



Conditional Privilege—Inducing Contractual Breach

Defending Professionals Against Tortious Interference with Contract Claims

By Blair T. Titcomb

Professionals, including attorneys, are often asked to opine on a client's rights and duties under a contract. When, as a result of the professional's assessment, the client decides to terminate or breach that contract, the professional may face a tortious interference with contractual relations (TICR) claim by the other party to the contract.

Certain professionals have a qualified or conditional privilege to induce a breach of their clients' contracts with another, as long as the professional is acting to protect a conflicting interest that is considered under the law to be of a value equal to or greater than the plaintiff's contractual rights, and the professional's conduct is legal and not unreasonable under the circumstances. *See, e.g., Certified Mech. Contrs., Inc. v. Wight & Co.*, 162 Ill. App. 3d 391, 400 (Ill. App. Ct. 1987) (design professionals have a conditional privilege to interfere with their principal's construction contract with a third party).

However, even with this privilege the battle is far from over. Plaintiffs' attorneys, armed with an endless supply of rhetoric and "buzz words," will allege everything but the kitchen sink to raise a factual question regarding the privilege's application to survive the pleading stage, thereby increasing their leverage in settlement negotiations. When faced with such a pleading, defense counsel should consider moving to strike or dismiss the pleading.

Generally, a TICR claim is comprised of the following elements: (1) the existence of a valid and enforceable contract between the plaintiff and a third party; (2) the defendant's awareness of the contractual relationship; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the third party caused by the defendant's wrongful conduct; and (5) damages resulting from the breach. *Safeway Ins. Co. v. Guerrero*, 210 Ariz. 5, 12, 106 P.3d 1020, 1027 (Ariz. 2005).

A plaintiff has the burden of pleading that the professional's actions were unjustified or malicious. Although a qualified privilege is considered an affirmative defense,

if the complaint alleges facts invoking the privilege, that defense may be raised on a motion to dismiss. *See, e.g., Abele v. Sawyer*, 750 So. 2d 90, 75 (Fla. Dist. Ct. App. 1999).

A lack of justification means the absence of any legal right to take the actions complained of. *See, e.g., Fleischer v. Hellmuth, Obata & Kassabaum*, 870 S.W.2d 832, 838 (Mo. Ct. App. 1993). For conduct to be malicious, the professional must have acted for his or her own self-interest, independent of, or inconsistent with, the interests of the client. *See Wagner-Smith Co. v. Riscilli Constr. Co., Inc.*, 139 Ohio Misc. 2d 101, 2006-Ohio-5463, ¶ 27.

The pleading standards offer defense counsel several grounds to present to a court on which the court may strike allegations or dismiss the pleading.

Excise Conclusory Allegations

The first step in attacking a TICR claim is to excise conclusory allegations that simply characterize the professional's actions as improper. Merely labeling a defendant's conduct as "malicious," "wrongful," or "intentional" is insufficient to show that the defendant acted without justification or privilege and does not state a cause of action for a TICR claim. *See George A. Fuller Co., a Div. of Northrop Corp. v. Chicago Coll. of Osteopathic Med.*, 719 F.2d 1326, 1333, n.6 (7th Cir. 1983).

To defeat a qualified privilege, a plaintiff must prove that the professional's acts or omissions were not taken to further the best interests of the professional's client, but rather to further the professional's personal goals or to injure the plaintiff. *HPI Health Care Services v. Mt. Vernon Hosp.*, 131 Ill.2d 145, 158 (Ill. 1989). For instance, a professional with a qualified privilege is unjustified in using illegal or wrongful means such as violence, fraud, intimidation, misrepresentation, deceit, defamation, criminal or civil threats, or violations of the law to induce a breach. *E Z Sockets, Inc. v. Brighton-Best Socket Screw Mfg. Inc.*, 307 N.J. Super. 546, 559, 704 A.2d 1364 (N.J. Super. Ct. Ch. Div. 1996).

The "justification" and "malice" analysis becomes murkier when the action at issue falls short of illegal or fraudulent conduct. Consider allegations involving commonplace competitive business practices. In most jurisdictions, such conduct in the ordinary business context does not rise to the level of wrongful means.

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See, e.g., *C.R. Bard, Inc. v. Wordtronics Corp.*, 235 N.J. Super. 168, 174, 561 A.2d 694 (N.J. Super. Ct. Law Div. 1989) (“sneaky” or “underhanded” acts were not “wrongful means”).

Argue With Contractual Scope

One strategy to defeat a TICS claim is to establish that the professional owed a contractual duty to the client or was otherwise legally entitled to offer the subject opinion or assessment regarding the third party. See *Community Title v. Roosevelt Federal Savings & Loan Assoc.*, 796 S.W.2d 369, 372 (Mo. banc 1990) (“No liability arises for interfering with a contract or business expectancy if the action complained of was an act which the defendant had a definite legal right to do without any qualification”). See also *Koch v. Mut. of Enumclaw*, 108 Wash. App. 500, 507, 31 P.3d 698, 701 (Wash. Ct. App. 2001) (physician furnished opinion pursuant to scope of engagement to perform an independent medical evaluation).

The qualified privilege will likely apply even if the professional’s evaluation or opinion will result in the client terminating the client’s contract with the third party. See, e.g., *Fleischer v. Hellmuth, Obata & Kassabaum*, 870 S.W.2d 832, 838 (Mo. Ct. App. 1993).

Jettison Financial-Incentive or Mixed-Motives Allegations

In addition, professionals do not have an “improper motive” simply because they stand to increase their fees, or even if they harbor some ill will toward a plaintiff, as long as their conduct is consistent with their client’s interests. See, e.g., *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 328 (9th Cir. 1982) (an attorney’s mixed motive to benefit both his client and himself does not make his intent “improper”); *Koch*, 108 Wash. App. at 508, 31 P.3d at 702 (a physician who stands to gain financially from repeated engagements by an insurer to perform independent medical examinations is not “improper”); *Ethyl Corp. v. Balter*, 386 So. 2d 1220, 1225 (Fla. Dist. Ct. App. 1980), review denied, 392 So. 2d 1371 (Fla.), cert. denied, 452 U.S. 955 (1981).

Eliminate Mistake-Concealment Allegations

Finally, mere allegations that a professional induced a client to breach the client’s contract with the plaintiff to conceal the professional’s own negligence or errors cannot sustain the element of malice. See, e.g., *Wagner-Smith Co.*, 139 Ohio Misc. 2d 101, ¶ 29 (allegations that the construction-manager defendant did not diligently perform its duties and attempted to blame its mistakes on the contractor plaintiff were insufficient to show actual malice).

The privilege will even apply if a professional provides incorrect advice to a client that causes the client to breach the client’s contract with a third party, as long as the professional acts consistent with the client’s interest and does not use wrongful means. See, e.g., *Macke Laundry Serv. Ltd. P’ship v. Jetz Serv. Co.*, 931 S.W.2d 166, 182 (Mo. Ct. App. 1996). 