"And the Truth Shall Make You Free": Truth as a First Amendment Defense in Tortious Interference with Contract Cases

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Introduction

Tortious interference with contractual relations is a new and controversial tort. This tort was first recognized in 1853, in the English case of *Lumley v. Gye*.[1] In *Lumley*, the plaintiff, a theater manager, contracted with a well-known singer to perform at the theater.[2] After the singer signed the contract, the defendant, who operated a rival theater company, induced the singer to break her contract and sing for the defendant instead.[3] The plaintiff filed a complaint against the competing theater alleging that the defendant, knowing of the contract and maliciously intending to injure the plaintiff, enticed and procured the singer to refuse to perform for the plaintiff while her contract was still in force.[4]

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1. 118 Eng. Rep. 749 (Q.B. 1853). *Lumley* is generally regarded as the turning point in the development of inducement of breach of contract as a separate tort. *See* RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (1979) [hereinafter RESTATEMENT (SECOND)].

2. *See Lumley*, 118 Eng. Rep. at 749.

3. *See id.* at 750.

4. *See id.* at 749-50.

The *Lumley* court, consisting of a panel of four judges, held in favor of the plaintiff in a three-to-one decision.[5] Each of the four judges wrote a separate opinion, but those written by Judges Crompton and Erle laid the foundation for the tort presently known as tortious interference with contractual relations. Judge Crompton wrote:

> In deciding this case on the narrower ground [that the case included a master-servant relationship for which an action for interference had long been recognized], I wish by no means to be considered . . . as saying that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract had been made.[6]

Judge Erle, concurring that a cause of action existed, formulated the tort in the following language:

> He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible.[7]

Forty years later, in *Temperton v. Russell*,[8] a three-judge panel of an English court of appeal expanded the cause of action in two significant ways. First, the *Temperton* court held that the tort of intentional interference could include interference with contracts in which no personal services were involved.[9] Second, it held that the tort could include interference with prospective, as well as existing, contractual relations.[10]

By the early part of the twentieth century, the tort of intentional interference with contract began to enjoy a general, but not universal, acceptance in the United States.[11] In 1939, tortious interference was recognized by the American Law Institute in section 766 of the *Restatement of the Law of Torts*.[12] As formulated by the authors of the *Restatement*, the tort of tortious interference provided protection

5. *See id.* at 768-69.
6. *Id.* at 754.
7. *Id.* at 756.
8. 1 Q.B. 715 (1893).
9. *Id.* at 727-28.
10. *See id.* at 728.
11. *See* Charles E. Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 730 app. at 764-68 (1928).
12. The formulation of the elements of the tort was set forth in section 766:

against interference with an existing contract, and also against interference with reasonable expectancies of commercial relations.[13]

Sections 767 through 774 of the original *Restatement* then set forth various "privileges," by which an actor's conduct in interfering with an existing or prospective business relationship could be excused. The original *Restatement* did not directly address the issue of whether providing truthful information to another could constitute an actionable interference with business relations.[14]

When these sections of the *Restatement* were rewritten in 1979, several significant changes were made to section 766. First, section 766 of the original *Restatement* was broken down into three separate subsections. Section 766 of the *Restatement (Second)*[15] addresses interference with existing contractual relations; section 766A[16] addresses intentional interference with another's performance of his

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> Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to
> a) perform a contract with another, or
> b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.

RESTATEMENT OF TORTS § 766 (1939) [hereinafter RESTATEMENT].

13. Comment "b" to section 766 of the *Restatement* explained that:

> The added element of a definite contract may be a basis for greater protection; but some protection is appropriate against unjustified interference with reasonable expectancies of commercial relations even when an existing contract is lacking . . . . The differentiation between them relates primarily to the scope of the privileges, or the kind and amount of interference that is justifiable in view of the differences in the facts.

RESTATEMENT, *supra* note 12, § 766 cmt. b.

14. Comment "b" to section 767 of the original *Restatement* stated that fraudulent misrepresentations are also ordinarily improper means of inducement and are not privileged. *Id.* § 767 cmt. b. It added that the actor may be held liable under section 766 even when the fraudulent representation is not of such a character as to be tortious on other grounds. *Id.* By the same token, comment "b" expressed the view that an actor may supply false information that would be independently actionable, but would not constitute a basis for liability under section 766 because of the actor's good faith belief in the truth of the statement. *Id.* Nothing in comment "b" addresses the impact of the communication of truthful information. *Id.* In addition, section 772 of the original *Restatement*, unlike its counterpart in the *Restatement (Second)*, addressed only a privilege to provide honest advice to another within the scope of a request for advice. *Id.* § 772. It did not go on, as section 772 of the *Restatement (Second)* now does, to protect the communication of truthful information, whether requested or not. *Id.*

15. Section 766 of the *Restatement (Second)* provides that:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND), *supra* note 1, § 766.

16. Section 766A of the *Restatement (Second)* provides that:

own contract; and section 766B[17] addresses intentional interference with prospective contractual relations. While section 766 of the original *Restatement* dealt with inducing a breach of either an existing contract or prospective business relations, the *Restatement (Second)* deals with these two topics separately.

A requirement that the actionable conduct be both "intentional" and "improper" constituted the second major change.[18] Sections 767 through 773 of the *Restatement (Second)* describe what constitutes "improper" interference. Rather than referring to these factors as "privileges" as the original Restatement did, the *Restatement (Second)* now refers to "factors in determining whether interference is improper."[19] Despite this change, the factors identified in these succeeding sections continue to be referred to, erroneously, as "privileges."[20]

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

Id. § 766A.

17. Section 766B of the *Restatement (Second)* provides that:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Id. § 766B.

18. The requirement that the actor's conduct be "intentional" is further underscored by section 766C of the *Restatement (Second)*, which specifically provides that there is no liability for merely negligent interference with existing or prospective contractual relations:

> § 766C. Negligent Interference with Contract or Prospective Contractual Relation
>
> One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently
>
> (a) causing a third person not to perform a contract with the other, or
>
> (b) interfering with the other's performance of his contract or making the performance more expensive or burdensome, or
>
> (c) interfering with the other's acquiring a contractual relation with a third person.

Id. § 766C.

19. *Id.* § 767.

20. *See, e.g.*, Green Constr. Co. v. Black & Veatch Engrs. & Architects, 1990 U.S. Dist. LEXIS 5333 (D. Kan. 1990) ("One of the established privileges . . . is contained in § 772 of the *Restatement* . . . ."). A "privilege" is an affirmative defense, as to which the defendant bears the burden of proof once a prima facie case has been made by the plaintiff. *See generally* BLACK'S LAW DICTIONARY 1197-98 (6th ed. 1990). By contrast, under a proper

The *Restatement (Second)* expressly adopted the requirement that the party seeking to establish a prima facie case of tortious interference must demonstrate that the actor's conduct is "improper." Notwithstanding this requirement, confusion exists about whether the lack of "justification" or the "impropriety" of the actor's conduct is an element as to which the plaintiff bears the burden of proof, or is a defense as to which the actor bears the burden of proof.[21] Some courts hold that the factors enumerated in sections 767 through 773 of the *Restatement (Second)* regarding the propriety or impropriety of the conduct are affirmative defenses, as to which the defendant carries the burden of proof.[22] In light of the express inclusion of the element of impropriety in the *Restatement (Second)* formulation of the tort, the better view is that the burden of proof should be on the plaintiff with respect to that issue. As the Supreme Court of Washington observed in *Pleas v. City of Seattle*:[23]

> The authors of the second *Restatement of Torts* modified this approach in favor of one that defines the tort as involving "improper" as well as intentional interference. . . .
>
> This change was made in response to a concern articulated by many courts and commentators that the prima facie tort approach in which every intentional infliction of harm is prima facie tortious unless justified. This approach required too little of the plaintiff insofar as it left the major issue in the controversy—the wrongfulness of the defendant's conduct—to be resolved by asserting an affirmative defense.
>
> Although its authors declined to take a clear position on the matter, the revised language of the second *Restatement* can be interpreted to require the plaintiff to show in the first instance that the defendant's interference was improper.[24]

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reading of sections 766 and 766B of the *Restatement (Second)*, the plaintiff bears the burden of proving that the interference was both "intentional" and "improper". *See* RESTATEMENT SECOND, *supra* note 1, § § 766, 766B.

21. *See* Thomas J. Collin et al., *Ohio Tortious Interference Law and the Role of Privilege and Competition*, 18 DAYTON L. REV. 635, 668 (1993) ("The *Restatement* acknowledges the fact that there is confusion in the decisions as to whether the issue of justification or privilege is properly treated as an element of the plaintiff's case or as an affirmative defense to be pleaded and proved by the defendant."). Those authors concluded that the weight of authority in Ohio appears to treat the issue of absence of privilege as an element of the tort. *See id.* at 671.

22. *See, e.g.*, Haupt v. International Harvester Co., 582 F. Supp. 545, 550 (N.D. Ill. 1984) ("Illinois courts consider privilege a defense to tortious interference, and not an element whose absence must be pleaded (or, more importantly, proved) by plaintiff.").

23. 774 P.2d 1158 (Wash. 1989).

24. *Id.* at 1162 (citations omitted); *see also* Four Nines Gold, Inc. v. 71 Constr., Inc., 809 P.2d 236, 238 (Wyo. 1991) ("However, if the interference is not improper, a necessary element of the tort is lacking.") (citations omitted).

A third major change in the tort of business interference, as formulated in the *Restatement (Second)*, was protection for the communication of truthful information. Section 772 of the original *Restatement* provided no express protection for the communication of truthful information.[25] Section 772 of the *Restatement (Second)* specifically states that one who intentionally provides truthful information to a third person which then causes the third person not to enter into or to perform a contract with another, does not interfere "improperly" with the other's contractual relations.[26] Comment "b" to section 772 elaborates on the position held by drafters of this section of the *Restatement (Second)*. That comment states that the interference caused by providing truthful information is "clearly not improper."[27] It also provides that the truthful information exception to liability is available "whether or not the information is requested."[28]

Under the *Restatement (Second)*, there is functionally no difference between sections 766 and 766B. Various courts have recognized that the tort of interference with existing contractual relations under section 766 of the *Restatement (Second)* is merely one branch of the tort of interference with prospective economic advantage protected

25. Section 772 of the original *Restatement* provided:

> § 772. Privilege to Advise.
>
> One is privileged purposely to cause another not to perform a contract, or enter into or continue a business relation, with a third person by giving honest advice to the other within the scope of a request for advice made by him, except that, if the actor is under a special duty to the third person with reference to the accuracy of the advice, he is subject to liability for breach of that duty.

RESTATEMENT, *supra* note 12, § 772.

26. Section 772 of the *Restatement (Second)* provides that:

> § 772. Advice as Proper or Improper Interference.
>
> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
>
> (a) Truthful information, or
>
> (b) Honest advice within the scope of a request for the advice.

RESTATEMENT (SECOND), *supra* note 1, § 772.

27. Comment "b" to section 772 provides as follows:

> b. Truthful Information. There is of course no liability for interference with a contract or with a prospective contractual relation on the part of one who merely gives truthful information to another. The interference in this instance is clearly not improper. This is true even though the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another. It is also true whether or not the information is requested.

Id. cmt. b.

28. *Id.*

under section 766B.[29] Both the original *Restatement*[30] and the *Restatement (Second)*[31] acknowledge that the tort of interference with business relations is of recent vintage.

It has been observed that "all fifty states now recognize some form of tortious interference with contract."[32] Prior to 1979, the vast majority of states expressly adopted or cited with approval the formulation of tortious interference as expressed in the original *Restatement*.[33] Since the publication of the *Restatement (Second)* in 1979, most states have expressly adopted or cited with approval the somewhat altered formulation of the tort set forth in section 766[34] and/or

29. Oaksmith v. Brusich, 774 P.2d 191 (Alaska 1989); Ellis v. City of Valdez, 686 P.2d 700 (Alaska 1984); Buckaloo v. Johnson, 537 P.2d 865 (Cal. 1975).

30. The authors of Comment "a" to section 767 of the original *Restatement* conceded: "Unlike the law of defamation, this branch of the law has not crystallized a complete set of definite rules as to the existence or non-existence of privilege to act in the manner stated in § 766." RESTATEMENT, *supra* note 12, § 767 cmt. b.

31. The introductory note to the chapter of the *Restatement (Second)* dealing with interference with contract or prospective contractual relations admits: "[T]he law in this area has not fully congealed but is still in a formative stage. The several forms of the tort set forth in §§ 766 to 766B are often not distinguished by the courts, and cases have been cited among them somewhat indiscriminately." *Introduction* to RESTATEMENT (SECOND), *supra* note 1, at 5.

32. Gary D. Wexler, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 292 (1994).

33. *See* Long v. Newby, 488 P.2d 719 (Alaska 1971); Hadley v. Southwest Properties, Inc., 570 P.2d 190 (Ariz. 1977); Mason v. Funderburk, 446 S.W.2d 543 (Ark. 1969); Worldwide Commerce, Inc. v. Fruehauf Corp., 84 Cal. App. 3d 803 (1978); Comtrol, Inc. v. Mountain States Tel. & Tel. Co., 513 P.2d 1082 (Colo. Ct. App. 1973); Deoudes v. G.B. Macke Corp., 153 A.2d 309 (D.C. 1959); Bowl-Mor Co., Inc. v. Brunswick Corp., 297 A.2d 61 (Del. Ch. 1972); NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Dist. Ct. App. 1963); Twin Falls Farm & City Distrib., Inc. v. D & B Supply Co., Inc., 528 P.2d 1286 (Idaho 1974); Herman v. Prudence Mut. Cas. Co., 244 N.E.2d 809 (Ill. 1969); Bissell Carpet Sweeper Co. v. Shane Co., 143 N.E.2d 415 (Ind. 1957); Clark v. Figge, 181 N.W.2d 211 (Iowa 1970); Taylor v. Hoisting & Portable Eng'rs Local Union 101, 368 P.2d 8 (Kan. 1962); Derby Rd. Bldg. Co. v. Commonwealth, 317 S.W.2d 891 (Ky. 1958); Daugherty v. Kessler, 286 A.2d 95 (Md. 1972); Pino v. Trans-Atlantic Marine, Inc., 265 N.E.2d 583 (Mass. 1970); Bahr v. Miller Bros. Creamery, 112 N.W.2d 463 (Mich. 1961); Stephenson v. Plastics Corp. of Am., Inc., 150 N.W.2d 668 (Minn. 1967); Downey v. United Weather-Proofing, Inc., 253 S.W.2d 976 (Mo. 1953); Bricker v. Crane, 387 A.2d 321 (N.H. 1978); Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 181 A.2d 774 (N.J. 1962); Wolf v. Perry, 339 P.2d 679 (N.M. 1959); Albemarle Theater, Inc. v. Bayberry Realty Corp., 277 N.Y.S.2d 505 (1967); Smith v. Ford Motor Co., 221 S.E.2d 282 (N.C. 1976); Juhasz v. Quik Shops, Inc., 379 N.E.2d 235 (Ohio Ct. App. 1977); Luisi v. Bank of Commerce, 449 P.2d 441 (Or. 1969); Birl v. Philadelphia Elec. Co., 167 A.2d 472 (Pa. 1960); Willard v. Claborn, 419 S.W.2d 168 (Tenn. 1967); Clements v. Withers, 437 S.W.2d 818 (Tex. 1969); Scymanski v. Dufault, 491 P.2d 1050 (Wash. 1972); Mendelson v. Blatz Brewing Co., 101 N.W.2d 805 (Wis. 1960); Board of Trustees of Weston County Sch. Dist. No. 1 v. Holso, 584 P.2d 1009 (Wyo. 1978).

34. *See* Barber v. Business Prods. Ctr., 677 So. 2d 223 (Ala. 1996); Bendix Corp. v. Adams, 610 P.2d 24 (Alaska 1980); Snow v. Western Sav. & Loan Ass'n, 730 P.2d 204 (Ariz. 1986); L.L. Cole & Son, Inc. v. Hickman, 665 S.W.2d 278 (Ark. 1984); Pacific Gas &

section 766B.[35] A few states seem indiscriminately to apply the for-

Elec. Co. v. Bear Stearns & Co., 791 P.2d 587 (Cal. 1990); Colorado Nat'l Bank v. Friedman, 846 P.2d 159 (Colo. 1993); Blake v. Levy, 464 A.2d 52 (Conn. 1983); Sorrells v. Garfinckel's, 565 A.2d 285 (App. D.C. 1989); Turchi v. Salaman, 1990 Del. Ch. LEXIS 191 (1990), *aff'd*, 1991 Del. LEXIS 191 (Del. 1991); Peninsula Fed. Sav. & Loan Ass'n v. DKH Properties, Ltd., 616 So. 2d 1070 (Fla. Dist. Ct. App. 1993); Wise v. State Bd. for Examination, Qualification & Registration of Architects, 274 S.E.2d 544 (Ga. 1981); Jensen v. Westberg, 772 P.2d 228 (Idaho Ct. App. 1988); Fellhauer v. City of Geneva, 568 N.E.2d 870 (Ill. 1991); Bochnowski v. Peoples Fed. Sav. & Loan Ass'n, 571 N.E.2d 282 (Ind. 1991); Anderson Plasterers v. Meinecke, 543 N.W.2d 612 (Iowa 1996); Turner v. Halliburton Co., 722 P.2d 1106 (Kan. 1986); NCAA v. Hornung, 754 S.W.2d 855 (Ky. 1988); 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989); Macklin v. Robert Logan Assocs., 639 A.2d 112 (Md. 1994); G.S. Enters, Inc. v. Falmouth Marine, Inc., 571 N.E.2d 1363 (Mass. 1991); Hutton v. Roberts, 451 N.W.2d 536 (Mich. Ct. App. 1989); Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991); Vestal v. Oden, 500 So. 2d 954 (Miss. 1987); Greenwood v. Sherfield, 895 S.W.2d 169 (Mo. Ct. App. 1995); Hoschler v. Kozlik, 529 N.W.2d 822 (Neb. Ct. App. 1955); Charlie Brown Constr. Co. v. City of Boulder City, 797 P.2d 946 (Nev. 1990); Mountain Springs Water Co., Inc. v. Mountain Lakes Village Dist., 489 A.2d 647 (N.H. 1985); Printing Mart-Morristown v. Sharp Elecs. Corp., 563 A.2d 31 (N.J. 1989); Quintana v. First Interstate Bank, 737 P.2d 896 (N.M. Ct. App. 1987); Kronos, Inc. v. A.V.X. Corp., 595 N.Y.S.2d 931 (1993); Peterson v. Zerr, 477 N.W.2d 230 (N.D. 1991); Kenty v. Transamerica Premium Ins. Co., 650 N.E.2d 863 (Ohio 1995); Morrow Dev. Corp. v. American Bank & Trust Co., 875 P.2d 411 (Okla. 1994); Uptown Heights Assocs. L.P. v. Seafirst Corp., 891 P.2d 639 (Or. 1995); Maier v. Maretti, 1995 Pa. Super. LEXIS 4010 (1995); Mesolella v. City of Providence, 508 A.2d 661 (R.I. 1986); Todd v. South Carolina Farm Bureau Mut. Ins. Co., 321 S.E.2d 602 (S.C. Ct. App. 1984); Southwestern Bell Tel. Co. v. John Carlo Texas, Inc., 843 S.W.2d 470 (Tex. 1992); St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1991); Williams v. Chittenden Trust Co., 484 A.2d 911 (Vt. 1984); Chaves v. Johnson, 335 S.E.2d 97 (Va. 1985); Pleas v. City of Seattle, 774 P.2d 1158 (Wash. 1989); Sampson Invs. v. Jondex Corp., 499 N.W.2d 177 (Wis. 1993); Four Nines Gold, Inc. v. 71 Constr., Inc., 809 P.2d 236 (Wyo. 1991).

35. *See* Oaksmith v. Brusich, 774 P.2d 191 (Alaska 1989); Bar J Bar Cattle Co. v. Pace, 763 P.2d 545 (Ariz. Ct. App. 1988); Westside Ctr. Assocs. v. Safeway Stores, 49 Cal. Rptr. 2d 793 (Cal. Ct. App. 1996); Amoco Oil Co. v. Ervin, 908 P.2d 493 (Colo. 1995); Blake v. Levy, 464 A.2d 52 (Conn. 1983); C.P.M. Indus. v. I.C.I. Americas, Inc., 1990 Del. Super. LEXIS 88 (Feb. 27, 1990); Huffey v. Lea, 491 N.W.2d 518 (Iowa 1992); Noller v. GMC Truck & Coach Div. Corp., 772 P.2d 271 (Kan. 1989); NCAA v. Hornung, 754 S.W.2d 855 (Ky. 1988); Macklin v. Robert Logan Assocs., 639 A.2d 112 (Md. 1994); United Truck Leasing Corp. v. Geltman, 551 N.E.2d 20 (Mass. 1990); Winiemko v. Valenti, 513 N.W.2d 181 (Mich. Ct. App. 1994); United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628 (Minn. 1982); Nichols v. Tri-State Brick & Tile Co., Inc., 608 So. 2d 324 (Miss. 1992); Cook v. M.F.A. Livestock Ass'n, 700 S.W.2d 526 (Mo. Ct. App. 1985); Omaha Mining Co., Inc. v. First Nat'l Bank, 415 N.W.2d 111 (Neb. 1987); Las Vegas-Tonopah-Reno Stage Lines, Inc. v. Gray Line Tours, 792 P.2d 386 (Nev. 1990); Printing Mart-Morristown v. Sharp Elecs. Corp., 563 A.2d 31 (N.J. 1989); Anderson v. Dairyland Ins. Co., 637 P.2d 837 (N.M. 1981); Laiso v. Cassetta, 550 N.Y.S.2d 829 (1989); Hunter v. B.P.S. Guard Servs., Inc., 654 N.E.2d 405 (Ohio Ct. App. 1995); Lewis v. Oregon Beauty Supply Co., 714 P.2d 618 (Or. App. 1986), *aff'd in part*, 733 P.2d 430 (Or. Ct. App. 1987); Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466 (Pa. 1979); Federal Auto Body Works v. Aetna Cas. & Sur. Co., 447 A.2d 377 (R.I. 1982); Tibke v. McDougall, 479 N.W.2d 898 (S.D. 1992); Heil-Quaker Corp. v. Mischer Corp., 863 S.W.2d 210 (Tex. Ct. App. 1993); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293 (Utah 1982); Pleas v. City of Seattle, 774 P.2d 1158 (Wash. 1989); Torbett v.

mulation of the tort as established by both the original *Restatement* and the *Restatement (Second).*[36]

Recognition of tortious interference with contract has not won universal acclaim. The leading treatise on tort law describes tortious interference as "a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way."[37] Professor Auerbach has observed that "foreign lawyers reading the *Restatement* as an original matter would find it astounding that the whole competitive order of American industry is prima facie illegal."[38] The detrimental effect on commerce and individual liberty attributable to recognition of this tort has been recognized and discussed at length by at least one commentator.[39] Although there has been some brief recognition that the tort of interference with contract impinges on First Amendment rights,[40] there has been little substantive analysis of the constitutionality of imposing tort liability for the communication of truthful information in a commercial setting. This Article suggests

Wheeling Dollar Sav. & Trust Co., 314 S.E.2d 166 (W.Va. 1983); Foseid v. State Bank of Cross Plains, 541 N.W.2d 203 (Wis. 1995); Four Nines Gold, Inc. v. 71 Constr., Inc., 809 P.2d 236 (Wyo. 1991).

36. In Ohio, for example, the elements of the tort of business interference originally established in *Juhasz*, 379 N.E.2d 235, were those of the original *Restatement.* Ohio courts appeared to adopt the modified formulation of the tort after the publication of the *Restatement (Second)* in 1979. *See* Walter v. Murphy, 573 N.E.2d 678, 679-80 (Ohio Ct. App. 1992). Some Ohio courts, however, still cite to *Juhasz* as the authoritative expression of the elements of Ohio's common law tort of business interference, rather than to the *Restatement (Second). See, e.g., Hunter*, 654 N.E.2d 405. Recent Ohio Supreme Court precedents have expressly adopted section 766 and have apparently impliedly adopted section 766B. *See Kenty*, 650 N.E.2d 863, syllabus 2; A&B-Abell Elevator Co. v. Columbus Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283 (Ohio 1995). However, it is possible to read these two precedents, decided within one month of each other, to establish two conflicting formulations of one generic tort of tortious interference with contract without distinguishing between existing and prospective contractual relations.

37. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 979 (5th ed. 1984).

38. Statement of Professor Carl Auerbach, 46 A.L.I. PROC. 201 (1969).

39. *See* Wexler, *supra* note 32, at 292.

40. Surprisingly, there appear to be no previously published law review articles directly addressing the First Amendment as a defense to tortious interference with contract resulting from the communication of truthful information, except for a very brief discussion in one article addressing the right of attorneys departing a law firm to solicit the firm's clients, and a passing reference in a second article to the chilling effect on free speech that would result from the imposition of tort liability for communicating truthful information. *See* Vincent R. Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 96-97 (1988); Wexler, *supra* note 32, at 281, 322-25.

that the imposition of tort liability for the mere communication of truthful information is a violation of fundamental First Amendment principles.

I. The "Justification" or "Privilege" for Communicating Truthful Information

The majority of courts applying sections 766B and 772 of the *Restatement (Second)* have consistently (and correctly) held that the communication of truthful information does not constitute improper interference with another's contractual relationships.[41] Courts applying the law of Wisconsin,[42] Pennsylvania,[43] New Hampshire,[44] Illinois,[45] Wyoming,[46] the District of Columbia,[47] Maryland,[48] Ohio,[49]

41. Even prior to the adoption of the *Restatement (Second)*, some courts had already recognized that the communication of truthful information does not constitute improper interference with contractual relationships. In *Masoni v. Board of Trade*, 260 P.2d 205 (Cal. Ct. App. 1953), the defendant invited creditors of the plaintiff to meet with the defendant, who took an assignment of their claims. The assignment granted the defendant the right to bring an action for collection of all its claims against the plaintiff. The defendant charged a collection fee for this service. The plaintiff brought suit against the defendant, claiming that the defendant's conduct constituted an improper interference with the contractual relations between the plaintiff and its creditors. The California Court of Appeal disagreed, holding that truthfully informing plaintiff's creditors of the plaintiff's ability to pay, and of the defendant's willingness to collect the creditor's claims by legal means, were not unfair or improper. The court also held that the fact that the defendant was motivated by the prospect of financial gain did not change this result. *Id.* at 208.

42. *See* Landess v. Borden, Inc., 667 F.2d 628, 632 n.6 (7th Cir. 1981) ("Section 772 of the *Restatement (Second)* creates a privilege for one who merely transmits truthful information to the terminating party. . . . The information Borden provided to the farmers on February 1, 1980, was truthful, and thus its conduct would be privileged.") (citation omitted); Liebe v. City Fin. Co., 295 N.W.2d 16, 20 (Wis. Ct. App. 1980) ("Transmission of truthful information is privileged and proper."); Kelly v. Western Wisconsin Legal Servs., 371 N.W.2d 428 (Wis. 1985) ("Because the transmission of truth information is privileged, a prima facie case was made for dismissing the tortious interference claim."); Aschenbrenner v. Sapko, 423 N.W.2d 882 (Wis. 1988) ("[T]he transmission of truthful information is privileged, does not constitute improper interference with a contract, and cannot subject one to liability for tortious interference with a contract."); Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211, 225 (Wyo. 1994) ("[T]ruthful statements, solicited or volunteered, are not actionable . . . .").

43. *See* Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 422 A.2d 611, 623 n.12 (Pa. Super. 1980) ("Of course, were the jury to conclude that Sheedy imparted only truthful information to Deshler, Sheedy's interference would not be improper.").

44. *See* Montrone v. Maxfield, 449 A.2d 1216, 1217-18 (N.H. 1982) ("Additionally, any truthful information or honest advice given by the defendants after being requested by seller cannot constitute wrongful interference.").

45. *See* George A. Fuller Co. v. Chicago College of Osteopathic Med., 719 F.2d 1326, 1332 (7th Cir. 1983) ("Furthermore, section 772 of the *Restatement (Second) of Torts* explicitly permits giving the third person truthful information."); Vajda v. Arthur Andersen & Co., 624 N.E.2d 1343, 1352 (Ill. App. 1993) ("Also section 772 of the *Restatement (Second) of Torts* provides that the giving of truthful information does not interfere improperly

Massachusetts,[50] Minnesota,[51] California,[52] Florida,[53] Texas,[54] and New Jersey[55] have held that there is no liability under the *Restatement*

with another person's contractual right."); Soderlund Bros., Inc. v. Carrier Corp., No. 1-92-4018, 1995 Ill. App. LEXIS 856, *29 (1995) ("There is no liability for interference with a prospective contractual relation on the part of one who merely gives truthful information to another.").

46. *See* Allen v. Safeway Stores, Inc., 699 P.2d 277, 280 (Wyo. 1985) ("Whether solicited or not, comments or notifications, truthfully given, cannot become actionable for tortious interference with a contract of employment."); Four Nines Gold, Inc. v. 71 Constr., Inc., 809 P.2d 236, 238 (Wyo. 1991) ("[T]ruthful statements, whether solicited or volunteered, are not actionable as intentional interference with prospective contractual relations.").

47. *See* International City Management. Ass'n Retirement Corp. v. Watkins, 726 F. Supp. 1, 6 (D.D.C. 1989) ("One competitor is free to communicate truthful information about another competitor to a third person."); Church of Scientology Int'l v. Eli Lilly & Co., 848 F. Supp. 1018, 1031 (D.D.C. 1994) ("It is true that this Court has twice before cited the *Restatement of Torts* and denied claims of tortious interference where the allegedly tortious acts involved conveying truthful information.").

48. *See* Weiss v. Lehman, 713 F. Supp. 489, 503 (D.D.C. 1989) ("Even if Katzow's conduct was intentional, which I do not find, the statement by Katzow that properties purchased in Phase II were grossly overvalued was a true statement and is not actionable.").

49. *See* Scanlon v. Gordon F. Stofer & Bro. Co., Nos. 55467-72, 1989 Ohio App. LEXIS 2528, at *28 (1989) ("Case law, which has adopted and interpreted Section 772 of the *Restatement of Law 2d, Torts*, has specifically held that the communication of truthful information or honest advice cannot be considered improper and a subject of potential liability.").

50. *See* United Truck Leasing Corp. v. Geltman, 533 N.E.2d 647, 651 n.5 (Mass. App. 1989), *superseded*, 551 N.E.2d 20 (Mass. 1990) ("We accept § 772 of the *Restatement (Second)* as Massachusetts law, and consider truthful information and honest advice matters of justification for a defendant to establish.").

51. *See* Lentsch v. Fuller, No. C7-88-2510 1989 Minn. App. LEXIS 531, at *2 (1989) ("So long as the information conveyed is truthful, it is immaterial whether or not the information was solicited.").

52. *See* Francis v. Dun & Bradstreet, Inc., 4 Cal. Rptr. 2d 361, 364 (1992) ("If a statement is protected, either because it is true or because it is privileged, that 'protection does not depend on the label given the cause of action.'") (citation omitted); Rickel v. Schwinn Bicycle Co., 192 Cal. Rptr. 732, 742 (1983) ("We find no wrongfulness in Schwinn's truthfully informing McCready of the legitimate business policy which it in fact had."); Arntz Contracting Co. v. St. Paul Fire and Marine Ins. Co., 54 Cal. Rptr. 2d 888, 897 (1996) ("[T]ruthful statements to interested parties about one's standard business practices (here, putting Arntz 'in claim') is not wrongful conduct actionable as intentional interference with prospective economic relations.").

53. *See* Worldwide Primates, Inc. v. McGreal, 26 F.3d 1089, 1092 (11th Cir. 1994) (citing section 772).

54. *See* Tarleton State Univ. v. Rosiere, 867 S.W.2d 948, 953 (Tex. App. 1993) ("[R]ecounting truthful information is not an improper interference.").

55. *See* C.R. Bard, Inc. v. Wordtronics Corp., 561 A.2d 694, 697 (N.J. Super. 1989) ("It is not improper to give truthful information to a customer about someone else's product, and this is so even if the purpose is to interfere with an existing or prospective contractual relationship.").

(Second) formulation of tortious interference with contract for the communication of truthful information to third parties.

Accordingly, the motive of the defendant who makes the truthful disclosure has no relevance to whether the conduct is actionable. Quite recently, the California Court of Appeal held that "a true representation does not become wrongful just because the defendant is motivated by a black desire to hurt plaintiff's business."[56] Similarly, in *Bard*, a New Jersey superior court held that the "defendant's motive is not relevant to the determination of this case. . . . It is not improper to give truthful information to a customer about someone else's product, and this is so even if the purpose is to interfere with an existing or prospective contractual relationship."[57] And in *Weiss*, a federal district court held that "[e]ven if Katzow's conduct was intentional[,] . . . the statement by Katzow that properties purchased in Phase II were grossly overvalued was a true statement and is not actionable."[58] Furthermore, the defendant need not have any interest under the existing contract in order to assert the truthful information defense.[59]

Despite the *Restatement's* unambiguous language protecting the communication of truthful information, a few courts have refused to acknowledge that truth is an absolute defense. In actions alleging that the communication of information constituted an intentional interference with contractual relations, these aberrant cases have held that the absolute defense of truth is not justified on public policy grounds. However, these cases failed to take into account the First Amendment protection provided to the communication of truthful information.[60] For example, in *Pratt v. Prodata, Inc.*,[61] the Utah

56. *Arntz Contracting Co.*, 54 Cal. Rptr. 2d at 895.

57. 561 A.2d at 697.

58. Weiss v. Lehman, 713 F. Supp. 489, 503 (D.D.C. 1989).

59. *See, e.g.*, Worldwide Primates, Inc. v. McGreal, 26 F.3d 1089, 1092 (11th Cir. 1994).

60. In fact, in at least one case, a court expressly denied that truth was an absolute defense to intentional interference with contractual relations and further denied that there was any First Amendment right to convey truthful information about the plaintiff to the plaintiff's employer. *See* Collincini v. Honeywell, Inc., 601 A.2d 292, 296 n.3 (Pa. Super. 1991).

Likewise, in *Chaves v. Johnson*, 335 S.E.2d 97 (Va. 1985), the Virginia Supreme Court held that the First Amendment does not apply to tortious speech. While the *Chaves* opinion does not directly address the issue of truth as an absolute defense in intentional interference cases, it does (erroneously) hold that the Constitution does not protect speech which rises to the level of a tort. *See id.* at 103. The *Chaves* court fails to take into account the clear holdings of the United States Supreme Court to the effect that state tort law may not impose liability for constitutionally protected speech. *See infra* text accompanying notes 76-79.

61. 885 P.2d 786 (Utah 1994).

Supreme Court expressly rejected the contention that an action for intentional interference with economic relations could not be based on the transmission of truthful information:

> Finally, we reject defendants' assertion that under *Leigh* a judgment for intentional interference with economic relations cannot be based on the transmission of truthful information. In so asserting, defendants rely heavily on section 772(a) of the *Restatement (Second) of Torts*. Section 772(a) states:
>
> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving to the third person . . . truthful information. . . . .
>
> Defendants' reliance on section 772(a) is misplaced. As our decision in *Leigh* makes clear, this court has rejected the various *Restatement* formulations of the tort of intentional interference with economic relations. Under *Leigh*, "the alternative of improper purpose (or motive, intent, or objective) will support a cause of action for intentional interference with prospective economic relations *even where the defendant's means were proper.*" Because we explicitly rejected the *Restatement* versions of the tort in *Leigh* and because liability may attach under *Leigh* even where a defendant's means were proper, we reject defendants' call to adopt truthfulness as an absolute defense to the tort of intentional interference with prospective economic relations.[62]

A federal district court applying the law of Rhode Island has also (erroneously) held that truth is not an absolute defense to an action for interference with contractual relations. In *C.N.C. Chemical Corp. v. Pennwalt Corp.*,[63] plaintiff and defendant were competitors. Pennwalt filed a suit against C.N.C., alleging that a C.N.C. product infringed one of Pennwalt's patents. Pennwalt dismissed its suit without prejudice. C.N.C. then sued Pennwalt, alleging that Pennwalt discussed the existence of the earlier infringement suit with one of C.N.C.'s customers in an attempt to deter the customer from purchasing any more of C.N.C.'s product. Pennwalt responded that all it did was truthfully inform C.N.C.'s customer of the existence of the suit. The court concluded that even if that was all that Pennwalt had done, providing that truthful information to C.N.C.'s customer was still actionable:

> Even if the complaint could be fairly read as alleging no more than a statement by Pennwalt that a suit was pending; and, perhaps, a factual recitation of the contents of that suit, dismis-

62. *Id.* at 790 (citations omitted).
63. 690 F. Supp. 139 (D.R.I. 1988).

> sal would still be inappropriate at this juncture. The general rule that communicating truthful information does not constitute "improper" interference should not be viewed as absolute. Its applicability depends upon the circumstances.[64]

The United States District Court for the Northern District of Illinois, in *Stonestreet Marketing Services, Inc. v. Chicago Custom Engraving, Inc.*,[65] expressed no opinion as to whether Illinois courts adhere to the truthful information defense contained in *Restatement* section 772.[66] However, in dicta, the court stated:

> In the absence of clear support [that the Illinois courts would adopt the truthful information defense of section 772], we believe that the truthful nature communications simply entitles Defendants to a qualified or conditional privilege which is a defense unless the jury concludes Defendants abused the privilege or took action motivated by desires other than the interest protected by the privilege.[67]

In *Carman v. Entner*,[68] the Ohio Court of Appeals also missed the boat on truth as an absolute defense to intentional interference with contract claims. The court held that the statements made by the defendants, while true, were nonetheless actionable because of defendants' subjective motivation and because the defendants "stood nothing to lose" under the contract between the plaintiff and the third party:

> No Ohio case-law exists that produces any bright-line test to determine whether the Entners should avoid liability for tortious interference with a contract where the same statement producing the liability is not actionable under as [sic] slander of title. However, we do not think, as a matter of public policy, that individuals may escape liability on the basis that otherwise clear and unprivileged threats are constructed from statements that are literally true. It has been recognized in Pennsylvania that although truth is an absolute defense in defamation actions, "truth is not a defense to intentional interference with contractual relations." Collincini v. Honeywell, Inc. (1991), 411 Pa. Super. 166, 601 A.2d 292, 296, *appeal denied*, 608 A.2d 27, *cert. denied*, 113 S. Ct. 199. Both Ohio and Pennsylvania law are generally congruent with the *Restatement of the Law* on the definition of tortious interference with contractual relations:
>
> . . . .

64. *Id.* at 143.

65. No. 93 C 1785, 1994 U.S. Dist. LEXIS 5548 (N.D. Ill. 1994).

66. *Id.* at *16 n.2.

67. *Id.*

68. No. 13978, 1994 Ohio App. LEXIS 387 (Montgomery App. Feb. 2, 1994).

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

4 RESTATEMENT OF THE LAW 2D, TORTS (1979) 20, Section 766B.

In Ohio, liability for interference with a business or contractual relationship exists when the defendant's conduct interfered with the business rights of the plaintiff, and, "taking into consideration the situation and relationship of the parties," the defendant lacked any privilege to interfere. Juhasz v. Quik Shops, Inc. (1977), 55 Ohio App. 2d 51, 58, 379 N.E.2d 235. The privilege to interfere with a contract arises if there is "a bona fide doubt" as to the remote party's rights under the contract.

There is no liability for tortious interference with a potential sales contract where the defendant acts to discourage the prospective contract which he believes in good faith to impair his legally protected interests. Bell v. Le-Ge Inc. (1985), 20 Ohio App. 3d 127, 485 N.E.2d 282.

> One is privileged purposely to cause another not to perform a contract, or enter into, or continue a business relationship with a third person by in good faith asserting or threatening to protect properly a legally protected interest of his own which he believes may otherwise be impaired or destroyed by the performance of the contract or transaction.

4 RESTATEMENT OF THE LAW 2D (1979), SECTION 773.

We find that the existence of a privilege to interfere with a contract depends essentially on whether the interfering party has a need to interfere with the contract. The rule is that where there is no need to interfere with a contract to protect a genuine legal right, even truthful statements, calculated to interfere with the contract, are actionable. The exception is where the interfering party has a bona fide belief that the contract will impair or destroy his genuine legal rights. *Juhasz* and *Bell, supra.*

Under the above rule and exception, the connection between truth and privilege is a question of fact. And the burden of proving the defense of a privilege to interfere clearly rests with the defendant. Proving the truth of all express statements made to parties to the contract may not always be sufficient to show that the defendant was privileged to interfere with the contract. Privilege depends upon the relationship of the parties. If the defendant stood to lose nothing under the contract, then no privilege can be said to exist. Moreover, even if the defend-

> ant stood to lose a right under the contract, going beyond what was reasonably necessary to protect that right may be considered unprivileged.[69]

On appeal after remand, the court of appeals repeated its holding that, as a matter of public policy, an action for intentional interference with contractual relations can be based upon statements that are literally true.[70]

If the issue in these cases were simply one of the elements of claims and defenses to be established under state tort law, no one could seriously take issue with the holdings of the courts in *Collincini*,[71] *C.N.C. Chemical*,[72] *Pratt*,[73] *Chaves*,[74] *Stonestreet Marketing*,[75] and *Carman*.[76] However, the absolute nature of truth as a defense to intentional interference cases derives not from state tort law, but from the First Amendment to the U.S. Constitution. Accordingly, the cases that have refused to acknowledge the absolute nature of the defense are in error.

II. The Communication of Truthful Information Is Constitutionally Protected Speech Under the First Amendment

In determining whether conduct of a defendant constitutes "intentional" and "improper" interference, the courts consistently look to the motives of the defendant. A few courts, however, have focused so narrowly on the issue of the defendant's motive that they have forgotten that occasionally the defendant's conduct is absolutely protected as a matter of constitutional law. In those instances, no inquiry into the defendant's motives is required or even permitted. The diffi-

69. *Id.* at **19-20, 21-24.

70. Carman v. Entner, No. 14491, 1994 Ohio App. LEXIS 4158, at *3 (Montgomery App. Sept. 23, 1994) ("[W]e do not think, as a matter of public policy, that individuals may escape liability on the basis that otherwise clear and unprivileged threats are constructed from statements that are literally true."). While it is true that a "threat" may be unprivileged even if the actor truthfully intends to make good on it, the *Carman* court's earlier holding that truthful statements are generally not privileged unless necessary to "protect a genuine legal right" of the actor is simply wrong.

71. Collincini v. Honeywell, Inc., 601 A.2d 292 (Pa. Super. 1991).

72. C.N.C. Chemical Corp. v. Pennwalt Corp., 690 F. Supp. 139 (D.R.I. 1988).

73. Pratt v. Prodata, Inc., 885 P.2d 786 (Utah 1994).

74. Chaves v. Johnson, 335 S.E.2d 97 (Va. 1985).

75. Stonestreet Mktg. Servs., Inc. v. Chicago Custom Engraving, Inc., 1994 U.S. Dist. LEXIS 5548 (N.D. Ill. 1994).

76. Carman v. Entner, No. 13978, 1994 Ohio App. LEXIS 387 (Montgomery App. Feb. 2, 1994).

culty has been pointed out by the authors of *Prosser and Keeton on the Law of Torts*:

> Although there may be no liability for interference with contract by a mere truthful statement of fact, liability has been imposed without much question where there is no misstatement of fact at all and the defendant has merely advised or persuaded another to breach his contract with the plaintiff, or where the defendant has merely made the other an offer better than the plaintiff's contract. Since persuasion or an offer of a better contract is necessarily speech, there is a question whether the First Amendment, which has had a very sizable impact in the defamation cases, might restrict liability to those cases in which some degree of personal fault and some false statements of fact are shown. . . . At this writing, the only "fault" considered sufficient to justify a penalty for speech has been fault in ascertaining or speaking the truth. Conceivably courts may therefore protect speech that interferes with contracts on the ground that it is a representation of the truth or at least is not a falsehood; or even on the ground that however bad the speaker's motive may be, this kind of fault does not touch the issue of truth or falsity. But the question is as yet an open one.[77]

The First Amendment to the United States Constitution[78] protects the freedom of speech; First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States.[79] The United States Supreme Court has repeatedly held that First Amendment protection of speech is applicable in civil lawsuits between private parties. In *New York Times Co. v. Sullivan*,[80] the plaintiff brought suit in Alabama state court alleging that he had been libeled by an advertisement in the defendant's newspaper. The issue before the Court was whether a state could award damages to a public official for defamatory falsehood relating to his official conduct in the absence of proof of "actual malice." In holding that a demonstration of "actual malice" was required, the Supreme Court observed that the First Amendment freedoms of speech and press were applicable in civil cases involving state law torts:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional free-

77. KEETON ET. AL, *supra* note 37, § 129 at 988-89 (footnotes omitted).

78. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

79. *See* Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

80. *See* 376 U.S. 254 (1964).

> doms of speech and press. It matters not that law has been applied in a civil action and that it is common law only, though supplemented by statute.[81]

In *NAACP v. Claiborne Hardware Co.*,[82] the defendant organization was involved in a boycott of white merchants in Claiborne County, Mississippi. Speeches encouraging nonparticipants to join the common cause were given and the boycott was supported by nonviolent picketing. The plaintiff white merchants filed suit in Mississippi state court for injunctive relief and damages on three separate conspiracy theories, including the tort of malicious interference with the plaintiffs' businesses. In holding that the defendants' activities were constitutionally protected, the Supreme Court again repeated its earlier holding that the protections for free speech applied even in the context of a civil lawsuit between private parties: "Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."[83]

A state may not, by manipulating its definition of the elements of a tort, impose civil liability for constitutionally protected expression. In *Blatty v. New York Times Co.*,[84] the plaintiff author brought an action for damages against the publisher of the *New York Times* for failing to include his book in its list of best sellers. The plaintiff's complaint included a cause of action for intentional interference with prospective economic advantage. The *Times* moved to dismiss the complaint on the ground that the claims were barred by the First Amendment. The motion to dismiss was granted by the trial court. The court of appeal reversed the dismissal of the claim for intentional interference with prospective advantage. On further appeal, the California Supreme Court reversed the court of appeal and reinstated the judgment of the trial court dismissing the claim for intentional interference with prospective advantage:

> The *Times* contends that Blatty's intentional interference claims—and his other claims as well—do not, and cannot, state a claim on which relief may be granted. In support it argues, inter alia, that the First Amendment to the United States Constitution and article I, section 2, of the California Constitution

81. *Id.* at 265.

82. 458 U.S. 886 (1982).

83. *Id.* at 916 n.51.

84. 728 P.2d 1177 (Cal. 1986).

> establish an absolute bar to liability. For the reasons that follow, we agree.
>
> . . . .
>
> The fundamental premise of Blatty's argument is unsound. Under the Supremacy Clause, a state's definition of a tort cannot undermine the requirements of the First Amendment. That is precisely the teaching of *New York Times*.[85]

The same conclusion has been reached by the Utah Supreme Court[86] and the Illinois Court of Appeals.[87]

The United States Supreme Court, and numerous lower courts, have consistently held that providing truthful information to third parties about the business practices of others is constitutionally protected, and the First Amendment bars the imposition of civil liability for providing such truthful information. In *Organization for a Better Austin v. Keefe*,[88] a case involving the peaceful distribution of leaflets:

> Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.[89]

The Seventh Circuit Court of Appeals in *Delloma v. Consolidation Coal Co.*[90] observed that "permitting recovery for tortious interference based on truthful statements would seem to raise significant First Amendment problems."[91] In *Hofmann Co. v. E.I. Du Pont de Nemours & Co.*,[92] the California Court of Appeal held that the First Amendment barred any cause of action for intentional interference with prospective economic advantage on the basis of statements con-

85. *Id.* at 1181, 1186.

86. *See* Searle v. Johnson, 709 P.2d 328, 330 (Utah 1985) ("In addition, state tort law is not the type of '[g]overnmental regulation that has an incidental effect on First Amendment freedoms [that] may be justified in certain narrowly defined instances . . . . [W]e are precluded by the First Amendment itself from gauging the degree of constitutional protection by the content or subject matter of the speech . . . .'").

87. *See* McErlean v. Harvey Area Community Org., 292 N.E.2d 479, 481-82 (Ill. App. 1972) ("Even if defendants' actions were the result of a purely economic dispute, the United States Supreme Court has made it clear that the guarantees of freedom of speech are not the exclusive preserve of political expression or comment upon public affairs.").

88. 402 U.S. 415 (1971).

89. *Id.* at 419 (citation omitted).

90. 996 F.2d 168 (7th Cir. 1993).

91. *Id.* at 172.

92. 248 Cal. Rptr. 384 (Cal. Ct. App. 1988).

sisting of truthful information.[93] The court in *Near East Side Community Organization v. Hair*[94] held that the actions of the defendants in circulating pamphlets complaining about the plaintiff's offensive real estate practices were constitutionally protected.[95]

In *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers' Union*,[96] the plaintiff grocery store claimed that the defendant's picketing and boycotting activities tortiously interfered with its right to contract by causing plaintiff to lose business due to a decrease in consumer shopping. Relying on *Claiborne Hardware*, the federal district court held that the defendant's activities in communicating truthful information to shoppers were constitutionally protected.[97] On appeal, the Eighth Circuit Court of Appeals affirmed summary judgment on the plaintiff's claims of tortious interference.[98]

Similarly, in *Caruso v. Local Union No. 690*,[99] the plaintiff businessman brought suit against a Teamsters local arising out of a "do not patronize" article published in a weekly Teamsters union paper. The plaintiff sought damages for interference with his business relations. The Washington Supreme Court, also relying on the United States Supreme Court decision in *Claiborne Hardware*, agreed that the publication of the article was constitutionally protected and dismissed the business interference claim.[100]

If the information communicated to the third party is true, the fact that the actor may be acting from purely economic or other ulterior motives is constitutionally irrelevant. In *Garrison v. Louisiana*,[101]

93. *See id.* at 391 ("*Blatty* applies here to the extent it bars appellant's cause of action for intentional interference with prospective economic advantage on the basis of statements consisting either of true facts or opinions.").

94. 555 N.E.2d 1324 (Ind. App. 1990).

95. *See id.* at 1334 ("Likewise, the defendants in the present case were engaged in making the public aware of the Hairs' real estate practices which were offensive to them. We find the NESCO actions, in this regard, are constitutionally protected.").

96. 840 F. Supp. 697 (E.D. Mo. 1993).

97. *See id.* at 706 ("Plaintiff's state law claim for tortious interference must fail because the defendant's activities (as listed by Plaintiff in Count I of the Second Amended Complaint) are constitutionally protected.").

98. *See* Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union, Local 655, 39 F.3d 191, 197 (8th Cir. 1994) ("The protection afforded under the First Amendment is not diminished where the communications are intended to exercise a coercive impact.") (citing Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

99. 670 P.2d 240 (Wash. 1983).

100. *See id.* at 242 ("Petitioner's only contention before this court is that the publication of the articles is constitutionally protected and cannot give rise to liability for the tort of business interference under *NAACP v. Claiborne Hardware Co.* . . . We agree.").

101. 379 U.S. 64 (1964).

the United States Supreme Court adopted the following statement from an earlier decision by the New Hampshire Supreme Court:

> If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. . . .
>
> It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion—a legal right to make a publication—and the matter is true, the end is justifiable, and that, in such case, must be sufficient.[102] The rule that the motives of the actor are constitutionally irrelevant has consistently been followed by both state and federal courts in the context of tortious interference with contractual relations cases.[103]

In 1988, in *Hustler Magazine v. Falwell*,[104] the Supreme Court expressly stated that the motivation of the actor is irrelevant in determining whether speech is entitled to constitutional protection:

> [I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment[;] . . . even when a speaker or writer is motivated by hatred or ill-will, his expression [is] protected by the First Amendment.[105]

A review of the pertinent decisions of the U.S. Supreme Court leads to the inescapable conclusion that the communication of truthful information in a commercial setting is constitutionally protected. More than fifty years ago, in *Chaplinsky v. New Hampshire*,[106] the Supreme Court held that the constitutional value of speech is determined in terms of whether the speech was "a step to truth."[107] In *Garrison v. Louisiana*,[108] the Court determined that plaintiff's "interest in private reputation is overborne by the larger public interest, secured by the Constitution in the dissemination of truth."[109] This analysis led to a definitive rule laid down by the *Garrison* Court: "Truth may not be the subject of either civil or criminal sanctions

102. *Id.* at 73 (quoting State v. Burnham, 9 N.H. 34, 42-43 (1837)).

103. *See Beverly Hills Foodland, Inc.*, 39 F.3d at 197; Johnston Dev. Group v. Carpenters' Local Union No. 1578, 712 F. Supp. 1174, 1182 (D. N.J. 1989) ("[T]he fact that the defendants may have had an ulterior motive behind their 'public interest' handbilling is irrelevant if the message itself is protected.").

104. 485 U.S. 46 (1988).

105. *Id.* at 53 (citing *Garrison*, 379 U.S. 64).

106. 315 U.S. 568 (1941).

107. *Id.* at 572.

108. 379 U.S. 64 (1964).

109. *Id.* at 73.

where discussion of public affairs is concerned."[110] In fact, the Supreme Court has subsequently held that the First Amendment's central purpose is to facilitate the "common quest for truth,"[111] and to provide "an uninhibited marketplace of ideas in which the truth will ultimately prevail."[112]

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[113] the Supreme Court rejected as "highly paternalistic" a state regulation preventing the dissemination of "concededly truthful information" about drug prices because the government was fearful of that information's effect.[114] The Court further concluded that the First Amendment is the overriding public policy consideration that protects the communication of truthful information, even in commercial settings, when it held that "it is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[115] Concluding that the First Amendment does indeed protect purely commercial speech,[116] the Court maintained that a state may not regulate the dissemination of truthful commercial information because of the effect that it may have on the recipient:

> What is at issue is whether a State may completely suppress the dissemination of concededly true information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.[117]

Since *Virginia State Board of Pharmacy*, the Supreme Court has consistently held that commercial speech is entitled to constitutional protection under the First Amendment. In *Edenfield v. Fane*,[118] the Supreme Court held that truthful, nonmisleading commercial information that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.[119] And recently, in

110. *Id.* at 74.

111. Bose Corp. v. Consumer's Union, 466 U.S. 485, 503 (1984).

112. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

113. 425 U.S. 748 (1976).

114. *Id.* at 770, 773.

115. *Id.* at 770; *see also* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Bates v. State Bar, 433 U.S. 350 (1977); Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

116. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24 ("[C]ommercial speech enjoys First Amendment protection.").

117. *Id.* at 773.

118. 507 U.S. 761 (1993).

119. *Id.* at 767.

Rubin v. Coors Brewing Co.,[120] the Court held that the government could not prohibit Coors from disclosing truthful, verifiable, and non-misleading factual information about alcohol content on its beer labels.[121]

In 1980, the Supreme Court established a three-part test for reviewing commercial speech restrictions in *Central Hudson Gas & Electric Corp. v. Public Service Commission*:[122]

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.[123]

This three-part test was cited and applied by the Supreme Court in *Rubin*[124] and *Edenfield*.[125]

One of the most sweeping statements about the breath of First Amendment protection given to truthful commercial speech came in the Supreme Court's decision in the case of *Ibanez v. Florida Department of Business & Professional Regulation*.[126] In *Ibanez*, the petitioner was a member of the Florida bar, a certified public accountant and a certified financial planner. She used the latter two credentials in her advertising and other communication with the public concerning her law practice. Notwithstanding the truthfulness of this information, she was reprimanded by the entity that regulated the practice of accountancy in Florida for mentioning it in her yellow pages listing and on her business cards and stationery.[127] In holding that the petitioner had a First Amendment right to utilize this truthful information in her contacts with the public, the Supreme Court stated that:

> Because "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is

120. 115 S. Ct. 1585 (1995).

121. *Id.* at 1590.

122. 447 U.S. 557 (1980). In *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376 (1995), the Court described the *Central Hudson* test as having "three related prongs." Previously, the Court had referred to the analysis of commercial speech as a four-part test. *See Central Hudson*, 447 U.S. at 566.

123. *Id.* at 566.

124. 115 S. Ct. at 1589.

125. 113 S. Ct. at 1798.

126. 114 S. Ct. 2084 (1994).

127. *Id.* at 2085.

> concealment of such information," *only false, deceptive, or misleading commercial speech may be banned.*[128]
>
> Commercial speech that is not false, deceptive, or misleading can be restricted, but only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest.[129]

Most recently, in *44 Liquormart, Inc. v. Rhode Island*,[130] the issue presented was whether Rhode Island could, consistent with the First Amendment, prohibit truthful, nonmisleading price advertising regarding alcoholic beverages. Observing that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good,"[131] the Supreme Court stated that bans against truthful, nonmisleading speech about a lawful product "rarely survive constitutional review."[132] The Court concluded that Rhode Island's prohibition against advertisements stating the true price at which liquor would be offered for sale was unconstitutional:

> Last Term we held that a federal law abridging a brewer's right to provide the public with accurate information about the alcoholic content of malt beverages is unconstitutional. We now hold that Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is also invalid. Our holding rests on the conclusion that such an advertising ban is an abridgement of speech protected by the First Amendment . . . .[133]

It is clear that the publication of truthful information by one business competitor concerning its competitors, its pricing, or its product is commercial speech protected under the First Amendment. But as recently as 1989, the Supreme Court expressly left open the issue of whether the communication of truthful information could ever be civilly or criminally punishable consistent with the First Amendment.[134] In *Florida Star v. B.J.F.*,[135] the Supreme Court held that

128. *Id.* at 2088 (emphasis added) (citations omitted).
129. *Id.* (citing *Central Hudson*, 447 U.S. at 566).
130. 116 S. Ct. 1495 (1996).
131. *Id.* at 1508.
132. *Id.*
133. *Id.* at 1501 (citing Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995)).
134. In several cases prior to 1989, the Supreme Court had also reserved ruling on the issue of whether truthful statements could ever constitutionally be punished. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court held that a cause of action for invasion of privacy based upon the public disclosure of a rape victim's name "imposes sanctions on pure expression—the content of a publication—and not conduct or a combi-

"where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."[136] In doing so, however, the Supreme Court expressly reserved ruling on whether truthful publications could ever be punished in light of the First Amendment:

> Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (hypothesizing "publication of the sailing dates of transports or the number and location of troops"); *see also* Garrison v. Louisiana, 379 U.S. 64, 72 n.8, 74 (1964) (endorsing absolute defense of truth "where discussion of public affairs is concerned," but leaving unsettled the constitutional implications of truthfulness "in the discrete area of purely private libels"); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978); Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967). Indeed, in *Cox Broadcasting*, we pointedly refused to answer even the less sweeping question "whether truthful publications may ever be subjected to civil or criminal liability" for invading "an area of privacy" defined by the State. Respecting the fact that press freedom and privacy rights are both "plainly rooted in the traditions and significant concerns of our society," we instead focused on the less sweeping issue "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited princi-

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nation of speech and non-speech elements that otherwise might be open to regulation or prohibition," *id.* at 495. It declined, however, to "address the broader question of whether truthful publications may *ever* be subject to civil or criminal liability consistently with the First and Fourteenth Amendments. . . ." *Id.* at 491 (emphasis added).

Several years later, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the Supreme Court held that a state cannot, consistent with the First and Fourteenth Amendments, publish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper, *see id.* at 103. The Court expressly observed that "[o]ur recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.* at 102.

135. 491 U.S. 524 (1989).

136. *Id.* at 541.

> ples that sweep no more broadly than the appropriate context of the instant case.[137]

The Supreme Court also discussed the First Amendment right to communicate truthful information in *Butterworth v. Smith*.[138] In *Butterworth*, respondent reporter testified before a grand jury about alleged improprieties committed by certain public officials.[139] At the time of his testimony, respondent was warned that if he revealed his testimony in any manner, he would be subject to criminal prosecution under state law.[140] After the grand jury terminated its investigation, respondent, who wanted to write about the investigation's subject matter, including his grand jury testimony, filed suit in federal district court seeking declaratory relief that the federal statute was an unconstitutional abridgment of his speech and for injunctive relief preventing his prosecution.[141] In holding that the statute violated First Amendment principles because it prohibited a grand jury witness from disclosing his own testimony after the grand jury's term had ended,[142] the Supreme Court reiterated its earlier position that "where a person 'lawfully obtains truthful information about a matter of public significance,' we have held that 'state officials may not constitutionally punish publication information, absent a need to further a state interest of the highest order.'"[143]

Another interesting but as yet unresolved issue involves the related tort of public disclosure of private facts. The United States Supreme Court has yet to address the question of whether a communication of truthful facts about a business rival to one of its existing or potential customers implicates the tort of public disclosure of private facts.[144] It is clear that the First Amendment applies to the tort of public disclosure of private facts. In *Gilbert v. Medical Economics Co.*,[145] the defendants published an article in a medical economics journal outlining two incidents in which the plaintiff, an anesthesiologist, allegedly committed malpractice in the operating room and in-

137. *Id.* at 532-33 (citations omitted).

138. 494 U.S. 624 (1990).

139. *Id.* at 626.

140. *See id.*

141. *See id.* at 628.

142. *See id.* at 637.

143. *Id.* at 632 (citing *Smith*, 443 U.S. at 103, and *Florida Star*, 491 U.S. at 533).

144. The Supreme Court has only specifically mentioned the tort of public disclosure of private facts in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 571 n.7 (1977). *Zacchini* involved the plaintiff's "right of publicity" and therefore did not address the constitutionality of the tort of public disclosure of private facts. *Id.*

145. 665 F.2d 305 (10th Cir. 1981).

flicted fatal or severely disabling injuries upon his patients.[146] Plaintiff sued, arguing that the article constituted a public disclosure of private facts,[147] and violated her privacy by casting her in a "false light before the public."[148] The Court of Appeals for the Tenth Circuit recognized that "the First Amendment at least sometimes protects what would otherwise be an actionable invasion of privacy where a publication by the media is involved."[149] The court held that the First Amendment clearly applied to the tort of public disclosure of private facts.[150] The court added, however, that the First Amendment protection is not absolute, but must be based upon a balance between the right of the press to disseminate newsworthy information to the public and the right to privacy.[151] The crucial issue, the Tenth Circuit held, was whether the truthful information was of legitimate concern to the public.[152] The First Amendment ceases to protect the publisher only when the publisher abuses its "broad discretion" to publish matters that are of legitimate public interest."[153] The *Gilbert* court concluded that publication of the plaintiff's name and photograph in connection with this article constituted a truthful representation that was "substantially relevant to a newsworthy topic," and was therefore protected by the First Amendment.[154]

Another case involving a media defendant is *McNamara v. Freedom Newspapers, Inc.*[155] In *McNamara*, the defendant newspaper published a photograph taken during a high school soccer game.[156] The photograph accurately depicted plaintiff student running full stride chasing a soccer ball, but also showed the plaintiff's exposed genitalia.[157] Plaintiff student brought suit for invasion of privacy based on public disclosure of private facts, as well as claims for negligent and intentional infliction of emotional distress.[158] The trial court granted defendant newspaper summary judgment on the ground that the publication was protected by the First Amendment.[159] The appel-

146. *Id.* at 306 (citations omitted).
147. *See id.*
148. *Id.* at 310.
149. *Id.* at 307.
150. *See id.*
151. *See id.* at 308.
152. *See id.*
153. *Id.*
154. *See id.* at 308-09.
155. 802 S.W.2d 901 (Tex. Ct. App. 1991).
156. *See id.* at 903 (citing Neff v. Time Inc., 406 F. Supp. 858, 861 (W.D. Pa. 1976)).
157. *See id.*
158. *See id.*
159. *See id.*

late court affirmed, holding that "a factually accurate public disclosure is not tortious when connected with a newsworthy event even though offensive to ordinary sensibilities."[160]

A third case involving media defendants is *Prahl v. Brosamle*.[161] In *Prahl*, plaintiffs were a research foundation, a research corporation, and their executive director and president, Dr. Prahl.[162] Prahl owned the land and the building which housed the laboratory and offices of the foundation and corporation.[163] One evening, the local police department received a complaint that shots had been fired at four boys who were bicycling in the area surrounding Prahl's land.[164] The report was investigated by police, and employees of defendant broadcasting company broadcast news accounts concerning the incident.[165] Plaintiff admitted that several boys had been playing with antique cars that he kept on the premises and that he had asked the boys to leave.[166] After they did so, the plaintiff shot at a gopher with a .22 caliber rifle.[167] Defendants filmed the arrival of squad cars as they entered plaintiff's property.[168] Defendants broadcast the story which contained shots of police cars driving up to the building, officers holding the confiscated guns, and Dr. Prahl talking to the officers in his office.[169] The gist of the broadcast was that Dr. Prahl had been charged with the crime of reckless use of a weapon. Prahl brought a complaint against the defendants, alleging that his privacy was invaded through the release of information obtained in confidence from him in a criminal investigation.[170] On the authority of the Supreme Court's decision in *Paul v. Davis*,[171] the court rejected the argument that the publication of this truthful information was actionable.[172]

160. *Id.* at 904.

161. 295 N.W.2d 768 (Wis. Ct. App. 1980).

162. *See id.* at 772.

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.* at 773-74.

171. 424 U.S. 693 (1976). In *Paul*, plaintiff claimed a right to damages under 42 U.S.C. § 1983 because of a public statement by police that the plaintiff had been arrested for shoplifting. *Id.* at 694-95. The Supreme Court held that there is no constitutional protection against the truthful public disclosure of the fact of an arrest. *See id.* at 713.

172. *See Prahl*, 295 N.W.2d at 774.

In *Montesano v. Donrey Media Group*,[173] plaintiff contended that defendants wrongfully published his involvement in a hit-and-run accident twenty years earlier, in which a police officer was killed.[174] Plaintiff argued that because the accident occurred long before publication, the article was not newsworthy and defendants should be held liable for publicly disclosing private facts.[175] The trial court dismissed the complaint with prejudice because no publication of private facts occurred, and thus the complaint failed to state a claim upon which relief could be granted.[176] The Nevada Supreme Court affirmed the decision holding that the "tort of public disclosure of private facts directly confronts the constitutional freedoms of speech and press."[177] The *Montesano* court noted that, after *Cox Broadcasting*, the Kansas Supreme Court had rejected the test of "current newsworthiness" which would have required a case-by-case evaluation of the current public interest in cases where the truthful facts published concerned a present or former official.[178] The *Montesano* court concluded that, at least where the publication involves public record or public facts which have been displayed, the "balance should be weighted in favor of free speech."[179]

Regrettably, there are virtually no cases discussing the constitutionality of the tort of public disclosure of private facts by nonmedia defendants.[180] One of the few decisions even to touch upon the issue was the federal district court decision in *Crain v. Krehbiel*.[181] In *Crain*, plaintiff provided Drug Enforcement Administration ("DEA") agents with information which led to the seizure of a one-half ton of marijuana and to the arrest and conviction of an individual named Lamkin.[182] Plaintiff provided the information only on the condition

173. 668 P.2d 1081 (Nev. 1983).

174. *See id.* at 1082-83.

175. *See id.* at 1083.

176. *See id.* at 1084.

177. *Id.* at 1087 (citing *Cox Broad. Corp.*, 420 U.S. at 489).

178. *See id.* at 1087-88 (citing Rawlins v. Hutchinson Publ'g Co., 543 P.2d 988, 996 (Kan. 1975)).

179. *Id.* at 1088.

180. An argument can be made that no distinction should be drawn between media and nonmedia defendants in this setting in light of the "general principle that members of the media have 'no special privilege to invade the rights and liberties of others.'" Kahn v. Bower, 284 Cal. Rptr. 244, 249 n.3 (Cal. Ct. App. 1991), *modified and reh'g denied*, 1991 Cal. App. LEXIS 1031 (Cal. App. 1991) (citing Associated Press v. Labor Bd., 301 U.S. 103, 132-33 (1937)); *see also* Branzburg v. Hayes, 408 U.S. 665, 683 (1972); Brown v. Kelly Broad. Co., 257 Cal. Rptr. 708 (Cal. 1989).

181. 443 F. Supp. 202 (N.D. Cal. 1977).

182. *Id.* at 205.

that the agents would try to keep his identity confidential.[183] Plaintiff did not allege or prove that the DEA agents ever disclosed his identity to Lamkin,[184] but contended that the agents' threats to do so constituted a violation of his right to privacy.[185] The court concluded that "plaintiff's failure to allege any actual or potential 'alteration of legal status' caused by the defendants' threatened conduct defeated his general constitutional claim that his right of privacy was violated."[186] The court went on to observe that the Supreme Court's decision in *Paul v. Davis* did not necessarily mean that a public disclosure of private facts could never violate the Constitution.[187]

The upshot of the applicable First Amendment cases is that the communication of truthful information cannot lead to civil liability so long as: (1) the information was lawfully obtained;[188] (2) the actor has not expressly or impliedly agreed not to disclose the information;[189] (3) disclosure of the information would not constitute a public disclosure of private facts;[190] and (4) disclosure of the information would not impinge upon some "state interest of the highest order"[191] or, where commercial speech is involved, a "substantial" government interest.[192]

183. *See id.*

184. *See id.*

185. *Id.* at 207.

186. *Id.* at 209.

187. *Id.*

188. In *Florida Star*, the Supreme Court protected the publication only of lawfully obtained truthful information and refused to address the constitutionality of punishment for the publication of unlawfully acquired truthful information. Florida Star v. B.J.F., 491 U.S. 532, 535 n.8, 541 (1989); *accord* Butterworth v. Smith, 494 U.S. 624, 632 (1990); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103-04 (1979). *But see* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 840 (1978) (holding that the First Amendment protects the communication of truthful information, even where it is of a kind "withheld by law from the public domain").

189. Where the actor has agreed not to disclose the truthful information but does so anyway, truth should still be an absolute defense to tort liability based on the disclosure. However, the actor could be held liable for breach of contract based on the unauthorized disclosure. The First Amendment right to free speech can, like other rights, be waived by contract. *See, e.g.*, ITT Telecom Prods. Corp. v. Dooley, 262 Cal. Rptr. 773, 780 (Cal. Ct. App. 1989) (citing cases holding that First Amendment rights were waived by contract).

190. *See* Gilbert v. Medical Econs. Co., 665 F.2d 305, 307 (10th Cir. 1981)

191. *See Butterworth*, 494 U.S. at 632 (quoting *Smith*, 443 U.S. at 103).

192. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

Conclusion

Under the *Restatement (Second)* formulation of the elements of tortious interference, it is incumbent upon the plaintiff to demonstrate that the alleged interference was both "intentional" and "improper." The *Restatement (Second)* further provides that merely providing truthful information to another does not constitute "improper" interference.

Some courts have taken issue with the *Restatement (Second)* formulation. These courts have found that, as a matter of public policy, an actor who provides truthful information to another who then discontinues, or refuses to enter into, a contract with the plaintiff should nonetheless be subject to liability if the actor's motive was impure or the actor had no financial stake in the existing contract between the plaintiff and the third party. Those courts, however, have disregarded the clearly expressed sentiments of the United States Supreme Court and other courts that there is virtually no set of circumstances under which the communication of truthful information to another can subject an individual to civil or criminal liability.

Because the communication of truthful information in a commercial setting is constitutionally protected, courts do not have the option of deciding, on public policy grounds, that one party should be subjected to tort liability for providing truthful information to another. As a matter of federal constitutional law, an actor cannot be subjected to tort liability for communicating truthful information to another which leads the other to discontinue or refuse to enter into a contract with the plaintiff where: (1) the truthful information was lawfully obtained; (2) the actor did not expressly or impliedly agree not to disclose the information; (3) the disclosure does not constitute a public disclosure of private facts about the plaintiff; and (4) the disclosure does not impinge upon some "state interest of the highest order." Courts holding otherwise are in error.