

economic relationship. Obviously, the plaintiff must show more than just the hope of a profit. **A plaintiff who has a definite and reasonable expectation of obtaining an economic advantage may sue a corporation that maliciously interferes and prevents the relationship from developing.**

The defense of justification, discussed earlier, applies here as well. A typical example of justification is that the defendant is simply competing for the same business that the plaintiff seeks. There is nothing wrong with that.

To demonstrate interference with a prospective advantage, most courts require a plaintiff to show that the defendant's conduct was independently unlawful. Suppose Pink manufactures valves used in heart surgery. Pink is about to sign a deal for Rabbit to distribute the products. Zebra then says to Pink, "I want that deal. If you sign with Rabbit, I'll spread false rumors that the valves are unreliable." Pink gives in and signs a contract with Zebra. Zebra has committed interference with a prospective advantage because slander is independently illegal.¹¹

The ice cream fight that follows demonstrates why plaintiffs often file but seldom win these cases.

CARVEL V. NOONAN

3 N.Y.3d 182

New York Court of Appeals, 2004

Facts: For decades, Carvel sold its ice cream only through franchised stores. However, a decline in revenues caused the company to begin selling its product in supermarkets. That effort expanded quickly, but many of the franchised stores (franchisees) went out of business. Franchisees filed suit, claiming tortious interference with a prospective advantage. In particular, the plaintiffs argued that Carvel undersold them in supermarkets and issued coupons only redeemable there. The case reached New York's highest court.

Issue: *Had Carvel committed tortious interference with a prospective advantage?*

Excerpts from Justice Smith's Decision: The franchisees' tort claim is that Carvel unlawfully interfered with the relationships between the franchisees and their customers. The franchisees do not claim that the customers had binding contracts that Carvel induced them to breach; they allege only that, by implementing its supermarket program, Carvel induced the customers not to buy Carvel products from the franchisees. The juries have found that Carvel did so induce customers, and the question for us is whether that inducement was tortious interference under New York law.

We have recognized that inducing breach of a binding agreement and interfering with a nonbinding "economic relation" can both be torts, but that the elements of the two torts are not the same. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant. The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort.

The franchisees claim that Carvel did use wrongful "economic pressure" but that argument is ill-founded for two independent reasons. First, it is ill-founded because the economic pressure that must be shown is not, as the franchisees assume, pressure on the franchisees, but on the franchisees' customers. Conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship.

Here, all Carvel did to the franchisees' customers was to make Carvel goods available in supermarkets at attractive prices; this was not "pressure" on these third parties but

¹¹For a more detailed explanation, see *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711 (Tex. 2001).

legitimate “persuasion,” and thus tortious interference with economic relations was not established.

The franchisees’ argument is also ill-founded because the Carvel activities they complain of do not amount to the sort of extreme and unfair “economic pressure” that might be “wrongful.” The crux of the franchisees’ complaint is that Carvel distributed its products through competitive channels, to an extent and in a way that was inconsistent with the franchisor–franchisee relationship. But the relationship between franchisors and franchisees is a complex one; while cooperative, it does not preclude all competition; and the extent to which competition is allowed should be determined by the contracts between

the parties, not by courts or juries seeking after the fact to devise a code of conduct.

Apart from attacking the supermarket program in general as excessively and destructively competitive, the franchisees also attack the coupon-redemption element of that program as excessive “economic pressure.” The essence of the coupon program was to give customers who used coupons a better price when they shopped in supermarkets. The mere institution of a coupon program was not “economic pressure” rising to the level of “wrongful” or “culpable” conduct.

Carvel’s conduct was not tortious interference with a prospective advantage.

The Lanham Act

The Lanham Act provides broad protection against false statements intended to hurt another business. In order to win a case, a plaintiff must prove three things:

- That the defendants made false or misleading fact statements about the plaintiff’s business. This could be a false comparative ad, showing the plaintiff’s product to be worse than it is, or it could be a misleading ad, which, though literally accurate, is misleading about the defendant’s own product.
- That the defendants used the statements in commercial advertising or promotion. In order to protect First Amendment rights of free speech, particularly political and social commentary, this act covers only commercial speech. A radio ad for beer could violate the Lanham Act; however, a radio ad urging that smoking be abolished in public places is not a commercial statement and cannot violate the act.
- That statements created the likelihood of harm to the plaintiff.¹²

“Knock It Off brand food supplement will help you lose weight and gain muscle faster than any competing supplement,” shrieks the television commercial, offering an independent study as proof. However, a competitor sues and demonstrates that during the study, users of Knock It Off received free health club memberships and low-fat gourmet meals, distorting the results. Knock It Off has violated the Lanham Act. The court will order the company to knock it off and stop showing the commercial, and also to pay damages to the injured competitor.

Chapter Conclusion

This chapter has been a potpourri of misdeeds, a bubbling cauldron of conduct best avoided. Although tortious acts and their consequences are diverse, two generalities apply. First, the boundaries of intentional torts are imprecise, the outcome of a particular case depending to a considerable extent upon the factfinder who analyzes it. Second, thoughtful executives and careful citizens, aware of the shifting standards and potentially vast liability, will strive to ensure that their conduct never provides that factfinder an opportunity to give judgment.

¹²18 U.S.C §2511.