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# CIVIL CONSPIRACY AND INTERFERENCE WITH CONTRACTUAL RELATIONS

## I. INTRODUCTION

There are many injuries which fall within the category of "business torts." Although the term has not acquired a crystallized definition,<sup>1</sup> its grasp comprehends the torts of unfair competition, trade libel, appropriation of trade secrets, boycotts, injurious falsehood, interference with contractual relations, interference with prospective business advantage, and other deprivations of the right to conduct a business, trade, or occupation without unjustified interference.<sup>2</sup> While many business torts cause injuries to a businessman in the form of a taking or destruction of his property without affecting his trade relations with others,<sup>3</sup> quite often other business torts will result in injuries to a businessman's relational interests—with the public, with certain individuals, or with other

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1. Weber, *The Reasons Behind the Rules in the Law of Business Torts*, 38 NEB. L. REV. 608 (1959) [hereinafter cited as Weber].

2. 1 R. CALLMANN, *THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* 28 (3d ed. 1967) [hereinafter cited as CALLMANN]. The author states:

The right to conduct any lawful business is generally, if not universally, recognized as "property" within the due process clause of the Constitution and "elucidation is not needed to make it plain that the right to carry on a lawful business is a valuable right which a court of equity will protect against unwarranted interference or undue obstruction."

*Id.* (footnotes omitted). For a listing of various business torts, see M. HANDLER, *CASES AND MATERIALS ON BUSINESS TORTS* (1972); Weber, *supra* note 1, at 609.

3. Many of the trade secret and misappropriation cases which involve the taking by the defendant of a property right from the plaintiff are considered a more direct and simple form of injury which may be characterized as "commercial larceny." These injuries do not necessarily affect the plaintiff's trade relations with third persons or the public at large. See, e.g., *International News Serv. v. Associated Press*, 248 U.S. 215 (1918); *Julius Hyman & Co. v. Velsicol Corp.*, 233 P.2d 977 (Colo. 1951); *Diodes v. Franzen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19 (1968); cases collected in K. YORK & J. BAUMAN, *REMEDIES, CASES AND MATERIALS* 558-79 (2d ed. 1973).

Although the tort of conversion is also analogous, it contemplates the taking of tangible personal property or intangible property, the rights to which are customarily merged or identified with some document. Professor Prosser suggests the analogy as well as the reason why it remains but a theory:

There is perhaps no very valid and essential reason why there might not be conversion of an ordinary debt, the goodwill of a business, or even an idea, or "any species of personal property which is the subject of private ownership," but thus far other remedies apparently have been adequate, and there has been no particular need or demand for any extension of the rather drastic relief of conversion beyond rights customarily represented by documents.

W. PROSSER, *THE LAW OF TORTS* 82-83 (4th ed. 1971) (footnotes omitted) [hereinafter cited as PROSSER].

business organizations.<sup>4</sup> Two of these business torts, however, may be distinguished from the rest on the basis of the interests which are injured and which the courts endeavor to protect. These are interference with contractual relations and interference with prospective business advantage. These two latter torts represent injuries to specifically identifiable business relationships as contrasted with those injuries to a general relationship with such members of the public as may be expected to deal with the party injured.<sup>5</sup>

Despite the classification by some of the torts of interference with contractual and prospective business relations as part of the law of unfair competition,<sup>6</sup> these torts have come to be regarded as a separate and special kind of wrong by virtue of the interests affected.<sup>7</sup> In the realm of injuries to relational interests, the law of unfair competition seems to play a predominant role in redressing injuries to a man's "custom"<sup>8</sup> or general business goodwill.<sup>9</sup> Yet the torts of interference with contractual and prospective business relations have traditionally been

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4. See generally Green, *Relational Interests* (pts. 1 & 2), 29 ILL. L. REV. 1041, 30 ILL. L. REV. 1 (1935).

5. PROSSER, *supra* note 3, at 915.

6. One treatise writer has claimed that "[i]nducing the breach of contract in a competitive context is always unfair competition." 2 CALLMANN, *supra* note 2, at 20 (footnote omitted); see J. CALIMAFDE, TRADEMARKS AND UNFAIR COMPETITION 351 (1970) [hereinafter cited as CALIMAFDE].

7. As one commentator has stated:

After considerable hesitation our law has come to recognize and to give legal protection to a proprietary interest in contract relationships. So far has this development now gone that mere competition is under no circumstances a justification for inducing breach of contract. However, it is to be noted that the basis of relief is found in the invasion of the proprietary interest in the existent contract and not in an unjustifiable invasion of the general interest in freedom to enter into business relationships. In other words, inducing breach of contract is itself regarded as a special kind of wrong rather than as merely one species of unfair competition.

Grismore, *Are Unfair Methods of Competition Actionable at the Suit of a Competitor?*, 33 MICH. L. REV. 321, 326 (1935) (footnotes omitted).

8. 37 MICH. L. REV. 115, 117 (1938). The author distinguishes between two kinds of business interferences which have not reached the contract stage: (1) those growing out of the goodwill developed between the tradesman and his customers or an employer and his employees through an established course of dealing, and (2) those growing out of negotiations for an isolated contract between parties who have had no regular course of dealing. The author refers to interference with an "established course of dealing not resting on contract as deprivation of a man's 'custom.'" *Id.*, citing *May v. Wood*, 51 N.E. 191 (Mass. 1898).

9. 1 CALLMANN, *supra* note 2, at 36. The author explains: "The occasion is rare, indeed, when an act of unfair competition will not affect the goodwill of a business, 'the basis of the action of unfair competition [being the] protection of goodwill.'" *Id.* at 31. Apart from the injuries to a plaintiff's goodwill, many of the cases also place emphasis upon the direct injury to the public caused by deception. See CALIMAFDE, *supra* note 6, at 267.

limited to injuries either to existing contractual relations or to relations which would probably take contractual form<sup>10</sup>—that is, relations creating specifically identifiable expectancies. There may be, however, a considerable overlap between interference with contractual and prospective business relations and other business torts.<sup>11</sup>

It is the purpose of this Comment to discuss both the concept of civil conspiracy and the tort of interference with contractual relations. More specifically, this Comment will focus on a divergence of opinion engen-

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10. In order to establish causation for the tort of interference with prospective business relations the plaintiff must show not only that he was "about to" but also that he "would," but for the unlawful interference, have entered into the contract. *See* *Moreno v. Marbil Prods., Inc.*, 296 F.2d 543, 545 (2d Cir. 1961); *Lewis v. Bloede*, 202 F. 7, 17 (4th Cir. 1912); *Chicago Title Ins. Co. v. Great W. Fin. Corp.*, 69 Cal. 2d 305, 319, 444 P.2d 481, 490, 70 Cal. Rptr. 849, 858 (1968); *Perati v. Atkinson*, 213 Cal. App. 2d 472, 473, 28 Cal. Rptr. 898, 899 (1963); *Union Car Advertising Co. v. Collier*, 189 N.E. 463, 469 (N.Y. 1934). *See also* *Wilson v. Loews, Inc.*, 142 Cal. App. 2d 183, 191-94, 298 P.2d 152, 158-60 (1956); *Campbell v. Rayburn*, 129 Cal. App. 2d 232, 234-35, 276 P.2d 671-72 (1954); *Goldman v. Feinberg*, 37 A.2d 355, 356 (Conn. 1944).

The rationale for this requirement of a "but for" showing is stated in *Union Car Advertising Co. v. Collier*, 189 N.E. 463 (N.Y. 1934):

There must be some certainty that the plaintiff would have gotten the contract but for the fraud. This cannot be left to surmise or speculation. . . . The courts will be a little slow in permitting juries to speculate upon what a competitor had reason to expect or might reasonably suppose would happen. The expressions "reasonable expectation" or "reasonably certain" may not be as precise as "would have received," and we think the latter words are preferable.

*Id.* at 470.

Perhaps a more analytical explanation may be found in an article wherein the author, having distinguished between interferences with established business customs and interferences with isolated relationships which have not reached the contract stage, stated:

In the former case [interference with established business custom], the plaintiff has an established good will resulting from a course of dealing with his employees or with a clientele of customers who regularly patronize his business. His prospective economic advantages in the form of future contracts are fairly predictable and certain. Therefore, the courts are not speculating when they give him relief against a defendant who has maliciously interfered with his business. On the other hand, the man who is negotiating for the sale of property, or for a particular contract, in an isolated instance is not so certain of success. In the early stages of his efforts it is not so certain that damage has been caused him if a rival gets the business, since it is by no means certain he would have succeeded had there been no interference by this defendant. But if the plaintiff has so far advanced in his negotiations that it can be said that but for the fraudulent acts of the defendant he would have completed the contract, the situation comes very close to that of interference with established business custom.

37 MICH. L. REV. 115, 119 (1938).

11. The same acts which constitute interference with a businessman's custom or goodwill may simultaneously constitute interference with contractual or prospective business relations. For example, X, a competitor of Y, falsely disparages Y's products before a meeting of a large number of community businessmen, some of whom either have contracts with Y to purchase Y's products or are negotiating to purchase Y's products. The same act which may destroy or impair Y's goodwill in the community, if intended to cause Y's current customers to terminate relations with Y, may constitute interference with contractual or prospective business relations, as well as trade libel.

dered by the application of the concept of civil conspiracy to the tort of interference with contractual relations.

## II. CIVIL CONSPIRACY

### A. *A Definition*

The concept of conspiracy had its birth in the English common law in the late thirteenth and early fourteenth centuries.<sup>12</sup> Although the criminal action of conspiracy underwent rapid growth at early common law,<sup>13</sup> the concept of civil conspiracy was not widely accepted until the latter part of the eighteenth century.<sup>14</sup>

Any instructive discussion of the law of civil conspiracy requires an attempt to distinguish it from the law of criminal conspiracy. Often a broad definition is used to describe both criminal and civil conspiracy, *i.e.*, a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means.<sup>15</sup> Although this definition is widely used, it does not completely state the elements required to show either a criminal or a civil conspiracy. At common law, a criminal conspiracy would exist if there were two or more persons, an unlawful object to be accomplished or a lawful object to be accomplished by unlawful means, and an agreement or meeting of the minds on the object or course of action.<sup>16</sup> The mere combination for an illegal purpose without an additional "overt act" was sufficient to establish guilt. This is still the law where unchanged by statute.<sup>17</sup> In the field of criminal law a conspiracy is itself

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12. An historical account of the development of conspiracy may be found in P. WINFIELD, *HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* (1921). See generally J. BRYAN, *THE DEVELOPMENT OF THE ENGLISH LAW OF CONSPIRACY* (1970) [hereinafter cited as BRYAN]; 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 227-29 (1883); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922); Comment, *Reason by Analogy: Agency Principles Justify Conspirators' Liability*, 12 STAN. L. REV. 476, 477 n.3 (1960); 3 FLA. B.J. 11, 54-58 (1930); 33 TUL. L. REV. 410 (1959).

13. See note 14 *infra*.

14. Although the criminal action developed rapidly, civil conspiracy, as we know it today, did not flourish until the effects of the Industrial Revolution began to be felt in the latter part of the eighteenth century. Industrialization precipitated a more integrated society in which activity by combinations of persons became a dominant feature.

33 TUL. L. REV. 410, 411 (1959).

15. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1920); 15A C.J.S. *Conspiracy* § 1(1) (1967); R. PERKINS, *CRIMINAL LAW* 613 (2d ed. 1969) [hereinafter cited as PERKINS]; Burdick, *Conspiracy as a Crime, and as a Tort*, 7 COLUM. L. REV. 229, 231 (1907) [hereinafter cited as Burdick]; 3 FLA. B.J. 11, 54 (1930).

16. 15A C.J.S. *Conspiracy* § 35(1) (1967); see *Pinkerton v. United States*, 145 F.2d 252, 254 (5th Cir. 1944).

17. See 15A C.J.S. *Conspiracy* § 43(1) (1967); PERKINS, *supra* note 15, at 616-17;

a crime.<sup>18</sup> The unlawful combination<sup>19</sup> is said to be the gist of the crime<sup>20</sup> as the offense will exist regardless of whether the acts agreed upon are ever in fact committed by the parties to the agreement.<sup>21</sup> At common law the acts themselves were considered to be merely evidentiary and were used only to prove the conspiracy.<sup>22</sup>

The elements required to establish a civil conspiracy are two or more persons, an unlawful object to be accomplished or a lawful object to be accomplished by unlawful means, an agreement or meeting of the minds on the object or course of action, one or more unlawful acts, and damages proximately caused thereby.<sup>23</sup> Unlike a criminal conspiracy, the existence of a civil conspiracy depends entirely upon the character of the acts following an unlawful combination. Thus it is almost uni-

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12 FORDHAM L. REV. 277, 279 n.15 (1943). See also W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 476 n.68 (1972) (for a list of those states which have codified the common law rule that no overt act need be proven).

18. PERKINS, *supra* note 15, at 613. See generally Iannelli v. United States, 95 S. Ct. 1284 (1975) (for a thorough discussion of the Wharton Rule—whether the crime of conspiracy will exist when defendants are charged with a substantive offense which requires concerted activity as a constituent element of the offense).

19. Since the conspiracy is the combination resulting from the agreement, rather than the mere agreement itself, it follows that the verb "conspire," when used in the law, has reference to the formation of the combination. "To conspire" means "to combine" and not merely "to agree."

PERKINS, *supra* note 15, at 615.

A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years.

*Id.* at 608.

20. See 12 FORDHAM L. REV. 277, 279 (1943). Burdick refers to the following passages:

"Such confederation or agreement is itself the offense. The unlawful agreement makes the crime, and it is complete the moment the agreement is entered into. Its legal character depends neither upon that which actually follows it nor upon that which is intended to follow it. It is the same whether its object be accomplished or abandoned. It may be followed by one overt act, or a series; but, as an offense, it is complete without them."

Burdick, *supra* note 15, at 229, quoting *State v. Setter*, 18 A. 782, 784 (Conn. 1889).

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself . . ."

Burdick, *supra* note 15, at 230, quoting *Mulcahy v. The Queen*, L.R. 3 H.L. 306 (1868) (Willes, J.).

21. See note 20 *supra*.

22. See *Yates v. United States*, 354 U.S. 298, 334 (1957); BRYAN, *supra* note 12, at 85-88.

23. See, e.g., *Zelinger v. Uvalde Rock Asphalt Co.*, 316 F.2d 47, 51 (10th Cir. 1963); *Lockwood Grader Corp. v. Bockhaus*, 270 P.2d 193, 196 (Colo. 1954); *Board of Educ. v. Hoek*, 168 A.2d 829, 835 (N.J. Super. Ct. 1961); 15A C.J.S. *Conspiracy* § 1(2) (1967); 33 TUL. L. REV. 410, 411 (1959).

versally accepted that the essence of an action for civil conspiracy is not the combination but the acts and damage resulting therefrom.<sup>24</sup> Consistent with this view is the conclusion that a combination in and of itself is not a tort.<sup>25</sup> Many of the authorities supporting this general rule echo the phrase that "a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy (or combination), would have given a right of action."<sup>26</sup> An exception is sometimes made to this maxim in cases where several persons combine to commit an act which would incur no liability if committed by a single individual,<sup>27</sup> but because the combination results in an aggrega-

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24. *E.g.*, *Nalle v. Oyster*, 230 U.S. 165, 182-83 (1913); *James v. Evans*, 149 F. 136, 140 (3d Cir. 1906); *de Vries v. Brumback*, 53 Cal. 2d 643, 649-50, 349 P.2d 532, 536, 2 Cal. Rptr. 764, 768 (1960); *Zumbrun v. University of S. Cal.*, 25 Cal. App. 3d 1, 12, 101 Cal. Rptr. 499, 506 (1972); *Buchanan v. Miami Herald Publishing Co.*, 206 So. 2d 465, 469 (Fla. Ct. App. 1968), *modified on other grounds*, 230 So. 2d 9 (Fla. 1969); *Miller v. Ortman*, 136 N.E.2d 17, 33 (Ill. 1956); *Coffey v. MacKay*, 277 N.E.2d 748, 751 (Ill. App. Ct. 1972); *Cohen v. Bowdoin*, 288 A.2d 106, 109-10 (Me. 1972); *Adkison v. Hannah*, 475 S.W.2d 39, 44 (Mo. 1972); *Cabakov v. Thatcher*, 99 A.2d 548, 549-50 (N.J. Super. Ct. 1953); *Green v. Davies*, 75 N.E. 536, 537 (N.Y. 1905); *Worrie v. Boze*, 95 S.E.2d 192, 198 (Va. 1956); *Smith v. Christopherson*, 64 N.W.2d 744, 747 (Wis. 1954); 3 FLA. B.J. 54 (1930); 12 FORDHAM L. REV. 277, 279 n.17 (1943); 23 GA. B.J. 548, 549-50 (1961); 10 SYRACUSE L. REV. 166, 167 (1958); 33 TUL. L. REV. 410, 412 (1959); 2 VAND. L. REV. 958, 959 n.2 (1959).

In *Browning v. Blair*, 218 P.2d 233 (Kan. 1950), the court stated:

The words fraud and conspiracy alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity until connected with some specific act for which one person is in law responsible to another; they have no more effect than other words of unpleasant signification.

*Id.* at 239.

25. Semantic care should be taken in using the words "combination" and "conspiracy" interchangeably when referring to one or the other as a tort. A combination can never by itself constitute a tort (see note 27 *infra*), but a conspiracy, if defined to include, in addition to a combination, both unlawful acts and damages proximately caused thereby (see note 23 *supra* and accompanying text defining "civil conspiracy"), may be labeled a tort though the acts and damages proximately caused thereby must be recognized as the substance of the tort (see notes 24 *supra* and 28 *infra* and accompanying text).

26. *E.g.*, *Bixby v. Wilson & Co.*, 196 F. Supp. 889, 892 (W.D. Iowa 1961); *Zumbrun v. University of S. Cal.*, 23 Cal. App. 3d 1, 12, 101 Cal. Rptr. 499, 506 (1972); *McKown v. McDonnell*, 175 N.E.2d 584, 585 (Ill. App. Ct. 1961); *Shannon v. Gaar*, 6 N.W.2d 304, 307 (Iowa 1942); *Tucker v. Edwards*, 38 So. 2d 241, 245 (La. 1948); *Lopez v. Swyer*, 300 A.2d 563, 568 (N.J. 1973); 12 FORDHAM L. REV. 277, 279 (1943). See generally *Liappas v. Augustis*, 47 So. 2d 582, 583 (Fla. 1950); cases collected in 1 T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 234 n.7 (4th ed. 1932) [hereinafter cited as COOLEY].

27. See *Cohen v. Lion Prods. Co.*, 177 F. Supp. 486, 490-91 (D. Mass. 1959); *St. Luke's Hosp. v. Industrial Comm'n*, 349 P.2d 995, 1000 (Colo. 1960); *Neustadt v. Employers Liab. Assurance Corp.*, 21 N.E.2d 538, 540-41 (Mass. 1939); *Shaltupsky v. Brown Shoe Co.*, 168 S.W.2d 1083, 1086 (Mo. 1943); *Pfoh v. Whitney*, 62 N.E.2d 744,

tion of power, which is used in some manner to intimidate, unduly influence or coerce the plaintiff, liability is imposed.<sup>28</sup>

755-56 (Ohio Ct. App. 1945) (suggests that definition of term "conspiracy" be limited to situations where an action is taken by a concert of persons, even though the same action when taken by an individual would not be actionable); *Bliss v. Southern Pac. Co.*, 321 P.2d 324, 328 (Ore. 1958).

28. See, e.g., *Allis-Chalmers Co. v. Iron Molders' Union*, 150 F. 155, 176 (C.C.E.D. Wis. 1906); *St. Luke's Hosp. v. Industrial Comm'n*, 349 P.2d 995, 1000 (Colo. 1960); *Snipes v. West Flagler Kennel Club, Inc.*, 105 So. 2d 164, 166 (Fla. 1958); *Cohen v. Bowdoin*, 288 A.2d 106, 110 n.4 (Me. 1972); *Weiner v. Lowenstein*, 51 N.E.2d 241, 243 (Mass. 1943); *Johnson v. East Boston Sav. Bank*, 195 N.E. 727, 730 (Mass. 1935); PROSSER, *supra* note 3, at 293; Charlesworth, *Conspiracy as a Ground of Liability in Tort*, 36 L.Q. REV. 38, 45 (1920); Note, *Resulting Confusion from the Varied Development of Civil Conspiracy*, 23 GA. B.J. 548, 549 (1961); 33 TUL. L. REV. 410, 412 (1959). See generally *Burdick, The Tort of Conspiracy*, 8 COLUM. L. REV. 117 (1908); *Burdick, supra* note 15.

Under this exception, sometimes referred to as "the force of numbers" exception (*Snipes v. West Flagler Kennel Club, Inc.*, 105 So. 2d 164, 166 (Fla. 1958); *Cohen v. Bowdoin*, 288 A.2d 106, 110 n.4 (Me. 1972); *Shaltupsky v. Brown Shoe Co.*, 168 S.W.2d 1083, 1086 (Mo. 1943); *Baucke v. Adams*, 188 S.W.2d 355, 366 (Mo. Ct. App. 1945); 15A C.J.S. *Conspiracy* § 8 (1967); Note, *Resulting Confusion from the Varied Development of Civil Conspiracy*, 23 GA. B.J. 548, 550 (1961); Note, *Economic Coercion Through Force of Numbers as an Actionable Wrong*, 12 VAND. L. REV. 958, 960 (1959)), a cause of action is stated as long as the combination of many creates some peculiar power of coercion, intimidation, or influence that could not have been accomplished by separate individuals. See *Snipes v. West Flagler Kennel Club, Inc.*, 105 So. 2d 164 (Fla. 1958); *Fleming v. Dane*, 22 N.E.2d 609, 611 (Mass. 1939); *DesLauries v. Shea*, 13 N.E.2d 932, 935 (Mass. 1938); *Willett v. Herrick*, 136 N.E. 366, 370 (Mass. 1922). See also *Short v. Hotel Riviera, Inc.*, 378 P.2d 979 (Nev. 1963) (ruling seems to have been modified by *Aldabe v. Adams*, 402 P.2d 34, 37 (Nev. 1965)). Conspiracy is considered to be an independent tort (J. FLEMING, *THE LAW OF TORTS* 668-75 (2d ed. 1961); P. JAMES, *GENERAL PRINCIPLES OF THE LAW OF TORTS* 328-32 (2d ed. 1964)) under this exception and is also referred to as "true conspiracy." See *Crofter Handwoven Harris Tweed Co. v. Veitch*, [1942] A.C. 435 (Scot.); 33 TUL. L. REV. 410, 412 (1959).

The rationale for this exception seems to be that, since the action is unlawful only when a combination occurs, the gist of the action must be the combination. However, it would be fallacious for one to conclude that in these cases the combination itself is a tort and that no acts other than the combination need be alleged in order to state a cause of action. Such a conclusion is obviously untenable as it ignores a fundamental axiom of tort law—that an action in tort can only be maintained by one who has been damaged. PROSSER, *supra* note 3, at 7. A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement. Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action. BRYAN, *supra* note 12, at 38.

Boycott cases and those cases where refusals to deal or to do business are unlawfully implemented against a plaintiff are the most likely candidates for illustration by those who maintain that a mere combination may, by itself, constitute a tort, since no "acts" are needed to cause damage to the plaintiff. It is suggested that, even though no affirmative conduct is taken in such cases, negative conduct separate and apart from any agreement or meeting of the minds is necessarily taken in the form of an implementation



### B. *The Purpose of Alleging Civil Conspiracy*

The principles which govern the substantive civil wrong committed by one or more of the co-conspirators are the same whether the sub-

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of the mutual understanding, *i.e.*, the actors not only must agree on a proposed boycott or refusal to deal, but also must execute this agreement by undertaking to discontinue or terminate that which otherwise would have occurred. Such a distinction is made in the dissenting opinion of Justice Roberts in *Snipes v. West Flagler Kennel Club, Inc.*, 105 So. 2d 164 (Fla. 1958):

Thus, the allegation that the other dog tracks in this state have become "unwilling partners in the boycott and conspiracy directed against the plaintiff," if such a vague generalization can mean anything, [it] can mean only that the other dog tracks have agreed not to book plaintiff's dogs at their tracks—not that they have actually refused to do so.

*Id.* at 169.

Nevertheless, in addition to the indispensability of acts and resulting damage in all cases of civil conspiracy, there are those cases in which a cause of action would not be available without a combination (see cases cited *supra*). In our competitive society, combinations of persons may be necessary to generate coercive power in certain contexts merely because of the inability of persons individually to employ sufficient economic resources toward such a goal. *See, e.g.*, 29 U.S.C. § 151 (1970.) It is submitted that if one person did have the power usually only exercised by many, his acts would cause the identical damage and would likewise be as unlawful as the exercise of that same power by many. Thus in those cases where a cause of action *would* not, under certain factual circumstances, lie for the mere acts of individuals, it does not therefore follow that a cause of action *could* not under those circumstances lie if the acts were done only by one person possessing the necessary economic power.

Thus one can see the true role of the combination in the "force of numbers" cases, not as a tortious act itself, but rather as a method of pooling economic power. For if it is possible that the same power *could* be exercised under similar circumstances by a single person to cause the same harm, the tort exists not because of the manner in which the power is acquired, but rather because of the use to which that economic power is put, either by one individual or by several acting in concert. *But see* cases cited in *Short v. Hotel Riviera, Inc.*, 378 P.2d 979, 985-86 (Nev. 1963); 15A C.J.S. *Conspiracy* § 8, at 611 n.38 (1967).

After closely examining the "force of numbers" exception, it becomes apparent that it was conceived out of necessity to rectify the result of a misleading maxim (see text accompanying note 26 *supra*). One can only surmise that courts, in their zeal to illustrate the difference between civil and criminal conspiracy, have seized upon what has turned out to be an unfortunate basis for a distinction. Mindful that the crime of criminal conspiracy is based solely upon the unlawful combination of two or more persons, without regard to any other acts which may occur in consequence thereof, the courts sought to distinguish criminal conspiracy from civil conspiracy by formulating the often quoted phrase that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy or combination, would have given a right of action. This maxim is workable in most cases and provides a direct contrast between criminal and civil conspiracy. Where a criminal conspiracy requires a combination before an offense will exist, by contrast, a civil conspiracy will only be actionable if the combination is not a necessary element and if the wrong will exist without it.

In the majority of cases this maxim works well as most injuries can be inflicted by a person acting alone. But in some cases where a pooling of economic power or other interests under certain circumstances is necessary to effect an unlawful result not capable of being caused by one individual under those same circumstances, this maxim, when

stantive wrong is claimed to have originated in a conspiracy or to have been committed individually without the aid of another.<sup>29</sup> Thus it is said that the major significance of referring to concerted action as a conspiracy lies in the fact that it renders each participant in the wrongful act jointly responsible for all damages ensuing from the wrong, regardless of whether or not he was an actual participant and regardless of the degree of his participation.<sup>30</sup> By pleading conspiracy, the plaintiff implicates each defendant who merely participates in the common design. The act or declaration<sup>31</sup> of one defendant in carrying out the wrong is the act or declaration of all, and thus persons who merely agree to the plan or design may be held liable for the acts of others even if they in fact commit no overt act and gain no benefit

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thus applied, leads one to conclude that a cause of action for civil conspiracy cannot exist.

This result left the courts with no choice but to fashion the "force of numbers" exception. It is submitted that the latter group of cases does not illustrate a different form of civil conspiracy deserving the titles of either "force of numbers" or "true conspiracy," but these undeserved titles have been bestowed by the courts in an effort to establish congruity in the law while unwittingly applying a maxim which, on analysis, has proven to be erroneous. The difficulty with this maxim is that its sweep is too broad. Instead of demonstrating the difference between criminal and civil conspiracy by stating that the wrong underlying an action for civil conspiracy is never based *solely* upon a combination, contrary to cases of criminal conspiracy, the courts have suggested by this maxim that the wrong underlying an action for civil conspiracy *can never be* based upon a combination.

Thus the flaw to be found in this maxim lies in its exaggeration. The wrong underlying an action for civil conspiracy may or may not require a combination for its existence, but in all cases there must be something beyond this combination before a civil injury occurs—there must be a tortious act done pursuant to the combination which causes injury to the plaintiff. Only these required acts done pursuant to the combination distinguish criminal conspiracy from civil conspiracy.

29. 12 FORDHAM L. REV. 277, 280 (1943).

30. See *Mox, Inc. v. Woods*, 202 Cal. 675, 677-78, 262 P. 302, 303 (1927); *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652, 660 (1963); *Miller v. John*, 70 N.E. 27, 29 (Ill. 1904); *Cohen v. Nathaniel Fisher & Co.*, 120 N.Y.S. 546, 547 (App. Div. 1909); *White v. White*, 111 N.W. 1116, 1119 (Wis. 1907); 12 FORDHAM L. REV. 277, 280 (1943).

31. One advantage that may be gained by a charge of civil conspiracy is the evidentiary consequences. See *Burton v. Dixon*, 131 S.E.2d 27, 30 (N.C. 1963); *Singer v. Singer*, 14 N.W.2d 43, 46 (Wis. 1944). Under the co-conspirators exception to the hearsay rule, the declarations of one conspirator made while participating in a conspiracy to commit a civil wrong, in furtherance of the objectives of that conspiracy and before or during the time that a co-conspirator was participating in the conspiracy, will be admissible against the co-conspirator. See *Glasser v. United States*, 315 U.S. 60, 74 (1941); *B.R. Paulsen & Co. v. Lee*, 237 N.E.2d 793, 796 (Ill. App. Ct. 1968); *Loewinthan v. Beth David Hosp.*, 9 N.Y.S.2d 367, 373 (Sup. Ct. 1938); *Shope v. Boyer*, 150 S.E.2d 771, 774 (N.C. 1966); *Hashimoto v. Halm*, 40 Hawaii 354, 363-64 (1953); *FED. R. EVID. 801(d)(2)(E)*; *CAL. EVID. CODE § 1223* (West 1966).

therefrom.<sup>32</sup> Everyone who enters into such a common design is legally a party to every act previously or subsequently done by any of the others pursuant to the design.<sup>33</sup>

Therefore, except for those cases where a combination is said to be a necessary part of the action,<sup>34</sup> allegations of civil conspiracy function merely as a means of according to the injured plaintiff a remedy against parties not otherwise legally responsible for the wrong.<sup>35</sup> If at trial a conspiracy cannot be proven because the evidence connects only one person with the wrong actually committed, the plaintiff may nevertheless recover against him as if he alone had been sued.<sup>36</sup> A charge of

32. See *Mox, Inc. v. Woods*, 202 Cal. 675, 678, 262 P. 302, 303 (1927); *Jackson v. Scott County Milling Co.*, 118 S.W.2d 1054, 1057 (Mo. Ct. App. 1938); *Trebelhorn v. Bartlett*, 47 N.W.2d 374, 378 (Neb. 1951). In *Western Md. Dairy, Inc. v. Chenowith*, 23 A.2d 660 (Md. Ct. App. 1942), the court noted:

When individuals associate themselves together in an unlawful enterprise, any act done by one of the conspirators is in legal contemplation the act of all. The mind of each being intent upon a common object, and the energy of each being enlisted in a common purpose, each is the agent of all the others, and the acts done and words spoken during the existence of the enterprise are consequently the acts and words of all.

*Id.* at 664.

The court in *Green v. Cochran*, 43 Iowa 544 (1876), provided similar analysis:

A number of persons may conspire to do an unlawful act, and each becomes responsible for acts done in furtherance of the conspiracy. It would be no defense to any one of them to show that his participation was not necessary to the accomplishment of the ultimate purpose, and that it would have been consummated if he had not become a conspirator.

*Id.* at 550; see *Brumley v. Chattanooga Speedway & Motordome Co.*, 198 S.W. 775 (Tenn. 1917); 1 COOLEY, *supra* note 26, at 236.

33. See *Myzel v. Fields*, 386 F.2d 718, 738 (8th Cir. 1967), citing *Nassof v. United States*, 370 F.2d 147 (8th Cir. 1966); *Calcutt v. Gerig*, 271 F. 220, 223 (6th Cir. 1921); *Riss & Co. v. Association of Am. R.Rs.*, 170 F. Supp. 354, 371 (D.D.C. 1959); *de Vries v. Brumback*, 53 Cal. 2d 643, 648, 349 P.2d 532, 535, 2 Cal. Rptr. 764, 767 (1960); *Western Homes, Inc. v. District Court*, 296 P.2d 460, 464 (Colo. 1956); *Peoples Loan Co. v. Allen*, 34 S.E.2d 811, 824 (Ga. 1945); *Reiter v. Illinois Nat'l Cas. Co.*, 65 N.E.2d 830, 841 (Ill. App. Ct. 1946); *Baker v. State Bank*, 44 N.E.2d 257, 260 (Ind. App. Ct. 1942).

While the parties to a conspiracy are responsible for acts growing out of the general design, they are not responsible for independent acts growing out of the particular malice of individuals. *Pyles v. Armstrong*, 275 P. 753, 756 (Mont. 1929). Conspirators are not held liable for the acts of their fellow conspirators, committed unbeknownst to the rest, "beyond the reasonable intendment of the common understanding." *Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448, 451 (3d Cir. 1961); *Momand v. Universal Film Exch.*, 72 F. Supp. 469, 475 (D. Mass. 1947), *aff'd*, 172 F.2d 37 (1st Cir. 1948).

34. See notes 27-28 *supra* and accompanying text.

35. *Keefe v. Derounian*, 6 F.R.D. 11, 12 (N.D. Ill. 1946); *Widdows v. Koch*, 263 Cal. App. 2d 228, 234, 69 Cal. Rptr. 464, 467 (1968); *cf. B.R. Paulsen & Co. v. Lee*, 237 N.E.2d 793, 796 (Ill. App. Ct. 1968); *Mills v. Murray*, 472 S.W.2d 6, 12-13 (Mo. Ct. App. 1971); *Shope v. Boyer*, 150 S.E.2d 771, 774 (N.C. 1966).

36. *Trebelhorn v. Bartlett*, 47 N.W.2d 374, 378 (Neb. 1951); 1 COOLEY, *supra* note 26, at 237-38.

civil conspiracy is simply a procedural method of joining defendants so that, subject to proof<sup>37</sup> of the necessary allegations,<sup>38</sup> a plaintiff's chances of recovery are increased.<sup>39</sup>

### III. CIVIL CONSPIRACY APPLIED TO INTERFERENCE WITH CONTRACTUAL RELATIONS

#### A. *Conspiracy to Interfere—Conspiracy to Breach*

Inasmuch as civil conspiracy is a procedural concept characterizing the manner in which substantive wrongs are perpetrated, it is manifest that a civil conspiracy may seek as its object not only the commission of a tort, but also the breach of a contract.

The concept of civil conspiracy has been applied in numerous cases involving disrupted business relationships.<sup>40</sup> One distinction which has been given little more than token recognition by the case law<sup>41</sup> is the

37. As an evidentiary matter, since conspiracy is usually conceived and executed in secret, courts allow the conspiracy to be established by circumstantial evidence, ordinarily consisting of the disconnected acts of the conspirators which, when taken in connection with each other, tend to show a combination to secure a particular result. See 12 FORDHAM L. REV. 277, 280 (1943).

Conspirators do not voluntarily proclaim their purposes; their methods are clandestine. It is sufficient if the proven facts and circumstances, pieced together and considered as a whole, convince the Court that the parties were acting together understandingly in order to accomplish the fraudulent scheme. Thus a conspiracy may be established by inference from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time of the commission of the acts, the motives which produced them, and all the surrounding circumstances preceding and attending the culmination of the common design.

Western Md. Dairy, Inc. v. Chenowith, 23 A.2d 660, 664 (Md. Ct. App. 1942); see Wise v. Southern Pac. Co., 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652, 660 (1963); Schaefer v. Berinstein, 140 Cal. App. 2d 278, 293, 295 P.2d 113, 123 (1956).

38. In California, the courts have held that to state a cause of action for conspiracy, the complaint must allege: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting from such act or acts. See Orloff v. Metropolitan Trust Co., 17 Cal. 2d 484, 488, 110 P.2d 396, 398 (1941); Mox, Inc. v. Woods, 202 Cal. 675, 677, 262 P. 302, 303 (1927); Wise v. Southern Pac. Co., 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652, 660 (1963); James v. Herbert, 149 Cal. App. 2d 741, 746, 309 P.2d 91, 94 (1957); Schaefer v. Berinstein, 140 Cal. App. 2d 278, 293, 295 P.2d 113, 123 (1956); California Auto Court Ass'n v. Cohn, 98 Cal. App. 2d 145, 149, 219 P.2d 511, 514 (1950).

39. Cf. Trebelhorn v. Bartlett, 47 N.W.2d 374, 378 (Neb. 1951); Board of Educ. v. Hoek, 168 A.2d 829, 835 (N.J. Super. Ct. 1961); State ex rel. Myers v. Wood, 175 S.E. 2d 637, 645 (W. Va. 1970); 1 COOLEY, *supra* note 26, at 236; 12 FORDHAM L. REV. 277, 280 (1943).

40. See cases collected in notes 47 & 49 *infra*. See generally 15A C.J.S. *Conspiracy* §§ 13-15 (1967).

41. See cases cited in notes 47 & 49 *infra*. New York case law seems to make a distinction between conspiracy to interfere and conspiracy to breach with the recitation that "a party to a contract cannot conspire to breach or induce the breach of his own con-

difference between conspiracy to *interfere with* and conspiracy to *breach* a contractual relationship. This unfortunate oversight has resulted in a split of authority in the law which will be developed below.

For the most part, applying the principles of civil conspiracy to join as defendants co-conspirators, none of whom are parties to the relationship interfered with, presents little difficulty. The wrong complained of is the tort of interference with contractual relations on the part of all of the co-conspirators. If all of these co-conspirators are strangers to or have no direct<sup>42</sup> interest in the contractual relationship, then they may be joined together as defendants conspiring to interfere and may be held liable jointly and severally for damages.<sup>43</sup>

The controversy arises when a party<sup>44</sup> to the relationship interfered

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tract." *Canister v. National Can Corp.*, 96 F. Supp. 273, 274 (D. Del. 1951) (applying New York law); *Cuker Indus., Inc. v. William L. Crow Constr. Co.*, 178 N.Y.S.2d 777, 778 (App. Div. 1958); *Sax v. Sommers*, 108 N.Y.S.2d 467, 468 (Sup. Ct. 1951). This distinction, however, is not well developed. Moreover, the New York courts have apparently chosen to blur any distinction between conspiracy to interfere and conspiracy to breach with their interchangeable use of the two terms. This loose treatment of these terms is reflected in those cases where the courts have concluded that a charge of conspiracy to breach may result in tort liability. See *Savarin Corp. v. National Bank of Pakistan*, 290 F. Supp. 285, 291 (S.D.N.Y. 1968); *Sax v. Sommers*, 108 N.Y.S.2d 467, 468 (Sup. Ct. 1951); note 65 *infra*. Such a conclusion presumably stems from the fallacious belief that civil conspiracy is solely a tort concept, ignoring its primary function as a method of charging one or more defendants with the acts or declarations of another regardless of whether or not those acts or declarations involve a tort or a breach of contract.

42. Although many persons may not be regarded as strangers to a relationship in the sense that they have an indirect interest in the outcome (*e.g.*, shareholders of a corporation would have an indirect interest in any relationships, contractual or otherwise, between their corporation and third parties), this indirect interest must be distinguished from the direct interest held by one who is, for example, a party to a contractual relationship or who is negotiating with the expectation of becoming a party to a contract.

43. There is little agreement on what measure of damages should be applied to the tort of interference with contractual relations.

Where substantial loss has occurred, one line of cases tends to adopt the contract measure of damages, limiting recovery to those damages which were within the contemplation of the parties when the original contract was made. Another, apparently somewhat more uncertain of its ground, has applied a tort measure, but has limited the damages to those which are sufficiently "proximate," with some analogy to the rules as to negligent torts. A third, perhaps the most numerous, has treated the tort as an intentional one, and has allowed recovery for unforeseen expenses, as well as for mental suffering, damage to reputation, and punitive damages, by analogy to the cases of intentional injury to person or property.

PROSSER, *supra* note 3, at 948-49 (footnotes omitted); see Comment, *Plaintiff's Measure of Recovery for Tortious Inducement of Breach of Contract—Profits or Losses*, 19 HASTINGS L.J. 1119 (1968); Note, *Interference with Contractual Relations: A Common Measure of Damages*, 7 SANTA CLARA LAW. 140 (1966) [hereinafter cited as *Interference*]; 30 COLUM. L. REV. 232 (1930).

44. For purposes of this Comment, both one who is a party to a contractual relation-

with is joined as a co-conspirator and a victim attempts to impose *tort* liability upon him along with other non-party interferers on a theory of conspiracy to interfere. It is in this context that the distinction between conspiracy to interfere and conspiracy to breach is overlooked, and the American cases bifurcate into distinct and directly opposed lines of authority. The cases expressing these conflicting views involve almost exclusively the tort of interference with contractual relations and, primarily, the more specific tort of inducing breach of contract.<sup>45</sup>

The New York view<sup>46</sup> is that a party to a contract cannot be held liable for conspiring to interfere with his own contract.<sup>47</sup> In contrast, the California view<sup>48</sup> holds that a contracting party *may* be held liable

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ship and one who is negotiating with the expectation of becoming a party to a contractual relationship will be referred to as a "party." See note 42 *supra*.

45. Interference with contractual relations and inducing breach of contract are separate and distinct actions. Interference is broader; it compensates for damages resulting from the defendant's actions affecting the subject matter of the contract, and does not require proof that there has been a breach of contract.

*Interference, supra* note 43, at 140 n.1.

46. The term "New York view" has been utilized because of the relative abundance of New York authority on this question. See note 47 *infra*.

47. Some of the cases expressing this view are *Alghanim v. Boeing Co.*, 477 F.2d 143, 149-50 (9th Cir. 1973); *Sewell v. J.E. Crosbie, Inc.*, 127 F.2d 599, 602 (8th Cir. 1942) (Woodborough, J., dissenting); *Ariate Compania Naviera, S.A. v. Commonwealth Tankship Owners, Ltd.*, 310 F. Supp. 416, 421 (S.D.N.Y. 1970); *Nolan v. Williamson Music, Inc.*, 300 F. Supp. 1311, 1320 (S.D.N.Y. 1969); *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92, 105 (E.D.N.Y. 1968); *Savarin Corp. v. National Bank of Pakistan*, 290 F. Supp. 285, 291-92 (S.D.N.Y. 1968); *Griebel v. J.I. Case Credit Corp.*, 285 F. Supp. 621, 624 (D. Minn. 1968); *Harris v. Equitable Life Assurance Soc'y of United States*, 147 F. Supp. 478 (S.D. Iowa 1957); *Allison v. American Airlines, Inc.*, 112 F. Supp. 37, 39 (N.D. Okla. 1953); *Canister Co. v. National Can Corp.*, 96 F. Supp. 273, 274 (D. Del. 1951); *Worrick v. Flora*, 272 N.E.2d 708, 711 (Ill. App. Ct. 1971); *Bartsas Realty, Inc. v. Nash*, 402 P.2d 650, 651 (Nev. 1965); *Flaster v. Lincoln Tide-water Terminals*, 10 A.2d 730, 731-32 (N.J. Ct. App. 1940); *Bereswill v. Yablon*, 160 N.E.2d 531, 533, 189 N.Y.S.2d 661, 664 (1959); *Miller v. Vanderlip*, 33 N.E.2d 51, 56 (N.Y. 1941) (Lehman, J., dissenting); *Hornstein v. Podwitz*, 173 N.E. 674 (N.Y. 1930) (by implication); *Turntables, Inc. v. M.B. Plastics Corp.*, 297 N.Y.S.2d 51, 52-53 (App. Div. 1969); *Warner Bros. Pictures, Inc. v. Simon*, 251 N.Y.S.2d 70, 71 (App. Div. 1964), *aff'd mem.*, 205 N.E.2d 869, 257 N.Y.S.2d 947 (1965); *Caprice Imports, Inc. v. Soc. Acc. Semplice Calzaturificio Vibelsport & Co.*, 216 N.Y.S.2d 498, 499-500 (App. Div. 1961); *Cuker Indus., Inc. v. William L. Crow Constr. Co.*, 178 N.Y.S.2d 777, 779 (App. Div. 1958); *Andrews v. Lebis*, 105 N.Y.S.2d 325, 331 (App. Div. 1951); *Quinlan v. Consolidated Edison Co.*, 237 N.Y.S.2d 745, 748 (Sup. Ct. 1963) (dictum); *Piranesi Imports, Inc. v. Laverne*, 233 N.Y.S.2d 659, 661 (Sup. Ct. 1962); *Boro Motors Corp. v. Century Motor Sales Corp.*, 187 N.Y.S.2d 490, 493 (Sup. Ct. 1959); *Sax v. Sommers*, 108 N.Y.S.2d 467, 468-69 (Sup. Ct. 1951); *Dumas v. Kalozois*, 94 N.Y.S.2d 749, 751 (Sup. Ct. 1949); *Schell v. Kaiser-Frazer Sales Corp.*, 274 N.E.2d 315, 318-19 (Ohio Ct. App. 1971) (dicta); *Hein v. Chrysler Corp.*, 277 P.2d 708, 715 (Wash. 1954). See generally 15A C.J.S. *Conspiracy* § 13 (1967); PROSSER, *supra* note 3, at 934.

48. The term "California view" has been utilized because the decision which most

in tort for conspiring to interfere with his own contractual relations.<sup>49</sup> The rationale which is used to support the New York view takes the form of one or more of the following arguments: first, "since plaintiff's damages can be recovered in an action for breach of contract, the contract action constitutes plaintiff's entire grievance";<sup>50</sup> second, a plaintiff may not recover extra-contractual damages in a breach of contract action;<sup>51</sup> third, a party to a contract is unable to interfere with or to induce the breach of his own contract.<sup>52</sup> The cases expressing the California view rely on the following arguments: first, it is just as wrong for a party to a contract to enlist the aid of third persons in effecting a breach of contract as is the act of a third party in interfering with or inducing the breach of another's contract;<sup>53</sup> and, second, to hold all of the conspirators liable in tort "is in harmony with sound morals."<sup>54</sup>

Inasmuch as the above perfunctory arguments provide little analysis of either the California or New York view, the remainder of this Comment will attempt to suggest insights into the rationale underlying these two divergent views which will be dispositive of this controverted issue.

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thoroughly discusses this issue is a California case, *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 (1963), and because the geographic locations of California and New York appropriately represent the polarity of opinion on this issue.

49. See *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 F. 389 (C.C.S.D.N.Y. 1908); *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 65-72, 35 Cal. Rptr. 652, 660-65 (1963); *National Linen Serv. Corp. v. Clower*, 175 S.E. 460, 466 (Ga. 1934); *Luke v. Du Pree*, 124 S.E. 13, 16-17 (Ga. 1924); *Blivas & Page, Inc. v. Klein*, 282 N.E.2d 210, 214 (Ill. App. Ct. 1972); *Edison Realty Co. v. Bauernschub*, 62 A.2d 354, 358 (Md. Ct. App. 1948); *Western Md. Dairy, Inc. v. Chenowith*, 23 A.2d 660, 664 (Md. Ct. App. 1942); *Spring Co. v. Holle*, 78 N.W.2d 315, 317 (Minn. 1956) (trial court found interference by all defendants but limited recovery to contract damages); *Sorenson v. Chevrolet Motor Co.*, 214 N.W. 754, 755-56 (Minn. 1927) (Stone, J., dissenting); *Mills v. Murray*, 472 S.W.2d 6 (Mo. Ct. App. 1971); *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 329 S.W.2d 393, 396-97 (Mo. Ct. App. 1959) (dictum); *Worrie v. Boze*, 95 S.E.2d 192, 198-99 (Va. 1956), *aff'd on rehearing*, 96 S.E.2d 799 (1957); *cf. Falstaff Brewing Corp. v. Iowa Fruit & Produce Co.*, 112 F.2d 101 (8th Cir. 1940).

50. *Savarin Corp. v. National Bank of Pakistan*, 290 F. Supp. 285, 291 (S.D.N.Y. 1968); *Flaster v. Lincoln Tidewater Terminals*, 10 A.2d 730, 731 (N.J. 1940); *cf. Barber v. Stephenson*, 69 So. 2d 251, 255 (Ala. 1953).

51. *Canister v. National Can Corp.*, 96 F. Supp. 273, 274 (D. Del. 1951). See also *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92, 105 (E.D.N.Y. 1968); *Savarin Corp. v. National Bank of Pakistan*, 290 F. Supp. 285, 291 (S.D.N.Y. 1968).

52. *Allison v. American Airlines, Inc.*, 112 F. Supp. 37, 38 (N.D. Okla. 1953); *Hein v. Chrysler Corp.*, 277 P.2d 708, 715 (Wash. 1954).

53. *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 F. 389, 397 (C.C.S.D. N.Y. 1908); *accord, Worrie v. Boze*, 95 S.E.2d 192, 199 (Va. 1956), *aff'd on rehearing*, 96 S.E.2d 799 (1957).

54. *Luke v. Du Pree*, 124 S.E. 13, 17 (Ga. 1924); see *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 72, 35 Cal. Rptr. 652, 665 (1963).

B. *Can One Interfere or Conspire to Interfere with a Relationship to Which One is a Party?*

The tort of interference with contractual relationships contemplates intentional conduct on the part of persons who can be appropriately labelled as interferers or outsiders, *i.e.*, those who by intermeddling take part in the concerns of others.<sup>55</sup> It is difficult to understand how a party to a contractual relationship could ever be labelled as an outsider or as one who could conspire to interfere with such a relationship. In numerous cases involving the tort of interference with contractual relationships there are examples of *non-party* defendants who are charged with interference but who are not found liable because of some justifiable interest held in the disrupted relationship.<sup>56</sup> However, a party to a contractual relationship not only has an interest in that relationship, but his interest is the *sine qua non* thereof. His acts with respect to the relationship can never be considered an interference because they are the essential and operative ingredients which determine its constitution and viability or, conversely, which cause its breach or deterioration.

In the recent case of *Blivas & Page, Inc. v. Klein*,<sup>57</sup> an Illinois court, although admitting that a party cannot *interfere* with his own contract, held that a party can nevertheless *conspire to interfere* with his own contract.<sup>58</sup> The logic behind this latter contention appears to be that an actor can be held liable for the consequences of an act on a theory of conspiracy even though he does not or cannot commit the act alone. In general, this logic is sound and represents the major advantage to

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55. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1178 (1964) ("interference"). See also *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 13 (3d Cir. 1963).

56. See *Culcal Stylco, Inc. v. Vornado, Inc.*, 26 Cal. App. 3d 879, 882, 103 Cal. Rptr. 419, 421 (1972) (financial interest); *Cal-Medicon v. Los Angeles County Medical Ass'n*, 20 Cal. App. 3d 148, 152, 97 Cal. Rptr. 530, 533 (1971) (special relationship); *Gunter v. Cooper*, 154 Cal. App. 2d 862, 871, 317 P.2d 94, 100 (1957) (health, safety and morals); *Carpenter, Interference with Contract Relations*, 41 HARV. L. REV. 728, 745-62 (1928). See also RESTATEMENT OF TORTS §§ 766-74 (1939); 24 CALIF. L. REV. 208 (1936).

57. 282 N.E.2d 210 (Ill. App. Ct. 1972).

58. *Id.* at 214. *Blivas and Page, Inc.* was an architectural firm that had been involved with several successful FHA projects. They were recommended to the developer on the project in question but that developer was not approved by the FHA. *Blivas and Page* were still desirous of continuing with the project so they solicited *Klein*, a former client, to serve as the sponsor. *Id.* at 212. *Klein* promised that if he were approved by the FHA, he would retain *Blivas and Page* as the architects for the project. *Klein* then brought in additional sponsors, including *Kay*. *Kay* acquired a large interest and induced *Klein*, still a major owner, to refuse to commission *Blivas and Page* as the architects.



a plaintiff in referring to concerted action as conspiracy.<sup>59</sup> However, in approaching the question of whether or not it is possible for a party to a relationship to *conspire to interfere* with the relationship, one must examine that party's motivations, for to be liable as a conspirator one must have participated intentionally in the conspiracy with a view toward fulfilling the common design.<sup>60</sup>

A common factual pattern<sup>61</sup> may be useful for purposes of analysis: *A* and *B* are parties to a contract. *C* induces *A* to breach his contract in order that *A* will be free to do business with *C*. *B* brings suit against both *A* and *C* for conspiring to interfere with his contractual relations with *A*.

In this illustration, *A* assumes the passive role of the one being persuaded to breach his contract. Under the California view, *A* may be held liable with *C* for conspiring to interfere, and both will be subject to liability in tort damages. But can it realistically be said that *A* participated with *C* for the purpose of causing an interference? It appears that in the above illustration the only act of interference was caused through the conduct of *C*, which was completed before *A* participated in any manner in the common design. Thus the tort of interference preceded any participation by *A*. Even if we assume that *A* formally agreed with *C* to breach his contract, this formation of intent would have taken place in the aftermath of the interference. It must be kept in mind that if *A* had decided to breach his contract at a time before *C* attempted to induce the breach thereof, *C*'s conduct would not be the cause in fact for *B*'s damages and would, therefore, not be tortious.<sup>62</sup>

59. See notes 30 & 32 *supra* and accompanying text.

60. *Holder v. Home Sav. & Loan Ass'n*, 267 Cal. App. 2d 91, 108, 72 Cal. Rptr. 704, 715 (1968); *James v. Herbert*, 149 Cal. App. 2d 741, 747, 309 P.2d 91, 94-95 (1957); *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 857 (Tex. 1968).

61. See generally *Sorenson v. Chevrolet Motor Co.*, 214 N.W. 754 (Minn. 1927); RESTATEMENT OF TORTS § 766 (1939).

62. See RESTATEMENT OF TORTS § 766 (1939). When a party to a contract takes an *active* role in soliciting or inviting one, not a party to that relationship (an outsider), to enter into a relationship with him, there may be some question as to whether or not the agreement of the outsider to enter into relations with the party constitutes an interference. Even assuming that the outsider is aware of the existing relationship, if the party had already determined that it would breach its contract or otherwise terminate its relations before it solicited the outsider, then it will be difficult to demonstrate that any acts of the outsider did in fact cause the breach or termination of relations. As Professor Prosser has stated:

In order to be held liable for interference with a contract, the defendant must be shown to have caused the interference. It is not enough that he merely has

One might further ask what goal were *A* and *C* acting concertedly to accomplish? Subsequent to *C*'s interference, *A* and *C* formed the mutual design and understanding that *A* would breach his contract and that *A* and *C* would thereafter enter into a relationship. Thus the conspiracy in this case, and in most cases where a party to the relationship is involved, is to *breach* the contract and not a conspiracy to *interfere* with the contract. *C*'s conduct, although performed pursuant to a con-

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reaped the advantages of the broken contract after the contracting party has withdrawn from it of his own motion.

PROSSER, *supra* note 3, at 934 (footnotes omitted).

An extreme example of active conduct on the part of the party to a contract may be found in *United States v. Newbury Mfg. Co.*, 36 F. Supp. 602 (D. Mass. 1941), in which the plaintiff alleged that a corporation (Newbury) entered into a contract with the United States to purchase merchandise from it and further agreed to dispose of this merchandise exclusively to foreign countries. Allegedly those persons who owned and controlled Newbury subsequently organized Belmont corporation, a shell to whom Newbury sold the merchandise in violation of the terms of the agreement. Plaintiff's suit charged Belmont with interference with contractual relations. The court commented on the necessity that the party be willing and able to perform but for the interference:

The rule [that one who persuades another to break a contract will be held liable in tort] presupposes that the party defaulting was ready, able and willing to perform and would have done so if it had not been prevented or persuaded by the malicious and unwarranted interference of a third party.

*Id.* at 605. The court thus concluded that plaintiff's complaint failed to state a cause of action against Belmont corporation since Belmont did not persuade Newbury to forgo performance or otherwise render Newbury unable to perform. Rather, the court found Belmont to be an instrumentality of Newbury.

A good discussion of a case of active conduct on the part of a party to a contract in soliciting others to assist in the breach of that contract may be found in *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 F. 389 (C.C.S.D.N.Y. 1908). The court cites an example of an employer of an actor who was desirous of driving the actor out of his employment. The employer invited several third parties to attend his theatre to hoot and hiss at the actor. This conduct by the third parties interrupted plaintiff and prevented him from exercising his profession, causing him to lose engagements and to be brought into public scandal and disgrace. *Id.* at 397-98.

The court concluded that an action in tort for interference could be maintained against the employer as well as the third parties in that situation. However, it is suggested that the third parties who hissed and hooted neither caused the employer to terminate his relationship with plaintiff nor induced him to harass the plaintiff, those decisions having been made before their participation or involvement. Thus these third parties should not have been charged with interference with contractual relations and should have been classified as the agents of the employer, assisting the latter in causing a termination of the contract. Such conduct, however, far surpasses what may be termed a *mere breach* on the part of the contracting party (employer) who could have merely fired the plaintiff if his sole objective were to breach his contract. The employer and his third party agents, therefore, may be held liable jointly not only for contractual damages for conspiring to *breach* the contract, but also for whatever damages in tort may have been occasioned by the hissing and hooting. It should be emphasized, however, that for the reasons stated above, this conduct exceeding a mere breach of contract, if at all tortious, cannot be classified as interference with contractual relations. Liability for conduct exceeding a mere breach is discussed at notes 102-17 *infra* and accompanying text.

spiracy to breach, also amounts to an interference. Although *C* could be held liable jointly with *A* for contract damages on a theory of conspiracy to breach,<sup>63</sup> a plaintiff will most likely opt to seek the greater recovery of tort damages for the interference.<sup>64</sup>

The opinions do not develop a meaningful distinction between conspiracy to breach and conspiracy to interfere.<sup>65</sup> Thus many courts, because they consider the concepts one and the same, erroneously embrace the view that a party to a contract can conspire to interfere with his own contract. This position fails to recognize that the breaching party alone could never be an interferer and that the breaching party participating in concert does not intend to accomplish any goal other than the breach of his contract.<sup>66</sup>

63. See note 65 *infra*.

64. See notes 69, 73-74 *infra* and accompanying text.

65. As indicated in note 41 *supra*, New York case law has apparently blurred the distinction between conspiracy to breach and conspiracy to interfere with the result that it maintains the peculiar view, not necessarily shared by other courts embracing the "New York view," that not only can a party to a contract not conspire to interfere with such a contract, but a party to a contract cannot conspire to breach his contract. Similarly, cases adopting the "California view" also blur the distinction between conspiracy to interfere and conspiracy to breach, see *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 63, 71, 35 Cal. Rptr. 652, 659, 664-65 (1963); *Mills v. Murray*, 472 S.W.2d 6, 13-14 (Mo. Ct. App. 1971), with the contrary finding that a party to a contract can not only conspire to breach his contract, but also can conspire to interfere with his contract. Logically there is no reason why a party to a contract cannot be held liable for conspiring to breach his contract, since civil conspiracy functions primarily as an adjective describing the concerted nature of independent acts which are unlawful whether the acts amount to tortious conduct or a breach of contract.

66. See *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 (1963); *Mills v. Murray*, 472 S.W.2d 6, 13-14 (Mo. Ct. App. 1971). What might be termed an "exception" to the New York view arises in those cases where there are three or more independent parties to a contract. Illustrations are necessary:

1. *A*, *B*, and *C* are all parties to a contract. *A* induces *B* to breach the contract causing *C* damages. *C* brings suit against *A* and *B* for conspiring to interfere.

2. *A*, *B*, and *C* are all parties to a contract. *A* and *B*, by mutual persuasion, come to the agreement that they will both breach their contract with *C*. They both breach causing *C* damages. *C* brings suit against *A* and *B* for conspiring to interfere.

In Illustration 1 above, although *A* is a party to the contract, he has assumed the role of an interferer in *B*'s relations with *C* and in Illustration 2 above, although both *A* and *B* are parties to their contracts, they are acting not only with an intent to cause a breach of their contracts, but each is assuming the role of an interferer—each having interfered with the other's relationship with *C*. This exception was recognized in the New York case of *Kay v. Sussel*, 199 N.Y.S.2d 180 (Sup. Ct. 1960). *Kay* alleged that he and *Percoco* were, by contract, managers for *Coby*, a singer, and that *Percoco* successfully conspired with *Sussel* to induce *Coby* to breach that contract. Defendant *Percoco* argued that since he was a party to the contract breached, he could not be sued for inducing breach of contract. The court denied *Percoco*'s motion to dismiss, distinguishing this case from the cases representing the New York view. Offering a somewhat unclear ra-

### C. *Are Tort Damages Recoverable for a Mere Breach of Contract?*

The fundamental distinction between the New York and California views lies in their diverse remedial consequences. The courts have stated three different measures of damages for the tort of interference with contractual relations: one, the damages recoverable in a tort ac-

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tionale, the court noted that in most cases where a party to a contract has been sued for conspiring to induce its breach, a cause of action is also stated for the breach itself, and that in such cases a plaintiff is made whole by recovery on the contract cause of action. The implication, therefore, was that plaintiff cannot recover on a tort theory of interference from the breaching party. The court distinguished this situation by pointing out that Percoco did not breach any contract, implying that plaintiff's only recovery against Percoco would have to be in tort.

The *Kay* decision seems to base its rationale on the argument that when one sues a contracting party who has breached his contract, he may not recover in tort from the breaching party for conspiring to induce the breach since the plaintiff's damages can be recovered in an action for breach of contract—these latter damages constituting his entire grievance. See note 50 *supra* and accompanying text. It is submitted that this "argument" avoids the question *why* contractual damages should constitute the plaintiff's entire grievance and thus represents a mere conclusory statement of the law. The focal question seems to be whether the contracting party's conduct can be labelled as a substantive tort of interference or whether the conduct can be said to be in furtherance of a design to interfere such that he may be held on a theory of conspiracy as though his conduct were in itself tortious. The fact that the contracting party may also breach his contract and the plaintiff may recover contractual damages is a question separate and apart from questions of the breaching party's tort liability. The result of the decision, though, is sound.

It is suggested, however, that a simpler and less dubious rationale would be the recognition that when there are three or more parties to a contract, one or more of these parties can assume the role of an interferer in the relations of other parties. It is noteworthy that Professor Prosser seems to have missed the actual significance of the *Kay* case. See PROSSER, *supra* note 3, at 934 n.9.

A related factual problem would be presented by the situation wherein several persons, each of whom has a separate contract with the plaintiff, combine and conspire to breach these several contracts. This problem was examined in *Hendricks v. Forshey*, 9 S.E. 747 (W. Va. 1917), wherein plaintiff alleged that three defendants, each of whom had a separate contract with plaintiff to haul milk, maliciously confederated and conspired to refuse to permit plaintiff to haul their milk and in pursuance thereof breached their several contracts causing damage to plaintiff's business. The trial court overruled defendants' demurrer, and on appeal from this ruling, the reviewing court stated:

The contracts were several, not joint, and the wrong alleged is not simply the breach by each one of the defendants of his individual contract, but the breach of all of them in consequence of the unlawful combination and conspiracy. "If one wantonly and maliciously, . . . induce[s] a person to violate his contract with a third person to the injury of that third person, it is actionable."

[D]efendants were induced to break their contracts by their concerted action and agreement among themselves to haul their own milk.

*Id.* at 747-48 (citations omitted).

In *Hendricks*, the problem of whether or not a party can interfere with his own contractual relations did not arise. There the defendants were each charged with interference with contracts separate and independent of their own.

tion are no different from the damages allowed in an action for breach of contract;<sup>67</sup> two, recovery may be allowed for damages proximately resulting from the wrongful act as in negligence actions;<sup>68</sup> and three, the damages recoverable are the same as those for intentional torts and include recovery for mental anguish and exemplary damages.<sup>69</sup>

In those jurisdictions where contract damages are the measure of recovery for interference with contractual relations,<sup>70</sup> it would make little difference whether a party to the contract is sued on a tort theory or on a breach of contract theory. Other than possible statute of limitations ramifications,<sup>71</sup> the plaintiff's case will be the same whether he sues in tort or in contract, since in either case his recovery will be measured by those injuries reasonably foreseeable by the parties at the time they entered into the contract.<sup>72</sup> In other jurisdictions where the courts allow the same measure of recovery as in negligence or intentional tort actions, the plaintiff may claim compensation not only for injuries foreseeable at the time of the wrongful act of interference,<sup>73</sup> e.g., damage to reputation, mental suffering, etc., but also for unforeseen expenses. Additionally, punitive damages may be recoverable in tort actions<sup>74</sup> but are generally not recoverable in actions on a contract.<sup>75</sup>

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67. *Interference*, *supra* note 43, at 140. See generally Note, *Damages Recoverable in an Action for Inducing Breach of Contract*, 30 COLUM. L. REV. 232 (1930); note 43 *supra*.

The leading case of *Hadley v. Baxendale* [156 Eng. Rep. 145 (Ex. 1854)] lays down the rule that damages for breach of contract can be recovered only for such losses as were reasonably foreseeable, when the contract was made, by the party to be charged. In other words, such losses must be either of the type usually resulting from breach of like contracts, or, if unusual, the circumstances creating the special hazard must have been communicated to the defaulter before he made the bargain.

C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 562 (1935) [hereinafter cited as McCORMICK].

68. *Interference*, *supra* note 43, at 140.

69. *Id.*

70. E.g., *Western Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 644 (8th Cir. 1957); *Wilson & Co. v. United Packinghouse Workers*, 181 F. Supp. 809, 821-22 (N.D. Iowa 1960); *McNutt Oil & Refining Co. v. D'Ascoli*, 281 P.2d 966, 970-71 (Ariz. 1955).

71. See *Trembath v. Digardi*, 43 Cal. App. 3d 834, 118 Cal. Rptr. 124 (1974); *Kiang v. Strycula*, 231 Cal. App. 2d 809, 42 Cal. Rptr. 338 (1965).

72. See *Interference*, *supra* note 43, at 146-47.

73. *Id.*

74. PROSSER, *supra* note 3, at 949.

75. See, e.g., *Young v. Main*, 72 F.2d 640, 643 (8th Cir. 1934); *Fordson Coal Co. v. Kentucky River Coal Corp.*, 69 F.2d 131 (6th Cir. 1934); *Baumgarten v. Alliance Assurance Co.*, 159 F. 275, 277 (C.C.N.D. Cal. 1908); *Schroeder v. Nationwide Mut. Ins. Co.*, 242 F. Supp. 787, 789 (S.D.N.Y. 1965); *Chelini v. Nieri*, 32 Cal. 2d 480, 486, 196 P.2d 915, 918-19 (1948); *Williams v. Kansas City Pub. Serv. Co.*, 294 S.W.2d 36, 40 (Mo. 1956); RESTATEMENT OF CONTRACTS § 342 (1932); cases collected in 11 S.

Those jurisdictions which both allow tort recovery for interference with contractual relations<sup>76</sup> and adopt the California view of holding a party to a contract liable on a theory of interfering or conspiring to interfere with a contract,<sup>77</sup> necessarily arrive at the peculiar result of imposing tort liability on one who has merely breached his contract. This anomaly is clearly illustrated in the case of *Luke v. Du Pree*.<sup>78</sup> In *Du Pree*, owners of real property secretly sold their property to a third party, sidestepping the plaintiffs-brokers who had contracted with the owners to receive the exclusive right to list and receive a commission on the sale of the defendants' property and who had introduced them to the third party purchaser. The court discussed the liability of the defendants on a theory of conspiracy:

Besides, it may seem anomalous that, if a party to a contract breaks it, and is alone responsible for the breach, he can only be sued in an action *ex contractu* for the breach; but, if he breaks the contract, and another induces him to break it or conspires with him to break it, or aids him in breaking it, both can be sued *ex delicto*, on the theory that both are liable for a tort perpetrated in pursuance of a conspiracy to break the contract.<sup>79</sup>

In both tort and contract actions, the primary purpose of an award of damages is compensation. The goal of tort compensation is to give to the person wronged a sum of money which, as nearly as possible, will restore him to the position he would have occupied had the wrong not been committed.<sup>80</sup> The goal of contract compensation, however, is not restoration but the awarding of a sum which is the equivalent of full performance of the agreement—the attempt to place the wronged party in the position he would be in if the terms of the contract had been fulfilled.<sup>81</sup>

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WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 209-14 (3d ed. W. Jaeger ed. 1968) [hereinafter cited as WILLISTON]. See generally 5 A. CORBIN, CORBIN ON CONTRACTS 437-46 (1964).

76. See cases collected in PROSSER, *supra* note 3, at 948-49 nn.44-50.

77. See, e.g., *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 (1963); *Blivas & Page, Inc. v. Klein*, 282 N.E.2d 210 (Ill. App. Ct. 1972).

78. 124 S.E. 13 (Ga. 1924).

79. *Id.* at 16-17. The court, however, proceeded to point out that "the tendency of modern decisions is to hold them [both the party to the contract and the inducer] liable as conspirators. This is in harmony with sound morals." *Id.* at 17.

80. McCORMICK, *supra* note 67, at 560.

81. RESTATEMENT OF TORTS § 901 (1939); McCormick, *The Contemplation Rule as a Limitation Upon Damages for Breach of Contract*, 19 MINN. L. REV. 497 (1935) [hereinafter cited as *Contemplation*]. See generally Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936).

To the extent that these remedial goals are actually effectuated, the damages caused by a breach of contract may be equally extensive as those damages caused by a tort and sometimes may be greater when the plaintiff is awarded the benefit of the bargain made rather than merely compensation for a loss.<sup>82</sup> Aside from pure cause-in-fact considerations, the principles upon which damages depend, in both tort and contract, attempt to strike

a balance between the claim to full reparation by the innocent party [for all damages caused in fact] on the one hand and the need to limit the wrongdoer's obligation to compensate for consequences which are unacceptably [unexpected,] widespread or bizarre . . . .<sup>83</sup>

Thus courts have developed different but similarly purposed doctrines in the areas of tort and contract which serve as limitations on liability.<sup>84</sup>

The tort limitation on liability is the doctrine of proximate cause,<sup>85</sup> and the contract limitation on liability is the rule of *Hadley v. Baxendale*<sup>86</sup> which operates to restrict damages to those which were in the "contemplation" of the parties at the time the contract was made.<sup>87</sup>

82. PROSSER, *supra* note 3, at 619. Prosser cites as an example the fraud cases in jurisdictions which adopt the out-of-pocket measure of damages for deceit.

83. Byrom, *Do Damages Depend on the Same Principles Throughout the Law of Tort and Contract?*, 6 U. QUEENSLAND L.J. 118, 122 (1968) [hereinafter cited as Byrom].

84. *Contemplation*, *supra* note 81, at 498.

85. See generally Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928); PROSSER, *supra* note 3, at 244-90; Levitt, *Cause, Legal Cause and Proximate Cause*, 21 MICH. L. REV. 34 (1922); Lewis, *Proximate Cause in Law*, 7 FLA. B.J. 109 (1933); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953).

86. 156 Eng. Rep. 145 (Ex. 1854).

87. Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

*Id.* at 151.

Professor McCormick described the response by American courts to the *Hadley* rule:

There has been but little variation of the original phraseology in the use of the principle by American courts, whose opinions still repeat the formula that damages are limited to the "natural and probable consequences" and those which in the light of the facts of which they had knowledge were "in the contemplation" of the parties. The same idea is occasionally expressed more simply and directly by stating that damages may be given only for those consequences of the breach which were

Duties to refrain from tortious activity are imposed by law and have their roots in some public policy of the state.<sup>88</sup> The person under such a duty cannot negotiate the extent of the obligation he will assume, so the scope of his liability can only be formulated in terms of what he can foresee at the time he commits the act or omission alleged to be a breach of duty.<sup>89</sup> On the other hand, contract duties are created and circumscribed by the contract; they are owed only to the parties to the contract and concern those parties alone—not the state.<sup>90</sup> The contractual duty is voluntarily undertaken, presumably after a comparison be-

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“reasonably foreseeable at the time the contract was entered into as probable if the contract were broken.”

*Contemplation, supra* note 81, at 504.

The author also indicates that the *Hadley* rule requires that the court apply an *objective standard* taking into account what the defendant who made the contract might have reasonably foreseen within the context of the facts known to him, rather than limiting the inquiry to those circumstances he actually did foresee. *Id.* at 502. If the loss occasioning the damages is deemed unusual, then the question becomes one of defendant's actual knowledge at the time he entered into the contract, *i.e.*, whether or not he was then able to foresee the precise circumstances which would cause the loss now complained of. *Id.* at 507.

In application, the term “contemplation of the parties” has been held to exclude the mere *possibility* of damages and requires that a reasonable person foresee the damage as at least a serious possibility or as a real danger (see *Victoria Laundry, Ltd. v. Newman Indus., Ltd.*, [1949] 2 K.B. 528, 539-40; *Monarch Steamship Co. v. Karlshamn Oljefabriker*, [1949] A.C. 196, 233-34; D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 812-14 (1973) [hereinafter cited as DOBBS]; Byrom, *supra* note 83, at 126-27. More recently, in *Koufos v. C. Czarnikow, Ltd. (The Heron II)*, [1967] 3 W.L.R. 1491, 1505 (H.L.), Lord Reid stated:

[I]t is generally sufficient that that event would have appeared to the defendant as not unlikely to occur. . . . [I] do not find in that case [referring to *Re Hall and Pim*, [1928] All E.R. 763], or in cases which preceded it, any warrant for regarding as within the contemplation of the parties any event which would not have appeared to the defendant, had he thought about it, to have a very substantial degree of probability.

This latter case, as well as the *Victoria Laundry* case, has been cited as an indication that “the days of a narrow construction of *Hadley* are over.” DOBBS, *supra* at 813.

88. *Reiner v. North Am. Newspaper Alliance*, 181 N.E. 561, 565 (N.Y. 1932) (Lehman, J., concurring).

89. Byrom, *supra* note 83, at 120.

90. *Reiner v. North Am. Newspaper Alliance*, 181 N.E. 561, 565 (N.Y. 1932) (Lehman, J., concurring). Justice Lehman makes a noteworthy distinction between contract and tort duties, referring to the latter as general duties rooted in some public policy of the state and to the former as narrow duties not rooted in public policy:

The courts grant redress for failure to perform a contractual duty through [an] award of damages and in some cases may decree specific performance of a contractual obligation; but denial of the benefit which would be derived from performance of a contractual obligation voluntarily assumed concerns the public policy of the state remotely, if at all. At least until the present time, the courts of this state have not held that a breach of such obligation in itself contravenes the public policy of the state or carries with it other consequences than liability for damages for breach of contract.

*Id.* at 565-66.



tween the burdens and benefits occasioned by performance.<sup>91</sup> The contract breaker's scope of liability is measured by taking him back in time to the formulation of the contract, limiting his liability to the consequences which he reasonably could have contemplated, foreseen, or expected when he entered into the contract.<sup>92</sup>

There are several reasons why a person who merely breaches his contract should benefit from the greater limits on liability afforded by the *Hadley* rule. First, such a rule diminishes the risk of business enterprise and encourages trade insofar as people will more freely engage in contractual relations if they feel secure that their liability for breach is limited.<sup>93</sup> Second, both parties should contemplate the possibility of a breach of contract when they enter into the agreement, and, therefore, they may be held to have impliedly agreed that damages should be limited to those injuries within the contemplation of the parties at the time of the making of the contract.<sup>94</sup> Third, in terms of fundamental

91. Byrom, *supra* note 83, at 121.

92. *Id.*

93. McCORMICK, *supra* note 67, at 567; 30 COLUM. L. REV. 232, 240 (1930).

94. *Interference*, *supra* note 43, at 146. The author states:

While breach of contract actions preserve the plaintiff's interest in securing the performance of the contract in accordance with the agreed terms, actions for interference with contractual relations preserve that interest from unjustified interference by third persons not parties to the contract. Both parties should contemplate the possibility of a breach of contract when they enter into the agreement, and generally an adequate remedy for a breach is readily available by an action in contract for damages. However, unjustified interference with that contract by one not a party is not contemplated when the original agreement is made. Such interference may occur and the remedy sounds in tort not in contract.

*Id.* But see *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1902); *Daugherty v. American Union Tel. Co.*, 51 Am. Rep. 435 (Ala. 1883); 11 WILLISTON, *supra* note 75, at 294-95; *Contemplation*, *supra* note 81, at 502 n.14 (1935).

It might be noted in passing that Professor Williston maintains resolutely that the measure of damages for breach of contract is not based on the terms of the contract and what the parties contemplated at the time of entering into the contract, but rather that the courts have imposed an equitable doctrine in these cases in order to alleviate the hardship which may result when a serious and unexpected injury results from a breach:

To assert then, as is sometimes done expressly or impliedly, that the measure of damages for breach of a contract is based on the terms of the contract is to assert a fiction which obscures the truth and invites misapprehension which may lead to error. One who, on borrowing money, agrees to pay it the following month does not stipulate for the alternative right to keep the money at legal interest until the lender can get judgment and levy execution, although this is the only remedy the law can enforce.

*Parties generally have their minds addressed to the performance of contracts not to their breach or the consequences which will follow a breach.* The fiction here criticized is a manifestation of the broader fiction that parties contract for whatever obligations or consequences the law may impose upon them.

The true reason why notice to the defendant of the plaintiff's special circumstances is important is because, just as a court of equity under circumstances of hardship arising after the formation of a contract may deny specific performance, so a court of law may deny damages for unusual consequences where the defendant

fairness, the injured party's claim is limited because he did not disclose the special circumstances which caused the "kind" and "quantum"<sup>95</sup> of damages to exceed that which is reasonably contemplated.<sup>96</sup> These con-

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was not aware when he entered into the contract how serious an injury would result from its breach.

11 WILLISTON, *supra* note 75, at 294-95 (footnotes omitted and emphasis added).

Professor Bauer suggests that Williston's rationale seems to recognize a prima facie right in a plaintiff to recover for all damage whatsoever resulting from the breach of contract, with a mere equitable limitation to the effect that a showing that the damage was not natural and probable or contemplated will prevent the imposition of damages as compensation for such loss. Bauer, *Consequential Damages in Contract*, 80 U. PA. L. REV. 687, 697 (1932). Professor Bauer opines that many courts of the period preceding *Hadley* did recognize a prima facie right to recover for all damage resulting from a breach.

95. Byrom perceptively distinguishes the foreseeability or foresight test employed by the courts in limiting liability in tort from that employed in contract cases. Byrom, *supra* note 83, at 119. He points out that in tort the test of foreseeability is used to determine the *kind* of consequence for which the wrongdoer will be held liable; for each category of injury considered damages are recoverable in full or not at all, citing the cases of the "eggshell skull" in personal injury, the "shabby millionaire" in the field of pecuniary loss resulting from personal injury and the truism that "a tortfeasor cannot invoke the plea that he had no reason to expect his casualty to be so expensive." Byrom asserts that the contract test of foresight is used "mainly if not exclusively" to determine the *quantum* or *value* of damages recoverable.

This commentator unqualifiedly agrees with the proposition that foreseeability in tort is limited to the *kind* of damages recoverable and does not concern itself with the *quantum* of damages recoverable, but questions whether or not the *Hadley* rule as applied in contract cases is used exclusively for the purpose of limiting the *quantum* of damages. It is suggested that the *Hadley* rule, at least under United States authorities, operates to limit both the *kind* as well as the *quantum* of damages recoverable. Consider the cases where the courts have applied the *Hadley* rule to preclude recovery for personal injury (*Miller v. Morse*, 192 N.Y.S.2d 571, 576 (App. Div. 1959); *Leavitt v. Twin County Rental Co.*, 21 S.E.2d 890 (N.C. 1942); *Timmons v. Williams Wood Prods. Corp.*, 162 S.E. 329, 330-31 (S.C. 1932)), for mental anguish (*McFarlin v. Gulf States Tel. Co.*, 257 S.W. 298 (Tex. Ct. App. 1924)), for injury to reputation (*Smith v. Beloit Corp.*, 162 N.W.2d 585, 589 (Wis. 1968)), for product disparagement (*Lanston Monotype Mach. Co. v. Times-Dispatch Co.*, 80 S.E. 736, 739 (Va. 1914)), for lost profits (*Stanley v. Tinsman*, 187 A.2d 401, 403 (Me. 1963); *Huler v. Nasser*, 33 N.W.2d 637, 640 (Mich. 1948); *Thermoid Rubber Co. v. Bricton*, 163 N.W. 567 (S.D. 1917)), or for conduct justifying the imposition of exemplary damages (see cases collected in note 75 *supra*).

96. This reason represents the most compelling rationale for the greater protection afforded a contract breaker under the *Hadley* rule than the protection afforded the tortfeasor under the foreseeability rules of proximate cause. See *Koufas v. C. Czarnikow, Ltd.* (The Heron II), [1967] 3 W.L.R. 1491, 1502-03 (H.L.); Byrom, *supra* note 83, at 130; *Contemplation*, *supra* note 81, at 506; 30 COLUM. L. REV. 232, 240 (1930).

This rationale could quite appropriately be labelled "the duty of disclosure" as disclosure underlies the fundamental difference in the doctrines limiting liability in tort and contract. As Professor Byrom suggests, the law makes its demand of the injured party that,

[i]f he knows of factors which may take the consequences of breach of contract beyond what is to be expected . . . the law demands that he disclose those factors

siderations should apply regardless of the reasons for the defaulting party's decision to breach his obligation. Moreover, a party to a contract is often considered to have a "right" to breach his contract in the sense that he must either perform or pay damages.<sup>97</sup> Varying personal or economic reasons motivate one to breach his contract, but the general rule is that the motives of the defendant in breaching his contract are immaterial and cannot be inquired into on the question of compensatory damages.<sup>98</sup>

The following illustrations highlight the unsupportability of the California view in this regard:

Illustration 1:

X, a party to a contract with Y, is induced by Z to breach his contract. X then breaches his contract with Y.

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to the other party in time for that party to consider them as he assesses whether or not it is worth his while to undertake the duty.

Byrom, *supra* note 83, at 121-22.

Lord Reid cogently articulated the same rationale by stating:

In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it . . . . In tort, however, there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage . . . .

Koufas v. C. Czarnikow, Ltd. (The Heron II), [1967] 3 W.L.R. 1491, 1502-03 (H.L.).

This duty of disclosure appears to be founded on the principle of fairness, *i.e.*, if at the time of contracting the injured party had knowledge of special circumstances and an opportunity to relate them to the breaching party, it is only fair that, if he fails to inform the breaching party of these special circumstances, he be precluded from recovering for those consequences which the uninformed breaching party could not be expected to anticipate. The breaching party should be afforded a fair chance to assess the significance of his contractual undertaking. Denial of this opportunity provides justification for the *Hadley* rule.

This principle of fairness requires that the duty of disclosure not be applied where the injured party has no knowledge of the special circumstances or has no reason to contemplate the existence of such special circumstances. In such cases the injured party cannot apprise the breaching party of special circumstances, and the equities favor complete compensation of the innocent victim as in tort cases. Byrom, *supra* note 83, at 130.

97. See *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543 (1903); *Sorenson v. Chevrolet Motor Co.*, 214 N.W. 754, 755 (Minn. 1927); *Reiner v. North Am. Newspaper Alliance*, 181 N.E. 561, 563 (N.Y. 1932) (Pound, C.J., concurring); *Barbour, The Right to Break a Contract*, 16 MICH. L. REV. 106 (1917); *Holmes, The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897); 18 CORNELL L. REV. 84, 87 (1932).

98. See *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 547 (1903); *Baumgarten v. Alliance Assurance Co.*, 159 F. 275, 277 (C.C.N.D. Cal. 1908); *Pirchio v. Noecker*, 82 N.E.2d 838, 840 (Ind. 1948); *Holland v. Spartanburg Herald-Journal Co.*, 165 S.E. 203, 207 (S.C. 1932); 2 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, 1162-63 (9th ed. A. Sedgwick & J. Beale eds. 1912); 1 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 286-87 (3d ed. 1903).

## Illustration 2:

X, a party to a contract with Y, decides that his contract is not profitable enough and breaches his contract in search of more profitable relations.

In Illustration 1, the California view will permit Y to recover tort damages from X for conspiring to interfere, while in Illustration 2, Y's recovery will be limited to contractual damages. Since the identical act on X's part, a breach of contract, is involved in both illustrations and since the combination itself is not the gist of the action,<sup>99</sup> the only possible distinction between these illustrations would be the actors' motives. If one does engage in an examination of motives and intent, it is suggested that X is less morally culpable when he is tempted or induced to breach his contract than when he intentionally or wilfully sets out on his own to breach it.<sup>100</sup> In both illustrations, X has merely breached his contract and has caused identical damages to the plaintiff, yet he will be held liable for tort damages under the California rule when he succumbs to the inducement of another and will be held liable for the lesser contractual measure of damages when he acts alone without inducement.

It is hoped that the courts will recognize and remedy this disparity of treatment to the contract breaker. While the imposition of liability in tort upon the non-party interferer may be justified in all cases for his intentional disruption of the contractual relation, the party who merely breaches his contract should in all cases be exposed only to contractual liability as he has not assumed the role of an intentional interferer. To impose tort liability upon the contract breaker because of the involvement of a third person (when liability is limited to contract damages when the contract breaker is acting alone) undermines the policies which have developed limited contractual liability.<sup>101</sup>

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99. See note 24 *supra* and accompanying text.

100. The use of words with such emotive elements as "intentionally" or "wilfully" is unavoidable. These words have acquired secondary meanings associated with concepts of moral culpability which logically should have no place in a rational system of awarding damages. While the antecedents of modern damages theories relied openly on notions of morality (see Sulnick, *A Political Perspective of Tort Law*, 7 *LOY. L.A.L. REV.* 410, 412-13 (1974)), the modern tendency is to view damages as an objective method of loss allocation, J. FLEMING, *INTRODUCTION TO THE LAW OF TORTS* 1 (1967). The use of these emotionally charged descriptions of contract breaching are utilized somewhat purposefully as a direct rebuttal to the view that to hold a party to a contract liable in tort for conspiring to interfere "is in harmony with sound morals" (see note 54 *supra* and accompanying text) and to dispel any possible distinction between Illustrations 1 and 2 cited in the text.

101. See notes 93, 94 & 96 *supra* and accompanying text.

#### D. More Than a "Mere" Breach

Any suggestion which has hitherto been made indicating that the liability of a party to a contract should be limited by the *Hadley* rule is necessarily confined to conduct by that party constituting a "mere" breach of the contract. A mere breach of a contract can best be defined both generally and negatively as an act or omission which can be anticipated to go no further than to violate the terms of the contract—a violation of contractual rights without attendant circumstances amounting to a breach of the implied covenant of good faith and fair dealing<sup>102</sup> or another independent tort.<sup>103</sup>

When a contracting party seeks to breach his contract and his conduct evidences such aggravating circumstances amounting to bad faith or another independent tort, he should be subjected to tort liability, for the policies favoring limited contractual liability would have no application in such a case.<sup>104</sup> Likewise, when the breaching party acts concertedly with others to cause injuries more excessive than those occasioned by a breach of contract, the doctrine of civil conspiracy should be available to impose tort liability upon all parties to the conspiracy irrespective of their degree of participation.

A good example of conduct undertaken by a contracting party in combination with non-parties which exceeds the boundaries of what may be considered a mere breach is cited in *Motley, Green & Co. v. Detroit Steel & Spring Co.*<sup>105</sup> The *Motley* court presented a factual pattern wherein an employer of an actor drove the actor out of his employment and caused him to abandon or refuse to perform his contract. It was alleged by the actor that his employer procured several persons to come to the theatre to hoot and hiss at him.<sup>106</sup> These persons interrupted his performance and prevented him from exercising his profession and thereby caused the plaintiff to lose "divers gains and

102. A breach of the implied covenant of good faith and fair dealing is commonly referred to as "bad faith." In *Merritt v. Reserve Ins. Co.*, 34 Cal. App. 3d 858, 110 Cal. Rptr. 511 (1973), the court defines "bad faith" as follows:

Good faith implies honesty, fair dealing and full revelation. . . . Bad faith implies dishonesty, fraud and concealment. . . . Neither mistaken judgment nor unreasonable judgment is the equivalent of bad faith.

*Id.* at 876, 110 Cal. Rptr. at 523.

103. For a good example of an independent tort—intentional infliction of emotional distress—attending a breach of contract, see *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

104. See notes 93, 94 & 96 *supra* and accompanying text.

105. 161 F. 389, 397 (C.C.S.D.N.Y. 1908), quoting 2 C. ADDISON, A TREATISE ON THE LAW OF TORTS 739-40 (4th Eng. ed. 1876).

106. *Id.*

emoluments" and to be brought into public scandal and disgrace.<sup>107</sup> Aside from the question of whether or not there existed a conspiracy to interfere,<sup>108</sup> these activities on behalf of the employer far exceeded what could be referred to as a mere breach. The employer presumably could have terminated the relationship by mere notice but instead chose to breach his contract with conduct intended not only to cause a breach of the contract, but also to defame and otherwise injure the actor. Such conduct goes beyond the denial of a contractual benefit and advances to the status of an instrument of injury.<sup>109</sup>

While such conduct may emanate from a contractual relationship, it has not gone unremedied. Courts are increasingly implying a covenant of good faith and fair dealing in all contracts generally,<sup>110</sup> with the re-

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107. *Id.*

108. See note 62 *supra*.

109. In *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928), Justice Cardozo drew the following analogous distinction between misfeasance and nonfeasance:

If conduct has gone forward to such a stage that in action would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. . . . The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.

*Id.* at 898.

110. Although the implied covenant of good faith and fair dealing seems to have recently taken a prominent position in the law of insurance contracts in California (*see* *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 460, 521 P.2d 1103, 1108-09, 113 Cal. Rptr. 711, 716-17 (1974); *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 575-77, 510 P.2d 1032, 1038-40, 108 Cal. Rptr. 480, 486-87 (1973); *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 429, 426 P.2d 173, 176, 58 Cal. Rptr. 13, 16 (1967); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958); *Merritt v. Reserve Ins. Co.*, 34 Cal. App. 3d 858, 868, 110 Cal. Rptr. 511, 517-18 (1973); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (1970); *see generally* *Hills & Pivnicka, Development and Direction of the California Bad Faith Insurance Doctrine or "O Ye of Little Faith,"* 8 U.S.F.L. REV. 29 (1973); Note, *Applying the Bad Faith Doctrine to the Primary and Excess Insurance Carrier Relationship in California*, 7 LOY. L.A.L. REV. 277 (1974); Note, *Contracting for Punitive Damages*, 4 LOY. L.A.L. REV. 208 (1971)), it is a duty which is implied in every contract. *See* *Brown v. Superior Court*, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949) (agreement to make mutual wills); *Nelson v. Abraham*, 29 Cal. 2d 745, 750-51, 177 P.2d 931, 934 (1947) (partnership agreement); *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal. 2d 751, 771, 128 P.2d 665, 677 (1942) (agreement to sell and promote a machine); *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933) (assignment of profits in the production of a play). *See also* *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958); *Parks & Heil, Insurers Beware: "Bad Faith" is in Full Bloom*, 9 FORUM 63 (1973); cases collected in 17A C.J.S. *Contracts* § 328, at 286 n.40.5 (1963).

It has been stated that the duty of good faith between parties to an insurance contract is somewhat greater than the duty implied in other contracts. Insurance contracts have

sult that, if a contracting party acts in bad faith in violation of this implied covenant, he will be exposed to tort liability notwithstanding the fact that his conduct may also constitute a breach of contract.<sup>111</sup> Moreover, courts have stood prepared to award exemplary damages in those exceptional cases where the breach amounts to an independent wilful tort.<sup>112</sup>

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traditionally been held to be "*uberrima fides*." See *Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311, 316 (1928); *Equitable Life Assurance Soc'y v. McElroy*, 83 F. 631, 636 (8th Cir. 1897). "*Uberrima fides*" is defined as follows:

The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight. A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made; for example, in the case of insurance, the insured must observe the most perfect good faith towards the insurer.

BLACK'S LAW DICTIONARY 1690 (4th rev. ed. 1968).

A clear statement of the greater duty of good faith implied in limited liability insurance contracts may be found in *Merritt v. Reserve Ins. Co.*, 34 Cal. App. 3d 858, 110 Cal. Rptr. 511 (1973):

This duty of good faith and fair dealing between parties to a liability insurance contract is reciprocal, and it amounts to something more than the usual duty of good faith between contracting parties, this for the reason that in limited liability insurance contracts conflicts of interest between assured and carrier remain endemic to their relationship, and whenever a conflict of interest breaks out the carrier becomes obligated to protect the interests of the assured equally with its own.

*Id.* at 868, 110 Cal. Rptr. at 517-18.

111. See *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 434, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 19 (1967); *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (1970). Contracts relating to matters which directly concern the comfort, happiness, or personal welfare of a party thereto appear at first glance to be a special but related category where extra-contractual recovery may be obtained for a mere breach of contract. Courts have, however, allowed recovery in these cases for physical suffering and illnesses proximately caused by the breach of contract on the theory that such results would be within the contemplation of the parties at the time of the making of the contract. Thus these cases merely reflect a logical extension of the rule set forth in *Hadley v. Baxendale*. See *Chelini v. Nieri*, 32 Cal. 2d 480, 481-82, 196 P.2d 915, 916 (1948); *Windeler v. Scheers Jewelers*, 8 Cal. App. 3d 844, 851, 88 Cal. Rptr. 39, 44 (1970); *Westervelt v. McCullough*, 68 Cal. App. 198, 208-09, 228 P. 734, 738 (1924); *Renihan v. Wright*, 25 N.E. 822 (Ind. 1890).

112. See, e.g., *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 401-02, 89 Cal. Rptr. 78, 93-94 (1970); *Kuiken v. Garrett*, 51 N.W.2d 149, 158 (Iowa 1952); *Burrus v. Nevada-California-Oregon Ry.*, 145 P. 926, 929 (Nev. 1915), *appeal dismissed*, 244 U.S. 103 (1917); *Forrester v. Southern Pac. Co.*, 134 P. 753, 760-61 (Nev. 1913); *Wellborn v. Dixon*, 49 S.E. 232, 234 (S.C. 1904); *Southwestern Gas & Elec. Co. v. Stanley*, 70 S.W.2d 413, 415 (Tex. 1934). See generally Note, *Contracting for Punitive Damages*, 4 LOY. L.A.L. REV. 208 (1971).

In a recent case, *Silberg v. California Life Ins. Co.*, 11 Cal. 3d 452, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974), the California Supreme Court ruled that, although an insurer violated its implied duty of good faith and fair dealing toward its insured, this tortious act alone did not necessarily establish that the defendant acted with the requisite intent necessary to impose exemplary damages. The court stated:

It does not follow that because plaintiff is entitled to compensatory damages that he is also entitled to exemplary damages. In order to justify an award of exemplary damages, the defendant must be guilty of oppression, fraud or malice.

In *Fletcher v. Western National Life Insurance Co.*,<sup>113</sup> a California court dealt with an insurer that not only breached its contract with the insured, but also engaged in conduct constituting intentional infliction of emotional distress.<sup>114</sup> The court made a discerning analogy<sup>115</sup> to the tort of interference with contractual relations:

If a third person, a legal stranger to plaintiff, were to interfere with plaintiff's rights under the insurance policy by conduct and with purposes similar to defendants' in the case at bench, that person would be liable to plaintiff in damages for all detriment proximately caused thereby, both economic loss and emotional distress and, in a proper case, could be assessed punitive damages. There is no sound reason why plaintiff's legally recognized interests should receive less protection from interference by the insurer itself, which has a special duty to plaintiff

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*Id.* at 462, 521 P.2d at 1110, 113 Cal. Rptr. at 718, citing CAL. CIV. CODE § 3294 (West 1970).

113. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

114. In *Fletcher*, after paying premiums for two years on a disability insurance contract, the insured was injured and placed on disability by his employer. The insurer began to make benefit payments until a new claims supervisor was hired. The new supervisor sent a series of letters to the insured claiming that his condition was congenital and therefore payable under the sickness provision of the policy which limited payments. The letters also accused the insured of material misrepresentation in completing his application form and demanded the return of all benefits paid thus far unless the insured accepted a compromise offer.

The evidence adduced at the trial disclosed a complete absence of investigation by the insurance company concerning the insured's congenital defect, as well as a complete absence of facts supporting the insured's knowledge of his condition. *Id.* at 389, 89 Cal. Rptr. at 85.

115. In Note, *Contracting for Punitive Damages*, 4 LOY. L.A.L. REV. 208 (1971), the author, referring to this analogy, commented:

An action for interference has never been extended to a party to the contract. If the *Fletcher* court's reasoning were logically extended, then every party who would breach his contract with another would be liable, not only for his breach (in an action on the contract) but would also be held for intentionally interfering with a contractual relation and be subject to exorbitant liability in damages. This is surely not what the court was driving at by making their analogy.

*Id.* at 227 n.102 (citation omitted).

This writer suggests that the first sentence quoted above is less than accurate. See note 49 *supra* and accompanying text. This writer further submits that the court was not driving at a rule which would impose tort liability for a mere breach of a contract; the court was merely stating that if a third party engaged in the disgraceful conduct which the insurer (party to the insurance contract) was found to have committed, an action for interference would necessarily lie. Implicit in the court's rationale is the suggestion that if both a legal stranger and a party to a relationship act in an equally tortious manner, their liability should be commensurate—the stranger's tort liability arising from the tort of interference with contractual relations and the breaching party's tort liability arising from the tort committed or from a breach of a duty of good faith. The court's language, however, unfortunately implies that the breaching party should be held liable for the tort of interference with contractual relations.



of good faith and fair dealing, nor is there any reason why plaintiff's insurer should be held to a lower standard of conduct than a stranger.<sup>116</sup>

The court's reasoning succinctly suggests the remedy available to a non-breaching party to a contract when the breaching party's conduct rises to the status of a tort. This so-called "interference" by the party to the contract above and beyond a mere breach is none other than an independent tort or a breach of the implied covenant of good faith and fair dealing. The result may be the same whether such conduct is referred to as interference or bad faith, but much confusion will be avoided if accurate designations are utilized.<sup>117</sup>

116. 10 Cal. App. 3d at 403, 89 Cal. Rptr. at 94-95 (citation omitted).

117. A California Supreme Court case which is worthy of attention is *Buxbom v. Smith*, 23 Cal. 2d 535, 145 P.2d 305 (1944). In that case, the plaintiff brought suit against several defendants alleging that they had breached two contracts of employment: a contract employing plaintiff to publish a newspaper and a contract to distribute that newspaper. Plaintiff alleged that immediately after the contracts were executed, plaintiff solicited advertising, enlarged his distribution crews, employed additional supervisors, and otherwise prepared to handle the distribution of 40,000 copies of the newspaper, and that after defendants breached their contracts, they employed plaintiff's distributing crews and supervisors. The trial court awarded plaintiff \$4,000 for the loss of plaintiff's trained organization, supervisors, and goodwill and for general damages to plaintiff's business.

Defendants appealed from this result, arguing that such an award could only be made in an action sounding in tort—that it had no place in a contract action. The court on appeal reviewed the evidence and found that defendants had committed tortious acts. The court pointed out that defendants gained an unfair advantage over plaintiff through deceptive dealings in the form of a contractual arrangement whereby they deliberately induced plaintiff to build up his distributing organization to a level consistent with the advertising needs of their then non-competing business. Having obtained complete knowledge of his business methods and records through their employment agreement with plaintiff, they then undertook to terminate their relationship with him, hired his crews, and assumed control of his valuable enterprise. The court stated:

Although defendant's conduct may not have been tortious if he had merely broken the contract and subsequently decided to hire plaintiff's employees, an additional factor is present in this case. From the evidence the trial court could reasonably infer that the breach, at the time it was made, was intended as a means of facilitating defendant's hiring of plaintiff's employees. A breach of contract is a wrong and in itself actionable. It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and, in our opinion, constitutes an unfair method of interference with advantageous relations . . . .

*Id.* at 548, 145 P.2d at 311.

Although *Buxbom* involves interference with the plaintiff's business advantages with his employees, it is also an illustration of a factual situation where recovery could have been based on defendants' bad faith performance of their contract with plaintiff. Suppose, for purposes of analysis, that defendants in *Buxbom* did not hire away plaintiff's employees but rather breached the contract solely for the purpose of utilizing the complete knowledge of plaintiff's business methods acquired during the course of the contract, leaving plaintiff with a substantial investment in winding-up costs and without the benefits of defendants' promised performances. Such conduct would not involve any element of interference but would clearly constitute a breach of the implied covenant of good faith and fair dealing which exists in every contract.

Once courts recognize that the bad faith or tortious conduct of a party to a contract is not interference but rather a breach of the implied covenant of good faith and fair dealing or another independent tort, then hopefully they will hesitate before imposing conspiracy-tort liability on a party to the contract for interference with contractual relations when that party's sole act is a mere breach.

### E. *A Logical Inconsistency*

Further support for the New York view may be derived from the logical inconsistency resulting from a simple application of the California view to a variation of the typical case of interference with contractual relations. A well-established rule in the law of interference with contractual relations is that the underlying contract need not be an enforceable one for the plaintiff to have standing to maintain an action for interference against third party interferers.<sup>118</sup> As long as the contract is not illegal<sup>119</sup> or against public policy,<sup>120</sup> the courts will assume that, but for the interference, the parties to the contract would have voluntarily performed their obligations thereunder despite the fact that these obligations would not be recognized in a court of law. The rationale for this rule may be found in *Harris v. Perl*,<sup>121</sup> where the New Jersey Supreme Court concisely stated the rule:

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118. [I]t usually is held that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, or harsh and unconscionable provisions, or conditions precedent to the existence of the obligation, can still afford a basis for a tort action when the defendant interferes with their performance.

PROSSER, *supra* note 3, at 932 (footnotes omitted). *But see* Sacks v. Martin Equip. Corp., 130 N.E.2d 547 (Mass. 1955); Morgan v. Speight, 89 S.E.2d 137 (N.C. 1955) (*criticized in* 58 W. VA. L. REV. 302 (1956)).

It seems correct to say that when the defect in the contract lies in its *formation* so that a contract never came into existence, an action for interference with contractual relations should not lie (*see* Alice v. Robett Mfg. Co., 328 F. Supp. 1377 (N.D. Ga. 1970), *aff'd*, 445 F.2d 316 (5th Cir. 1971); Williams v. DeMan, 151 N.W.2d 247 (Mich. Ct. App. 1967); Overlock v. Central Vt. Pub. Serv. Corp., 237 A.2d 356 (Vt. 1967)), but this should not preclude an action for interference with prospective business advantage.

119. *Gunnels v. Atlanta Bar Ass'n*, 12 S.E.2d 602, 610 (Ga. 1940); *Revlon Prods. Corp. v. Bernstein*, 119 N.Y.S.2d 60 (Sup. Ct. 1953); PROSSER, *supra* note 3, at 931 n.72; 24 CALIF. L. REV. 208, 212-13 (1936); 89 U. PA. L. REV. 991-92 (1941).

120. *E.g.*, *Advance Indus. Security Inc. v. William J. Burns Detective Agency, Inc.*, 377 F.2d 236, 238 (5th Cir. 1967); *Hansen v. Barrett*, 183 F. Supp. 831, 833 (D. Minn. 1960); *Mindenberg v. Carmel Film Prods.*, 132 Cal. App. 2d 598, 602, 282 P.2d 1024, 1027 (1955); *Gunnels v. Atlanta Bar Ass'n*, 12 S.E.2d 602, 610 (Ga. 1940); 86 C.J.S. *Torts* § 44 (1954); PROSSER, *supra* note 3, at 931 n.73.

121. 197 A.2d 359 (N.J. 1964). *See also* *Golden v. Anderson*, 256 Cal. App. 2d 714, 719, 64 Cal. Rptr. 404, 407 (1967).

[O]ne who unjustifiably interferes with the contract of another is guilty of a wrong. And since men usually honor their promises no matter what flaws a lawyer can find, the offender should not be heard to say the contract he meddled with could not have been enforced.<sup>122</sup>

This principle has likewise been applied to unenforceable contracts "at the will" of the parties where the courts have often stated that "the fact that the contract is at the will of the parties, does not make it at the will of others."<sup>123</sup>

Thus the tort of interference with contractual relations will stand by itself irrespective of the insufficiency of the underlying contract. In the California case of *Patterson v. Philco Corp.*,<sup>124</sup> however, a plaintiff brought suit against his employer (Philco) and his fellow employee (Joyce) for damages for his alleged wrongful discharge on an apparent theory of conspiracy to interfere with contractual relations. The court preliminarily noted that the demurrer of Joyce was properly overruled since it was alleged that he was acting in a personal capacity,<sup>125</sup> which presumably would preclude a finding that he was acting on behalf of the corporation.<sup>126</sup> In his brief, plaintiff conceded that his employment with Philco was terminable at will. The court affirmed the trial court's order dismissing Philco, concluding that, although there is California authority that a conspiracy will lie against a party to a contract for con-

122. 197 A.2d at 363.

123. *Truax v. Raich*, 239 U.S. 33, 38 (1915); *American Sur. Co. v. Schottenbauer*, 257 F.2d 6, 10-11 (8th Cir. 1958); *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 39-40, 172 P.2d 867, 870 (1946); *Childress v. Abeles*, 84 S.E.2d 176, 184 (N.C. 1954); 36 TEMP. L.Q. 237, 239 (1963). See generally *Zelinger v. Uvalde Rock Asphalt Co.*, 316 F.2d 47, 50-51 (10th Cir. 1963); *Gruen Watch Co. v. Artists Alliance*, 191 F.2d 700, 704-05 (9th Cir. 1951); cases collected in Annot., 84 A.L.R. 43, 60 n.f. (1933), supplemented by 26 A.L.R.2d 1227, 1258 (1952); 25 BROOK. L. REV. 73 (1958); 33 N.Y.U.L. REV. 238 (1958).

124. 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1967).

125. *Id.* at 65, 60 Cal. Rptr. at 111.

126. The court's finding rests on the immunity which corporate officers, directors, and employees enjoy while acting on behalf of the corporation—sometimes referred to as the "freedom of action rule." See *Buckley v. 112 Central Park S., Inc.*, 136 N.Y.S.2d 233, 237 (App. Div. 1954). Under this rule any interference with a corporation's contract by an officer, director or employee of the corporation who is acting in the good faith belief that he is furthering the interests of the corporation is privileged. See generally *Zelinger v. Uvalde Rock Asphalt Co.*, 316 F.2d 47, 52 (10th Cir. 1963); *Hare v. Family Publications Serv. Inc.*, 334 F. Supp. 953, 959 (D. Md. 1971); *Allison v. American Airlines, Inc.*, 112 F. Supp. 37, 38 (N.D. Okla. 1943); *Vassardakis v. Parish*, 36 F. Supp. 1002, 1005 (S.D.N.Y. 1941); *Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 576, 510 P.2d 1032, 1039, 108 Cal. Rptr. 480, 487 (1973); *Becket v. Welton Becket & Associates*, 39 Cal. App. 3d 815, 823, 114 Cal. Rptr. 531, 535 (1974); *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 72, 35 Cal. Rptr. 652, 665 (1963); *Greyhound Corp. v. Commercial Cas. Ins. Co.*, 19 N.Y.S.2d 239, 241-42 (App. Div. 1940).

spiring to induce its breach,<sup>127</sup> "[plaintiff's] employment was 'at will' and does not come within that class of cases which hold that a conspiracy action will lie against a party to the contract . . . ."<sup>128</sup>

In a case involving an unenforceable contract terminable at will, California has inconsistently concluded that a party to the contract cannot be held liable for conspiring to interfere. This result, it is suggested, demonstrates an unspoken admission that when an *enforceable* contract is involved, under the California view, the party to the contract is held liable in tort solely for the mere act of breaching a contract. Although a party to an unenforceable contract may have combined, plotted, and planned with the interferer (acts which, under the California view, would be considered to be participation in a conspiracy to interfere), these acts are suddenly ignored where the party to the contract cannot be said to have breached his contract. In the absence of a breach of contract, there is an opportunity to examine the charge of conspiracy to interfere independently and in its own right. The *Patterson* court recognized the potential liability of the non-party defendant Joyce for acts constituting interference, but declined to recognize the same liability of the party defendant Philco, since the latter did not and could not breach the employment contract with the plaintiff. It is suggested that the *Patterson* court unwittingly sensed the emptiness of a charge of conspiracy to *interfere* which is levelled against a party to a contract.

Logically, there is no reason why an action for conspiracy to *interfere* should not lie irrespective of the enforceability of the underlying contract since the tort of interference will exist without regard to the enforceability of the contract in question. On the other hand, if under facts similar to those in *Patterson*, a party to the contract is charged as a defendant with conspiracy to *breach* his contract, then the result of the *Patterson* case would be sound. It is quite obvious that an unenforceable contract cannot be breached, and, accordingly, there can be no conspiracy to effect its breach. The *Patterson* case can perhaps be read as teaching either or both of the following: first, that when the courts say "conspiracy to *interfere*" while joining a party to the contract as a defendant, they really mean "conspiracy to *breach*";<sup>129</sup> or, second, if the courts really mean what they say when using the term "conspiracy

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127. 252 Cal. App. 2d at 67, 60 Cal. Rptr. at 113, citing *Wise v. Southern Pac. Co.*, 223 Cal. App. 2d 50, 35 Cal. Rptr. 652 (1963).

128. 252 Cal. App. 2d at 68, 60 Cal. Rptr. at 113.

129. A good example of a case adopting the California view which uses the terms "conspiracy to breach" and "conspiracy to interfere" interchangeably is *Mills v. Murray*, 472 S.W.2d 6, 13-14 (Mo. Ct. App. 1971).

to interfere" while joining a party to the contract as a defendant, they reach a logical inconsistency and are at a loss to impose liability in the unenforceable contract cases when a breach does not and cannot occur.<sup>130</sup> Either of the above interpretations lends support to the New York view. The first more directly and the second indirectly by exposing an inherent flaw in the California view.

#### IV. CONCLUSION

Civil conspiracy, except in unusual circumstances,<sup>131</sup> must properly be placed in perspective, not as a tort or a wrong in and of itself, but as an adjective describing the concerted nature of recognized forms of injury which produces remedial<sup>132</sup> and evidentiary<sup>133</sup> consequences. An understanding of this concept will more readily enable one to distinguish between conspiracy to breach and conspiracy to interfere as two independent wrongs. Conspiracy to *breach* should in all cases be applicable to a party to a contract as well as to non-parties who may be concurrently liable for contractual damages regardless of their degree of activity.<sup>134</sup> In most cases these non-parties may alternatively be held liable in tort damages for interference with contractual relations, but theoretically an injured party could nevertheless proceed on a conspiracy theory against parties and non-parties alike for breach of contract.<sup>135</sup> Conspiracy to *interfere*, on the other hand, should not be applicable to a party to a contract.<sup>136</sup>

An attempt has been made to illustrate the conceptual difficulties with a rule which recognizes that one may interfere with his own contract;<sup>137</sup> however, the primary objection to the California view can be found in its arbitrary and illogical imposition of tort damages upon a party who is said to have merely breached his contract. Although the New York view expresses the more tenable rule, such a position should not be interpreted as a perfunctory adherence to traditional contract and tort distinctions.

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130. Further support for the New York view may be found from the lack of any case law holding a party to an expectancy (which has not yet reached contractual form) liable for conspiracy to interfere with this prospective business relationship. Such a situation would be most analogous to the unenforceable contract cases inasmuch as the party to the relationship cannot be found liable for breach of contract.

131. See notes 25, 27 & 28 *supra* and accompanying text.

132. See notes 30-32 *supra* and accompanying text.

133. See note 31 *supra* and accompanying text.

134. See notes 64-65 *supra* and accompanying text.

135. See note 65 *supra*.

136. If multiple parties are involved, the conclusion is the opposite. See note 64 *supra*.

137. See text accompanying notes 55-66, 118-30 *supra*.

The *Hadley* rule is founded upon sound principles<sup>138</sup> limiting liability for a mere breach of contract, and when conduct incident to a contractual relationship exceeds a mere breach, other remedies have been fashioned to adequately compensate the victim and punish the wrongdoer.<sup>139</sup> The California view is thus unnecessary if its goal is to afford extra-contractual recovery for aggravated conduct exceeding a mere breach. Moreover, in cases of a mere breach of contract, the California view serves only to engender disparate and inconsistent judicial treatment of contract breakers—such treatment being founded upon no rational or moral basis.

*Brand Lawless Cooper*

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138. See notes 92-96 *supra* and accompanying text.

139. See notes 109-17 *supra* and accompanying text.