argue that its damages are equal to the difference between the price at which it could have acquired the target and the value to it of owning the target. Such a measure of damages, however, is so speculative that most courts probably would reject it.

When the defeated bidder does not seek compensatory damages for a direct loss to its stock holdings, relief may be unavailable unless the interference enabled another bidder to attain control.⁷⁵ In that case, a constructive trust for the benefit of the injured bidder could be placed on the stock holdings of the successful bidder.⁷⁶ If the successful bidder itself did not act tortiously vis-à-vis the

69. *Id.* at 189.

70. *Id.* at 190.

71. *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977).

72. *Chris-Craft Indus. v. Piper Aircraft Corp.*, 516 F.2d 172, 184-85 (2d Cir. 1975), *rev'd on other grounds*, 430 U.S. 1 (1977).

73. *Id.* at 185 (quoting *Chris-Craft Indus. v. Piper Aircraft Corp.*, 384 F. Supp. 507, 514 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 516 F.2d 172 (1975), *rev'd*, 430 U.S. 1 (1977)).

74. *See, e.g., Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Lewis v. McGraw*, 619 F.2d 192 (2d Cir. 1980).

75. *But see Nappe v. Anshelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 477 A.2d 1224 (1984) (awarding compensatory damages not prerequisite to awarding punitive damages for intentional tort).

76. The courts have imposed constructive trusts on property in tortious interference cases. A typical example is *Scymanski v. Dufault*, 80 Wash. 2d 77, 491 P.2d 1050 (1971):

We have here a defendant who has intentionally interfered with another's business relationship and as a result of such interference has acquired the property that was the subject of that relationship. A constructive trust for the benefit of Scymanski during the period of improper retention, and a final transfer of the property for the price originally agreed upon, is the appropriate remedy.

Id. at 88, 491 P.2d at 1057; *see Bobbs-Merrill Co. v. Straus*, 147 F.2d 15 (2d Cir. 1906), *aff'd*, 210 U.S. 339 (1908); *Estes, supra* note 42, at 357.

plaintiff, but target management did, a constructive trust still might be imposed if it can be proved that the successful bidder aided and abetted or otherwise participated in management's tortious conduct.⁷⁷

When target security holders are the complaining parties, as in the third hypothetical, computing damages should be less complicated. A reasonable measure of damages might be the difference between the tender offer price and the market value of the securities within a reasonable time after the tortious interference occurred. This measure would recapture the premium lost by the plaintiffs. Alternatively, the plaintiffs could allege that the interference unlawfully deterred them from selling their securities in the market, with the measure of damages being the difference between some average market price during the tender offer and a post-interference price.⁷⁸

C. Malice

Opinions analyzing the interference tort commonly discuss malice, both what it is and whether the plaintiff must prove it. Most jurisdictions that have decided the issue have held that proof of malice is an element of the plaintiff's case.⁷⁹ There are, however, at least three different definitions of malice: acting with spite or ill will (sometimes called "actual malice");⁸⁰ seeking to harm the plaintiff;⁸¹ and acting without justification or excuse (sometimes called "legal malice").⁸² These three definitions, though not exhaustive, include nearly all the cases.⁸³

In those jurisdictions that require proof of actual malice, a plaintiff faces a serious obstacle in all three hypotheticals. The party seeking to defeat a tender offer usually will be motivated by factors other than ill will. Even if ill will motivates the defendant in part, other motivations are likely to predominate; the

77. *Cf. Illinois Rockford Corp. v. Kulp*, 41 Ill. 215, 242 N.E.2d 228 (1968) (buyer of corporate stock found jointly and severally liable with a shareholder-seller of stock for aiding and abetting the breach by that shareholder-seller of his fiduciary duties to plaintiff).

78. This difference was an alternative theory of damages alleged in *Panther v. Marshall Field & Co.*, 464 F.2d 271, 283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

79. *See W. PROSSER & W. KEETON, supra* note 23, at 979 (It is sufficient for liability to show intentional interference, which has caused harm, for an improper purpose.).

80. *E.g., Gasbarro v. Lever Bros. Co.*, 490 F.2d 424 (7th Cir. 1973) (Illinois law); *Phillips Chem. Co. v. Hulbert*, 301 F.2d 747 (5th Cir. 1962) (Texas law); *Bendix Corp. v. Adams*, 610 P.2d 24 (Alaska 1980) (to prove interference, person's conduct must be motivated by malice or ill will); *Anderson v. Dairyland Ins. Co.*, 97 N.M. 155, 637 P.2d 837 (1981) (must show that motive was personal vengeance or spite).

81. *E.g., Hammerhead Enters. v. Brezenoff*, 551 F. Supp. 1360 (S.D.N.Y. 1982) (New York law), *aff'd*, 707 F.2d 33 (2d Cir.), *cert. denied*, 104 S. Ct. 237 (1983); *Techno Corp. v. Dahl Assocs.*, 535 F. Supp. 303 (W.D. Pa. 1982) (Pennsylvania law); *North Carolina Mut. Life Ins. Co. v. Plymouth Mut. Life Ins. Co.*, 266 F. Supp. 231 (E.D. Pa. 1967) (Pennsylvania law); *Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc.*, 604 P.2d 1090 (Alaska 1979); *Barr v. Essex Trades Council*, 53 N.J. Eq. 101, 30 A. 881 (N.J. Ch. 1894).

82. *E.g., Hayes v. Irwin*, 541 F. Supp. 397 (N.D. Ga. 1982) (Georgia law), *aff'd*, 729 F.2d 1466 (11th Cir. 1984); *Chanay v. Chittenden*, 115 Ariz. 32, 563 P.2d 287 (1977); *Heavener, Ogier Servs. v. R.W. Fla. Region, Inc.*, 418 So. 2d 1074 (Fla. Dist. Ct. App. 1982); *Louis Kamm, Inc. v. Flink*, 113 N.J.L. 582, 175 A. 62 (N.J. 1934).

83. *See Lewis, Should the Motive of the Defendant Affect the Question of His Liability?*, 5 COLUM. L. REV. 107 (1905).

predominant motive usually is considered the crucial one.⁸⁴ Few jurisdictions, however, require the plaintiff to prove that the defendant acted with actual malice.⁸⁵

In those jurisdictions that require the plaintiff to prove that the defendant sought to harm the plaintiff, an action usually should be maintainable. The rival bidder in the first situation and the target management in the second and third situations act to defeat the plaintiff's bid. In each case, the defendants know that harm to the putative plaintiffs is a necessary consequence of their behavior; thus, this type of malice generally is proved easily.

The definition of malice applied most commonly by courts is that which requires the defendant to have acted without justification or excuse. This definition of malice may require the plaintiff to negate the defendant's possible defenses. On the other hand, some jurisdictions have eliminated malice as an element of the plaintiff's case because they view a justification or excuse as an affirmative defense to be pled and proved by the defendant.⁸⁶ A middle ground, however, also exists: the plaintiff could be required to negate only those justifications or excuses that the defendant alleged in its answer.⁸⁷

D. Defenses and Nature of Conduct

The courts have recognized several defenses to the interference tort. In the context of post-tender offer litigation, the most important defenses (or "privileges" or "justifications") are the following:

1. One is privileged to interfere with another's business in the course of economic competition;⁸⁸
2. One who is responsible for the welfare of a third person is privileged to give honest advice to that person not to enter into or continue business relations with another and, subject to certain limitations, intentionally cause that person not to perform a contract or enter into a prospective contractual relation;⁸⁹ and

84. *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 307 (Utah 1982). The courts often state that the plaintiff must prove the defendant "acted solely out of malice." *Hammerhead Enters. v. Brezenhoff*, 551 F. Supp. 1360, 1369 (S.D.N.Y. 1982); *cf.* *North Carolina Mut. Life Ins. Co. v. Plymouth Mut. Life Ins. Co.*, 266 F. Supp. 231, 234 (E.D. Pa. 1967) (Breach of contract can give rise to claim for intentional interference with prospective advantage if defendant's underlying motive is "purely malevolent, a desire to do harm to the plaintiff for its own sake . . .").

85. *Estes*, *supra* note 42, at 343.

86. *Id.*

87. *Cf.* *Gasbarro v. Lever Bros.*, 490 F.2d 424 (7th Cir. 1973) (defendant's privilege of protecting interests of its employees was conditional and would be defeated by proof of actual malice); *see also infra* note 125 (cases cited).

88. *Memorial Gardens, Inc. v. Olympian Sales & Management*, 661 P.2d 296 (Colo. Ct. App. 1982); *Neel v. Allegheny County Memorial Park*, 391 Pa. 354, 137 A.2d 785 (1958); *Island Air, Inc. v. LeBar*, 18 Wash. App. 129, 566 P.2d 972 (1977); *see* RESTATEMENT (SECOND) OF TORTS § 768 (1965); *cf.* *Heavener, Ogier Servs. v. R.W. Fla. Region, Inc.*, 418 So. 2d 1074 (Fla. Dist. Ct. App. 1982) (purely malicious motive may destroy the competitor's privilege).

89. *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Menefee v. CBS*, 458 Pa. 46, 329 A.2d 216 (1974); *Calbom v. Knudtson*, 65 Wash. 2d 157, 396 P.2d 148 (1964); *see* RESTATEMENT (SECOND) OF TORTS §§ 770, 772 (1965).

3. One is privileged to interfere with the expectancies of another to protect his own contractual relations or financial interests.⁹⁰

The relevance of these defenses in post-tender offer litigation is immediately apparent. In the first hypothetical, the defendant bidder would argue the defense of competition. In the second and third hypotheticals, target management might argue its right, indeed its obligation, to protect the welfare of its company and shareholders (the second defense) and, possibly, its right to protect its own economic interests (the third defense). The first two defenses pose difficult legal issues. The third, however, does not—protecting one's own financial interest should not be a defense available to the target directors. Although directors *qua* directors have a financial stake in their company, the directors' duty to protect the best interests of the shareholders must prevail over the directors' own financial interests.⁹¹

The first two defenses are arguably more valid: after one offer, the law should not discourage an offer by another prospective bidder or the solicitation by target management of an offer from a so-called "white knight." If a white knight defeats the first bid not by a higher bid, but rather by making false and misleading statements about the first bidder in violation of the federal securities laws, however, the white knight has acted tortiously and should be held accountable for damages.⁹² Thus, when a justification for the interference exists, tortious interference can be distinguished from nontortious interference only through an analysis of the *manner* of the interfering conduct.⁹³

90. *Hamro v. Shell Oil Co.*, 674 F.2d 784 (9th Cir. 1982) (California law); *Gasbarro v. Lever Bros.*, 490 F.2d 424 (7th Cir. 1973) (Illinois law); *McReynolds v. Short*, 115 Ariz. 166, 564 P.2d 389 (Ariz. Ct. App. 1977); see RESTATEMENT (SECOND) OF TORTS § 769 (1965).

91. Section 35 of the Model Business Corporation Act provides: "A director shall perform his duties as a director . . . in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinary prudent person in a like position would use under similar circumstances." MODEL BUSINESS CORP. ACT § 35 (1979); see *Bennett v. Propp*, 41 Del. Ch. 14, 187 A.2d 405 (1962) (director may not use corporate funds to maintain himself in office); H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 625-28 (3d ed. 1983).

92. This situation occurred in *Piper v. Chris-Craft Indus.*, 430 U.S. 1 (1977).

93. Modern authority seems to require that the means of interference be wrongful even if the defendant cannot cite a justification for the interference. *E.g.*, *A & K R.R. Materials, Inc. v. Green Bay & W.R.R.*, 437 F. Supp. 636 (E.D. Wis. 1977). Two recent law review articles have argued persuasively for that conclusion. See *Dobbs, Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335 (1980); *Pearlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982). Nevertheless, by one writer's count, proof of predatory or unlawful means is not required in a majority of jurisdictions. *Estes, supra* note 42, at 349. Even in those jurisdictions that require the interfering conduct to be independently wrongful, however, the courts still must determine what kind of conduct is sufficiently objectionable to be wrongful. Must the defendant's conduct be independently tortious, or is this element of the tort satisfied if the defendant merely acted unfairly in relation to the plaintiff? If something less than an independent tort is sufficient, how much less will do?

The courts that have insisted on independently wrongful conduct are not uniform in what constitutes such conduct; some require proof of conduct that might be tortious aside from the interference, *Belden Corp. v. InterNorth, Inc.*, 90 Ill. App. 3d 547, 413 N.E.2d 98 (1980) (fraud, disparagement, or intimidation), while others will accept something less, *Adler, Barish, Daniels, Levin, & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978) (conduct that violates the Code of Professional Responsibility), *cert. denied*, 442 U.S. 907 (1979). When the defendant's conduct is privileged (for example, by competition), the court examines the manner of interference to determine if the privilege has been abused. *Techno Corp. v. Dahl Assocs.*, 535 F. Supp. 303 (W.D. Pa. 1982). Presumably, a defendant's behavior may be sufficiently wrongful to allow the plaintiff to state a

The cases have announced a variety of standards for identifying an impermissible manner of interference. At one end of the spectrum are cases such as *Belden Corp. v. InterNorth, Inc.*,⁹⁴ in which the Illinois Court of Appeals vacated an order enjoining InterNorth from proceeding with a tender offer for Crouse-Hinds, Inc. Plaintiff Belden alleged that InterNorth's offer would affect adversely Belden's proposed merger with Crouse-Hinds and that, therefore, InterNorth was interfering with Belden's prospective advantage. In vacating the preliminary injunction, the court of appeals stated that, "Belden cannot meet the requirements for interference with prospective advantage unless it makes a showing of unfair competition on the part of InterNorth. . . . Unfair competition, which is not privileged, includes *fraud, intimidation, or disparagement.*"⁹⁵ The result in this case undoubtedly was correct. Belden did not act wrongfully; it simply made a tender offer. If the language is read literally, however, the opinion would place a significant burden of proof on a plaintiff and permit extensive nonactionable interference.

An interesting contrast to *Belden*, at least in terms of judicial language defining actionable conduct, is the decision by the United States Court of Appeals for the Seventh Circuit in *Panter v. Marshall Field & Co.*⁹⁶ This case, like *Belden*, arose out of a hostile takeover attempt; the court also looked to Illinois law to define the interference tort. The *Panter* court quoted from a 1973 decision of the Illinois appellate court:

"The theory of the tort of interference, it is said, is that the law draws a line beyond which no member of the community may go in intentionally intermeddling with the business affairs of others; that if acts of which complaint is made do not rest on some legitimate interest, or if there is sharp dealing or overreaching or other conduct below the behavior of fair men similarly situated, the ensuing loss should be redressed; and that line of demarcation between permissible behavior and interference reflects the ethical standards of the community."⁹⁷

Although the *Panter* court affirmed the lower court finding that defendants did not engage in improper behavior, the standard it recognized was far different from that in *Belden*. Under this commonly adopted standard, the courts act almost as referees at a sporting event, calling "foul" when a defendant's conduct exceeds some standard of fair play.⁹⁸

prima facie case but not too wrongful to defeat the defendant's privilege. It is difficult to articulate and identify the type of conduct that falls between those extremes.

94. 90 Ill. App. 3d 547, 413 N.E.2d 98 (1980).

95. *Id.* at 553, 413 N.E.2d at 103 (emphasis added).

96. 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981).

97. *Id.* at 298 (quoting *City of Rock Falls v. Chicago Title & Trust Co.*, 13 Ill. App. 3d 359, 362-63, 300 N.E.2d 331, 333 (1973)).

98. *Insurance Field Servs. v. White & White Inspection & Audit Serv.*, 384 So. 2d 303, 307 (Fla. Dist. Ct. App. 1980) ("the ultimate inquiry is whether the interference by the defendant is 'sanctioned by the rules of the game'"); *Grillo v. Board of Realtors*, 91 N.J. Super. 202, 226, 219 A.2d 635, 649 (N.J. Ch. 1966); cf. *Techno Corp. v. Dahl Assocs.*, 535 F. Supp. 303 (W.D. Pa. 1982) (use of confidential information by defendants is wrongful and bars them from asserting the competitor's privilege); *Jewelcor, Inc. v. Pearlman*, 397 F. Supp. 221 (S.D.N.Y. 1975) (target unlawfully interfered with tender offeror's banking relations by seeking to discredit offeror to its banks).

This more flexible standard poses some interesting possibilities in post-tender offer litigation. In terms of the hypotheticals posed above, the first situation would appear to include the element of wrongful interference. Violating the federal securities laws presumably is conduct "below the behavior of fair men similarly situated," even if the plaintiff was not in the class of persons intended to be protected by the securities laws. In *Piper v. Chris-Craft Industries*⁹⁹ the Supreme Court observed that defendants' violations of certain provisions of the Exchange Act could form the basis of a state action for interference with prospective commercial advantage, even though the violated provisions were not enacted to protect plaintiff, a defeated tender offeror.¹⁰⁰

The second and third hypotheticals raise a different question: whether behavior that is lawful under the federal securities laws nevertheless can form the basis for a state tort action. The broad range of defensive maneuvers used by target management has been criticized extensively. In addition to soliciting higher bids, target boards have relied on the following defensive tactics: granting options to white knights, effectively precluding a successful tender offer by a hostile bidder and assuring victory for the white knight (a "lock-up" defense);¹⁰¹ awarding management lucrative severance benefits in the event of a change of control ("golden parachutes") to make the target less attractive to a bidder;¹⁰² acquiring companies to create antitrust problems for the bidder (the "antitrust block");¹⁰³ and approving stock dividends that change the capital structure of the target company and make it unattractive to the bidder (the "poison pill" defense).¹⁰⁴ In each of these and many other instances¹⁰⁵ of aggressive defensive maneuvers the question may be asked, "Is this conduct below the behavior of fair men similarly situated?" If so, an additional question is raised: Is there some policy reason that nevertheless should permit such behavior?

A strong argument can be made that these defensive maneuvers fall below some acceptable level of behavior and, therefore, should subject the board of directors of the target company to liability.¹⁰⁶ The *Panter* court, however, judged the propriety of the target board's response to a hostile tender offer by the business judgment rule, which protects corporate directors from liability to

99. 430 U.S. 1 (1977).

100. *Id.* at 40-41.

101. *E.g.*, *Data Probe Acquisition Corp. v. Datab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984); *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981).

102. *E.g.*, *Schreiber v. Burlington N., Inc.*, 731 F.2d 163 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 81 (1984).

103. *E.g.*, *Panter v. Marshall Field & Co.*, 646 F.2d 271 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

104. *National Educ. Corp. v. Bell & Howell Co.*, No. 7278 (Del. Ch. Aug. 25, 1983) (order denying preliminary injunction); *see* *Legal Times*, Aug. 29, 1983, at 1, col. 2 (description of the defense); *infra* note 123. For a defense of the poison pill tactic, *see* Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 HARV. L. REV. 1964 (1984). The Delaware Court of Chancery recently sustained use of the poison pill defense. *Moran v. Household Int'l, Inc.*, ___ A.2d ___ (Del. Ch. Jan. 29, 1985), *noted in* 17 SEC. REG. & L. REP. (BNA) 219.

105. *See infra* note 120. *See generally* SEC Advisory Committee on Tender Offers Report of Recommendations, FED. SEC. L. REP. (CCH) Special Report, No. 1028 (July 15, 1983), at 36-46 (reviewing various defensive tactics and their policy ramifications).

106. *See* cases cited *supra* note 97.

their shareholders for business decisions made in good faith.¹⁰⁷ The *Panter* court, quoting from a Delaware decision, framed the test as follows:

“[N]ot every action taken by a board of directors to thwart a tender offer is to be condemned. The test, loosely stated, is whether the board is fairly and reasonably exercising its business judgment to protect the corporation and its shareholders against injury likely to befall the corporation should the tender offer prove successful.”¹⁰⁸

A review of the case law reveals that if director action is judged by the business judgment rule, it will not be held unlawful.¹⁰⁹ Courts generally are very reluctant to second-guess business decisions made by directors.¹¹⁰

Thus, the real issue is whether the business judgment rule ought to be applied in these circumstances. The argument against application of the rule starts with this well-recognized premise: if the directors are acting on a matter in which they have a conflict of interest, the courts should scrutinize their actions.¹¹¹ In many cases target directors are motivated at least in part by a desire to retain their directorships and other positions with the corporation and thus arguably have a conflict of interest.¹¹² A 1980 decision by the United States Court of Appeals for the Third Circuit, however, rejected such an approach, holding that to avoid the presumptions of the business judgment rule, the plaintiff “at a minimum . . . must make a showing that the *sole or primary* motive of the defendant [director] was to retain control.”¹¹³ With the sophisticated advice that target management receives in contested takeover battles, only in rare cases can such a showing be made.¹¹⁴

107. *Auerbach v. Bennett*, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979); see W. CARY & M. EISENBERG, *CORPORATIONS* 537-53 (5th ed. 1980), and sources cited therein.

108. 646 F.2d at 294 (quoting *GM Sub Corp. v. Liggett Group, Inc.*, No. 6155, slip. op. at 3 (Del. Ch. Apr. 25, 1980)).

109. For a review of several recent decisions, see Lipton, *Takeover Bids in the Target's Boardroom: An Update After One Year*, 36 BUS. LAW. 1017 (1981).

110. *E.g.*, *Panter v. Marshall Field & Co.*, 646 F.2d 271, 301 (7th Cir.) (Cudahy, J., dissenting), cert. denied, 454 U.S. 1092 (1981); *Treadway Cos. v. Care Corp.*, 638 F.2d 357, 380 (2d Cir. 1980); *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (1964); *Auerbach v. Bennett*, 42 N.Y.2d 619, 630-31, 393 N.E.2d 994, 1000, 419 N.Y.S.2d 920, 926-27 (1979). See generally H. HENN & J. ALEXANDER, *supra* note 90, at 661-63 (describing the “business judgment” rule).

111. Under modern authority, if the directors authorize a transaction in which they have a personal interest, the transaction is voidable by the corporation unless the directors prove that the transaction was fair to the corporation. Thus, the presence of a conflicting interest removes the favorable presumption of the business judgment rule and shifts the burden of sustaining the transaction to the directors. See H. HENN & J. ALEXANDER, *supra* note 90, at 637-44.

112. *Panter*, 646 F.2d at 300-01 (Cudahy, J., dissenting); *Crane Co. v. Harsco Corp.*, 511 F. Supp. 294, 305 (D. Del. 1981) (“in the context of a tender offer, the directors have an inherent conflict of interest”); *Northwest Indus. v. B.F. Goodrich, Co.*, 301 F. Supp. 706, 712 (N.D. Ill. 1969).

113. *Johnson v. Trueblood*, 629 F.2d 287, 293 (3d Cir.) (emphasis added), vacated on other grounds, 629 F.2d 302 (3d Cir. 1980) (per curiam), cert. denied, 450 U.S. 999 (1981).

114. See Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 120-31 (1979), in which the author sets forth detailed advice for directors to defeat a hostile tender offer and preserve their business judgment defense. See also E. ARANOW, H. EINHORN & G. BERLSTEIN, *DEVELOPMENTS IN TENDER OFFERS FOR CORPORATE CONTROL* 193-206 (1977); 1 A. FLEISCHER, *TENDER OFFERS: DEFENSES, RESPONSES AND PLANNING* (2d ed. 1983). But see *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255 (2d Cir. 1984) (showing of board's self-interest made when stock transferred to subsidiary and to stock option plan was to be approved by vote of board of parent, members of

Several commentators¹¹⁵ and some judges¹¹⁶ have criticized the current application of the business judgment rule in takeover contests; some even have suggested that the proper response of target management is no response.¹¹⁷ Such criticism has prompted recent proposals to amend the Exchange Act to limit certain defensive maneuvers available to target management.¹¹⁸ The proposed legislation, however, does not address all the abuses, nor can it anticipate new tactics that may be devised. Unless the rule is abandoned or limited in some way in suits involving tender offers, disgruntled shareholders bringing a tort action in the third hypothetical would not succeed. This result, however, is unjust; although target management should be free to seek a better offer or persuade the shareholders not to accept the offer, the benefits of any further interference by management do not outweigh the losses that the shareholders would incur.

In the first two hypotheticals, the plaintiff is a third party, rather than a shareholder, and target management presumably is fighting a tender offer that it believes, in good faith, not to be in the best interest of the company. Some writers¹¹⁹ and several courts¹²⁰ have stated that, in this situation, there should be no limits on directors' actions, and therefore any type of interference is justified. Once a good faith determination has been made to "fight" a hostile tender offer, the target directors, under this view, must be given a free hand to employ any defensive maneuver not forbidden by law.¹²¹ This response, however, ignores the traditional purpose of the rule—to protect directors from suits by dis-

board of parent were appointed trustees of stock option plan, and stock option plan created same day stock was issued).

115. M. STEINBERG, *CORPORATE INTERNAL AFFAIRS* 235-39 (1983); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Note, *Tender Offer Defensive Tactics and the Business Judgment Rule*, 58 N.Y.U. L. REV. 621 (1983); J. Huber, Remarks to the American Bar Association's Section of Corporation, Banking and Business Law (Apr. 7, 1984) (summarized in 16 SEC. REG. & L. REP. (BNA) No. 15, at 639-40 (Apr. 13, 1984)).

116. *Panter*, 646 F.2d at 299-304 (Cudahy, J., dissenting); *Johnson v. Trueblood*, 629 F.2d 287, 299-301 (3d Cir.) (Rosenn, J., dissenting), *vacated on other grounds*, 629 F.2d 302 (3d Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 999 (1981).

117. Easterbrook & Fischel, *supra* note 114, at 1194-1204.

118. H.R. 5695, 98th Cong., 2d Sess. (1984). This bill, introduced by Rep. Tim Wirth, would require target management to prove that its defensive maneuvers were prudent to the issuer, fair to shareholders, and satisfied the business judgment rule. 16 SEC. REG. & L. REP. (BNA) No. 21, at 913 (May 25, 1984); *see also* H.R. 5693, 98th Cong., 2d Sess. (1984) (would impose additional restraints on corporate takeover process, including revisions affecting tender offers, proxy solicitations, and securities acquisitions); S. 2782, 98th Cong., 2d Sess. (1984) (includes provisions to restrict securities purchases and executive compensation arrangements in corporate takeover situations).

119. *E.g.*, Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, 3 CORP. L. REV. 107 (1980); Lipton, *supra* note 113; Steinbrink, *Management's Response to the Takeover Attempt*, 28 CASE W. RES. L. REV. 882 (1978); Fleischer, *Business Judgment Rule Protects Takeover Targets*, Legal Times, Apr. 14, 1980, at 15.

120. In addition to *Panter*, *see Treadway Cos. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980); *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690 (2d Cir. 1980); *Berman v. Gerber Prods. Co.*, 454 F. Supp. 1310 (W.D. Mich. 1978).

121. *E.g.*, *Northwest Indus. v. B.F. Goodrich Co.*, 301 F. Supp. 706, 712-13 (N.D. Ill. 1969) ("[M]anagement has the responsibility to oppose offers which, in its best judgment, are detrimental to the company or its stockholders. . . . After [making a carefully considered decision] the company may then take any step not forbidden by law to counter the attempted capture."); Lipton, *supra* note 113, at 123 (After a proper board determination that a takeover should be rejected, directors may resist with any "reasonable actions," which include "litigation, complaints to government authorities, the acquisition of a company to create an antitrust or regulatory problem for the raider, the

appointed *shareholders*.¹²² Moreover, it ignores the legitimate interest of the bidder, who is protected by the interference tort, in being able to compete fairly to acquire the target company.

The defensive maneuvers allowed a target company should be limited¹²³ on a case-by-case basis. Target management should be privileged¹²⁴ to interfere

issuance of shares to a big brother, or the premium purchase of shares of the target from the raider.”).

122. *Maldonado v. Flynn*, 413 A.2d 1251, 1257 (Del. Ch. 1980) (The business judgment rule “provides a shield with which directors may oppose stockholders’ attacks on the decisions made by them.”), *rev’d on other grounds*, 430 A.2d 779 (Del. 1981); Arshst, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93 (1979).

123. *But cf.* *Great W. Prod. Coop. v. Great W. United Corp.*, 200 Colo. 180, 613 P.2d 873 (1980). In this case plaintiff agreed to sell substantially all of its assets, which consisted of the stock of a wholly-owned subsidiary, to defendant. Shareholder approval was required, and plaintiff’s directors agreed to use their “best efforts” to secure it. Due to price movements in the commodities markets after the sale agreement was executed, the value of the subsidiary increased significantly. The directors of plaintiff withdrew their recommendation of approval and the transaction was not approved. Plaintiff brought suit seeking a declaratory judgment that the purchase agreement had been terminated; defendant counterclaimed for damages for breach of contract. On the counterclaim, the court held that the “best efforts” clause did not bind the directors to recommend approval when they determined “pursuant to the exercise of their independent good faith judgment, that the terms of the purchase agreement were no longer in the security holders’ best interests.” *Id.* at 187, 613 P.2d at 879.

Arguably, *Great Western* protects target directors seeking to defeat a tender offer that they believe is not in the best interests of the target shareholders. Just as a director’s fiduciary duty protects him from a breach of contract action, so might fiduciary duty limit tort liability. *Great Western*, however, is not that broad. In effect, all the court held is that the contract included an implied term that the directors need not seek approval if doing so would violate their fiduciary duties. It does not follow thereby that directors can engage in tortious or illegal conduct in discharging their fiduciary duties.

In *Jewel Cos. v. Pay Less Drug Stores N.W.*, 741 F.2d 1555 (9th Cir. 1984), plaintiff Jewel had signed a merger agreement with Pay Less Drug Stores, the target company. Before the shareholder vote ratifying the agreement, defendant Pay Less Drug Stores Northwest made a competing tender offer. Although the initial agreement required the target directors to use “best efforts” to consummate the merger, they withdrew their support from it and entered into a new agreement with defendant.

The court held that it was possible for a board of directors to enter into a valid contract that required the board’s support of the agreement, and remanded to determine the intent of the parties. It also rejected a lower court’s holding that “a merger contract is justified as a matter of law because ‘the marketplace is the proper forum to resolve competing tender offers.’” *Id.* at 1567 (quoting *Jewel Cos. v. Pay Less Drug Stores N.W.*, 550 F. Supp. 770, 773 (N.D. Cal. 1982)). The court stated:

It is nowhere written in stone that the law of the jungle must be the exclusive doctrine governing sorties into the world of corporate mergers. The legitimate exercise of the right to contract by responsible boards of directors can help bring some degree of much needed order to these transactions.

Id. at 1568-69.

124. No privilege is absolute. See *Feminist Women’s Health Center, Inc. v. Mohammad*, 586 F.2d 530, 551-52 (5th Cir. 1978), (privilege of protecting the public welfare lost if defendant used threats), *cert. denied*, 444 U.S. 924 (1979); *Gasbarro v. Lever Bros.*, 490 F.2d 424, 426 (7th Cir. 1973) (defendant’s statements were conditionally privileged, so plaintiff must prove actual malice to sustain cause of action); *International Adm’ts, Inc. v. Life Ins. Co. of N. Am.*, 541 F. Supp. 1080, 1082-83 (N.D. Ill. 1982) (plaintiff’s complaint alleged that defendant sought to compete through intimidation, force, coercion, threats, and misrepresentations, and thus the complaint for interference with prospective business advantage was sufficient to withstand motion to dismiss); *Williams v. Burns*, 540 F. Supp. 1243, 1252 (D. Colo. 1982) (summary judgment would not be awarded to defendant on the claim of interference with prospective business relations because defendant’s privilege, to protect the interest of third parties, may be defeated if plaintiff proves that defendant acted with malice); *Techno Corp. v. Dahl Assocs.*, 535 F. Supp. 303, 307 (W.D. Pa. 1982) (defendants’ means of interference and motive defeated privilege of competition); *Calbom v. Knudtson*, 65 Wash.

with an offer in a reasonable manner, such as soliciting other offers and urging shareholders not to tender to a hostile bidder. The ingenuity of tender offer counsel constrained only by a disclosure statute, however, is limitless, as was demonstrated by Martin Marietta's surprising "pac-man" defense¹²⁵ that defeated Bendix's tender offer in 1982 and the novel "poison-pill" defense¹²⁶ adopted by Lennox to thwart Brown-Forman's bid in 1983. Such responses, which preclude a bidder's success,¹²⁷ should be viewed as unprivileged or an abuse of privilege. Focusing on the nature of the interference in this situation is entirely appropriate and consistent with judicial analysis in other interference cases.¹²⁸

The traditional formulation of the interference tort thus affords a basis for an aggrieved tender offeror, and possibly a shareholder of the target corporation, to recover damages resulting from unlawful interference with the offer. The

2d 157, 166, 396 P.2d 148, 153-54 (1964) (malice destroys privilege). *But see* Stidham v. State Dep't of Licensing, 30 Wash. App. 611, 615-16, 637 P.2d 970, 973 (1981) (remarks of governmental official absolutely privileged against claim of interference with prospective economic advantage).

125. In a "pac-man" defense, the target company makes a tender offer for the shares of the bidder. See *Martin Marietta Corp. v. Bendix Corp.*, 549 F. Supp. 623 (D. Md. 1982), in which the court described the defense.

Closely analogous to the pac-man defense is the "scorched earth" defense, in which the target company proposes a transaction that makes it an unattractive merger partner for the bidder. In *Whittaker Corp. v. Edgar*, 535 F. Supp. 933 (N.D. Ill. 1982), for instance, the target agreed to sell its principal subsidiary to a third party. The bidder's attempt to enjoin the transaction was unsuccessful.

Another illustration of the scorched earth defense (at least an allegation of one) occurred when Saul Steinberg attempted a takeover of Walt Disney Productions. Mr. Steinberg has alleged that he dropped plans to make a tender offer when he learned that Disney planned to make a cash offer, at a high price, for shares that Mr. Steinberg did not purchase. The result of Disney's actions, if carried out, would have been to leave Mr. Steinberg the sole owner of a company heavily in debt. *Wall St. J.*, July 5, 1984, at 2, col. 3.

126. The "poison-pill" defense has been described as follows:

[A] corporation distributes to its common stockholders a dividend in the form of a convertible preferred stock. The preferred stock is convertible into at least the same number of outstanding common shares, so roughly half of the outstanding equity is represented by the convertible preferred. The plan provides that dividends on common shares will be reduced by 50 percent, but that dividends on the preferred stock will be slightly more than 50 percent of the dividends received before issuance of the preferred.

Once a raider acquires more than a certain percentage of a company's voting power . . . and does not promptly propose and consummate a merger, the preferred becomes redeemable for cash at any time at a price equal to the highest price paid by the raider during the previous 12 months. This provision is intended to prevent a partial offer that is not followed by a second step, which could adversely affect stock value.

The preferred stock contains a "flipover" provision in the event of a tender offer followed by a merger. That provision allows holders to exchange their preferred stock for voting preferred stock in the acquiror. The target's shareholders could convert those shares into common stock, which could lead to unpredictable dilution of pershare earnings.

Legal Times, Aug. 29, 1983, at 9, col 2.

Companies sometimes issue "poison pill" shares in anticipation of an offer or when the directors feel the company is vulnerable to a takeover. Crown Zellerbach Corporation, for instance, recently distributed rights to its common stockholders that entitled the holder to purchase common shares of the surviving company with a market value equal to twice the exercise price of the right. The right is exercisable when someone acquires 20% of the company's common or makes an offer for 30% or more of the stock. *Wall St. J.*, July 20, 1984, at 33, col 1.

127. See *supra* notes 124-25.

128. See cases cited *supra* note 123.

other formulations of the tort, the Restatement Second and the Oregon approach, similarly should allow these actions.

III. THE APPROACH OF THE RESTATEMENT (SECOND) OF TORTS

The Restatement (Second) of Torts sets forth a three-part definition of the tort of interference with a prospective economic advantage. Section 766B of the Restatement is the cornerstone of this definition:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) 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.¹²⁹

The finesse of section 766B lies in the interpretation of the word "improperly." This word, the drafters tell us, is a substitute for "culpable and not justifiable" conduct¹³⁰ that, for various reasons, they found objectionable.¹³¹

Section 767 then sets forth seven factors to consider in determining whether an actor's conduct is improper. These factors are:

- (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.¹³²

Finally, in sections 768 through 774 the drafters apply the general rules of sections 766B and 767 to conduct that formerly was discussed under the rubric of "privilege." For example, section 768 discusses the circumstances under which interference motivated by competitive considerations is not "improper." The Restatement, however, does not use the terms "privilege" or "defense." Instead, it refers to the unified approach of section 766B: Is the interference, considering all the circumstances, improper?

In comment k to Section 767 the drafters discuss burdens of proof. After

129. RESTATEMENT (SECOND) OF TORTS § 766B (1965).

130. *Id.*, Introductory Note to Ch. 37.

131. *Id.* The drafters explained that the use of a single new term would emphasize the balancing process inherent in the interference tort. In addition, the terms "culpable and not justifiable" had connotations from other torts that the drafters found undesirable.

132. RESTATEMENT (SECOND) OF TORTS § 767 (1965).

noting that there is no consensus on who has to prove justification or lack of it, they suggest that when the matter goes to the culpability of the defendant, the plaintiff bears the burden of proof. Thus, if the issue is whether the defendant was competing with the plaintiff for the business of a third person, the plaintiff should bear the burdens of pleading and proof. On the other hand, when the relationship between the defendant and a third party arguably gives the defendant special license to interfere, the burden of proving justification would be on the defendant.¹³³

Although the Restatement approach seeks to bring some order to this area, it is not easy to understand or apply. The courts that have cited it often have avoided its prescribed analysis.¹³⁴ The most difficult question in this area of the law—whether the nature of the defendant's conduct must be independently wrongful for the interference to be unlawful—remains unanswered by the Restatement. Instead, the nature of the defendant's conduct becomes just one of several factors that the courts are to assess in determining whether the interference is improper. If the interference is accomplished by actual physical violence or threats of violence, or fraudulent misrepresentation, the interference usually would be improper.¹³⁵ On the other hand, if the defendant's sole motive was to injure the plaintiff,¹³⁶ such interference would be improper, whether the means used were innocent or not. As the introductory note to this chapter of the Restatement indicates, this area of the law has not congealed and may not be appropriate for a restatement.¹³⁷ The authors of the Restatement have made a valuable contribution, however, by noting that simple rules regarding the defendant's motive and the nature of the defendant's conduct cannot be formalized. Rather, motive and conduct are just two of many factors that the fact finder must consider.

Nothing in the Restatement approach necessarily would change any of the

133. This distinction is not satisfactory. The defendant's culpability is as much at issue when he is a competitor as when he is in a special relationship. The distinction, if one exists, may be that in the latter case the facts are peculiarly within the defendant's knowledge and it would be unfair to expect the plaintiff to anticipate and disprove this defense. Competition, however, is a generally available defense; the plaintiff should know whether the defendant is his competitor and, if so, plaintiff should be prepared to raise the defense and demonstrate why it is unavailable under the circumstances. This analysis suggests that the burden of proof be allocated on the basis of fairness or reasonableness, not a wholly unworkable standard, but one with certain difficulties. In any event, the drafters' decision not to propose a rule on burden of proof reflects the disagreements among the courts and the difficulty of formalizing this area of the law.

134. Two prominent examples are *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Or. 201, 582 P.2d 1365 (1978), and *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982), in which the courts, in well-reasoned opinions, reexamined the law in their respective jurisdictions, considered the approach of the Restatement, and chose a different formulation. Other courts have used selected portions of the Restatement. See, e.g., *M & M Rental Tools, Inc. v. Milchem, Inc.*, 94 N.M. 449, 612 P.2d 241 (Ct. App. 1980). The federal courts, sitting in diversity jurisdiction, have been more willing than the states to embrace the Restatement. See *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 274 (4th Cir. 1980); *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir.), cert. denied, 449 U.S. 842 (1980); *Franklin Music Co. v. ABC*, 616 F.2d 528 (3d Cir. 1979). But see *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628 (Minn. 1982) (Minnesota relied on Restatement).

135. RESTATEMENT (SECOND) OF TORTS § 767 comment c (1965).

136. *Id.* comment d.

137. See *supra* note 128.

previously discussed results of the hypotheticals. In the first hypothetical, the defendant would seek to justify its conduct under section 768 with the "defense" of competition. That section, however, indicates that an actor improperly interferes if he employs "wrongful means" in the course of competition.¹³⁸ A defendant's violation of the federal securities laws in that situation presumably would be considered wrongful means. The directors' justifications in the second and third hypotheticals, which are set forth in section 770 of the Restatement, also are lost if wrongful means are employed.¹³⁹ The abusive defensive maneuvers that target management frequently uses certainly could be considered wrongful under this approach.

At about the time the drafters of the Restatement were attempting to clarify the law in this area, a few state courts were making similar efforts. The Supreme Court of Oregon has demonstrated a degree of independence in this area, particularly in its leading decision of *Top Service Body Shop, Inc. v. Allstate Insurance Co.*¹⁴⁰

IV. THE OREGON APPROACH

In *Top Service*, plaintiff, an automobile repair shop, alleged that defendant insurance company unlawfully interfered with its business by directing insurance claimants to have repairs done at competing body shops. At trial, the jury entered verdicts in favor of plaintiff, but these verdicts were set aside by the trial court, primarily for lack of proof.¹⁴¹ On appeal, the Oregon Supreme Court affirmed the trial court opinion¹⁴² and, in doing so, reviewed and summarized the tort of interference with a prospective economic advantage:

In summary, such a claim [for intentional interference with contractual or other economic relations] is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession. No question of privilege arises unless the interference would be wrongful but for the privilege; it becomes an issue only if the acts charged would be tortious on the part of an unprivileged defendant. Even a recognized privilege may be overcome when the means used by defendant are not justified by the reason for recognizing the privilege.¹⁴³

To a certain extent, the court follows the approach of the Restatement,¹⁴⁴ but

138. See RESTATEMENT (SECOND) OF TORTS § 768 (1965).

139. *Id.* § 770.

140. 283 Or. 201, 582 P.2d 1365 (1978).

141. *Id.* at 203, 582 P.2d at 1367.

142. *Id.* at 223, 582 P.2d at 1378.

143. *Id.* at 209-10, 582 P.2d at 1371.

144. *Id.* at 210, 582 P.2d at 1371.

avoids the cumbersome balancing tests of the Restatement's section 767.¹⁴⁵ The court intimates that privilege (a matter covered in sections 768 to 774 of the Restatement) is an issue that arises only if the plaintiff establishes a "wrongful" interference.¹⁴⁶

The Oregon Supreme Court did not address who bears the burden of proof on privilege, however, until confronted with another case the following year. In *Straube v. Larson*¹⁴⁷ the court affirmed its *Top Service* analysis and added, with regard to defendant's claim of privilege, the following explanation: "The rule we have applied, which denies an action for interference when made in good faith for a proper purpose, amounts to the application of a qualified privilege, *with the burden of negating this qualified privilege placed upon plaintiff as part of his affirmative case.*"¹⁴⁸ Despite this language, it is unclear whether the plaintiff must negate in his pleadings and initial presentation of evidence possible privileges or whether his burden arises only after the defendant has come forward with some proof of privilege. It is more logical to require the defendant to raise the defense of privilege so as not to place too great a burden on the plaintiff. Thus, if the plaintiff established an improper interference based on the defendant's ill will and the defendant proved that the parties were competitors, the burden then would shift back to the plaintiff either to disprove the defendant's claim of competition, to demonstrate that the defendant was motivated predominantly by ill will, or to show that the privilege was abused. This approach is consistent with the Oregon court's broad definition of the tort quoted above¹⁴⁹ and with the approach of the Utah and New Mexico supreme courts, which interpreted *Top Service* to hold that the claim of privilege is an affirmative defense.¹⁵⁰

The Oregon approach is sufficiently flexible to permit recovery in some post-tender offer litigation. The defendant, in each hypothetical, arguably employed "improper means" of interference. The next issue then is whether the plaintiff can overcome the asserted privilege; this inquiry does not differ from those discussed above.

VI. CONCLUSION

The tort of interference with prospective economic advantage can be a useful tool in tender offer litigation. In one reported case, the court refused to dismiss a claim for an injunction based on this tort.¹⁵¹ Although no reported cases have awarded damages to tender offer participants on this theory, an action should be maintainable. As litigation in this area develops, two principal obstacles to recovery may be a broad interpretation of the defense of competition for defendant rival bidders and a pervasive use of the business judgment rule in

145. *Id.* at 210 n.12, 582 P.2d at 1371 n.12.

146. *Id.* at 210, 582 P.2d at 1371.

147. 287 Or. 357, 600 P.2d 371 (1979).

148. *Id.* at 371, 600 P.2d at 379 (emphasis added).

149. See *supra* text accompanying note 140.

150. See *M & M Rental Tools, Inc. v. Milchem, Inc.*, 94 N.M. 449, 455, 612 P.2d 241, 247 (Ct. App. 1980); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 304 (Utah 1982).

151. *Jewelcor, Inc. v. Pearlman*, 397 F. Supp. 221, 246 (S.D.N.Y. 1975).

judging defendant target managements. Although these defenses are legitimate, they also have their limitations. A third obstacle to recovery may be an inability to calculate damages. In many cases, however, damages or other relief will be capable of calculation and clearly appropriate.