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Potential Tort Liability for Attempting to Enforce an Unenforceable Restrictive Covenant

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Employment lawyers confront these facts time and time again. The situation is this — a lawyer receives a telephone call from a client who wants to enforce a restrictive covenant. Time is of the essence, and the client wants counsel to send a cease and desist letter to the new employer. In reviewing the restrictive covenant and learning about the underlying facts, the lawyer determines that an argument could be made either way that the covenant does or does not prohibit the former employee's work for his new employer. Or, perhaps, the former employee has gone to work for a competitor and the client suspects that the employee is breaching his or her obligations under a restrictive covenant but lacks proof that there has been a breach; however, the failure to take action if a breach is ongoing would cause significant harm. In either event, a court could rule against the former employer for one of the many reasons that courts refuse to enforce restrictive covenant agreements. Perhaps the covenant might be deemed to be too broad in geographic scope, or perhaps it extends for too long a period of time, or perhaps the covenant is written more broadly than is necessary to protect the legitimate interests of the employer, or maybe it is unclear whether the new employer fits within the restrictive covenant's definition of a "competitor."

Attorneys frequently respond to this situation by sending a letter to the former employee and his or her new employer, demanding that the new employer terminate its relationship with the former employee, with the expectation that a court ultimately would resolve any dispute over the enforceability of the restrictive covenant. This tactic, however, can create unexpected liability for the client (and perhaps the attorney).

Maryland recognizes the tort action for wrongful interference with contractual or business relationships in two general forms: inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic, or prospective, relationships. A cause of action for tortious interference with an existing contract is fairly easy to establish under Maryland law. In order to prove a case for tortious interference with an existing contract, a plaintiff must establish: 1) the existence of a contract between plaintiff and

a third party; 2) the defendant's knowledge of that contract: 3) the defendant's intentional interference with that contract: 4) a breach of that contract by the third party, and 5) resulting damages caused to the plaintiff by the breach. *See, e.g. Fowler v.Printers II, Inc.* 89 Md. App. 448, 466 (1991). *cert. denied*, 325 Md. 619, 602 A.2d 710 (1992).

In order to prevail on a cause of action for tortious interference with prospective advantage, under Maryland law a plaintiff must establish: (1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) that were done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) with actual damage and loss resulting. *Natural Design, Inc. v The Rouse Co.*, 302 Md. 47, 71 (Md. 1984) (citation omitted).[1] The Court of Appeals has held that wrongful or malicious interference with prospective advantage requires interference that is independently wrongful. "Wrongful or unlawful acts include common law torts and 'violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad Faith." *See K & K Management, Inc. v. Lee*, 316 Md. App. 137, 166, 557 A.2d 965 (1989), quoting Prosser, *Law of Torts*, § 130, 952-53 (4th ed. 1971).

Given the elements of these two causes of action, the risk inherent in causing a new employer to terminate a relationship with an employee based on the threat to enforce an invalid restrictive covenant is apparent. It is uncertain, however, whether a Maryland court would consider interference with a former employee's at-will employment with another employer under the rubric of tortious interference with contract or tortious interference with prospective advantage.[2] While the Maryland appellate courts have not addressed a claim for tortious interference by a former employee in a situation where the former employer erroneously attempted to enforce an unenforceable restrictive covenant. there is well-established, long standing law in other states holding that a former employer may be liable if a potential new employer withdraws an offer of employment based on the threat of litigation.

In some jurisdictions, the former employer will be liable, but only to the extent that the employer failed to act in good faith and with a reasonable basis to believe that the restrictive covenant was enforceable. *See Luketich v. Goedecke*, *Wood & Co.*, 835 S.W.2d 504, 199 Mo. App. LEXIS 1077 (Mo. App. 1992). Under this reasoning, the court focuses on whether the former employer who threatened to enforce the noncomplete or restrictive covenant had the right to assert a claim that the covenant was enforceable. According to the *Luketich* Court, there is no liability for tortious interference

which results in the termination of employment where the termination is caused by "the exercise of an absolute right, that is, an act which one has a definite legal right to do without any qualification." "As a matter of law, ...a former employer [is] justified in attempting to enforce its rights under [a] non-compete agreement...as long as [the former employer has] a reasonable, good faith belief in the validity of the agreement." *Luketich*, 835 S.W.2d at 508-09. Although "reasonableness" and "good faith" are issues of fact, this reasoning provides some protection for employers who rely on covenants that are ultimately found to be unenforceable.

In West Virginia, however, a former employer may be held liable for tortious interference with prospective relations if the restrictive covenant is unenforceable, even if the employer had a good faith reason to believe that the restrictive covenant or noncompetition agreement was enforceable. *See. e.g., Voorhees v. Guyan Machinery Co.*, 191 W. Va. 450.446 S.E.2d 672 (W. Va. 1994). In *Guyan*, the former employer threatened to "go to the highest court in the land" to enforce a noncompetition agreement that had been signed by its former outsides salesman. In response to the threat of litigation, the competitor that had agreed to hire the former employee advised him that he had to obtain a waiver of the noncomplete from his former employer or the offer of employment would be withdrawn. When Guyan would not agree to a waiver, the former employee was tired by the competitor, and the employee sued Guyan for tortious interference.

Ultimately, Guyan was unable to convince a jury that it had satisfied its burden of "demonstrating a legitimate business interest warranting the protection of the restrictive covenant" and the noncompetition agreement was deemed unenforceable. The court reasoned from this decision by the jury that any attempt to enforce the unenforceable noncompetition agreement was wrongful and therefore constituted tortious interference. Moreover, the court found that an award of punitive damages was appropriate since the cease and desist letter sent by Guyan was intended to interfere with the former employee's relationship with the new employer, and since the jury's decision that the restrictive covenant was unenforceable meant, *ipso facto*, that the threat of litigation was wrongful and therefore constituted malice to support a punitive damages award. *See Voorhees*, 191 W.Va. at 456.

The well-established Maryland law on the tort of tortious interference, as well as these two lines of authority, make it imperative that counsel consider carefully whether a restrictive covenant or noncompetitive agreement is likely to be enforceable before threatening a new employer with a lawsuit if it does not refuse to employ a former employee. Employers that insist on moving forward to interfere with a former employee's employment, when it is unclear whether

the applicable agreement bars that new employment, should be advised of the risk that their threat of litigation might well result in a successful tort claim back against them by the employee whose ability to earn a livelihood has been adversely affected.

Notes

[1]The Restatement (Second) of Torts defines Tortious Interference With Prospective Contractual Relations as:

One who intentionally and improperly interferes with another's prospective contractual relation . . . 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. $766B.

[2]Cases involving claims by a former employer that a new employer had interfered with its employment relationship with an at-will employee generally have been analyzed as a claim for tortious interference with prospective advantage and required proof of wrongful conduct by the new employer. *See, e.g., Fowler v. Printers II*, 89 Md. App. at 468-71. It is not clear that the same test should or would be applied in a case where a former employer erroneously caused a new employer to terminate a former employee's employment based an invalid restrictive covenant.

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