

Sued for Someone Else's Breach

Interference With Contract Relations Carries Big Risks

By Albert S. Frank, LL.B.

In the normal competitive struggle of business, you or your clients could stumble over a piece of law known as the tort of intentional interference with contractual relations.

Suppose there is a long-term lease, but you persuade the tenant to move to your premises. Suppose you persuade a manufacturer to break a contract with one of its suppliers, and instead to deal with you. Suppose you persuade the supplier of a scarce product to sell to you instead of honoring its obligations under a supply contract with someone else.

In any of these cases you might be guilty of the tort of intentional interference with contractual relations.

Elements of the Tort

Torts are breaches of certain kinds of non contractual duties. What kind of conduct is seen as a tort evolves over time. Intentional interference with contractual relations is a fairly new kind of tort.

The elements of that tort, all of which must be present for there to be a tort, are:

- 1) An enforceable contract;
- 2) Knowledge of the plaintiff's contract by the defendant;
- 3) An intentional act on the part of the defendant to cause a breach of that contract;
- 4) Wrongful interference on the part of the defendant; and
- 5) Resulting damage to one of the parties to the contract.

Thus, suppose there is an enforceable lease. You know of the lease. You lure the tenant into breaking the lease by making attractive offers as to a rent-free period, an allowance for the cost of tenant improvements, and so on. You know that the tenant will not be keeping the old space as well as your new space, but rather will be breaching the old lease. This is exactly what happens, and the old landlord suffers damages.

Under those circumstances you could be liable to the old landlord for damages for intentional interference with contractual relations.

Renewable Contracts

Leases – and other contracts for that matter – do not last forever. It is usually perfectly acceptable to induce a party to a contract to plan to do business with you as

soon as the contract expires.

Suppose the contract has a renewal clause under which it can be extended. Various cases have said that if the party has the right to choose whether or not to renew, then there is not really a binding contract as of the expiry date. You are therefore perfectly at liberty, before the expiry date, to make arrangements for the party to do business with you after the expiry date instead of renewing the contract.

The same principle applies where there is a clause in the contract allowing the party to terminate the contract. You may persuade the party to terminate so as to do business with you. As one judge put it, "there can be no tort where the contract contains a termination clause and is properly terminated."

Intentional Act to Cause a Breach

Suppose a party to a contract says to you, "I'm fed up with my supplier [or distributor or landlord or tenant or employer or employee, etc.] and I'm going to break the contract. Will you take the business? If not, I'll break the contract anyway and I'll just do business with someone else."

I have seen case law suggesting that you are allowed to say "yes." The point is you have not done an intentional act to cause a breach of the contract – the person was going to breach the contract no matter

what you did or said.

Although this point makes theoretical sense, there are practical difficulties. Would a court believe that the person was going to breach the contract anyway, and that whatever you did or said did not cause the breach? How strong is the evidence? Is it worth risking the inconvenience and expense of a lawsuit?

Of course, the person breaching the contract could, at or before the time of doing business with you, sign a document stating that you have not caused breach of the contract and that the intention was to breach the contract anyway. Unfortunately, such a document would be of little or no value as evidence, and could even be counterproductive.

Personal Liability?

Suppose it is a company that has intentionally induced a breach of contract. Could the company's directors and officers and employees also be liable? Possibly, under some circumstances.

Directors, officers, and employees can be liable for torts they personally commit. Intentional interference with contractual relations is a tort. So it is possible that a director, officer, or employee could be personally liable for inducing the breach of contract.

Under what circumstances a court would say that the director, officer, or employee has personally committed the tort, versus it really only being the tort of the company, is unclear. It would likely depend greatly on the detailed circumstances of a particular case.

One thing that is fairly clear is that you cannot find a director, officer, or employee personally liable for the failure of his or her own company to honor a contract. This is known as the "*Said v. Butt* exception."

The *Said v. Butt* exception prevents a claim for the inducement of breach of contract to proceed against a corporate director, officer, or employee where a claim for breach of contract is available against the corporation.

#

The above article originally appeared in the December, 2001 issue of ***The Bottom Line***.

#

Research has NOT been done to see if this article is still good law. Also, this is general information that might not apply to your particular situation.

#

*Albert S. Frank is a business and trial lawyer
with over 30 years of experience.*

Phone: 416 929 7202
Email: afrank@FrankLaw.ca
Web: www.FrankLaw.ca

Copyright © Albert S. Frank