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TORTIOUS INTERFERENCE: THE LIMITS OF COMMON LAW LIABILITY FOR NEWSGATHERING

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Media lawyers have recently been confronted with a relatively new source of litigation: the tort of intentional interference with contractual relations, which arises out of confidentiality agreements. In this Article, the authors identify the elements of tortious interference with contracts and examine the key issues presented when this tort is applied to newsgathering. The authors then consider a potential defense based on the First Amendment. In light of the public and constitutional interests at stake, the authors conclude that the breach of a confidentiality agreement should not sustain a tortious interference claim when the press is involved in newsgathering activity.

* * *

INTRODUCTION

The revelation that CBS had decided not to air an interview with a former tobacco executive on the news magazine program *60 Minutes* sent media lawyers across the country scrambling to understand the tort of intentional interference with contractual relations, a little-litigated tort in the media context. This Article addresses some of the many questions raised by the CBS announcement about the applicability of that tort to newsgathering. We first lay out the elements of the tort of intentional interference with contractual relations and then identify the key issues presented when this tort is uprooted from its traditional commercial context and applied to newsgathering activity. Finally, the parameters of a potential First Amendment defense to this tort are sketched out for media lawyers to consider and develop if plaintiffs indeed seek to expand this tort to sanction newsgathering.

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The absence of much directly relevant case law attempting to apply this tort to newsgathering activity may itself reflect a recognition that the tort has no proper application to traditional newsgathering techniques. Part I illustrates that the societal needs that gave rise to the recognition of this tort at common law have nothing to do with restricting the flow of newsworthy information. Part II reviews the elements required to make out a claim for intentional interference. As developed by the judiciary over the past century, the necessary elements indicate that this is not an area in which news organizations should be overly concerned that significant new liability will be imposed on accepted newsgathering techniques. Finally, Part III proposes a constitutional defense available to members of the press confronted with intentional interference claims.

I. OVERVIEW OF THE TORT

A. *The Common Law Roots of Tortious Interference*

The tort of interference originally developed as a means of protecting employers from the actual damages they suffered through the loss of the services of irreplaceable employees. As Professor Dan Dobbs has noted, the tort has its doctrinal roots in medieval cases allowing a master to recover for the loss of services of his servant against an interfering defendant who beat or otherwise caused injury to the servant.¹ Over time, courts relaxed the original limitations that allowed recovery only in cases involving actual physical violence and independently wrongful conduct.

In 1853, in the English case of *Lumley v. Gye*,² the modern concept of interference with economic expectancies took shape. In that case the court upheld a claim for liability for inducing an opera singer to cancel an engagement by offering a higher fee.³ The tort was for "wrongfully and maliciously" interfering with a personal service contract with notice, regardless of the means used.⁴ In other words, the tort simply was enticing a laborer to leave a pre-existing employment contract. In subsequent cases, this tort was expanded beyond personal service contracts and extended to prospective relationships not yet reduced to a signed agreement.⁵

Uprooted from its historical limitations, the tort evolved to one with theoretically universal application: liability could exist for intentional inter-

¹ Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 338 (1980).

² 118 Eng. Rep. 749 (Q.B. 1853).

³ *Id.*

⁴ *Id.* at 756.

⁵ See Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 64 (1982).

ference with any economic relationship, unless some privilege or justification existed for the interference.⁶ The potential sweep of the tort and the confusing analysis of burdens and defenses that grew up around it repeatedly led to calls for re-examination and reform. In 1923, Francis Sayre published a sweeping indictment of the tort, calling for its reformulation.⁷ Calls to rethink the elements of the tort and the burdens of proof again gained strength in the mid-1960s, causing the American Law Institute to discard the *prima facie* tort approach contained in the original *Restatement of Torts* in favor of a balancing approach requiring that the defendant's conduct first be shown to be "improper."⁸ In reluctantly approving a new restatement of the tort in 1979—126 years after *Lumley v. Gye*—the American Law Institute drafters continued to complain that the "law in this area has not fully congealed but is still in a formative stage."⁹

In short, as Professor Perlman concluded, notwithstanding its long history, "doctrinal confusion [about this tort remains] pervasive, both within and among jurisdictions."¹⁰

B. *Elements of a Cause of Action*

The tort of interference with contract thus is not a tort with clear elements and boundaries. At bottom, the tort requires intentional, unjustified interference with an existing economic relationship. The *Restatement* defines liability under interference with contract as follows:

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.¹¹

⁶ See RESTATEMENT OF TORTS § 766 (1939).

⁷ Francis B. Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 672 (1923).

⁸ Compare RESTATEMENT OF TORTS § 766 (1939) with RESTATEMENT (SECOND) OF TORTS § 766B (1979); see also RESTATEMENT (SECOND) OF TORTS, introductory note to ch. 37, at 6-7 (1979); *Penna v. Toyota Motor Sales* 902 P.2d 740 (Cal. 1995) (recounting development of the tort).

⁹ RESTATEMENT (SECOND) OF TORTS, introductory note to ch. 37, at 5.

¹⁰ Perlman, *supra* note 5, at 64; see also David A. Anderson, *An Errant Tort*, 9 REV. LITIG. 409 (1990).

¹¹ RESTATEMENT (SECOND) OF TORTS § 766.

The *Restatement*, however, notes that the tort is still so ill-defined that "[i]nitial liability depends upon the interplay of several factors and is not reducible to a single rule; and privileges, too, are not clearly established but depend upon a consideration of much the same factors."¹²

There is considerable disagreement even as to which party has the burden of pleading and proving key elements of the tort, such as whether the plaintiff must show impropriety in the defendant's conduct, or whether the defendant is left with the burden of showing a justification for the interference.¹³ The general rule is that the plaintiff's proof of an intentional act causing disruption of an economic relationship shifts to the defendant the burden of proving that the interference was privileged or justified.¹⁴ Some states, though, require the plaintiff also to prove lack of justification.¹⁵

However the burdens are allocated, the *Restatement* definition of the tort raises three issues: (1) what types of existing relationships give rise to liability for interference; (2) what does it mean to interfere "intentionally"; and (3) what constitutes "improper" interference causing the third person not to perform. Unlike many other intentional torts, these considerations necessarily incorporate into the elements of the tort an evaluation of motive, intent, and social policy in order to determine whether conduct was "improper" or, to the contrary, "justified." This tort thus raises issues akin to the amorphous concerns presented in deciding whether private information is actually "newsworthy" or would be "beyond the bounds of decency" to republish. Nevertheless, the tortious interference analysis is more problematic than the privacy tort because so many varied actions may be challenged and so many competing policy concerns need to be weighed.

As Part II will show, the need to weigh both motives and social policies in making a determination of liability underscores the strong arguments available within the common law elements of the tort itself to defeat claims asserted against the press.

¹² *Id.* introductory note to ch. 37, at 5.

¹³ *Id.* introductory note to ch. 37, at 5-6.

¹⁴ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 983 (5th ed. 1984).

¹⁵ See, e.g., *Swager v. Couri*, 395 N.E.2d 921, 925-26 (Ill. 1979); *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1370 (Or. 1978); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1183-84 (Pa. 1978), *cert. denied*, 442 U.S. 907 (1979).

II. LIMITS ON PRESS LIABILITY CONTAINED IN THE TORT ITSELF

A. *The Prerequisite of a "Valid Contract"*

Courts unanimously hold that a contract or proposed contract that is illegal or contravenes public policy is void, and an action cannot be maintained either for its breach or for inducing its breach.¹⁶ Therefore, a first line of defense against a claim of tortious interference based upon newsgathering activity lies in the purposes justifying use of a valid existing contract or prospective contract.¹⁷ Where an employer-imposed confidentiality agreement operates to prohibit the disclosure of information relating to illegal conduct or threats to the public safety, health, or welfare, or other information of public interest, it may contravene public policy and therefore not form a valid basis for a tortious interference claim.¹⁸

An agreement may be held to be against public policy if it is injurious to the interests of the public, contravenes an established interest of society, violates a statute, tends to interfere with the public welfare or safety, or is in conflict with the morals of the time.¹⁹ Although an agreement that operates to conceal evidence of illegal activity, misconduct, or danger to the public

¹⁶ KEETON ET AL., *supra* note 14, § 129, at 994 & n.68; *see also* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 406-09 (1911) (holding contract illegal under common law restraint of trade and Sherman Antitrust Act); Gold v. Wolpert, 876 F.2d 1327, 1332 (7th Cir. 1989) (finding contract invalid under New York law due to violation of real estate law and thus foreclosing tort action); NCH Corp. v. Share Corp., 757 F.2d 1540, 1543 (5th Cir. 1985) (applying Texas law to find that contract against public policy could not form basis of tort); Shamblin v. Berge, 212 Cal. Rptr. 313, 316 (Ct. App. 1985) (holding that one cannot recover for contractual interference without a valid contract); Colorado Accounting Machs., Inc. v. Mergenthaler, 609 P.2d 1125, 1127 (Colo. Ct. App. 1980) (finding contract that is illegal under state statute cannot form liability for tort); W.H. Hill Co. v. Gray & Worcester, 127 N.W. 803, 808 (Mich. 1910) (holding contract void because it violated common law prohibition of restraint of trade); Behnke v. Hertz Corp., 235 N.W.2d 690, 692 (Wis. 1975) (finding contract that is illegal under state statute cannot support tort claim).

¹⁷ The *Restatement* discusses both interference with contract and with prospective contractual relations as grounds for liability. The factors set out for the torts are essentially the same, but have a different weight where a contract exists because of "the greater definiteness" of plaintiff's expectations and his stronger claim to rights under it. RESTATEMENT (SECOND) OF TORTS § 767 cmt. e; *see also id.* § 767 cmt. j (noting that "greater protection is given to the interest in an existing contract than to the interest in acquiring prospective contractual relations, and as a result permissible interference is given a broader scope in the latter instance").

¹⁸ *See id.* § 774.

¹⁹ Marvin N. Benn & Assocs. Ltd. v. Nelsen Steel & Wire, Inc., 437 N.E.2d 900, 903 (Ill. App. Ct. 1982).

welfare would seem to accomplish most if not all of these objectives, our research revealed no decisions squarely addressing the enforceability of such an agreement.

Nevertheless, substantial authority underscores a strong public policy that favors the disclosure of information relating to criminal activities or other violations of the law. Such policy would support an attack on the validity of non-disclosure agreements, at least in some contexts.²⁰ Cases dealing with the enforceability of employer confidentiality agreements also focus on the strong public policy against restricting the ability of employees to seek gainful employment utilizing non-proprietary knowledge gained through prior employment.²¹ These cases provide a framework for evaluating the interests that an employer may legitimately seek to further through a non-disclosure agreement and the types of information that may be protected. Each line of authority may be instructive on the enforceability of non-disclosure contracts.

1. *Disclosure of Wrongful Conduct*

Courts recognize the danger posed by agreements requiring employees to remain silent about illegal practices. As the Supreme Court observed in *Branzburg v. Hayes*,²² "it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy."²³ A confidentiality agreement that operates to conceal information relating to criminal activities clearly is unenforceable and void because "[i]t is public policy . . . to encourage the disclosure of criminal activity."²⁴ According to Williston, "[a]ny bargain, express or implied, having for its purpose or consideration the concealment or compounding of a crime is unlawful."²⁵ Were the rule otherwise, "[a] party bound by contract to silence, but suspecting that its silence would permit a crime to go undetected, would be forced to choose between breaching the contract and hoping an actual crime is eventually proven, or honoring the contract while a possible crime goes unnoticed."²⁶ Although the reported decisions adopting this principle generally involve agreements not to prosecute, the policy is no less applicable in the context of confidentiality agreements. In both cases, the agreements operate to conceal information of public concern.

²⁰ See *infra* part II.A.1.

²¹ See *infra* part II.A.2.

²² 408 U.S. 665 (1972).

²³ *Id.* at 696.

²⁴ *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972).

²⁵ 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1718 (3d ed. 1972) (citation omitted).

²⁶ *Lachman*, 457 F.2d at 854.

In *Chambers v. Capital Cities/ABC, Inc.*,²⁷ a federal district court assessed the validity of a confidentiality agreement in the context of pre-trial interviews of former employees. The court observed that when such agreements operate to conceal underlying events leading up to disputes of potentially illegal practices, enforcement "can be harmful to the public's ability to rein in improper behavior and in some contexts the ability of the United States to police violations of its laws."²⁸ As such, the court held that "[a]bsent possible extraordinary circumstances not involved here, it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or predeposition interviews concerning litigation under federal law, facts relating to alleged or potential violations under such law."²⁹

In *McGrane v. Reader's Digest Ass'n*,³⁰ another federal district court reviewed in dicta the assortment of doctrines that address the public interest in assuring protection for persons with inside information concerning wrongdoing where a cover-up is involved. The court noted that arrangements to cover up criminal wrongdoing may violate 18 U.S.C. § 3 (accessory after the fact), § 4 (misprision of felony), § 371 (conspiracy to defraud), §§ 1341-1346 (mail and other fraud), or §§ 1501-1517 (obstruction of justice).³¹ As it further observed, "[c]ourts are increasingly reluctant to enforce secrecy arrangements where matters of substantial concern to the public—as distinct from trade secrets or other legitimately confidential information—may be involved."³² In support of this observation, the court cited judicial access cases and several government reports.³³ Additionally, the court cited the First and Fourteenth Amendment protection of public employees' rights to raise matters of public interest without being subjected to adverse job consequences.³⁴

The public policy against discouraging employees from disclosing information relating to misconduct, criminal activities, or other threats to the public welfare also is embodied in "whistleblower" decisions. It has long

²⁷ 159 F.R.D. 441 (S.D.N.Y. 1995).

²⁸ *Id.* at 444.

²⁹ *Id.*

³⁰ 822 F. Supp. 1044, 1045 (S.D.N.Y. 1993).

³¹ *Id.* at 1046 (citing 18 U.S.C. §§ 3, 4, 371, 1341-1346, 1501-1517 (1994)).

³² *Id.*

³³ *Id.* (citing *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159 (6th Cir. 1987); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985); *Commanche Peak and Rancho Seco Nuclear Power Plants: Hearing Before the Subcomm. on Nuclear Regulation of the Senate Environment and Public Works Comm.*, 101st Cong., 1st Sess. (1989); FIFTY-NINTH REPORT BY THE HOUSE COMM. ON GOVERNMENT OPERATIONS, H.R. REP. NO. 991, 100th Cong., 2d Sess. (1988)).

³⁴ *Id.* at 1045-46.

been recognized that employees who blow the whistle on their employer's wrongdoing should be protected from retaliation due to the public interest in encouraging such disclosure.³⁵ As described by the Supreme Court of Illinois in *Palmateer v. International Harvester Co.*,³⁶ "public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy."³⁷

Increasingly, state courts have found a public policy exception to at-will employment relationships that may also be relevant to the enforceability of confidentiality agreements. Traditionally, at-will employees could be terminated by the employer for any cause.³⁸ For example, in *Palmateer*, an employee brought an action for retaliatory discharge claiming he had been terminated for supplying information to a local law enforcement agency that a fellow employee might be violating the criminal code for agreeing to gather further evidence implicating the employee, and for intending to testify at the employee's trial.³⁹ The trial court dismissed the complaint for failure to state a cause of action and the appellate court affirmed.⁴⁰ The Supreme Court of Illinois reversed, finding that the employee stated a cause of action for retaliatory discharge in violation of the "clear public policy favoring investigation and prosecution of criminal offenses."⁴¹

In addition to common law protections, by 1993 thirty-five states had passed statutes to encourage those with insider knowledge to report organizational misconduct without fear of retaliation.⁴² Certain federal statutes also provide legal recourse for employees terminated in retaliation for reporting wrongdoing.⁴³ These statutes vary widely with respect to the designation of appropriate recipients of whistleblowers' reports. Some specifically identify the entity to which disclosure must be made—typically a governmental agency—while others are silent on this issue.⁴⁴ At least one court has found that the Occupational Safety and Health Act (OSHA) protects

³⁵ See Terry M. Dworkin & Elletta S. Callahan, *Employee Disclosures to the Media: When Is a "Source" a "Sourcerer"?*, 15 HASTINGS COMM. & ENT. L.J. 357 (1993).

³⁶ 421 N.E.2d 876 (Ill. 1981).

³⁷ *Id.* at 880 (quoting *Joiner v. Benton Community Bank*, 411 N.E.2d 229, 231 (Ill. 1980)).

³⁸ Some states have even extended the exception to employees working under collective bargaining agreements or other contracts. See *Egan v. Wells Fargo Alarm Servs.*, 23 F.3d 1444, 1447 n.3 (8th Cir.), *cert. denied*, 115 S. Ct. 319 (1994); Dworkin & Callahan, *supra* note 35, at 373-78.

³⁹ *Palmateer*, 421 N.E.2d at 877.

⁴⁰ *Palmateer v. International Harvester Co.*, 406 N.E.2d 595 (Ill. App. Ct. 1980), *rev'd*, 421 N.E.2d 876 (Ill. 1981).

⁴¹ *Palmateer*, 421 N.E.2d at 880.

⁴² See Dworkin & Callahan, *supra* note 35, at 361.

⁴³ See *id.* at 365.

⁴⁴ *Id.*

persons reporting directly to the media.⁴⁵ In that instance, the court held that "the broad remedial purpose of the Act mandates that an employee's communications with a newspaper reporter regarding conditions of the workplace are protected."⁴⁶

These cases and statutes establish a strong public policy to encourage employees to reveal information about employers' wrongdoing and misconduct. An agreement that operates to conceal such information therefore may be challenged as contravening public policy and thus void. Unfortunately, defining further types of information that cannot be suppressed properly remains problematic. Beyond information relating to criminal or illegal activity, case law provides little guidance as to the specific parameters for enforceable disclosure agreements concerning other types of information of public concern.

2. *The Scope of an Employer's Legitimate Interests*

The enforceability of a confidentiality agreement also depends upon the interest an employer seeks to protect.⁴⁷ Typically, employers advance an interest in protecting trade secrets or other proprietary information in order to preserve a competitive advantage. Courts require such agreements to be reasonably related to the protection of pertinent information, and will not enforce overly broad agreements.⁴⁸

Enforceability of a nondisclosure provision in an employment contract will depend upon whether, given the particular facts of the case, the restraints imposed are reasonably necessary for the protection of the plaintiff's business from unfair or improper competition.⁴⁹ "The reasonableness of the restrictions is measured by their effect, if any, on the general public, the extent of the hardship imposed thereby on the restricted party and whether they are necessary to protect a legitimate business interest of the former employer."⁵⁰ Nondisclosure agreements that are too broad and unreasonable have been found to be void and incapable of supporting a cause of action for tortious interference.⁵¹

⁴⁵ See *Donovan v. R.D. Andersen Constr. Co.*, 552 F. Supp. 249, 252-53 (D. Kan. 1982).

⁴⁶ *Id.* at 253.

⁴⁷ See *Prudential Ins. Co. v. Baum*, 629 F. Supp. 466, 471 (N.D. Ga. 1986).

⁴⁸ See *id.*; *Nasco, Inc. v. Gimbert*, 238 S.E.2d 368 (Ga. 1977).

⁴⁹ *R.R. Donnelly & Sons Co. v. Fagan*, 767 F. Supp. 1259, 1264 (S.D.N.Y. 1991); see also *Disher v. Fulgoni*, 464 N.E.2d 639, 643 (Ill. App. Ct. 1984); *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 369 N.E.2d 4, 6 (N.Y. 1977).

⁵⁰ *R.R. Donnelly*, 767 F. Supp. at 1264.

⁵¹ *Id.*; see also *NCH Corp. v. Share Corp.*, 757 F.2d 1540 (5th Cir. 1985); *Equifax Servs., Inc. v. Examination Mgmt. Servs., Inc.*, 453 S.E.2d 488, 491, (Ga. Ct. App. 1994), *cert. denied*, No. S95C0728, 1995 Ga. LEXIS 560 (Ga. Apr. 14, 1995). The fact

These holdings primarily are rooted in the strong public policy against restraints of trade and the high value placed on an individual's ability to ply his trade.⁵² Nevertheless, these cases demonstrate that courts will limit the types of information that can be protected by such agreements. As a general rule, the interest the employer seeks to protect must be legitimate and the agreement must be narrowly tailored to protect that interest.⁵³ Where the asserted interest is the protection of the employer's business from unfair competition, courts generally require that the restriction be no greater than that necessary to protect the proprietary interests of the employer.⁵⁴

The decision as to what interests are properly protected appears to turn on whether the information qualifies as a trade secret. Although the standard for identifying trade secrets varies from state to state, typically the analysis involves an examination of the degree of effort required to develop the information and the extent to which the employer sought to keep the information confidential. For example, in *R.R. Donnelly & Sons Co. v. Fagan*,⁵⁵ a federal district court refused to issue an injunction to enforce a confidentiality agreement that purported to protect information that the court considered "vague, contradictory and conclusory,"⁵⁶ finding insufficient evidence to prove that the information which the employer sought to protect was entitled to protection as a trade secret under Illinois law.⁵⁷ The court found that the sales, marketing, and pricing practices at issue did not qualify as trade secrets and thus did not warrant protection.⁵⁸ The court also declined to find customer lists to be confidential information entitled to protection because, although such lists may, under certain circumstances, qualify as confidential information, the names of the employer's customers were readily available through directories.⁵⁹ By contrast, in *Ecolab Inc. v. Paolo*,⁶⁰ another federal district court enforced an agreement restricting confidential

that an employee receives post-employment compensation for complying with the provision does not make the restriction more reasonable or enforceable. *G&W Elec. Co. v. Joslyn Mfg. & Supply Co.*, 468 N.E.2d 449, 451-52 (Ill. App. Ct. 1984). Rather, enforceability is determined by how relevant and necessary the agreement is to the protection of a former employer's legitimate interests. *Id.* Thus, if the former employer does not have a legitimate protectable interest or the scope of the agreement is unreasonable, a compensation provision is irrelevant. *Id.*

⁵² *Paramount Pad Co. v. Baumrind*, 151 N.E.2d 609, 610 (N.Y. 1958) ("Absent a breach of confidence, an employer cannot exact from a former employee an agreement to refrain from putting to use the experience gained while working at his trade.").

⁵³ *See Columbia Ribbon*, 369 N.E.2d at 6.

⁵⁴ *See id.*; *see also Disher v. Fulgoni*, 464 N.E.2d 639, 643 (Ill. App. Ct. 1984).

⁵⁵ 767 F. Supp. 1259 (S.D.N.Y. 1991).

⁵⁶ *Id.* at 1269.

⁵⁷ *Id.* at 1266.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1267.

⁶⁰ 753 F. Supp. 1100 (E.D.N.Y. 1991).

information that was specifically defined to include customer lists, sales reports, and price lists.⁶¹ The court found that this information qualified for protection as trade secrets under New York law in part because it was kept confidential by the company, it was developed with considerable effort by the employer, and it could not be developed by a competitor without a similar expenditure of effort.⁶²

These cases establish that the information suppressed by a confidentiality agreement must correspond to the legitimate interest the employer seeks to protect through the agreement. No reported cases appear in which a court specifically refused to enforce a confidentiality agreement because an employer had no legitimate interest in suppressing information of public concern. Nevertheless, the fact that courts limit the enforceability of such agreements to the protection of competitive information supports an argument that an employer has no proper interest in protecting from disclosure information relating to wrongdoing, potential health hazard, or other misconduct. Just as limiting the dissemination of information for anticompetitive reasons is not a legitimate purpose, neither is employing a nondisclosure provision to conceal information relating to illegal activity or other conduct detrimental to society.

This analysis suggests that an agreement that operates to conceal information of substantial public concern may be held void and thus would not form the basis of a tortious interference claim.

3. *Voidable Contracts*

A contentious issue in tortious interference suits arises when the underlying contract is not void but is nonetheless voidable or potentially unenforceable. The question then becomes whether such a defective contract can support a claim for tortious interference. Voidable contracts are those where "one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance."⁶³ A contract may be voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, infancy, unconscionable provisions, or even uncertainty of particular terms.⁶⁴ This issue could be of some importance, for example, where an agreement was entered into under duress, and thus was "voidable," but not "void."

⁶¹ *Id.* at 1104.

⁶² *Id.* at 1111-12.

⁶³ RESTATEMENT (SECOND) OF CONTRACTS § 7 (1979).

⁶⁴ RESTATEMENT (SECOND) OF TORTS § 766 cmt. f (1979); KEETON ET AL., *supra* note 14, § 129, at 995.

Under the *Restatement (Second) of Torts*, voidable contracts support a claim for tortious interference.⁶⁵ The rationale for this result is that a promise may be valid and subsisting even though it is voidable, and such promises cannot be interfered with until the contracting party formally repudiates.⁶⁶ Legal commentators also adopt this position.⁶⁷ Case law, however, is split over this issue.⁶⁸

Courts have on occasion reviewed "voidable" employment contracts in the context of tortious interference claims, most notably when the contract is voidable under the statute of frauds. Although jurisdictions differ, courts usually permit such contracts to form the basis of a claim.⁶⁹ By contrast, in *Lauter v. W & J Sloane, Inc.*,⁷⁰ a federal district court dismissed an interference claim, holding that a contract was unenforceable under the statute of frauds, and thus could not support such an action because no allegations were made that, but for the interference, the employee and the company would have adhered to the contract despite its unenforceability.⁷¹ Instead, the court noted from the evidence that the company would have repudiated the contract.⁷²

A line of New York cases built upon *Guard-Life Corp. v. S. Parker Hardware Manufacturing Corp.*⁷³ attempts to bridge the gap between the *Lauter* decision and the *Restatement* position by carving out limited exceptions as to when a voidable contract can support a tortious interference

⁶⁵ RESTATEMENT (SECOND) OF TORTS § 766 cmt. f.

⁶⁶ *Id.*

⁶⁷ See, e.g., KEETON ET AL., *supra* note 14, § 129, at 995-96.

⁶⁸ For cases following the *Restatement*, see *Barnes Group, Inc. v. C&C Prods., Inc.*, 716 F.2d 1023 (4th Cir. 1983) (statute of frauds); *Allen v. Leybourne*, 190 So. 2d 825 (Fla. Dist. Ct. App. 1966) (lack of mutuality); *Consolidated Petroleum Indus., Inc. v. Jacobs*, 648 S.W.2d 363 (Tex. Ct. App. 1983) (statute of frauds); *Speer v. Continental Oil Co.*, 586 S.W.2d 193 (Tex. Civ. App. 1979) (statute of frauds). For cases that find that there is no liability for tortious interference under a voidable contract, see *Dwight v. Tobin*, 947 F.2d 455 (11th Cir. 1991) (statute of frauds); *Stanley v. Kelley*, 422 N.E.2d 663 (Ind. Ct. App. 1981) (terminable at will); *Kopp, Inc. v. United Technologies, Inc.*, 539 A.2d 309 (N.J. Super. Ct. App. Div. 1988) (statute of frauds).

⁶⁹ See, e.g., *Friedman & Fuller v. Funkhouser*, 666 A.2d 1298, 1309 (Md. Ct. Spec. App. 1995) (holding contract containing confidentiality provision voidable because the statute of frauds can still afford a basis for a tortious interference claim); see also *NCH Corp. v. Share Corp.*, 757 F.2d 1540, 1543 (5th Cir. 1985); *Barnes Group*, 716 F.2d at 1027; *Kemper v. Worcester*, 435 N.E.2d 827, 830 (Ill. App. Ct. 1982) (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 129, at 932 (4th ed. 1971)); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 689 (Tex. 1989) (citing KEETON ET AL., *supra* note 14, § 129, at 995-96).

⁷⁰ 417 F. Supp. 252 (S.D.N.Y. 1976).

⁷¹ *Id.* at 262.

⁷² *Id.*

⁷³ 406 N.E.2d 445 (N.Y. 1980).

claim. The *Guard-Life* line of cases holds that liability will result from interference with an at-will contract only when some independently actionable misconduct is present.⁷⁴ For example, in *Huebener v. Kenyon & Eckhardt, Inc.*,⁷⁵ an employee brought suit against his supervisor alleging interference with an oral employment agreement deemed voidable under the statute of frauds. Affirming the dismissal of the claim, the appellate court described the *Guard-Life* approach as follows:

In *Guard-Life* . . . , the applicable rule with regard to contracts terminable at will was set forth in the following words: "Where contracts terminable at will have been involved, we have upheld complaints and recoveries in actions seeking damages for interference when the alleged means employed by the one interfering were wrongful, as consisting of fraudulent representations, or threats or as in violation of a duty of fidelity owed to the plaintiff by the defendant by reason of a relation of confidence existing between them. Absent some such misconduct, no liability has resulted to one whose actions have induced nonperformance of a contract deemed to be voidable and thus unenforceable."⁷⁶

Because the employment contract was voidable under the statute of frauds and the plaintiff did not allege any independently wrongful conduct on the defendant's part, no liability under the tort was allowed. In reaching this conclusion, the court observed that "[i]t would require a strained reading of the allegations of the complaint indeed to find that they sufficiently set forth language supporting a recovery under any of the narrowly defined circumstances permitting such recovery set forth in *Guard-Life*."⁷⁷

Under this authority, therefore, a claim for tortious interference based on a voidable confidentiality agreement will not be permitted to proceed absent evidence of wrongful conduct. Similarly, the *Lauter* decision suggests that when an employee would have repudiated the voidable agreement even in the absence of any interference, no claims for tortious interference exist. Nevertheless, in light of the conflicting views among jurisdictions, and even

⁷⁴ *Id.* at 448; see also *Perry v. International Transport Workers' Fed'n*, 750 F. Supp. 1189 (S.D.N.Y. 1990); *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741 (S.D.N.Y. 1990); *Huebener v. Kenyon & Eckhardt, Inc.*, 534 N.Y.S.2d 952 (App. Div. 1988); *Yan's Video, Inc. v. Hong Kong TV Video Programs, Inc.*, 520 N.Y.S.2d 143 (App. Div. 1987).

⁷⁵ 534 N.Y.S.2d 952 (N.Y. App. Div. 1988).

⁷⁶ *Id.* at 957 (citations omitted).

⁷⁷ *Id.*

among courts within a single jurisdiction, it is not clear whether voidable confidentiality agreements can support a tortious interference claim.

B. *Intentional and Improper Interference*

As noted, tort liability for interference with contract generally requires a showing that the defendant acted intentionally *and* improperly to interfere with the contract.⁷⁸ Generally, "[t]he interference with the other's performance of his contract is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action," whereas the determination of impropriety requires a detailed examination of the circumstances surrounding the alleged interference.⁷⁹ Each of these common law factors is interrelated and gives rise to several potential defenses for press defendants.

1. *"Intentional" Interference*

Technically, the intent requirement is satisfied by demonstrating that the defendant "acts with knowledge that interference will result."⁸⁰ According to the *Restatement*, the interference need not be the defendant's sole or even primary goal. Rather, "[t]he rule applies . . . to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action."⁸¹

Notwithstanding this broad formulation, courts often consider the extent to which a defendant was motivated by a desire to induce a breach of contract, as opposed to the breach being incidental to another purpose. As the *Restatement* acknowledges:

If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he was aware that he will cause interference with the plaintiff's

⁷⁸ See RESTATEMENT (SECOND) OF TORTS § 767 (1979); KEETON ET AL., *supra* note 14, § 129, at 978; *see also* *Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc.*, 968 F.2d 286, 292-93 (2d Cir. 1992); *Schmid, Inc. v. Zucker's Gifts, Inc.*, 766 F. Supp. 118, 121-22 (S.D.N.Y. 1991); *Hanzel Constr., Inc. v. Wehde & Southwick, Inc.*, 474 N.E.2d 38, 43 (Ill. 1985); *Schott v. Glover*, 440 N.E.2d 376, 379 (Ill. 1982); *G.S. Enters., Inc. v. Falmouth Marine, Inc.*, 571 N.E.2d 1363, 1369 (Mass. 1991); *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 21 (Mass. 1990); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 448 (N.Y. 1980).

⁷⁹ RESTATEMENT (SECOND) OF TORTS § 766A cmt. e.

⁸⁰ KEETON ET AL., *supra* note 14, § 129, at 982.

⁸¹ RESTATEMENT (SECOND) OF TORTS § 766 cmt. j.

contract may be regarded as such a minor or incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.⁸²

For example, in *Dukas v. D.H. Sawyer & Associates, Ltd.*,⁸³ an announcer who narrated a political commercial claimed, among other things, that the subsequent use of his voice in an opponent's political commercial tortiously interfered with his contract with the organization that had retained him to narrate the original commercial. The court found no intentional interference with the plaintiff's contract because any interference that occurred "was merely incidental to defendants' exercise of their constitutional rights. Their purpose was a legitimate, political one and did not involve an intent to interfere with plaintiff's business relationships."⁸⁴

Although decisions excusing "incidental" interference purport to assess the actor's intent to interfere, the analysis in the end usually turns upon a more general evaluation of the actor's motive and the interest he sought to further by the challenged conduct. These factors are considered in many jurisdictions as part of the analysis of whether an interference is "improper" rather than "intentional."⁸⁵ Other jurisdictions consider these factors under the rubric of justification or privilege.⁸⁶ In any event, there is a compelling argument to be made in any action brought against the press that the breach of a confidentiality agreement is incidental to the legitimate goal of gathering and disseminating news of public interest, and therefore is not subject to tort liability.

2. "Improper" Interference

The impropriety of an interference is essential under any formation of the tort.⁸⁷ "It has always been agreed that a defendant might intentionally interfere with the plaintiff's interests without liability if there were good grounds for the interference, or in other words that some kind of unacceptable purpose was required in addition to the intent."⁸⁸ The difficulty lies in differentiating proper interference from improper interference.

⁸² *Id.*

⁸³ 520 N.Y.S.2d 306 (Sup. Ct. 1987).

⁸⁴ *Id.* at 309; see also *Health-Chem Corp. v. Baker*, 915 F.2d 805, 809 (2d Cir. 1990); *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 385 N.E.2d 1238, 1241 (N.Y. 1978).

⁸⁵ See *infra* parts II.B.2.b, II.B.2.d.

⁸⁶ See *id.*

⁸⁷ See RESTATEMENT (SECOND) OF TORTS § 766.

⁸⁸ KEETON ET AL., *supra* note 14, § 129, at 983.

Standards applied by courts vary widely. The *Restatement* seeks to catalogue the various factors that have been taken into account in determining whether an alleged interference is sufficiently "improper" to sustain liability. The seven factors identified by the revisers of the *Restatement* are:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the societal interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.⁸⁹

Courts applying the *Restatement* have sought to balance these factors to reach a fact-specific determination as to the propriety of specific behavior.⁹⁰ The issue presented in every case is whether the conduct should be permitted without liability, despite its effect of causing harm to another, when all of the relevant factors are considered.⁹¹

⁸⁹ RESTATEMENT (SECOND) OF TORTS § 767.

⁹⁰ See, e.g., *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671, 677-78 (2d Cir. 1983), *cert. denied*, 466 U.S. 938 (1984); *Italian & French Wine Co. v. Negociants USA, Inc.*, 842 F. Supp. 693, 700 (W.D.N.Y. 1993); *Hursey Porter v. Bounds*, No. 93C-01-091, 1994 WL 762670, at *13 (Del. Super. Ct. Dec. 2, 1994); *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 633 (Minn. 1982).

⁹¹ Even when the *Restatement* formulation is not specifically applied, courts generally weigh the same competing interests to decide whether the conduct was "justified" or "privileged." See, e.g., *Ran Corp. v. Hudesman*, 823 P.2d 646, 648 (Alaska 1991); *Hanzel Constr., Inc. v. Wehde & Southwick, Inc.*, 474 N.E.2d 38, 43 (Ill. App. Ct. 1985). Some jurisdictions vary the definition of liability, requiring a showing that the interference was improper in either motive or means. See, e.g., *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 23-24 (Mass. 1990); *Lewis v. Oregon Beauty Supply Co.*, 733 P.2d 430, 434 (Or. 1987); *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293, 303-04 (Utah 1982). Cases applying this standard suggest that either motive or means is sufficient to support liability. A defendant's motives are improper where his "predominant purpose was to injure the plaintiff." *Leigh Furniture*, 657 P.2d at 307. A defendant's means are improper when they are contrary to law, "such as violations of statutes, regulations, or recognized common-law rules." *Id.* at 308; see also *United Truck Leasing*, 551 N.E.2d at 23-24.

a. *Nature of the "Conduct"*

The *Restatement* and many courts consider the actor's conduct to be the most important consideration.⁹² There is, however, no specifically proscribed conduct that will result in liability.⁹³ Rather, conduct potentially supporting a claim runs the gamut from mere persuasion to independently illegal acts. Although conduct that exerts no influence or pressure should not give rise to liability, "any conduct conveying to the third person the actor's desire to influence him not to deal with the other" may be actionable in the traditional commercial context of the tort.⁹⁴ It is not necessary to show independently tortious or illegal means to establish liability because "the defendant may be held [liable] even for peaceable persuasion" so long as the interference is deemed "'improper' under the circumstances."⁹⁵

As a review of the case law makes abundantly clear, analysis of any one of the *Restatement* factors is always interrelated to consideration of the other factors. Thus, under identical circumstances, some conduct will be permitted while other conduct will be improper; likewise, identical conduct may be permissible under certain circumstances while wrongful under others. The issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the precise manner in which it was caused.⁹⁶

Notwithstanding the interplay of all the factors, a few general statements may be made about the types of conduct likely to result in liability. First, although there is no requirement that the defendant's conduct be independently actionable, illegal conduct almost certainly will satisfy the "improper" element of the tort.⁹⁷ Indeed, it is possible that independently tortious conduct will be held sufficient to impose liability regardless of the interest the actor seeks to further through his actions. According to Prosser and Keeton, "Methods tortious in themselves are of course unjustified and liability is appropriately imposed where the plaintiff's contract rights are invaded by violence, threats and intimidation, defamation, misrepresentation, unfair competition, bribery and the like."⁹⁸

⁹² See, e.g., *Kand Medical, Inc. v. Freund Medical Prods., Inc.*, 963 F.2d 125 (6th Cir. 1992); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 448 (N.Y. 1980); see also *RESTATEMENT (SECOND) OF TORTS* § 767 cmt. c (noting that "[t]he nature of the actor's conduct is a chief factor in determining whether the conduct is improper").

⁹³ See *RESTATEMENT (SECOND) OF TORTS* § 766 cmt. k.

⁹⁴ *Id.*

⁹⁵ *KEETON ET AL.*, *supra* note 14, § 129, at 982-83.

⁹⁶ *RESTATEMENT (SECOND) OF TORTS* § 767 cmt. c.

⁹⁷ See *supra* note 94 and accompanying text.

⁹⁸ *KEETON ET AL.*, *supra* note 14, § 129, at 992 (footnotes omitted); see also *RE-*

In the commercial context even affirmative conduct that is not independently tortious may be actionable as a tortious interference.⁹⁹ Liability for non-tortious conduct turns on the purpose of the alleged interference. The offer of a better price or better terms alone has been held sufficient to satisfy the requirement of impropriety in a commercial context.¹⁰⁰

An offer to indemnify the contracting party against liability in order to obtain its breach for competitive purposes has also been held to be actionable.¹⁰¹ For example, in *Edward Vantine Studios, Inc. v. Fraternal Composite Service, Inc.*,¹⁰² the appellate court found that a photographer improperly induced fraternity and sorority houses to breach their agreements with a competing photographer when he offered to indemnify them for any legal costs resulting from the breach. The court rejected the defendant's argument that the competitive environment justified his offer to indemnify: "Our acceptance of such a tactic would render the notion of sanctity of contract a nullity and would indicate that a contract could be breached with impunity merely by having the party inducing the breach assume the financial consequences of such a breach."¹⁰³

At least one court, however, has held that an offer to indemnify can be justified under certain circumstances in which identifiable legitimate interests were at stake. In *Hursey Porter & Associates v. Bounds*,¹⁰⁴ a real estate agent claimed that a bank tortiously interfered with the agent's listing agreement with a seller of real estate. The agent claimed that the bank, which had liens on the property and was entitled to receive all proceeds of the sale, improperly agreed to indemnify the seller for any commission it might be obligated to pay the agent.¹⁰⁵ The bank and the seller disagreed as to whether the agent was legally entitled to the commission, and the

STATEMENT (SECOND) OF TORTS § 767(a) cmt. c (observing that "physical violence, fraudulent misrepresentation and threats of illegal conduct are ordinarily wrongful means and subject their user to liability even though he is free to accomplish the same result by more suitable means").

⁹⁹ See RESTATEMENT (SECOND) OF TORTS § 766 cmt. m; KEETON ET AL., *supra* note 14, § 129, at 990.

¹⁰⁰ See *P.A. Bergner & Co. v. Martinez*, 823 F. Supp. 151, 163 (S.D.N.Y. 1993); *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597, 608 (S.D.N.Y. 1971); *Gold Medal Farms, Inc. v. Rutland County Co-op. Creamery, Inc.*, 195 N.Y.S.2d 179, 185 (N.Y. App. Div. 1959); *Top Value Enters. v. Carlson Mktg. Group, Inc.*, 703 S.W.2d 806, 809 (Tex. Ct. App. 1986).

¹⁰¹ See *Edward Vantine Studios, Inc. v. Fraternal Composite Serv., Inc.*, 373 N.W.2d 512, 515 (Iowa Ct. App. 1985); *Jim-Bob, Inc. v. Mehling*, 443 N.W.2d 451, 462 (Mich. Ct. App. 1989); *Downey v. United Weatherproofing, Inc.*, 253 S.W.2d 976, 982 (Mo. 1953).

¹⁰² 373 N.W.2d 512 (Iowa Ct. App. 1985).

¹⁰³ *Id.* at 515.

¹⁰⁴ No. 93C-01-091, 1994 WL 762670 (Del. Super. Ct. Dec. 2, 1994).

¹⁰⁵ *Id.* at *3.

seller refused to sell unless the bank provided the indemnity.¹⁰⁶ The court concluded that the indemnification could not be characterized as improper because the bank had a legitimate interest in preventing the agent from receiving a commission to which he was not legally entitled, and because the bank could protect its interest in the proceeds from the sale of the property only by providing the indemnity.¹⁰⁷

In the newsgathering context, this principle suggests that an indemnity agreement provided by the press to a source who breaches a confidentiality agreement could be deemed "wrongful" under the first *Restatement* factor. Consideration of the other six factors, however—particularly the media's and society's interest—ultimately should render such conduct non-actionable. Until then, plaintiffs will undoubtedly argue that affirmative inducements, such as indemnification agreements or direct payments, warrant relief.

Absent such inducements, the question remains as to whether it is improper merely to question a source who is known to be subject to a nondisclosure agreement. In competitive situations, defendants have been held liable for "mere persuasion" under certain circumstances.¹⁰⁸ Nevertheless, because liability for the simple act of persuasion turns on the actor's motive and on the other *Restatement* factors, a similar result should not occur in the newsgathering context. When an alleged interferer does not have an improper motive for inducing the breach and acts to advance a favored societal interest, courts have found persuasion insufficient to impose liability.¹⁰⁹ Conversely, where the defendant is motivated by a desire to harm the plaintiff or to benefit at the expense of the plaintiff, simple persuasion may be sufficient.¹¹⁰ Therefore, because reporters who legitimately seek to obtain a

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *14.

¹⁰⁸ See RESTATEMENT (SECOND) OF TORTS § 766 cmt. k (1979) (observing that "[t]he inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other"); KEETON ET AL., *supra* note 14, § 129, at 982-83 (noting that "the defendant may be held even for peaceable persuasion" so long as the interference is deemed "'improper' under the circumstances").

¹⁰⁹ See, e.g., *National Right to Life Political Action Comm. v. Friends of Bryan*, 741 F. Supp. 807, 814 (D. Nev. 1990) (holding that sending letter to inform radio and television stations of purported inaccuracies in plaintiff's political advertisements not improper); *Silverman v. Caplin*, 541 N.Y.S.2d 546, 547-48 (App. Div. 1989) (holding that claim that wife intentionally persuaded her husband to breach partnership agreement did not allege improper interference).

¹¹⁰ See, e.g., *McNamara v. City of Chicago*, 700 F. Supp. 917, 920 (N.D. Ill. 1988) (finding valid a claim by police officer alleging that he was terminated by secondary employer because his sergeant spoke to the employer regarding an internal affairs investigation that was conducted to punish officer for his political affiliation and speech); *Chaves v. Johnson*, 335 S.E.2d 97, 103 (Va. 1985) (holding that a non-defamatory letter from architect to city council about obsessive competitor that was designed to enrich

news story act to advance a favored societal interest instead of their self-interest, they should not be subject to liability for asking questions, even of those known to be bound by confidentiality agreements.

The *Restatement* also suggests that conducting one's business in the usual manner is not restricted, even if the defendant knows of the existing contract with plaintiff.¹¹¹ Ordinary advertising and solicitation of business is an example of unrestricted behavior. Seemingly corollary behavior in the newsgathering context would involve seeking potential sources of information. Furthermore, the extent to which the defendant's behavior comports with the customs or practices of the industry should also be considered in an evaluation of the actor's conduct.¹¹² Under this analysis, too, asking questions and engaging in traditional newsgathering activities should not weigh in favor of liability, even under the first factor.

Finally, as with any tort, there must be a showing that the actor's conduct caused the breach. As a general matter, the defendant must have played at least a significant part in "inducing" the breach.¹¹³ This requirement is not met in those cases in which a source approaches a reporter or in cases which a source planned to breach the confidentiality agreement regardless of any action by the reporter.¹¹⁴

b. "*Motive*"

The only clear rule regarding the motive factor is that common law malice is *not* required in the commercial context. The defendant need not engage in interference maliciously or with ill will toward the plaintiff.¹¹⁵

architect at expense of competitor was sufficient to support liability).

¹¹¹ See RESTATEMENT (SECOND) OF TORTS § 766 cmt. m.

¹¹² *Id.* § 766 cmt. j; see also *C.W. Dev. Inc. v. Structures, Inc.*, 408 S.E.2d 41, 44 (W. Va. 1991) (holding that the established standards of a profession provide a means of evaluating conduct).

¹¹³ See *Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 828 (2d Cir. 1990), *cert. denied*, 499 U.S. 907 (1991); *Bryce v. Wilde*, 333 N.Y.S.2d 614, 616 (App. Div.), *aff'd*, 292 N.E.2d 320 (N.Y. 1972); KEETON ET AL., *supra* note 14, § 129, at 989 ("defendant must be shown to have caused the interference and the loss . . . [or] played an active and substantial part in the loss").

¹¹⁴ See, e.g., *Guity v. Tennessee Valley Auth.*, 740 F. Supp. 484, 488 (E.D. Tenn. 1989) (holding that conduct of investigator in obtaining information allegedly in violation of a hospital's duty of confidentiality to its patients could not be considered the proximate cause of breach where contacts were initiated by the source and confidential information was provided willingly and without inducement), *aff'd*, 904 F.2d 707 (6th Cir. 1990); *Tomson v. Stephan*, 696 F. Supp. 1407, 1415 (D. Kan. 1988) (finding causation element not met where party to confidentiality agreement "decided for himself to make the disclosure without [defendant's] urging" or "encouragement").

¹¹⁵ See RESTATEMENT (SECOND) OF TORTS § 766 cmt. r; KEETON ET AL., *supra* note 14, § 129, at 979, 983.

Certainly, however, evidence of spite or ill will carries great weight in a court's balancing of factors: "there has been general agreement that a purely malicious motive, in the sense of spite and a desire to do harm to the plaintiff for its own sake, will make the defendant liable for interference with a contract."¹¹⁶

To a large extent, inquiry into "motives" blends into the inquiry into justification for, or "interests" served by, the interference in question. "The propriety of an actor's motives in a particular setting necessarily depends on the attending circumstances, and must be evaluated on a case-by-case basis."¹¹⁷ According to the *Restatement*,

the factor of motive is concerned with the issue of whether the actor desired to bring about the interference as the sole or a partial reason for his conduct while the factor of the actor's interest is concerned with the individual and social value or significance of any interests that he is seeking to promote.¹¹⁸

Tortious interference probably will not be found where the defendant acts with "an impersonal or disinterested motive of a laudable character."¹¹⁹ Such motives include protecting a person for whom the defendant has responsibility, namely, an agent protecting the interests of a principal; protecting the public interest by "removing a danger to public health or morals"; and giving bona fide advice to withdraw from a contractual relationship.¹²⁰ "Laudable" motives, however, may not function as a "trump card" defeating liability. Liability may still be found in instances in which "the steps taken are . . . unreasonable in view of the harm threatened."¹²¹ Thus, wrongful conduct may render even proper motives actionable.¹²²

When a reporter is motivated by a desire to obtain information of public concern and harbors no ill will or spite toward the employer, an employee's breach of a confidentiality agreement should be considered incidental to the goal of gathering newsworthy information. According to the *Restatement*,

¹¹⁶ KEETON ET AL., *supra* note 14, § 129, at 984; *see, e.g.*, *Advanced Power Sys. v. Hi-Tech Sys., Inc.*, 801 F. Supp. 1450, 1460 (E.D. Pa. 1992).

¹¹⁷ *G.S. Enters., Inc. v. Falmouth Marine, Inc.*, 571 N.E.2d 1363, 1370 (Mass. 1991).

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 767 cmt. d.

¹¹⁹ KEETON ET AL., *supra* note 14, § 129, at 985.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See, e.g.*, *Feminist Women's Health Ctr., Inc. v. Mohammad*, 586 F.2d 530, 551-52 (5th Cir. 1978) (noting that "[i]f . . . [defendants'] activities went beyond mere persuasion and included threats, we do not think that the purity of their motivations would shield them from liability"), *cert. denied*, 444 U.S. 924 (1979).

if there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this makes the interference intentional, but the factor of motive carries little weight toward producing a determination that the interference was improper.¹²³

Applying this principle, the court in *Dulgarian v. Stone*¹²⁴ dismissed an action for tortious interference based upon an investigative report about conflicts of interest among local businesses because "[t]here [was] no indication that the report was broadcast for any reason other than the reporting on an issue of public concern."¹²⁵ Similarly, in *Brown & Williamson Tobacco Corp. v. Jacobson*,¹²⁶ the Seventh Circuit dismissed a claim for interference with potential customers because, by plaintiff's own admission, the purpose of the broadcast was "solely to increase the audience ratings of and attract attention to" a television station, not to harm the defendant.¹²⁷

c. The Interests of the Other with Which the Actor's Conduct Interferes

The third *Restatement* factor recognizes that certain contractual interests receive greater protection than others.¹²⁸ Although the focus is primarily on the nature of the contractual relationship—existing contract as opposed to prospective contractual relations—this factor also permits consideration of the contract's subject matter.¹²⁹ Thus, "the fact that a contract violates public policy . . . or that its performance will enable the party complaining of the interference to maintain a condition that shocks the public conscience, may justify an inducement of breach that, in the absence of this fact, would be improper."¹³⁰ Both the contractual interest and the actor's interest are to be appraised in light of the social interests that would be advanced by their protection.¹³¹

¹²³ RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1979).

¹²⁴ 652 N.E.2d 603 (Mass. 1995).

¹²⁵ *Id.* at 609.

¹²⁶ 713 F.2d 262 (7th Cir. 1983).

¹²⁷ *Id.* at 274; cf. *Dukas v. D.H. Sawyer & Assocs.*, 520 N.Y.S.2d 306, 309 (Sup. Ct. 1987) (barring claim where interference "was merely incidental to defendants' exercise of their constitutional rights").

¹²⁸ See RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1979).

¹²⁹ *Id.*

¹³⁰ *Id.* (citation omitted).

¹³¹ *Id.* § 767 cmt. f.

d. *The Actor's Interest and the Social Interest*

The fourth and fifth factors address the interests the actor seeks to further by his conduct and the "social utility" of those interests. Courts recognize that under certain circumstances, the interference with the contract of another may be justified, or privileged. The third party is so "privileged" when he is acting to protect a conflicting interest that is considered to be of a value equal to or greater than the plaintiff's contractual rights.¹³²

An actor may also be privileged to interfere with a contract when he is acting to promote a public interest.¹³³ In *Brownsville Golden Age Nursing Home, Inc. v. Wells*,¹³⁴ the Third Circuit affirmed summary judgment for the defendants—including a United States Senator—who reported the conditions of a nursing home to state and federal regulators.¹³⁵ The court held that "[t]here can be no tortious action or impropriety when private citizens or public officials exercise their rights to notify the appropriate agencies or mobilize public opinion about a serious violation of the law."¹³⁶ Similarly, a federal district court held that a letter sent by a political action committee to all Nevada television and radio stations urging them not to run another committee's allegedly inaccurate advertisements was not actionable as an interference with the latter committee's advertising contracts, noting that an interference judgment against the defendant committee would impermissibly infringe upon its free speech rights.¹³⁷

¹³² *Id.* § 767 cmt. g; see, e.g., *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671 (2d Cir. 1983) (examining social benefit of promoting or deterring the communication of good faith views about the merits of a literary work to publishers and book clubs), *cert. denied*, 446 U.S. 938 (1984); *Raczkowski v. City of Chicago*, 491 N.E.2d 1309 (Ill. App. Ct. 1986) (holding that co-worker has a qualified privilege to interfere with the employment of another so long as the interferer is acting in accord with the interests of the employer).

¹³³ RESTATEMENT (SECOND) OF TORTS § 767 cmt. f; see also *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115 (6th Cir. 1981) (finding that public interest furthered by joint operating agreement between newspapers justifies actions of one party to interfere with lifetime employment contracts of printers of other party by using its own printers), *cert. denied*, 456 U.S. 991 (1982); *MLI Indus., Inc. v. New York State Urban Dev. Corp.*, 613 N.Y.S.2d 977 (N.Y. App. Div. 1994) (holding interference justified by the need to ensure that public funds were used in a manner consistent with public policy of the state); *Stratford Materials Corp. v. Jones*, 499 N.Y.S.2d 172 (App. Div. 1986) (finding no liability for interference with contract to supply cast-iron manhole covers to county agency where officials acted to protect the public interest in safe construction), *appeal denied*, 515 N.E.2d 909 (N.Y. 1987).

¹³⁴ 839 F.2d 155 (3d Cir. 1988).

¹³⁵ *Id.* at 159.

¹³⁶ *Id.* (emphasis added).

¹³⁷ *National Right to Life Political Action Comm. v. Friends of Bryan*, 741 F. Supp.

The *Restatement* identifies a series of questions relevant to situations in which an actor claims to be protecting the public interest:

whether the practices are actually being used by the other, whether the actor actually believes that the practices are prejudicial to the public interest, whether his belief is reasonable, whether he is acting in good faith for the protection of the public interest, whether the contractual relation involved is incident or foreign to the continuance of the practices and whether the actor employs wrongful means to accomplish the result.¹³⁸

Certain established privileges are set forth in sections 770 through 774 of the *Restatement*. Of particular interest are sections 770 and 774, which provide, respectively, that the actions of one who is responsible for the welfare of another, and the actions of one who interferes with an agreement that is illegal or contrary to public policy, are privileged acts.¹³⁹

Whether the alleged interference is analyzed under the rubric of justification or in terms of its propriety, the focus of the inquiry is whether the societal interest furthered by the breach—in this context, the substantial interest in the gathering and dissemination of news presumably of public interest—outweighs the interest of the other party in maintaining the secrecy of the information through the confidentiality agreement.¹⁴⁰

e. *Proximity or Remoteness of Actor's Conduct to Interference*

This factor focuses on whether the interference was direct—A induces B to breach his contract with C—or indirect—B's failure to perform causes C to breach his contract with D. Generally, a party who engages in "indirect" interference is less likely to be found liable under the tort.¹⁴¹

f. *Relations Between the Parties*

The final factor evaluates the significance of the relationship between any two of the three parties.¹⁴² Analysis of this factor considers, among other things, whether the relationship between the third party and the injured party arises from a prospective contract or an existing contract, whether the

807, 817 (D. Nev. 1990).

¹³⁸ RESTATEMENT (SECOND) OF TORTS § 767 cmt. f (1979).

¹³⁹ *Id.* §§ 770, 774.

¹⁴⁰ *Id.* § 767 cmt. g.

¹⁴¹ *Id.* § 767 cmt. h.

¹⁴² *Id.* § 767 cmt. i.

alleged interferer and the injured party are competitors, and whether the alleged interferer owes a duty to the third party that justifies inducement of the breach.¹⁴³

3. *Interplay of the Common Law Factors in the Newsgathering Context*

As the above discussion reveals, there is significant overlap among the factors to be considered in assessing the propriety of an alleged interference on common law grounds. The confusion is compounded by the tendency of courts to blend the various factors in reaching a determination. Under any approach, however, there are compelling arguments against the imposition of any liability for breach of a confidentiality agreement that results from a reporter's otherwise legal efforts to obtain information for the purpose of reporting the news.

Indeed, it can be argued that the public and constitutional interests in the free flow of information are so substantial that they outweigh any interest in confidentiality asserted to support a contractual interference claim. Under a *Restatement* analysis, however, in all likelihood the public interest will be weighed against the interest claimed by the other party, the conduct of the press in obtaining the information, and the motives of all involved. Information that is protected as a matter of policy to advance larger interests of society, such as commercially valuable trade secrets, attorney-client communications, and sensitive, personal information, will produce a different balancing of factors than information concerning threats to the public health or safety, wrong-doing, or corruption, the disclosure of which present different social interests. Similarly, a breach resulting from a reporter asking questions of a source may be given different weight by the courts than a breach resulting from conduct such as large payments to a source, agreements to indemnify a source for the breach, or the conferring of other seemingly significant benefits conferred on the breaching party. Yet, the interplay of all the factors, where newsgathering is involved, must be undertaken with full recognition of the significant state and federal public and constitutional interests involved.¹⁴⁴ These interests should defeat liability even under the traditional common law analysis in most cases involving newsgathering.

First Amendment interests have previously been weighed by courts to preclude liability for tortious interference in a number of contexts.¹⁴⁵ Tortious interference claims based on *publication*, for example, have been

¹⁴³ *Id.*

¹⁴⁴ While this Article does not specifically address the authority analyzing and applying state law protections for newsgathering and publishing, they not only exist, but have been held in other contexts to afford protection beyond that afforded by the federal Constitution. See, e.g., *Immuno AG v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y.), *cert. denied*, 500 U.S. 954 (1991).

¹⁴⁵ KEETON ET AL., *supra* note 14, § 129, at 988-89.

soundly rejected as an end-run around constitutional limits to liability based on free speech.¹⁴⁶ As the Seventh Circuit noted:

Any libel of a corporation can be made to resemble in a general way this archetypal wrongful-interference case, for the libel will probably cause some of the corporation's customers to cease doing business with it; and whether this involves an actual breaking of contracts or merely a withdrawal of prospective business would make no difference under the modern law of wrongful interference. But this approach would make every case of defamation of a corporation actionable as wrongful interference, thereby enabling the plaintiff to avoid the specific limitations with which the law of defamation—presumably to some purpose—is hedged about. We doubt that the Illinois courts would allow this end run around their rules on defamation, and we therefore need not consider any constitutional implications of their doing so.¹⁴⁷

¹⁴⁶ See *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 362 (D. Colo. 1987); *Taylor v. Nashville Banner Publishing Co.*, 573 S.W.2d 476, 485 (Tenn. Ct. App. 1978), *cert. denied*, 441 U.S. 923 (1979).

¹⁴⁷ *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273-74 (7th Cir. 1983).

A related policy argument exists under the *Restatement* to limit the assertion of liability for interference with prospective customers based on a publication. The press, as surrogate for the public, acts in furtherance of a duty to another when it engages in newsgathering. The *Restatement* recognizes that

[o]ne who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract or enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if the actor . . . does not employ wrongful means and . . . acts to protect the welfare of the third person.

RESTATEMENT (SECOND) OF TORTS § 770 (1979). This rule is frequently applied to those who stand in a fiduciary relation toward another, as in the case of agents acting for the protection of their principals, trustees acting for their beneficiaries or corporate officers acting for the benefit of their corporation. *Id.* § 770, cmt. b; see *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781, 789-90 (7th Cir. 1985) (holding that architects have a privilege to breach contract if it is necessary to protect the interest of their principal); *Swager v. Couri*, 395 N.E.2d 921, 927-29 (Ill. 1979) (discussing corporate officer privilege); *Schott v. Glover*, 440 N.E.2d 376, 379 (Ill. App. Ct. 1982) (discussing attorney privilege).

The First Amendment right to petition¹⁴⁸ has also been held to foreclose liability for common law tortious interference.¹⁴⁹ The reasoning underlying these decisions is that the First Amendment right to petition outweighs the plaintiff's contract rights or any harm resulting from the interference.¹⁵⁰

Similarly, newsgathering is an activity of constitutional significance. The Supreme Court repeatedly has recognized that restrictions on newsgathering raise First Amendment concerns because "[w]ithout some protection for seeking out the news freedom of the press could be eviscerated."¹⁵¹ Indeed, without protection for newsgathering, the value of Constitutional protection afforded publication would be severely diminished. Thus, as expressed in *First National Bank of Boston v. Bellotti*,¹⁵² the First Amendment "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."¹⁵³

Because a necessary prerequisite to publishing the news is gathering it, lower courts repeatedly have recognized that constitutional protection of newsgathering is necessary to avoid media self-censorship and to preserve an unimpeded flow of information to the public.¹⁵⁴ In *Nicholson v.*

¹⁴⁸ U.S. CONST. amend. I.

¹⁴⁹ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-32 (1982); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union Local 655*, 39 F.3d 191, 196-97 (8th Cir. 1994); *Havoco of America, Ltd. v. Hollobow*, 702 F.2d 643, 650-51 (7th Cir. 1983); *First Nat'l Bank of Omaha v. Marquette Nat'l Bank*, 482 F. Supp. 514, 524-25 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980); *Sierra Club v. Butz*, 349 F. Supp. 934, 936-39 (N.D. Cal. 1972).

¹⁵⁰ See, e.g., *Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. 310, 320 (S.D.N.Y. 1993) (holding that "[a] claim of tortious interference cannot be made where, as here, defendants' First Amendment right to petition government outweighs the harm that their actions may have produced indirectly"); see also *Beverly Hills Foodland*, 39 F.3d at 196-97 (rejecting interference claim of union's constitutionally protected pamphleteering and boycott of grocery store); *Missouri v. NOW, Inc.*, 620 F.2d 1301, 1317 (8th Cir.) (holding that First Amendment right to petition was of such importance that NOW boycott of all states that had not ratified ERA could not support claim for interference), *cert. denied*, 449 U.S. 842 (1980); *Rudoff v. Huntington Symphony Orchestra, Inc.*, 397 N.Y.S.2d 863, 865 (App. Term 1977) ("[p]laintiff's right to petition his government is privileged and is superior to defendant's right to maintain an action for interference"); *Searle v. Johnson*, 709 P.2d 328, 330 (Utah 1985) (holding that Humane Society media campaign to discourage tourists from visiting county to increase public awareness of conditions at dog pound was protected by First Amendment, thereby defeating claim for tortious interference).

¹⁵¹ *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

¹⁵² 435 U.S. 765, 783 (1978).

¹⁵³ *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

¹⁵⁴ See, e.g., *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300 (7th Cir. 1990) (recognizing First Amendment protection for newsgathering); *In re Express News*

McClatchy Newspapers,¹⁵⁵ a California appellate court recognized that “the newsgathering component of the freedom of the press—the right to seek out information—is privileged at least to the extent it involves ‘routine . . . reporting techniques’ [which] include asking persons questions, including those [persons] with confidential or restricted information.”¹⁵⁶ The plaintiffs in *McClatchy* sued for, among other things, intrusion arising out of a newspaper’s investigation of a judicial candidate.¹⁵⁷ The allegedly offending conduct included “soliciting, inquiring, requesting and persuading agents, employees and members of the [state bar] to engage in the unauthorized and unlawful disclosure of information.”¹⁵⁸ The court found such conduct to constitute newsgathering activity protected by the First Amendment and, as such, non-tortious: “For the same reason ‘liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication,’ it cannot be imposed for constitutionally protected newsgathering.”¹⁵⁹

Through its several access decisions, the Supreme Court has also acknowledged that First Amendment interests are at stake in newsgathering. The Supreme Court first recognized the constitutional dimension of the right of access in *Richmond Newspapers, Inc. v. Virginia*,¹⁶⁰ stating:

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a “right of access” or a “right to gather information,” for we have recognized that “without some protection for seeking out the news, freedom of the press could be eviscerated.”¹⁶¹

In a concurring opinion, Justice Stevens underscored that *Richmond Newspapers* was “a watershed case,”¹⁶² because “for the first time, the Court unequivocally [held] that an arbitrary interference with access to important

Corp., 695 F.2d 807, 808-09 (5th Cir. 1982) (same); *Allen v. Combined Communications Corp.*, 7 Media L. Rep. (BNA) 2417, 2419 (Colo. Dist. Ct. July 22, 1981) (stating that because newsgathering is inseparable from news publication courts should “open the umbrella of the First Amendment to all of th[o]se activities which are necessary to the publication of [a] news story”).

¹⁵⁵ *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58 (Ct. App. 1986).

¹⁵⁶ *Id.* at 64 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1978)).

¹⁵⁷ *Id.* at 58-59.

¹⁵⁸ *Id.* at 64.

¹⁵⁹ *Id.* at 65 (quoting *Reader’s Digest Ass’n, Inc. v. Synanon Church*, 690 P.2d 610, 624 (Cal. 1984)).

¹⁶⁰ 448 U.S. 555 (1980).

¹⁶¹ *Id.* at 576 (citation omitted).

¹⁶² *Id.* at 582 (Stevens, J., concurring).

information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.”¹⁶³ Although the holdings of the Supreme Court’s subsequent access cases focus primarily on the role of the press in monitoring the manner in which the government functions, these cases nevertheless demonstrate the importance of ensuring that the press is not unreasonably restricted in its ability to fulfill its role as an important source of information for the public.¹⁶⁴

Under the *Restatement* formulation, the First Amendment policies articulated in *Branzburg*, *Bellotti*, and *Richmond Newspapers* should serve to defeat liability against the press for tortious interference with a confidentiality agreement, absent some independently wrongful conduct. Although apparently no appellate court has yet addressed this issue directly, two recent New York trial court decisions support this conclusion. These decisions arose out of separate actions brought by Melba Moore’s former husband against media organizations that broadcast statements made by Ms. Moore in violation of a confidentiality agreement with her former spouse that barred either party from publicly criticizing or otherwise disparaging the other. In both actions, the plaintiff claimed that the defendants induced his wife to violate the confidentiality agreement. The claims were based on both the breach of the agreement and the subsequent publication. In *Huggins v. Whitney*,¹⁶⁵ the trial court dismissed the claim, holding that the defendants’ First Amendment rights outweighed the harm that the plaintiff had suffered by virtue of the breach.¹⁶⁶ The court found that the First Amendment barred liability because media organizations cannot be liable or punished for the use of “‘routine newspaper reporting techniques’” to ascertain and publish a newsworthy story.¹⁶⁷ In *Huggins v. National Broadcasting Co.*,¹⁶⁸ the court dismissed the tortious interference claim because “[a]ny interference that occurred was merely incidental to defendants’ exercise of their constitutional right to broadcast information.”¹⁶⁹ The court further held that “[d]efendants purpose was a legitimate one and did not involve an intent to unjustifiably interfere with the confidentiality agreement.”¹⁷⁰

Similarly, although not involving a typical confidentiality agreement, a tortious interference claim was dismissed in *Wells v. Marton*,¹⁷¹ a case in

¹⁶³ *Id.* at 583 (Stevens, J., concurring).

¹⁶⁴ *See, e.g.,* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986) (holding that right of access applies to preliminary hearings as they are conducted in California).

¹⁶⁵ 24 Media L. Rep. (BNA) 1088 (N.Y. Sup. Ct. Aug. 28, 1995).

¹⁶⁶ *See id.* at 1091.

¹⁶⁷ *Id.* at 1090 (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)).

¹⁶⁸ N.Y. L.J., Feb. 13, 1996, at 29 (N.Y. Sup. Ct. Feb. 5, 1996).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ 794 F. Supp. 1092 (S.D. Fla. 1991).

which the reporter's sole objective was to gather and disseminate newsworthy information. In *Wells*, a reporter interviewed a Hungarian politician, Dr. Antall, for the magazine *Vanity Fair*.¹⁷² The plaintiff sued on a theory of tortious interference, claiming that a contractual relationship with Dr. Antall gave him exclusive interview rights for the purposes of writing a biography.¹⁷³ The court dismissed the claim on summary judgment in large part because the reporter's "sole interest" was to disseminate news regarding Hungary's current political climate and because she had no intention to interfere with any contractual interest that Wells had in Dr. Antall's life story.¹⁷⁴

Although these three cases do not extensively explore the interplay of the *Restatement* factors where newsgathering is involved, they do demonstrate that the constitutional interest in the protection of newsgathering and reporting should weigh heavily against liability under several of the factors, including those requiring an assessment of a reporter's motive, the interests a reporter seeks to advance, and the societal interests involved. Moreover, the protection of newsgathering safeguards the *process* of ferreting out and reporting the news. Thus, it can be argued that the factors weighing against the imposition of interference liability for newsgathering should not turn on the importance of the particular story being reported. If the focus is properly on the protection of the process, newsgathering in pursuit of a routine story should be as protected as newsgathering in pursuit of significant threats to the public health or safety. Again, extremely limited precedent supports this conclusion: *Huggins* rejected liability for disclosure of marital information; *Wells* involved a fairly routine magazine interview on the political climate in Hungary.

Under the common law approach, however, First Amendment protections may not be an absolute bar to liability for tortious interference. The Second Circuit, for example, has held that the right to petition does not insulate interfering conduct when it is designed to achieve an unlawful objective.¹⁷⁵ Conduct that would be independently actionable—fraud, bribery, and illegal entry, for example—may still be considered improper under the *Restatement* even if done in pursuit of news.¹⁷⁶ Other actions, such as payment of money for information, also could constitute such actionable wrong-

¹⁷² *Id.* at 1097-98.

¹⁷³ *Id.* at 1093.

¹⁷⁴ *Id.* at 1097.

¹⁷⁵ See *Jews for Jesus, Inc. v. Jewish Community Relations Council*, 968 F.2d 286, 296-98 (2d Cir. 1972) (holding that no First Amendment protection exists where defendant induced country club to cancel a contract for a discriminatory purpose).

¹⁷⁶ See *supra* notes 80-81 and accompanying text. Although conduct may be "improper," this does not always lead to the conclusion that liability exists for tortious interference. There still must be a weighing of all factors in the context giving rise to the improper actions.

doing in some settings.¹⁷⁷ Nevertheless, the permissible range of conduct connected to newsgathering has never been tested in court.

In the commercial context, indemnification against liability for breach of the underlying contract is generally considered improper, but even in that context it does not automatically produce liability under circumstances where the indemnity is offered to protect a proper interest.¹⁷⁸ Where newsgathering is involved, the First Amendment principles that necessarily must be considered under many of the *Restatement* factors dictate against liability for indemnification in ways not present when a commercial tort is at issue. These issues, however, are also untested.

In short, the several significant constitutionally protected interests advanced by the press when it engages in legitimate newsgathering indicate that, under the *Restatement* approach, tort liability is not properly imposed in most circumstances. So long as the press acts for the purpose of reporting the news and does not engage in independently wrongful conduct, there should be no liability under a common law analysis.

C. *Proximately Caused Damages*

Another required element of recovery is, of course, proof of damages. In the case of a breach of confidentiality agreement, the permissible measure of damages may present several significant questions.

There is authority limiting damages for interference to those damages that could be recovered against the contract breacher on the underlying contract.¹⁷⁹ Most jurisdictions, however, including New York, Texas, Illinois, and California, recognize the more generous "tort measure" of damages, under which general pecuniary and consequential damages are available, as well as, in certain circumstances, punitive damages, recovery for emotional distress or reputational harm, and the equitable remedies of injunction and restitution.¹⁸⁰ Many of these jurisdictions have either explicitly or implicitly adopted *Restatement* § 774A, which states in relevant part:

One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for

- (a) the pecuniary loss of the benefits of the contract or the prospective relation;

¹⁷⁷ See, e.g., N.Y. PENAL LAW §§ 180.00-.45 (Consol. 1984) (defining criminal bribery).

¹⁷⁸ See *supra* notes 101-07 and accompanying text.

¹⁷⁹ See KEETON ET AL., *supra* note 14, § 129, at 1003.

¹⁸⁰ *Id.* § 129, at 1004. "There is obviously an anomaly in making the defendant liable for a greater sum than that for which the contracting party himself can be held." *Id.*

- (b) consequential losses for which the interference is the legal cause; and
- (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.¹⁸¹

The *Restatement* and case law also demonstrate that the availability of a remedy against the contract breacher is no bar to an action against the interferer, but that damages actually paid by one will be offset against those recoverable against the other.¹⁸²

1. General (Pecuniary) Damages

The measure of general damages for tortious interference with contract is the difference between the price of the contract and the value of the performance to be received.¹⁸³ The most common use of this measure is in sales contracts, in which a breaching seller pays the difference between the contract price and the market price, and services contracts, in which a worker discharged earlier than as provided by the contract recovers the difference between what he or she has been paid and the total that was to have been paid.¹⁸⁴ Given that the goal of this measure of damages is to give to the plaintiff the profit he or she would have earned upon performance,¹⁸⁵ its relevance seems limited in the context of a news organization that induces an employee to disclose information in violation of a confidentiality agreement. Absent publication, courts would likely dismiss as hopelessly speculative an attempt to measure the profit a company would have made had its employee remained silent. There may be, however, alternate measures of

¹⁸¹ RESTATEMENT (SECOND) OF TORTS § 744A (1979). For cases that have applied the measure of damages spelled out in the *Restatement*, see, e.g., *Tose v. First Pa. Bank, N.A.*, 648 F.2d 879, 898 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981); *Allied Int'l v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1384 (1st Cir. 1981), *aff'd*, 456 U.S. 212 (1982); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 274 (4th Cir. 1980); *Pino v. Protection Maritime Ins. Co.*, 490 F. Supp. 277, 280 (D. Mass. 1980); *Bean v. Johnson*, 649 S.W.2d 171, 173 (Ark. 1983); *Ross v. Holton*, 640 S.W.2d 166, 173 (Mo. Ct. App. 1982); *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 452, (N.Y. 1980); *Mooney v. Johnson Cattle Co.*, 634 P.2d 1333, 1335 (Or. 1981); *Meyer v. 4-D Insulation Co.*, 652 P.2d 852, 856 (Or. Ct. App. 1982); *Johnson v. Schmitt*, 309 N.W.2d 838, 841 (S.D. 1981); *Boyles v. Thompson*, 585 S.W.2d 821, 836 (Tex. Civ. App. 1979).

¹⁸² RESTATEMENT (SECOND) OF TORTS § 774A(2); see, e.g., *International Minerals & Resources, Inc. v. Pappas*, 761 F. Supp. 1068, 1079 (S.D.N.Y. 1991).

¹⁸³ See, e.g., *Crummer v. Zalk*, 57 Cal. Rptr. 185, 187 (Ct. App. 1967).

¹⁸⁴ See 3 DAN B. DOBBS, *LAW OF REMEDIES* § 12.2(1) (2d ed. 1993).

¹⁸⁵ 3 *id.*

damages available to the employer. For example, courts have held that a plaintiff may recover from the defendant any profits earned as a result of the interference.¹⁸⁶

2. *Damages for Harm to Reputation*

In the commercial context, the *Restatement* specifically provides that a tortious interferer is liable for "actual harm to reputation, if [it is] reasonably to be expected to result from the interference."¹⁸⁷ Nevertheless, any attempt, at least by a public figure or official, to recover reputational damages for tortious interference arising out of publication should be required to meet the requirements of a defamation claim—falsity and fault.¹⁸⁸ In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,¹⁸⁹ an operator of food supermarkets sued a television network after the network conducted an undercover investigation of the supermarket, and broadcast the results, which were highly critical of Food Lion.¹⁹⁰ Food Lion did not sue for defamation. Instead, it alleged that the network had committed fraud, trespass, and other wrongful acts that arose out of the surreptitious means employed to gather the information for the report.¹⁹¹ In addressing whether reputational damages were available under the torts alleged, the court turned to the Supreme Court's holding in *Hustler Magazine, Inc. v. Falwell*¹⁹² and determined that the plaintiff was attempting to recover reputational damages without meeting the requirements of a defamation claim.¹⁹³ The court thus found that, just as in *Falwell*, reputation damages under the interference tort could be awarded only if the plaintiff established the additional elements of actual malice and

¹⁸⁶ See, e.g., *Federal Sugar Ref. Co. v. United States Equalization Bd.*, 268 F. 575, 582 (S.D.N.Y. 1920); *National Merchandising Corp. v. Leyden*, 348 N.E.2d 771, 775-76 (Mass. 1976).

¹⁸⁷ RESTATEMENT (SECOND) OF TORTS § 744(1)(c) (1979) (emphasis added).

¹⁸⁸ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811, 822-24 (M.D.N.C. 1995). Courts have consistently refused to allow plaintiffs to use tortious interference as an end run around the constitutional and other requirements of libel laws, and various lower courts have applied the principles from *Falwell* to private figures. See, e.g., *Deupree v. Iliff*, 860 F.2d 300, 304 (8th Cir. 1988); *Tackett v. KRIV-TV*, 22 Media L. Rep. (BNA) 2092, 2093-94 (S.D. Tex. May 5, 1994); *Salek v. Passaic Collegiate Sch.*, 605 A.2d 276, 278-79 (N.J. Super. Ct. App. Div. 1992).

¹⁸⁹ 887 F. Supp. 811 (M.D.N.C. 1995).

¹⁹⁰ *Id.* at 812.

¹⁹¹ *Id.*

¹⁹² 485 U.S. 46 (1988).

¹⁹³ *Food Lion*, 887 F.Supp. at 823.

falsity.¹⁹⁴ The court supported this conclusion by distinguishing *Cohen v. Cowles Media Co.*:¹⁹⁵

[I]t appears that in determining that the First Amendment does not prohibit a plaintiff from recovery for a defendant's violation of a generally applicable law, the *Cohen* Court was mindful of the *type* of damages that the plaintiff sought to recover. Where a plaintiff sought recovery for non-reputational or non-state of mind injuries, the *Cohen* Court indicated that such a plaintiff could recover these damages without offending the First Amendment. Where, however, a plaintiff seeks to use a generally applicable law to recover for injury to reputation or state of mind while avoiding the requirements of a defamation claim . . . the *Cohen* holding does not appear to be applicable.¹⁹⁶

3. Consequential Damages

A plaintiff also may seek "consequential losses for which the interference is a legal cause."¹⁹⁷ The gauge of such damages is "the amount necessary to put [the plaintiff] in as good a position as it would have had if its agreement . . . had been performed."¹⁹⁸ Whether the interference is indeed the proximate cause of the loss is determined according to the normal rules applicable in tort actions.¹⁹⁹

A common type of consequential damages at issue in the tortious interference context is lost profits. Generally, "an injured party may recover damages for lost profits by showing that the loss is a natural and probable result of the act or omission complained of and that the amount of profits that the party would have earned is reasonably certain."²⁰⁰

¹⁹⁴ *Id.* at 824.

¹⁹⁵ 501 U.S. 663 (1991).

¹⁹⁶ *Food Lion*, 887 F. Supp. at 822-23.

¹⁹⁷ RESTATEMENT (SECOND) OF TORTS § 774A(1)(b) (1979).

¹⁹⁸ *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 835 (Tex. Ct. App. 1987) (quoting jury instructions and applying New York law), *cert. dismissed*, 485 U.S. 994 (1988).

¹⁹⁹ See, e.g., *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 452 (N.Y. 1980) ("In an action . . . for tortious interference, . . . the elements of damages, including consequential damages, would be those recognized under the more liberal rules applicable to tort actions").

²⁰⁰ *Browning-Ferris, Inc. v. Reyna*, 852 S.W.2d 540, 549-50 (Tex. Ct. App. 1992), *rev'd*, 865 S.W.2d 925 (Tex. 1993); see also *American Air Filter Co. v. McNichol*, 527 F.2d 1297, 1301 (3d Cir. 1975) (stating that, in breach of restrictive covenant in employment contract, plaintiff could not recover speculative damages); *Orchid Software, Inc. v. Prentice-Hall, Inc.*, 804 S.W.2d 208 (Tex. Ct. App. 1991) (rejecting the general

In the newsgathering context, employers are likely to seek lost profits and other economic losses allegedly resulting from the subsequent publication of information obtained by virtue of the breach of confidentiality. The measure of such damages, however, is virtually identical to reputational damages—the business lost as a result of the report. As such, any attempt by a public official or public figure to recover damages separately resulting from publication of the information, regardless of the label given to these damages, should be subject to the *Falwell* defamation requirements of actual malice and falsity. Otherwise, an employer would be permitted to evade the standard for reputational damages by attempting to designate such losses as consequential damages.²⁰¹

4. Punitive Damages

Assuming that intentional interference with contract has been established, most jurisdictions permit punitive damages in commercial cases on the same basis as for other torts if the interference was accomplished through especially improper means or for improper motives.²⁰² The mental state generally required to recover punitive damages is common law malice, spite, or ill-will.²⁰³ Courts generally have held that punitive damages may not be awarded absent a finding of compensatory damages,²⁰⁴ although some authority supports allowing an award of punitive damages even if the plaintiff shows only nominal damages.²⁰⁵

Plaintiffs may be able to recover punitive damages if a defendant induces breach of a fiduciary duty or a contract designed to protect a fiduciary duty.²⁰⁶ This is particularly relevant in a suit for tortious interference with employment contracts containing noncompetition covenants. Noncompetition

rule that loss must be a natural and probable result and amount must be reasonably certain).

²⁰¹ *But see* *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 840 & n.2 (Kan. Ct. App. 1979) (suggesting, in dicta, that diminution of customer patronage and sales resulting from publication of information obtained by trespass may properly be recovered).

²⁰² *See, e.g.,* *Purgess v. Sharrock*, 33 F.3d 134, 143 (2d Cir. 1994); *Ramona Manor Convalescent Hosp. v. Care Enters.*, 225 Cal. Rptr. 120, 132 (Ct. App. 1986). *But see* *Association Research & Dev. Corp. v. CNA Fin. Corp.*, 333 N.W.2d 206 (Mich. Ct. App. 1983), *appeal denied*, 419 Mich. 881 (1984); *Pennzoil*, 729 S.W.2d at 863-66; RESTATEMENT (SECOND) OF TORTS § 774A cmt. a (1979).

²⁰³ *KEETON ET AL.*, *supra* note 14, § 2, at 9-10.

²⁰⁴ *Id.* § 2, at 14-15.

²⁰⁵ *Id.* § 2, at 14.

²⁰⁶ *See, e.g.,* *Cherne Indus., Inc. v. Grounds & Assocs.*, 278 N.W.2d 81 (Minn. 1979) (awarding punitive damages when employee breached fiduciary duty to employer by using employer's customer list).

covenants often are devices designed to protect trade secrets and other confidential information and, as such, are considered to be rooted in the concept of fiduciary duty.²⁰⁷ The fiduciary duty usually prohibits an agent from not using the principal's information to reap an economic opportunity through, for example, the use of a trade secret.²⁰⁸ If a court finds an organization liable for inducing the disclosure of confidential information, it may be argued that the organization induced the breach of a fiduciary duty. On this theory, the defendant arguably could be subject to punitive damages even if the information did no particular pecuniary harm to the plaintiff.

Whether this outcome is appropriate in a commercial context, when liability is based on newsgathering activity or the publication of information, however, independent reasons argue against the propriety of punitive damages, based upon the constitutional interests at stake. As the Supreme Court noted in *New York Times Co. v. Sullivan*,²⁰⁹ imposition of punitive damages for constitutionally protected activity can pose a severe problem because it is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."²¹⁰ The Court subsequently warned that punitive damages could defeat First Amendment interests by giving juries the discretion to selectively "punish expressions of unpopular views"²¹¹ and to award punitive damages in "wholly unpredictable amounts."²¹² Commentators also have recognized that the arbitrary nature of punitive damages substantially increases the danger of self-censorship by the press.²¹³ All of these arguments apply to punitive damages imposed for newsgathering and may be marshalled to attack the permissibility of such awards in the newsgathering context. The Supreme Court itself has thus far explicitly left open "the proposition that punitive damages, despite their historical sanction, can violate the First Amendment."²¹⁴

5. *Injunctive Relief*

Courts have granted injunctive relief to prevent a tortious interference in the commercial context. For example, when interference with contract takes

²⁰⁷ *Id.* at 90.

²⁰⁸ RESTATEMENT (SECOND) OF AGENCY §§ 395, 396 (1958).

²⁰⁹ 376 U.S. 254 (1964).

²¹⁰ *Id.* at 278 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

²¹¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

²¹² *Id.*

²¹³ See, e.g., Association of the Bar of the City of New York, Committee on Communications Law, *Punitive Damages in Libel Actions*, RECORD OF ASS'N OF B. OF CITY OF N.Y., Jan./Feb. 1987, at 20, 29.

²¹⁴ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 38 (1991) (Scalia, J., concurring in judgment).

the form of an injurious falsehood or trade libel, some jurisdictions will approve the injunction despite the resulting impact on speech.²¹⁵ Even in the commercial context, however, authority exists to forbid injunctions when the harm sought to be enjoined involves reputational harm.²¹⁶ In the media context, any effort to enjoin the publication of information obtained through interference with a confidentiality agreement is subject to First Amendment scrutiny because it is a prior restraint.²¹⁷ Courts have issued injunctions restraining publication to protect certain specific business interests such as trade secrets, copyrights, and trademarks.²¹⁸ Nevertheless, with the exception of such specific interests, courts repeatedly have held that the mere allegation of harm to a business is insufficient to justify a prior restraint.²¹⁹ A similar result should apply when the effort is to enjoin legitimate newsgathering activities.

III. ARTICULATING A FIRST AMENDMENT DEFENSE

The common law elements of tortious interference already mandate a detailed consideration of the state and federal constitutional interests involved when a claim is based upon newsgathering, the result of which should preclude liability in most circumstances.²²⁰ Nonetheless, a distinct First Amendment or state constitutional defense to tortious interference may be articulated separately by media defendants. Although the Supreme Court, in recent years, has demonstrated some reluctance to create new First Amendment "defenses" to media liability, a defense to the tortious interference tort should be recognized, especially because such a defense is rooted in the Supreme Court's recent holdings.²²¹ Moreover, the already strong state common law restrictions that courts have recognized in connection

²¹⁵ See, e.g., *Lowe Excavating Co. v. International Union of Operating Eng'rs*, 535 N.E.2d 1065 (Ill. App. Ct.), *appeal denied*, 541 N.E.2d 1107 (Ill.), *cert. denied*, 493 U.S. 975 (1989).

²¹⁶ See, e.g., *Stewart v. United States Immigration & Naturalization Serv.*, 762 F.2d 193, 200 (2d Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 91-92 (1974), for the proposition that "damage to reputation 'falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction'").

²¹⁷ See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976).

²¹⁸ See, e.g., *Charles of the Ritz Group Ltd. v. Quality King Distribs., Inc.*, 832 F.2d 1317 (2d Cir. 1987) (trademark); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert denied*, 484 U.S. 890 (1987) (copyright); *Garth v. Staktek Corp.*, 876 S.W.2d 545 (Tex. Ct. App. 1994) (trade secret).

²¹⁹ See, e.g., *Turner Advertising Co. v. National Serv. Corp. (In re Nat'l Serv. Corp.)*, 742 F.2d 859 (5th Cir. 1984); *Lloyd v. Alaska Worldwide, Inc.*, 550 S.W.2d 343 (Tex. Civ. App. 1977).

²²⁰ See *supra* part II.B.3.

²²¹ See *supra* notes 148-53, 160-64 and accompanying text.

with tortious interference²²² are closely related to the nearly universal state constitutional interests in protecting free expression. The constitutional defense, therefore, should be developed in response to any future effort to expand tort liability to newsgathering.

Courts consistently have rejected attempts to impose liability for tortious interference when plaintiffs use the tort to punish the exercise of otherwise protected First Amendment rights.²²³ Accordingly, the First Amendment already has been held to bar liability under this tort where the allegedly interfering conduct consisted of the exercise of the right to petition.²²⁴ The First Amendment also prohibits recovery for tortious interference that allegedly is the result of the publication of defamatory statements, requiring plaintiffs instead to come within the constitutionally imposed strictures of libel law.²²⁵ A similar analysis should prohibit tortious interference liability for newsgathering that results in the breach of a confidentiality obligation.

Newsgathering is an activity of constitutional significance.²²⁶ Imposing liability for obtaining information from a source bound by an agreement to remain silent would severely impair the press's ability to serve its constitutional function by effectively cutting off vital sources of information.²²⁷ Tort liability would impair the flow of significant information just as effectively as would denying access to judicial proceedings or compelling disclosure of confidential sources or materials. The right of reporters to ask questions of potential sources—including those known to be subject to confidentiality restrictions—is among the reporters' most basic functions and should be protected under the First Amendment.

An issue to be addressed in pressing this constitutional defense arises out of decisions which hold that the press has no blanket First Amendment immunity from laws of general application.²²⁸ In *Cohen v. Cowles Media Co.*, the Supreme Court noted the "well established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its

²²² See *supra* parts II.A., II.B.1-2.

²²³ See *supra* part II.B.3.

²²⁴ See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union Local 655*, 39 F.3d 191 (8th Cir. 1994).

²²⁵ See, e.g., *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Henderson v. Times Mirror Co.*, 669 F. Supp. 356, 362 (D. Colo. 1987), *aff'd*, 876 F.2d 108 (10th Cir. 1989); *Taylor v. Nashville Banner Publishing Co.*, 573 S.W.2d 476, 485 (Tenn. Ct. App. 1978), *cert. denied*, 441 U.S. 923 (1979).

²²⁶ See *supra* part II.B.3.

²²⁷ See *supra* notes 151-70 and accompanying text.

²²⁸ See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (copyright).

ability to gather and report the news.”²²⁹ Even before *Cohen*, courts widely accepted that news organizations were liable for torts and crimes committed in the process of gathering the news.²³⁰ But these principles should not serve to defeat a First Amendment defense to tortious interference asserted in the context of newsgathering.

The majority opinion in *Cohen* suggested the rationale for such a conclusion. In allowing the plaintiff to assert a claim against the press for promissory estoppel, the Court explained that such generally applicable laws “do not offend the First Amendment” when their “enforcement against the press has incidental effects on its ability to gather and report the news.”²³¹ *Cohen* presented just such a case of “incidental” effects.²³² Indeed, enforcing the press promise at issue in *Cohen* arguably would promote newsgathering over the long term more effectively than would allowing the promise to be broken. In any event, Justice White found that holding the press responsible for a promise of confidentiality would result in a “no more than incidental, and constitutionally insignificant” impact on newsgathering and reporting.²³³ When applied in the context of a nondisclosure agreement, however, imposition of liability for tortious interference serves significantly to punish the act of newsgathering and, in some cases, would protect no other legitimate interest of the plaintiff.²³⁴ In such situations, the impact of expanding tort liability to newsgathering would not be “incidental” but substantial and manifest.

If no independently wrongful conduct by the press is involved, the tort applied to newsgathering would allow private individuals to attempt to regulate through agreements and then litigation the types of conduct that the press may “properly” undertake and the types of stories the press may pursue. If liability were allowed based on *post hoc* assessments of press conduct and the value of press objectives in pursuing a particular story, the specter of damage claims likely would result in self-censorship by the press and would impede the flow of information to the public. Application of the tort to the media also could result in a proliferation of secrecy agreements

²²⁹ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

²³⁰ See, e.g., *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (intrusion); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (intrusion and emotional distress); *Le Mistral, Inc. v. CBS*, 402 N.Y.S.2d 815 (N.Y. App. Div. 1978) (trespass); *Stahl v. State*, 665 P.2d 839 (Okla. Crim. App. 1983), *cert. denied*, 464 U.S. 1069 (1984) (trespass).

²³¹ *Cohen*, 501 U.S. at 669.

²³² *Id.* at 671-72 (finding that if “news organizations . . . have legal incentives not to disclose a confidential source’s identity . . . [the incentives are] no more than . . . incidental”).

²³³ *Id.* at 672.

²³⁴ To the extent that the plaintiff has a legitimate interest that has been damaged, he may have a claim against the source and, in certain circumstances, against the media based on any actionable content of the publication.

and mandatory commitments from all employers aimed solely at foreclosing disclosure of information to the press.

All of this suggests a further reason why this tort, if applied to newsgathering, would violate the First Amendment. Central to the *Cohen* holding rejecting a constitutional defense to a promissory estoppel claim was the fact that "any restrictions that may be placed on the publication of truthful information are self-imposed," the scope of which were determined in advance by the news organization and its source.²³⁵ The exact opposite is true if liability may be imposed on newsgathering through a tortious interference claim. The restrictions are *not* self-imposed and may not even be ascertainable in advance. Unlike trespass, bribery, and other torts, no relatively clear standard allows a person to distinguish in advance permissible conduct from impermissible conduct. Because a jury would decide only after the fact if a reporter's conduct was "improper," if indeed the underlying confidentiality agreement was enforceable, a reporter may never know in advance what is allowed under a tortious interference theory of liability. Indeed, even Prosser and Keeton recognize that the list of factors in the *Restatement* would not "inspire one to predict an outcome, or decide one's rights or duties."²³⁶ The First Amendment does not permit such uncertainty when otherwise protected activities are involved.

The interference tort is so "ill-defined" and "not reducible to a single rule,"²³⁷ that it cannot withstand constitutional scrutiny when applied to newsgathering activities of the press. If the provisions of a statute or regulation are "so vague that men of common intelligence must necessarily guess at its meaning," they are void for vagueness.²³⁸ The general test for vagueness applies with particular force when reviewing laws that deal with activity protected by the First Amendment.²³⁹ When "the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."²⁴⁰

In *Grayned v. City of Rockford*,²⁴¹ the Supreme Court explained the policies underlying the void-for-vagueness doctrine in the First Amendment area. First, the Due Process Clause requires that an individual have adequate advance warning that conduct is unlawful.²⁴² Second, the mere existence of

²³⁵ *Id.* at 671.

²³⁶ KEETON ET AL., *supra* note 14, § 129, at 984 n.63.

²³⁷ RESTATEMENT (SECOND) OF TORTS, introductory note to ch. 37, at 5 (1979).

²³⁸ *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). *See generally* 1 NORMAN DORSEN ET AL., EMMERSON, HUBER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 54-55 (4th ed. 1976).

²³⁹ *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976).

²⁴⁰ *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

²⁴¹ 408 U.S. 104 (1972).

²⁴² *Id.* at 108.

a vague standard of liability creates First Amendment concerns because it will deter law-abiding citizens from conduct that may or may not be covered by the law.²⁴³ When such conduct involves free speech, the chilling effect of a vague proscription is an unacceptable price to pay. Finally, vague laws involving First Amendment activity are not tolerated because they do not provide enforcement officials, including jurors, with adequate guidance concerning the precise scope of the prosecuted activity, vesting such officials with excessive discretion over whether to penalize a given act.²⁴⁴

These considerations compel the conclusion that a tortious interference claim may not be asserted against newsgathering activity that is consistent with the First Amendment. The elements of a tortious interference claim fail to inform members of the press of the specific conduct that would render them liable and afford impermissible discretion to jurors to sanction conduct after the fact. Reporters likely would be overly cautious in the exercise of their First Amendment rights if such liability could be asserted. Rather than risk liability, reporters will refrain from pursuing sources who may be bound by such agreements, and the flow of information to the public will be substantially impeded.

Moreover, when protected interests are burdened significantly, as in this case, the tort can withstand constitutional scrutiny only if its adverse impact is justified by some subordinating, valid governmental interest "of the highest order."²⁴⁵ A tortious interference claim based on newsgathering activity seems unlikely to meet this test. Indeed, the Supreme Court already has recognized a First Amendment defense to this tort in the context of the right to petition.²⁴⁶

CONCLUSION

The established common law elements required to assert a cause of action and the constitutional defenses potentially available suggest that tortious interference is unlikely to become a source of significant liability for newsgathering. Even where a confidentiality agreement is found to be enforceable, potent defenses remain available to the media based on the substantial policies favoring the free flow of information. The common law elements of the tort require courts to consider such interests in assessing liability. In light of the public and constitutional interests at stake, the

²⁴³ *Id.* at 109.

²⁴⁴ *Id.* at 108-09; *see also* *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (holding unconstitutionally vague a statute requiring dismissal of faculty or other school personnel for treasonous or seditious behavior).

²⁴⁵ *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979); *see, e.g., Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

²⁴⁶ *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

breach of a confidentiality agreement should not sustain a tortious interference claim when the press is involved in newsgathering activity.