

Tortious Interference and Business Competition



BY MICHAEL SEAN QUINN

Insurance agents are in a tough spot. They compete for business against nearly everybody: each other, banks, financial analysts, annuity companies, and—yes!—even insurers. Often, it seems that insurance agents have to

compete against the very companies they represent. If they are cheap, as the public generally believes, they certainly do not want to pay commissions if they do not have to.)

Sometimes those involved in a competitive free-for-all look for legal remedies to cut down on the competition. There are two tempting torts. First, if A and B are competing, and A induces C to break a contract it has already made to B, B may sue A for tortious interference with contract. Second, if A and B compete, and B and C have an ongoing arrangement, but no contract, or if B and C are about to form a contract but haven't done so yet, sometimes, if A diverts the business of C to himself, B can sue A for tortious interference with prospective advantage.

But we live in a competitive economy. Indeed, we live in a competitive society. In his Short Gain Clinic, Ben Crenshaw routinely says that competition is necessary not only for improving golf but for human development and fulfillment. Crenshaw may be not only a great golfer but a good philosopher. So, why are these two types of torts not appropriate? After all, they both diminish competition.

I. The Case

The Texas Supreme Court dealt with this question thoroughly in *Wal-Mart Stores, Inc. v. Sturges*, decided on March 8, 2001. This decision was mainly about tortious interference with respect to prospective advantage, but it used tortious interference with contract as a contrast. This is one of those opinions which will end up in law school case books. It is also a highly symbolic decision which probably catches the flavor of the times.

The case arose out of a land deal. Wal-Mart owned use restrictions on land, though not the land itself. Sturges, and others, wanted Wal-Mart to revise those restrictions so that they could develop the property. Sturges received a tentative indication from a Wal-Mart employee that the corporation would probably be well-

disposed toward a revision, so he prepared a site plan.

In the meantime, other employees of Wal-Mart concluded that the company might want the property for its own expansion. Sturges lost the deal he had nurtured, and sued Wal-Mart for tortiously interfering with his prospective lease of the land. The allegation was that Wal-Mart unreasonably refused to approve the requested site plan modification. The case went to trial on this theory. The jury assessed \$1,000,000 in actual damages and \$500,000 in punitive damages. The court of appeals affirmed the award of compensatory damages, but remanded the case for a new trial on the issue of punitive damages. Wal-Mart petitioned the Supreme Court of Texas for review. It took the case.

II. History

Justice Nathan Hecht, one of the most distinguished and profound jurists working in Texas today, wrote the opinion of the court. The five-person majority treated the problem as one involving what kind of evidence must be presented by a plaintiff in order to be entitled to a verdict. There is a problem with this vision of the case, as we shall see.

Justice Hecht's main project was to drive a wedge between tortious interference with contract (TIK) and tortious interference with prospective advantage (TIPA). He thinks that neither tort is very clear but that TIPA was unconscionably unclear and had to be revised.

In order to carry out his reasoning, Justice Hecht reviewed the history of interference torts beginning with the time of ancient Rome. In doing so, he carries on the grand tradition of common law judging.

A. Ancient History

In ancient Rome, if A did violence to the family members of B, B could sue A. The reason was that the labor of family members was a valuable economic asset. Similarly, if A interfered with the household slaves of B, B could sue A for his losses.

The common law was similar. If A used fraud, defamation, or duress to drive customers away from B, B could sue A. In the American South, slave owners could sue those who injured their slaves.

Also, although Justice Hecht does not discuss this matter either, in the 19th Century and in the early part of the 20th, if A hired the daughter of B to work as a servant in his house and impregnated her, B could sue A for seduction. The reasoning was that B lost the economic value of his daughter as the result of A's

illegitimate activities. Curiously, the daughter of B herself—she who was seduced—could not sue A for seduction. Only B could.)

B. Victoriana

Nineteenth Century England saw two venerable cases, shape the law of tortious interference for the next 150 years. In *Lumley v. Gye* (1853), the Queens Bench decided that when Gye induced an opera singer to sing for him instead of Lumley by means of offering a higher fee, Gye was liable to Lumley for TIK. *Lumley v. Gye* is the law today.

(Obviously, it does not apply to employment contracts terminable at will, i.e., most employment contracts. However, it does apply to fixed-date employment-like commitments, as well as other such contracts, and it applies to covenants not to compete. In many jurisdictions, the interferer cannot contest the reasonableness of the covenant not to compete, although the parting employee can.)

In 1893, the Queen's Bench extended the rule in *Lumley* to situations where there was no existing contract. In *Temperton v. Russell*, the court held that trade union officials might be liable to a vendor of building supplies when they threatened the customers of that business with labor disruptions if they continued to purchase from him.

Temperton thus treated TIPA as "simply another aspect of interference with contract." This gambit was a mistake, according to Justice Hecht. "It is one thing for A and B to compete for C's business, and quite another for A to persuade or force C to break his contract with B." TIK assumes the lawfulness of competition but limits competition by enforceable promises already made. TIK presupposes that in the absence of any such promises, "competitors should be free to use any lawful means to obtain advantage."

Without quite saying so, Justice Hecht is contending that TIK and TIPA are deeply different. He is contending that one is legitimate, while the other undermines free competition. According to him, competitors should be able, "well within the bounds of law, to try to achieve the best for themselves and, consequently, harm to each other." They should even be permitted to try to injure each other, within the framework of legal rules. This is why, Justice Hecht implies, economic competition is so much like a competitive game. "In a society built around business competition, interference with prospective business relations has never been thought to be wrong in and of itself." Indeed, it is to be approved.

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III. Liability Factor

What added ingredient is necessary to make competition tortious? Some people have tried out the idea of malice. But the common law is very uncomfortable with malevolent motive being that which makes something tortious. The common law strives to find objective criteria for tortious conduct. Subjective factors are just too hard to deal with. If a person does something legal with a mean spirit, the person has not thereby violated the law. No law says, Act only in a positive manner on pain of paying damages.

It begs the question to say that there ought to be a tort of injuring someone deliberately, without justification. The question then becomes: What constitutes a justification?

It is very little help to articulate a list of potential liability factors and simply invite judges and juries to savor the stew. This smacks of subjectivity, relativism, and unreason. The key to the law is objectivity, orderly lists of elements, and reasonableness.

IV. Hecht's Solution

Justice Hecht proposes that interference with the prospective advantage is tortious only if the interferer commits an independently unlawful act. In general, this will mean that the interferer has either committed a crime or committed a separate tort.

Thus, if A and B are competing for the business of C and A diverts C's business from B by committing a crime, B may sue A on a theory of TIPA. Furthermore, if B commits a tort as against C—or perhaps a complete stranger to the competitive configuration, say, D—then B can sue A on a theory of TIPA.

The list of available torts is extensive. It includes battery, intimidation, fraud, negligent misrepresentation, and more. The list probably also includes violations of the Deceptive Trade Practices Act, perhaps violations of the Insurance Code, and other statutory violations not actionable by A. Conduct that is merely 'sharp' or unfair is not actionable and cannot be the basis of an action for [TIPA].

In general, the plaintiff in a TIPA case must prove that the defendants lacked justification. There is a single exception to this rule. If the tort (or whatever) utilized as the necessary predicate for the TIPA action specifies affirmative defenses, it will be the alleged interferer's burden to plead and prove them.

V. A Twist

Only five justices joined in the crucial part of the majority opinion. No one dissented, however. One justice did not participate. As is customary no explanation was given. Perhaps he owed Wal-Mart stock or knew a plaintiff socially. The court is also shy one justice, since one former member recently resigned to go to Washington with President Bush. Two justices had a procedural problem with what the major-

ity of the court did. They did not dissent, however. Then again, they did not join in the opinion either.

The procedural problem is an interesting one. As a general rule, appellate courts consider only matters raised in the trial court. Further, the standard, time-honored method for asking a court to rethink substantive legal standards is to object to questions the court puts to the jury and to provide the trial court new and better formulations of the law. The court then ignores or rejects those suggestions, and they become a necessary condition for appeal.

There were no relevant objections to the questions put to the jury in this case. Consequently, the concurring justices believed that the court could not revise the legal standard for TIPA.

As stated, what Justice Hecht did was to argue that he was not revising the legal standard but was considering what evidence must be presented before a plaintiff can even get to the jury in a TIPA case.

If this looks like judicial slight-of-hand, it probably is. Thus, while the supreme court has shrunk the tort of TIPA, it has expanded its legal power to make revisions in the law.

VI. Observations

Wal-Mart v. Sturges is a highly symbolic case. It is a sign of the times. First, the case is trying to eliminate subjectivity from legal decision making. It manifests a distinct preference for clear and objective standards. Subjective factors, like motive, are demoted.

Second, many current legal standards involved diverse factors which must be articulated, considered, contemplated, somehow weighed, and then used in a decision. The trouble is that groups of factors are frequently difficult to weigh against each other. Indeed, sometimes they are incommensurable. Justice Hecht is leading the Texas Supreme Court back to right-line rules, where possible.

Third, a decision in Sturges augers the restoration of vigorously competitive capitalism. It has always been a theme in American thought, but it waxes and wanes.

VII. Agents

Fourth, by driving a wedge between TIK and TIPA Justice Hecht has impliedly exalted promising as a social institution. For most of the Twentieth Century the importance of contract as promise has been played down in the law. The Sturges case heralds a new and more moralistic age.

In terms of the legal situation of insurance agents, however, Sturges is not good news. Many insurance agents know the distinct feeling that the carriers they represent are at least unreliable and perhaps out to get them. A decision in Sturges would make it

much more difficult for agents to threaten insurers with TIPA actions than it has been in the past. It has never been easy, since TIPA actions are difficult to win anyway. Now it is even harder. ■

Quinn is an Austin shareholder in the law firm of Scheinfeld, Maley & Kay. He litigates and testifies on insurance related problems and is currently the chair of the Insurance Section of the State Bar of Texas. He also is a Visiting Professor of Law at the University of Texas-Austin.

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