The Use of State Statutes and Common Law Tort Theories to Regulate Business Conduct

James M. Burns

Williams Mullen

1666 K. St., N.W., Ste 1200
Washington, D.C. 20006
(202) 327-5087
jmburns@williamsmullen.com

James B. Kinsel

Williams Mullen

8270 Greensboro Dr., Ste 700
McLean, Virginia 22102
(703) 760-5251
jkinsel@williamsmullen.com

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JIM BURNS is the chair of Williams Mullen's Antitrust Practice Group and vice-chair of the DRI Commercial Litigation Antitrust Specialty Group. He is also the vice-chair of the American Bar Association Antitrust Section's Exemptions and Immunities Committee, and previously served as the chair of the Antitrust Section's Insurance Industry Committee. For more than 20 years, Mr. Burns has represented clients in a wide variety of antitrust litigation, merger and counseling matters, with a particular emphasis on the representation of clients in the insurance, health care, and financial services industries.

JIM KINSEL is a trial attorney and a cochair of Williams Mullen's Unfair Business Practices Team. His litigation practice focuses on unfair business practice claims, including business conspiracies, trade secret misappropriation, fiduciary duty breaches, and other business torts. Jim also coauthors the Unfair Business Practices Blog: http://unfairbusinesspractices.blogspot.com

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I. Introduction

Government regulation of business competition occurs in many forms, at both the federal and state levels. For example, business competition is regulated through the patent and trademark laws, the False Claims Act, and the antitrust laws, to name just a few of the more prominent means by which federal law regulates business conduct. In each of these instances, federal law creates a statutory framework that provides guidelines regulating the appropriate bounds of business competition. At the same time, business competition is also regulated at the state level. State regulation occurs sometimes through state laws that are comparable in scope and reach to the federal laws described above but more commonly through private lawsuits based upon common law and state statutory causes of action. Business regulation through litigation is harder to categorize and more diverse in its application, but is no less important in shaping the course of business conduct.

Because the legal principles underlying these state laws often vary in material respects from state to state, a business practice that may be an acceptable part of the rough-and-tumble business world in one state may constitute actionable conduct in another. Therefore, a close examination of the particular manner in which business competition is regulated at the state level is critical in determining whether conduct that constitutes merely aggressive business tactics in one state is considered tortious in another.

This article will examine how differences in state law can shape and influence what constitutes the appropriate bounds of business competition in a particular state. Focusing on the laws in selected states (Massachusetts, North Carolina, and Virginia), this article will highlight the different approaches of these states to these issues and the impact of such decisions on business conduct in those states. As demonstrated below, given the varying state laws, businesses that operate across state lines may be unable to adopt uniform policies without either narrowing their competitive opportunities or increasing their liability. Consequently, a careful review of the unfair competition laws of every state in which a national or regional corporation operates is essential to ensuring compliance with the law.

II. Intentional Interference with Contract or Business Expectancy

Perhaps no form of business dispute between competitors is as common as that arising from a company's attempt to attract business away from a competitor. In assessing such claims, the courts are necessarily required to determine when such conduct crosses the line between legitimate competition and tortious interference with a competitor's business relationships. In determining where to draw that line, the courts typically are required to balance a company's entitlement to protect its client and prospective client relationships against the general policy of encouraging open competition. Many jurisdictions have tried to answer this question by distinguishing between contractual and prospective relationships, and some have further divided contractual relationships into at-will and defined term contracts.

As highlighted below, a key difference exists among the states concerning whether a plaintiff is required to establish an illegal or wrongful act before recovering under a tortious interference claim. There is also a difference in the standards courts employ to determine whether a business activity is wrongful, for example, "without legal justification," "improper motive," "improper methods," or "independently wrongful."

These differences have a material impact in determining what type of business competition constitutes actionable conduct in a particular state.

A. Virginia

Virginia recognizes the torts of intentional interference with contract and intentional interference with business expectancy. Virginia distinguishes between fixed duration contracts on the one hand and at-will contracts and prospective contractual relationships on the other. It treats at-will and fixed duration contracts differently because "not all business relationships are entitled to the same level of protection . . . ." *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co.*, 493 S.E.2d 375, 378 (Va. 1997).

Under Virginia law, to establish tortious interference with contract, the plaintiff must show: "(1) the existence of a valid contractual relationship; (2) the interferor's knowledge of the relationship; (3) intentional interference inducing or causing a breach or termination of the relationship; and (4) resulting damage to the plaintiff's relationship." *Signature Flight Support Corp. v. Landow Aviation Ltd.*, 2008 U.S. Dist. Lexis 93715 at *5 (E.D. Va. Nov. 17, 2008) ("*Flight I*").

If a company's potential sales are harmed, rather than its contractual relationships, that company may recover damages against its competitor only if it satisfies additional elements of proof. To recover under Virginia's claim for tortious interference with business expectancy, a company must prove: "(1) the existence of a business relationship or expectancy, with a probability of future economic benefit to plaintiff; (2) defendant's knowledge of the relationship or expectancy; (3) a reasonable certainty that absent defendant's intentional misconduct, plaintiff would have continued the relationship or realized the expectancy; and (4) damage to plaintiff." *Signature Flight Support Corp. v. Landow Aviation Ltd.*, 2009 U.S. Dist. Lexis 1938 at *5 (E.D. Va. Jan. 13, 2009) ("*Flight II*").

In addition, to recover for interference with an at-will contract or business expectancy, "the plaintiff must show that the defendant's actions were improper." *Id.*; *accord Maximus*, 493 S.E.2d at 378. Improper methods do not necessarily need to be independently actionable and can "include (1) means that are illegal or independently tortious, (2) violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship, (3) means that violate an established standard of a trade or profession, (4) sharp dealing, overreaching, unfair competition, or other competitive conduct below the behavior of fair men similarly situated." *Flight II* at *6 (quoting *Duggin v. Adams*, 360 S.E.2d 832, 836-37 (Va. 1987) [internal quotation marks omitted]).

Defendants in Virginia can assert an affirmative defense of justification or privilege to defeat a tortious interference claim. *Duggin*, 360 S.E.2d at 838 (citing *Chaves v. Johnson*, 335 S.E.2d 97, 103 (Va. 1985)). "The defense is based upon the relationships between the parties and the balance to be struck between the social desirability of protecting the business relationship, on one hand, and the interferor's freedom of action on the other. Specific grounds for the defense include legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice." *Id.* [citations and internal quotation marks omitted].

Notably, courts applying Virginia law have also found that interference that only diminishes the profits from a business relationship is insufficient to support a claim of tortious interference with contract. *Flight I* at *7. Diminution of profits is sufficient, however, for a claim of tortious interference with business expectancy, because such a claim does not require a complete breach of contract with a third party. See *Flight II.*

The court in *Flight II* also rejected the argument that a plaintiff's business expectancy claim is insufficient where the plaintiff has alleged only a possibility—not a probability—that it would realize its expectancy, finding that "a valid business expectancy is still merely an expectancy. It need not be absolutely guaranteed." *Flight II* at *7. In addition, the court discarded the defendant's assertion that the plaintiff must allege that its expected customers were "loyal and repeat" customers in order to show this probability. *Id.* at *9.

Punitive damages may be awarded in claims of intentional interference with contract or claims of intentional interference with business expectancy "if the acts are done with malice or wantonness." *Simbeck, Inc. v. Dodd Sisk Whitlock Corp.*, 508 S.E.2d 601, 604 (Va. 1999).

In sum, intentional interference with a *fixed duration contract* does not require the plaintiff to show a use of improper acts, but Virginia does require a showing of improper motive for a claim of tortious interference with a *business expectancy* or an *at-will contract*. A company operating in Virginia, therefore, must be particularly careful not to interfere with a competitor's fixed term contracts but has wider latitude to compete for work from a competitor's prospective clients and contracts terminable at will. Companies still must be cautious when competing in the latter category because the standard for improper means is susceptible to different interpretations.

B. Massachusetts

Massachusetts takes an approach to tortious interference claims somewhat different from that taken by Virginia, using the same test for claims of tortious interference with business expectancy and for claims of interference with contract. *NPS, L.L.C. v. StubHub, Inc.*, 2009 Mass. Super. Lexis 97 at *12 (Super. Ct. Jan. 22, 2009). "To prevail on [a] tortious interference claim, the [plaintiff] must prove that (1) [the plaintiff] had an advantageous relationship with a third party (*e.g.*, a present or prospective contract or employment relationship); (2) [the defendant] knowingly induced a breaking of the relationship; (3) [the defendant's] interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the [plaintiff was] harmed by [the defendant's] actions." *Id.* at *13 [citation and internal quotation marks omitted].

Accordingly, an improper motive or means must occur before a company can assert a claim of tortious interference, although the "plaintiff need not prove both." *Cavicchi v. Koski*, 855 N.E.2d 1137, 1142 (Mass. App. Ct. 2006) (citing *Draghetti v. Chmielewski*, 626 N.E.2d 862, 869 n.11).

The question whether improper means have to be independently actionable, however, may not be entirely resolved in Massachusetts. *Compare Stubhub*, 2009 Mass. Super. Lexis at *21 ("improper means *must* consist of conduct that violates a statute or constitutes a common-law tort.") [emphasis added], *with Cavicchi*, 855 N.E.2d at 1142 ("Improper means *include* violation of a statute or common law precept, *e.g.*, by means of threats, misrepresentation, or defamation.") [emphasis added].

"As to improper motive, evidence of retaliation or ill will toward the plaintiff will support the claim." *Cavicci*, 855 N.E.2d at 1142 (citing *Draghetti*, 626 N.E.2d at 869, and contrasting *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 24 (Mass. 1990) (defendant's "motives were to benefit his customers and himself financially"; insufficient evidence to "warrant a finding that his real motive ... was to hurt [the plaintiff]")).

Thus, in relation to Massachusetts' law for tortious interference with contract, a business may be able to compete for work from a third party even if that party is already contracting with another company, provided that the business does not commit a tort or violate a statute, or take such action with an improper motive. But some Massachusetts courts have suggested that the term *improper means* is not limited to violations of common law or statutes.

In addition, unlike Virginia law, Massachusetts law does not allow punitive damages absent statutory authority; so a plaintiff cannot be awarded punitive damages under a common-law tortious interference claim. *Pine v. Rust*, 535 N.E.2d 1247, 1249 (Mass. 1989); *National Econ. Research Assocs. v. Evans*, 2008 Mass. Super. Lexis 294 at *39-40 (Mass. Super. Ct. Sept. 10, 2008).

C. North Carolina

North Carolina takes a third approach to these issues, although it also divides interference claims into those arising from prospective contracts and those arising from existing contracts. While most of the elements under North Carolina law are similar to those in Virginia and Massachusetts, North Carolina requires the defendant to act "without justification" before it can be liable under either theory. *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 411 S.E.2d 916, 924 (N.C. 1992); *S.N.R. Mgmt. Corp. v. Danube Partners 141, L.L.C.*, 659 S.E.2d 442, 453 (N.C. App. 2008).

"Where it is claimed that the interference with business relations was rendered by a competing business entity, the court must determine whether that defendant was acting for a legitimate business purpose and not merely motivated by a malicious wish to injure the plaintiff. Numerous authorities have recognized that competition in business constitutes justifiable interference in another's business relations and is not actionable so long as it is carried on in furtherance of one's own interests and by means that are lawful." *Thortex, Inc. v. Std. Dyes, Inc.*, 2006 N.C. App. Lexis 1171 at *8-9 (Ct. App. June 6, 2006) [citations and internal quotation marks omitted].

"Interference is without justification if a defendant's motive is not reasonably related to the protection of a legitimate business interest." *Radcliff v. Orders Distrib. Co.*, 2008 N.C. App. Lexis 1129 at *13 (Ct. App. June 17, 2008) [citation and internal quotation marks omitted] (inducing termination of another company's employee was justified because it ensured better customer service to defendant's clients). "Whether an actor's conduct is justified depends upon the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of the actor, and the contractual interests of the other party. Generally speaking, interference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant ... are competitors. A complainant must show that the defendant acted with malice and for a reason not reasonably related to the protection of a legitimate business interest of the defending party." *Sellers v. Morton*, 661 S.E.2d 915, 921 (N.C. 2008) [citation and internal quotation marks omitted].

"The word malicious ... does not import ill will, but refers to an interference with design of injury to plaintiffs or gaining some advantage at their expense. [T]he plaintiffs must allege facts to show that the defendants acted without justification." *Walker v. Sloan*, 529 S.E.2d 236, 241-42 (N.C. Ct. App. 2000).

As for damages in an interference claim, a plaintiff can recover punitive damages "only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless wanton disregard of the plaintiff's rights." *United Lab. v. Kuykendall*, 437 S.E.2d 374, 379 (N.C. 1993) [citation and internal quotation marks omitted]; *accord Scarborough v. Dillard's, Inc.*, 655 S.E.2d 875, 878 (N.C. App. 2008).

III. Statutory Private Rights of Action

In addition to common-law tort claims, another manner in which business competition is typically regulated at the state law level is through state unfair business practices statutes. These statutes are often based upon section 5 of the Federal Trade Commission Act ("FTCA"), which states, "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby unlawful." 15 U.S.C. §45(a)(1) (2006).

While private persons cannot bring suit under section 5 of the FTCA (such actions being the sole province of the Federal Trade Commission), the state law equivalents typically do permit private causes of action, which has led to differences, state to state, in how such statutes have been interpreted. Indeed, the courts often face many of the same definitional struggles that they encounter in interpreting tortious interference claims. Adding a further degree of complexity to the analysis, some states, including Massachusetts and North Carolina, permit both consumers and business competitors to bring private rights of action, while others, including Virginia, provide remedies only to consumers. Not surprisingly, in states like Virginia, alternative legal theories have arisen to regulate business competition.

A. Massachusetts' Unfair and Deceptive Trade Practices Statute

Chapter 93A of the Massachusetts General Laws is similar in its text to section 5 of the FTCA. It provides that "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Mass. Gen. Laws ch. 93A §2(a) (2009) ("c. 93A"). Massachusetts courts have explained that the "purpose of *G. L. c. 93A* is to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace." *Morrison v. Toys "R" Us, Inc.*, 806 N.E.2d 388, 392 (Mass. 2004) (quoting *Poznik v. Massachusetts Med. Prof'l Ins. Ass'n*, 628 N.E.2d 1, 9 (Mass. 1994)). If the defendant commits a willful or knowing violation of c. 93A, the court shall grant two to three times actual damages and reasonable attorneys' fees. c. 93A §(3), (4).

Significantly, "[t]here is no binding definition of what constitutes an unfair practice under c. 93A." *Green v. Blue Cross & Blue Shield of Mass., Inc.*, 713 N.E.2d 992, 996 (Mass. App. Ct. 1999). Instead, "[t]he existence of unfair acts and practices must be determined from the circumstances of each case." *Id.* (quoting *Commonwealth v. DeCotis*, 316 N.E.2d 748, 754 (Mass. 1974)). Massachusetts courts look to federal interpretation of section 5 of the FTCA as well to determine the application of Massachusetts law. c. 93A §(2)(b) ("It is the intent of the legislature that ... the courts will be guided by the interpretation given by the Federal Trade Commission and the Federal Courts to Section 5(a)(1) of the Federal Trade Commission Act.").

Factors that courts routinely consider include the following: (1) whether the practice is "within the penumbra of some common law, statutory, or other established concept of unfairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to [consumers,] competitors or other business people." *Morrison*, 806 N.E.2d at 392.

Not only is there no "overly precious standard of ethical or moral behavior" for determining the types of conduct that violate c. 93A, *USM Corp. v. Arthur D. Little Sys., Inc.*, 546 N.E.2d 888, 897 (Mass. App. Ct. 1989), but any determination also considers the level of business sophistication of both the plaintiff and the defendant. *Madan v. Royal Indem. Co.*, 532 N.E.2d 1214, 1218 n.7 (Mass. App. Ct. 1989); *Spence v. Boston Edison Co.*, 459 N.E.2d 80, 88 (Mass. 1983) ("One can easily imagine cases where an act might be unfair if practiced upon a commercial innocent yet would be common practice between two people engaged in business.").

Something more that a breach of contract, however, is required before a c. 93A claim can succeed. *Instrument Indus. Trust v. Danaher Corp.*, 2005 Mass. Super. Lexis 575 at *20. (Super. Ct. Nov. 28, 2005) ("These are claims in the nature of breach of contract; but a mere breach of contract alone is not enough to make out a *c. 93A* claim." (citing *Madan v. Royal Indem. Co.*, 532 N.E.2d 1214, 1218 (Mass. App. Ct. 1989))).

B. North Carolina's Unfair Methods of Competition

Like Massachusetts, North Carolina has what is commonly referred to as a "little FTC act" that mirrors the federal statute: "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. §75-1.1(a) (1994). It "prohibits two

separate, although related, types of conduct; ... [both] conduct that is 'unfair' and conduct that is 'deceptive.'" *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303, 305 (M.D.N.C. 1988). As in Massachusetts, private remedies exist both for consumers and business competitors that have been harmed by a defendant's actionable conduct. The statute provides for treble damages and attorneys' fees, and claims under this statute are often accompanied by state law antitrust claims. N.C. Gen. Stat. §§75-16 and 75-16.1. Unlike most states, these statutes allow a prevailing defendant to recover attorneys' fees if the plaintiff's claim was frivolous. *Id.*

"To establish a *prima facie* claim for unfair trade practices, the plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Pleasant Valley Promenade v. Lechmere, Inc.*, 464 S.E.2d 47, 58 (N.C. 1997). Unfair competition does not require a showing of malice. Neither do "deliberate acts of deceit or bad faith ... have to be shown." *Edwards v. West*, 495 S.E.2d 920, 924 (N.C. 1998).

North Carolina courts have held that it is impossible to precisely define *unfair or deceptive acts. Concrete Serv. Corp. v. Investors Group, Inc.*, 340 S.E.2d 755, 760 (N.C. 1986). In describing these concepts, courts have used terms such as *unethical* or *unscrupulous*, or *has a tendency to deceive. Polo Fashions, Inc. v. Craftex, Inc.* 816 F.2d 145, 148 (4th Cir. 1987). In addition, courts have held that unfairness is a question of equity, which can only "be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others." *Harrington Mfg. Co. v. Powell Mfg. Co.*, 248 S.E.2d 739, 744 (N.C. 1978). As such, North Carolina courts have established no bright line test for determining what types of competition or acts will be found to be unfair or deceptive, but the North Carolina courts have held that section 5 cases may serve as guidance to the courts in making such a determination. See *Marshall v. Miller*, 302 N.C. 539, 541 (1981) ("[T]he FTC Act may be used as guidance in determining the scope and meaning of G.S. 75.1-1.").

C. Virginia's Business Conspiracy Statute

In Virginia, unfair business practices are governed by the Virginia Consumer Protection Act, Va. Code §§59.1-196 through 207.51. However, unlike the statutes in Massachusetts and North Carolina, the Virginia Act, having a principal focus on consumer protection, provides no private cause of action to an aggrieved business competitor.

Accordingly, the statutes most often used by businesses to regulate business conduct in Virginia are the Virginia "business conspiracy" statutes. Va. Code Ann. §§18.2-499 and 18.2-500 (2009). These statutes grant a company a private right of action when "[a]ny two or more persons ... combine, associate, agree, mutually undertake or concert together for the purpose of ... willfully and maliciously injuring [it in its] reputation, trade, business or profession by any means whatever." §18.2-499. The statute allows a successful plaintiff to recover treble damages, costs, and attorneys' fees. §18.2-500.

The statute does not require proof of actual malice. See *Feddeman & Co., P.C. v. Langan Assocs., P.C.*, 530 S.E.2d 668, 674 (Va. 2000). "In order to sustain a claim for this statutory business conspiracy, the plaintiff must prove by clear and convincing evidence that the defendants acted with legal malice, that is, proof that the defendants acted intentionally, purposefully, and without lawful justification, and that such action injured the plaintiff's business." *Williams v. Dominion Tech. Partners, L.L.C.*, 576 S.E.2d 752, 757 (Va. 2003).

"[W]ithout lawful justification means that the actions were taken to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not itself criminal or unlawful, by criminal or unlawful means." *Greenfeld v. Stitely*, 2007 Va. Cir. Lexis 7 at *31-32 (Cir. Ct. Jan. 5, 2007) (citing *Hechler Chevrolet v. General Motors Corp.*, 337 S.E.2d 744, 748 (Va. 1985)) [internal quotation marks omitted].

A successful claim does not require proof that the conspirators' primary purpose was to injure the plaintiff; it is necessary only for a plaintiff to prove that the conspirators anticipated that their actions would result in harm to the plaintiff. *Id.* at *31. Interference with contract or business expectancy satisfies the requirement that conspirators' conduct be unlawful. See *Advanced Marine Enters., Inc. v. PRC Inc.*, 501 S.E.2d 148, 154-55 (Va. 1998).

In *Greenfeld*, the trial court dealt with a partnership dispute that ended with two of the three partners setting up a new partnership without including the third partner. The court found that a number of the defendants' actions were taken for an unlawful purpose using improper means. 2007 Va. Cir. Lexis at * 32-36. Some of the actions were clearly egregious, such as the conversion of the original partnership's assets for the benefit of the new partnership and to the exclusion of the frozen-out partner, and the court's finding that the defendants' acted with legal malice for using unlawful *means* is unsurprising. *Id.* at *33-35.

But the court's finding of unlawful *purpose* is striking because it conflates a breach of contract with an unlawful purpose:

> The unlawful purpose Defendants pursued was [the plaintiff's] involuntary expulsion from the partnership without payment of any compensation for his partnership interest. The ... partnership agreement does not provide for or permit the involuntary expulsion of a partner ... [because] ... the partnership agreement states: "The Partners may unanimously agree to end the partnership."

Id. at *32. If other courts follow this analysis, many plaintiffs may include a business conspiracy claim in a complaint that involves only a breach of contract—provided of course, that two or more parties were sufficiently involved with the breach.

IV. Conclusion

While any analysis of what constitutes tortious business conduct can confound even the shrewdest businesses, it is important to note that the vast majority of business transactions do not invite litigation. If, however, a business regularly engages in practices that may be susceptible to a competitor's claim for tortious interference or a statutory unfair competition violation, then it should carefully understand the law relating to unfair business practices in those states in which it conducts business, and it should develop strategies to portray its actions, to the extent possible, as legitimate business competition.

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