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TORT LAW—TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY—A TRAP FOR THE WARY AND UNWARY ALIKE

I. INTRODUCTION

Tortious interference with business expectancy, ambiguous and amorphous, has become a "trap for the wary and unwary alike."[1] Yet tort law should be clear and provide adequate notice to would-be defendants. As Justice Oliver Wendell Holmes, Jr. noted, "any legal standard must, in theory, be capable of being known" and if "a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was."[2]

Because tortious interference with business expectancy has developed in a muddled manner,[3] it is especially important that state courts continue to refine this common-law tort. In Arkansas, however, tortious interference has remained problematic over the last century even though it has been stable and unchanged over the last decade.[4] Undoubtedly, there is great value in stability in the law, but a common law tort should provide parties with adequate notice and provide courts with well-defined law. Tortious interference in Arkansas accomplishes neither, and it should be changed.

Tortious interference comes in two varieties—interference with contract and interference with business expectancy.[5] Since their inception in 1853,[6] courts have struggled to separate and apply these two distinct torts, allowing them to evolve together in "an illogical and piecemeal fashion."[7] Nevertheless, the basic form of tortious interference involves an established contract or business expectancy between two parties, a third party who intentionally interferes with their relationship, and, as a result, one party to the original contract or expectancy who suffers an injury.[8] The primary difference between these two claims is that tortious interference with contract requires third-party interference with an *existing* contract between parties, whereas interference with business expectancy requires third-party interference with a *prospective* contract between parties.[9]

The rationales for these two rules are slightly different. Broadly speaking, courts have been concerned with balancing contract rights and competition—two essential ingredients in a free market economy. Because contract rights deserve more protection than prospective contracts,[10] the law requires less third-party interference in contract cases[11] than in business expectancy cases.[12] Another way of expressing this concept is to say that the law does not protect the harmed party in prospective contract cases as much as it does in existing contract cases.[13] When forming the rule for contract interference, courts placed greater emphasis on contract rights, and when forming the rule

for business expectancy interference, courts placed greater emphasis on competition.[14]

Tortious interference with contract in Arkansas certainly suffers from many ailments,[15] but this note focuses on interference with business expectancy and only discusses interference with contract as necessary.

This note argues that the rule for tortious interference in Arkansas should be formally separated into two distinct rules—interference with contract and interference with business expectancy—in order to help prevent courts from intermingling terms and standards from both rules when addressing only one cause of action. This note also argues that the *improper* element of tortious interference in Arkansas should be redefined as an unlawful act or an independent tort in order to provide a clear standard for courts and to give adequate notice to would-be defendants.

In Part II, this note provides the historical development of tortious interference law from its origin through its recent evolution in Arkansas.[16] In Part III, this note demonstrates the difficulty Arkansas courts have in applying the law due to the courts' intermingling interference with contract language and interference with business expectancy language in cases involving only one cause of action. Part III also demonstrates that the factors courts currently use to determine whether an act was *improper* are both ambiguous and unnecessary.

To resolve these two difficulties, this note proposes two changes in the law.[17] First, the Arkansas Supreme Court should formally separate the current single interference rule into two distinct rules—a tortious interference with business expectancy rule and a tortious interference with contract rule—so that there is a clear distinction.[18] Second, the court should limit the scope of and provide clarification for the *improper* element of tortious interference with business expectancy, and to this end, the court should redefine *improper* as an unlawful act or independent tort.[19]

II. TORTIOUS INTERFERENCE'S TORTIOUS HISTORY

A. The Early History of Tortious Interference with Business Expectancy

The famous case, *Lumley v. Gye*,[20] is the starting point for any discussion of tortious interference. *Lumley*, an 1853 tortious interference with contract case from England, is significant because it stands for the novel proposition that if two parties have a contract, and a third party induces one of them to breach the contract, the interfering third party is liable for any resulting damages—even though the means of inducement were neither illegal nor independently tortious.[21] The court based liability on Gye's intentional, malicious interference with Lumley's contract rights.[22]

Forty years later, the English court extended *Lumley* to cases involving interference with a prospective contract or potential business relationship.[23]

The court confirmed that the interference must be intentional and malicious.[24] One year after England recognized tortious interference with business expectancy, the Supreme Court of the United States recognized tortious interference with contract, citing *Lumley*.[25] Stating the rule, the Court held that "if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against" the interfering party.[26] In short order, tortious interference spread throughout the states.

B. Arkansas's Contribution to Tortious Interference with Business Expectancy

The Arkansas Supreme Court first recognized tortious interference—or something akin to it—in 1908.[27] Without offering a rationale or naming the cause of action, the court held that this tort was an "actionable wrong" because the defendant induced the promisor to breach his contract "with the intent to injure" the promisee.[28] Arkansas recognized tortious interference, citing *Lumley* and the adopting case from the Supreme Court of the United States,[29] which signaled that the essential elements were inducement (intentional interference), a resulting breach, and malicious intent.

Tortious interference became a more permanent fixture in Arkansas law in 1969 when the Arkansas Supreme Court adopted the current rule and provided a rationale.[30] Because a party to a contract has a right to performance by the other party and because those pursuing business opportunities prior to forming a contract have reasonable expectancies of commercial relations,[31] the court adopted the following rule:

> The basic elements going into a prima facie establishment of the tort are (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted.[32]

The tort was founded on the premise that a person has a right to pursue both contractual and business expectancies without another's "wrongful and officious intermeddling."[33] The court stated that the interference must be malicious but caused confusion regarding the malice requirement by not listing malice with the other elements.[34] Of equal importance, the court omitted a workable definition for malicious interference and failed to discuss whether the plaintiff had the burden of proving that the defendant's interference was malicious.

The malice requirement and burden of proof uncertainty were problematic until the Arkansas Supreme Court attempted to resolve these issues in 1979. The court *appeared* to abandon the malice requirement as a method

of determining the interferor's intent, holding that "intentional interference with the existing contractual relations of another is prima facie sufficient for liability, and that the burden of proving that it is 'justified' rests upon the defendant."[35] Under this addition to the rule, the defendant had the burden of proving the interference was justified or privileged, rather than the plaintiff having to prove malice.[36] Thus, instead of abandoning malicious intent altogether, the court now presumed the intent was improper, wrongful, or unjustified.

In 1992 the Arkansas Supreme Court reverted back to requiring that a third party's actions must be malicious in order to constitute tortious interference,[37] and the court affirmed this view again 1997.[38] By 1998, there was enough confusion regarding whether an interfering party's act had to be malicious or improper[39] that the Arkansas Supreme Court directly addressed these conflicting elements of tortious interference.[40] The court retained the core elements it first adopted in 1969,[41] and it also adopted two new requirements.[42] First, the court required the plaintiff to show that the defendant's interference was *improper*.[43] Second, the court defined *improper* using seven factors from the Restatement (Second) of Torts § 767.[44] The seven factors 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 social interests in protecting the freedom of action of the actor and 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.[45]

At this point, tortious interference had well-established elements, an additional *improper* requirement, and seven factors to define *improper*, but this tort remained problematic due to the ambiguous nature of the *improper* factors and the difficulty the courts experienced in separating interference with contract from interference with business expectancy.

C. Stagnation: Tortious Interference with Business Expectancy in the Last Decade

Although many of the cases that contributed to the development of tortious interference involved interference with contract, the last decade has witnessed a handful of interference with business expectancy cases in the Arkansas Supreme Court. These cases demonstrate three things. First, they confirm the existing rule for tortious interference with business expectancy,[46] which is the same rule for interference with contract.[47] Second, in cases where the court found tortious interference, the interfering behavior was either independently tortious or unlawful.[48] This second observation is especially relevant because it shows that the court's adoption and application of

the Restatement § 767 factors to define *improper* has not been helpful in evaluating the plaintiff's tortious interference claim. In fact, outside of mentioning the factors, the court has not provided more than a few sentences of analysis.[49] Rather, the court has ignored the *improper* factors and has instead held that independently tortious or unlawful conduct is *improper*.[50] Third, Arkansas recognizes the privilege to compete, which "will justify interfering with another's business expectancy."[51] The law carves out this privilege so that competition will not be inhibited.[52] For example, if there are two parties who intend to engage in commercial activities, then a third-party competitor may interfere without incurring liability.[53] Citing a prior Arkansas Supreme Court case, the Arkansas Court of Appeals confirmed the privilege to compete rule:

> (1) One who intentionally causes a third person not to enter into a prospective contract relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if (a) the relation concerns a matter involved in the competition between the actor and the other and (b) the actor does not employ wrongful means and (c) his action does not create or continue an unlawful restraint of trade and (d) his purpose is at least in part to advance his interest in competing with the other.[54]

Even though the Restatement (Second) of Torts § 768—the origin of this rule—refers to the formulation above as the rule to determine whether "competition [is] proper or improper interference,"[55] Arkansas courts call it the privilege to compete.[56] According to the Restatement, this § 768 "competition" rule should be used in lieu of the § 767 *improper* rule if the case involves interference with business expectancy, and the interfering party is a competitor of the plaintiff.[57] Regardless of what a court calls the Restatement rule in § 768, the object is to negate the *improper* element of tortious interference with business expectancy.[58]

As of 2010,[59] the rule for tortious interference with business expectancy in Arkansas consists of the core elements,[60] the *improper* element,[61] and an available privilege to compete.[62]

III. A PROPOSAL FOR CLARITY

The slow, incremental change of the common law provides stability in the legal system, but it also frustrates reform efforts. The proposal below is not a recommendation for sweeping changes in Arkansas's tortious interference law; rather, the proposal consists of two changes that will improve courts' application and potential litigants' understanding of the rule.

The Arkansas Supreme Court should change the law of tortious interference because Arkansas courts have difficulty applying the current law, and it fails to provide people with notice that their behavior may subject

them to civil liability.[63] These underlying principles—clarity for correct judicial application and proper notice of proscribed conduct—are foundational in the American legal system. In fact, the Supreme Court of the United States has weighed in on these principles, stating

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.[64]

Justice Oliver Wendell Holmes, Jr. stressed the importance of clarity in tort law in order to provide proper notice of proscribed conduct, and he also stated that it is the "business of the court" to clearly "formulate these standards" of tort liability.[65]

Ambiguous tort laws may not violate the Constitution,[66] but they nevertheless violate fundamental principles of American jurisprudence. This section provides a remedy for this "sorry state of affairs"[67] by proposing that Arkansas separate tortious interference with contract from tortious interference with business expectancy and formulate a separate rule for each action. This section further proposes that Arkansas redefine the *improper* interference element of tortious interference with business expectancy as behavior that is unlawful or independently tortious. Tortious interference with business expectancy in Arkansas is unnecessarily ambiguous, and the courts can and should remedy these defects.

A. Separation Anxiety: Two Different Claims Need Two Separate Rules

At first blush, a proposal to separate a rule because it contains two separate claims seems unnecessary. However, because tortious interference has developed so haphazardly, it is a confusing area of law for lawyers and judges alike.[68] Although the current rule in Arkansas covers both tortious interference with contract and tortious interference with business expectancy,[69] the Arkansas Supreme Court has recognized that these two causes of action are distinct because contract relations deserve greater protection.[70] Distinctions notwithstanding, Arkansas courts sometimes confuse these two claims when they apply the tortious interference rule. As the following cases demonstrate, the courts intermingle contract and business expectancy language in cases involving only one interference cause of action. Separating the rule will bring much-needed clarity to a murky area of the law because courts will be forced to use a specific rule for the appropriate cause of action.

1. *Cases: Misunderstanding, Misapplying, or Mistaking?*

With a handful of exceptions,[71] the Arkansas Supreme Court and the Arkansas Court of Appeals have consistently used the same *core* elements in tortious interference cases.[72] In *Walt Bennett Ford, Inc. v. Pulaski County Special School District*[73] the Arkansas Supreme Court mixed the rules for interference with business expectancy and contract in an action involving only business expectancy.[74] The court referred to the cause of action as "tortious interference with business relations,"[75] which, according to the rule, could mean either interference with contractual relations or business expectancy. The court appeared to clarify the discussion by stating the issue was interference with "contractual rights," but then the court introduced the rule as the law for interference with "valid contractual and business expectancies."[76] Although the rule does apply to both tortious interference actions, this case did not involve contractual rights at all—as the court later clarified.[77] In a supplemental opinion, the *Walt Bennett Ford* court stated, "The case at bar deals with interference with a business expectation and not an existing contract."[78] In a single opinion, the court referred to a tortious interference with business expectancy issue as interference with 1) business relations; 2) contractual rights; 3) contractual and business expectancies; and 4) business expectation.[79] Since the only issue was tortious interference with business expectancy, the only correct reference was the fourth one—business expectation. The court combined terminology from both causes of action in a case involving only one cause of action.

The courts again intermingled contract and business expectancy language fifteen years after *Walt Bennett Ford* when the Arkansas Court of Appeals decided another tortious interference with business expectancy case, *Office Machines, Inc. v. Mitchell*.[80] The *Mitchell* court referred to the issue on appeal as "tortious interference" and began its analysis with "Arkansas has recognized wrongful interference with a contract as an actionable tort for nearly a century."[81] Finally, the appellate court recited the tortious interference rule and held that pursuant to the privilege to compete doctrine the defendant's competition with the plaintiff justified his "interfering with another's business expectancy."[82] In this case, the court used the terms tortious interference, interference with contract, and interference with business expectancy in a case solely concerning interference with business expectancy.[83] Again, even though there was only one cause of action—interference with business expectancy—the court mixed in interference with contract language.

The Arkansas Supreme Court mixed up the tortious interference actions when it decided an interference with contract case in 2007. *El Paso Production Co. v. Blanchard*[84] involved a claim that El Paso tortiously interfered with a lease between Blanchard, the plaintiff-lessor, and Swift, the lessee.[85] In fact, the court concluded that since Swift did not breach his lease

with Blanchard, as required by the Arkansas rule, El Paso could not have engaged in tortious interference.[86] The problem here is that the court expressly stated that the case was about "a claim of tortious interference with business expectancy," which is in direct conflict with the rest of the opinion and the court's admission that the "point on appeal"[87] involved El Paso's contention that it "did not tortiously interfere with the Swift lease."[88] The court's intermingling of terms from both causes of action has led to more confusion.

In *Knox v. Regions Bank*,[89] a 2008 tortious interference with contract case, the Arkansas Court of Appeals used the phrase "contractual expectations" before reciting the rule involving a "contractual relationship or a business expectancy."[90] Although the court later discusses tortious interference with contract, the phrase "contractual expectations" is puzzling because the court seems to combine the two different causes of action into one phrase. If the rule would have been separated, there would have been no need to mention tortious interference with business expectancy in this interference with contract case.

The most recent example of Arkansas courts intermingling contract interference language with business expectancy interference language is *West Memphis Adolescent Residential, LLC v. Compton*,[91] an appellate court case involving a relationship between a healthcare facility and a health services provider.[92] The court provided headings for all four sections of the opinion: Breach of Contract, Breach of Fiduciary Duty, Breach of Implied Covenants of Good Faith and Fair Dealing, and Tortious Interference with Contract.[93] The court introduced the tortious interference with contract section by acknowledging the state's recognition of "wrongful interference with a contract," but then the court proceeded to discuss tortious interference with "business expectancy."[94] The court concluded that the defendant's interference was not improper because it was "privileged competition,"[95] and the competition privilege only applies to interference with business expectancy.[96] The court's intermingling the two causes of action makes it difficult to understand how the court is applying the rules to the separate instances of tortious interference—is the court discussing interference with contract, interference with business expectancy, or both? Furthermore, the court's incorrect use of language appears to have changed the outcome of this case.

As the cases above illustrate, Arkansas courts sometimes intermingle the language of interference with contract with that of interference with business expectancy—even when the court is only addressing one cause of action. Not only is there a risk that the court will use the wrong elements[97]—which could affect the outcome of the case—but a court's combining language from two distinct causes of action causes confusion for lawyers and other judges. Fortunately, there is an easy solution.

2. *The Solution is a Simple Separation*

Arkansas should normally separate tortious interference with contract and interference with business expectancy into two separate rules because they are two distinct claims. The problems discussed in the cases above could be largely eliminated if courts will separate the interference torts into separate rules and state the appropriate rule in judicial opinions. This will assist Arkansas courts in applying the rule and using terms associated with the appropriate claims. Such a change, while important, would be easy.

The difficulty that the Arkansas courts have in separating interference with contract and interference with business expectancy is not unique. The Restatement (Second) of Torts begins its chapter on tortious interference by stating that tortious interference law is still in the "formative stage," and courts do not often properly differentiate between interference with contract and interference with business expectancy.[98] In a highly influential tortious interference opinion, the California Supreme Court stated that it must draw a "sharpened distinction" between the two interference torts.[99] Additionally, the Texas Supreme Court noted that erroneous judicial association of these two interference torts and confusion regarding their distinct standards of liability are persistent problems when it changed the state's tortious interference with business expectancy rule in 2001.[100]

To mitigate judicial confusion over tortious interference in Arkansas, this note proposes separating the current tortious interference rule into the following separate rules:

Tortious interference with contract requires

> (1) the existence of a valid contract; (2) the defendant's knowledge of the contract; (3) intentional interference by the defendant that induces or causes a breach or termination of the contract; (4) resultant damage to the party whose contract has been disrupted; and (5) improper conduct on the part of the defendant as defined by the following factors: (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 social 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.

Tortious interference with business expectancy requires

> (1) the existence of a valid business expectancy; (2) the defendant's knowledge of the expectancy; (3) intentional interference by the defendant that causes a termination of the expectancy; (4) resultant damage to the party whose expectancy has been disrupted; and (5) improper conduct on the part of the defendant, which is defined as conduct that is unlawful or independently tortious.

As this note's discussion of Arkansas courts' confusion concerning interference torts illustrates,[101] the courts need to provide clarity to this already murky area of the law by establishing a distinct rule for each cause of action. Separating the current rule, this note proposes, is part of the solution.

B. Properly Defining *Improper*: A New Definition

Since the Arkansas Supreme Court formally adopted the *improper* element and defined it with factors from the Restatement (Second) of Torts,[102] the new element's definition has been marginally useful at best and hopelessly ambiguous at worst. Tort scholars agree that the Restatement § 767 factors lack clarity for determining when behavior becomes improper,[103] cause judicial unfairness because they are vague and indeterminate,[104] and fail to improve or edify tortious interference law.[105]

Clearly and appropriately defining *improper* behavior is important for two reasons. First, although the courts must sometimes address the other elements of tortious interference with business expectancy, the majority of interference cases turn on whether the interference was improper.[106] Second, Arkansas's use of § 767 to define improper conduct in tortious interference cases "fails to notify defendants whether their conduct is improper."[107] Because improving the quality of notice that defendants receive is a primary goal of tort law,[108] Arkansas should redefine the *improper* element of interference with business expectancy.

As the interference with business expectancy cases below demonstrate, the Arkansas Supreme Court cited the *improper* factors without providing analysis and instead used independently tortious or unlawful conduct to determine if interference was improper. Further, as the proposal below argues, if the court formally defines *improper* as an act that is either an independent tort or unlawful act, the definition will better represent case law and give adequate notice to would-be defendants.

1. *Is Arkansas Improperly Using Improper?*

In 1998, when the Arkansas Supreme Court adopted the Second Restatement's *improper* element from § 766 and defined the term using § 767, there was no Arkansas case law applying these rules for the court to consider.[109] Since 1998, however, a number of tortious interference with business expectancy cases have come before the court. In all of these cases where the plaintiff recovered damages, there were two important features in the court's opinions. First, the court recited the Second Restatement's § 767 factors without applying them. Second, the interfering behavior in these cases was either independently tortious or unlawful.

When the Arkansas Supreme Court adopted the *improper* element and its defining factors for tortious interference, the case before the court only

involved interference with contract.[110] Three years later, in 2001, the court first applied the *improper* element to a business expectancy case where the defendant's interfering acts were both independently tortious and unlawful.[111] In *Vowell v. Fairfield Bay Community Club, Inc*.,[112] the defendant, Vowell, engaged in a fraudulent "scheme" to deprive a property management organization, Fairfield Bay, of property owner dues.[113] Vowell also attempted to force Fairfield Bay to accept unilateral transfers of forty-nine deeds of property without Fairfield's consent, which would have resulted in a loss of owner dues.[114] Lastly, Vowell transferred 221 other deeds to an offshore corporation "in a thinly veiled attempt to thwart the chancery court's . . . order."[115] Here, Vowell engaged in fraudulent behavior consisting of invalid and forced property transfers and actions designed to thwart a court order. These acts are both independently tortious and unlawful. It is no surprise that the Arkansas Supreme Court affirmed the lower court's determination that Vowell tortiously interfered with Fairfield Bay's business expectancy.[116] When the court discussed applying the factors that define *improper*, however, it simply stated that "[p]ursuant to the Restatement guidelines, we may also describe Vowell's conduct, motives, and interests, as 'improper.'"[117] The court did not actually apply the *improper* factors or offer any guidance as to their application.

The Arkansas Supreme Court once again addressed interference with business expectancy in a 2005 case involving a defendant who engaged in illegal conduct, and the court once again failed to apply or offer any guidance in applying the *improper* factors.[118] In *Stewart Title Guaranty Co. v. American Abstract & Title Co.*,[119] the plaintiff, American Abstract, stated in its complaint that the defendant engaged in illegal conduct, which was sufficient "evidence of impropriety [or improper interference]."[120] The court found that the defendant, Stewart, violated the Real Estate Settlement Procedures Act (RESPA), and the court held the jury was therefore justified in finding that Stewart "engaged in improper conduct."[121] Although the court began its analysis of whether Stewart's conduct was improper by listing the seven *improper* factors,[122] the court never applied them, but it instead discussed Stewart's violation of RESPA at length.[123] In sum, the defendant's interfering behavior was unlawful, and unlawful behavior is improper.[124]

In the most recent tortious interference with business expectancy case, the Arkansas Supreme Court held that the defendant's illegal conduct constituted improper interference, and again, the court listed the *improper* factors without providing analysis or guidance.[125] In *Baptist Health v. Murphy*,[126] the court affirmed the lower court's finding that "Baptist's conduct constituted a violation of the Arkansas Deceptive Trade Practices Act and that such violation can satisfy the impropriety requirement for a claim of tortious interference [with business expectancy]."[127] As with earlier tortious interference cases where the defendant's improper behavior was at issue, the Arkansas Supreme Court began its analysis by listing the *improper* factors,

but it never applied them and instead discussed Baptist's unlawful conduct.[128]

There was little reason for Arkansas to adopt the Restatement's § 767 *improper* factors prior to 1998, and there remains little reason to continue using the factors because case law clearly indicates that the Arkansas Supreme Court focuses on independently tortious or unlawful conduct to determine whether a defendant's interference with business expectancy was improper.

2. *The Solution is Redefinition*

The fact that the Arkansas high court has not used the factors in § 767 to determine if a defendant's conduct was improper in any tortious interference with business expectancy cases since the factors were adopted in 1998 raises the question: What do the *improper* factors accomplish? The answer is that the factors' lack of clarity results in would-be defendants having inadequate notice that their behavior—which may be purely competitive—may subject them to civil liability.[129] Likewise, a plaintiff does not benefit from the ambiguity because he will be uncertain about strength of the claim.

These factors[130] based on subjective considerations—the actor's motive, interests, and society's interests, etc—are abstract and vague.[131] Applying these vague and abstract rules causes unpredictability and an unfair judicial process because their application "cannot describe the wrongful acts" that are prohibited.[132] Arkansas should abandon the *improper* factors and adopt a clear standard.[133]

At the national level, the law of tortious interference with prospective contract or business expectancy is moving away from the Restatement § 767 factors. For example, only thirteen states still use the Restatement factors to define improper conduct.[134] Thirty-seven states have declined to use the Restatement factors, and of those thirty-seven states, twenty-two require interference to be wrongful, malicious, unjustified, unprivileged, or improper as defined by state case law.[135] These twenty-two states have chosen the lesser of two evils, preferring inconsistent case law definitions over the Restatement factors. The remaining fifteen states require the interference to be an independent tort or an unlawful act.[136]

The fact that less than half of the states still use the Restatement factors is a persuasive reason for Arkansas to change its rule because this signals that the law in this area is moving away from § 767. However, a more persuasive reason to redefine *improper* in Arkansas to mean an independent tort or unlawful conduct lies in a number of other state supreme court decisions where the court recently rejected or abandoned the *improper* factors and adopted an independent tort or unlawful act standard. The two most important cases are discussed below, and in accordance with scholarship in this

field,[137] these decisions together "requiring independent tortious conduct as the measure of wrong doing mark[ ] a new direction."[138]

a. California's measure: Interference must be wrongful by some legal measure

In 1995, the California Supreme Court held that interference with prospective contractual relations requires the interfering conduct to be "wrongful by some legal measure."[139] This change in the law was necessary, the court noted, for two reasons.[140] First, the court reasoned that interference with business expectancy should be differentiated from interference with contract in terms of the potential for tort liability because "ours is a culture firmly wedded to the social rewards of commercial contests, [and thus] the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties."[141] Second, the court observed that evaluating improper or wrongful behavior in the same manner for interference with business expectancy and interference with contract "blurs the analytical line" between the two and "invites both uncertainty in conduct and unpredictability of its legal effect."[142] In essence, courts should not use the same standard for evaluating wrongful or improper interference with contract as it does with business expectancy because contract rights deserve greater protection than prospective contract relations.

The standard to evaluate wrongful or improper interference with business expectancy must be a legal measure because in non-contractual relations the "rewards and risks of competition are dominant."[143] A standard less than a legally measureable standard—violation of a statute or common law tort—for determining wrongful or improper interference fails to give notice that one's conduct may have an adverse "legal effect" on him.[144] Evaluating interfering conduct using a legal measure instead of factors or standards that invite uncertainty provides clarity for the court and potential defendants.

b. Texas clarity: Interference must be independently tortious or unlawful

In 2001 the Supreme Court of Texas began its opinion in an interference with business expectancy case by stating "This case affords us the opportunity to bring a measure of clarity to this body of law."[145] The court then proceeded to require "that to establish liability for interference with a prospective contractual or business relation the plaintiff must prove that it was harmed by the defendant's conduct that was either independently tortious or unlawful."[146] Lest anyone misunderstand what the court meant by the new independently tortious interference requirement, the court unequivocally stated, "we mean conduct that would violate some other recognized tort duty."[147]

Grounding liability in tortious interference with business expectancy in "conduct that is independently tortious by nature or otherwise unlawful,"[148] the court offered two reasons for changing the rule. First, the court criticized the *improper* requirement and its associated factors for interference with contract and prospective contract in the Restatement (Second) of Torts, writing that the Restatement overstated case law.[149] Second, the Texas Supreme Court wrote that a requirement that interference must be either an independent tort or otherwise unlawful is necessary because "no other workable basis exists for distinguishing between tortious interference and lawful competition."[150]

Here, the court was concerned with accurately following the recent developments in the law of tortious interference with business expectancy.[151] But, the court was also focused on creating a standard for evaluating wrongful or improper conduct that was 1) more difficult to meet than the standard used for interference with contract, since contract cases involve preexisting contract entitlements but interference with prospective contract cases involve no such entitlements;[152] and 2) clearly wrongful or improper to the defendant and jury, and existing independent torts or unlawful acts are both established and known.[153] In short, the Texas Supreme Court concluded that an established standard of wrongful conduct—a tort or other illegal act—is a far better standard for juries and would-be defendants to apply.

The Texas and California supreme courts both recently required that a defendant's conduct must be either an independent tort or an unlawful act because this requirement creates a clear distinction between the type of conduct that is improper for interference with contract versus interference with business expectancy. Further, this requirement provides notice to defendants that their behavior may subject them to tort liability. Arkansas would realize an additional benefit by redefining *improper* as well. If there are no § 767 factors, then there is no need for the privilege to compete in § 768—lawful competition would be safe and competitors would be able to distinguish between the types of interference the law allows and those that it prohibits.

IV. CONCLUSION

Judges, juries, defendants, and would-be defendants would greatly benefit from the important changes to tortious interference law proposed in this note. Courts unquestionably confuse interference with contract and interference with business expectancy, and, thus, the current rule should be separated into distinct claims. Furthermore, there is no doubt that the current *improper* element's definitional factors are unnecessary and abstract, and, thus, defining *improper* as an independent tort or unlawful act would be in accord with case law and would provide adequate notice to would-be defendants. Tortious interference law in Arkansas needs to change.

Larry Watkins[*]

1. Pratt v. Prodata, Inc., 885 P.2d 786, 789 n.3 (Utah 1994) (discussing a prior case concerning tortious interference with business expectancy).

2. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 75 (A.B.A. 2009) (1881).

3. *See* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 61 (1982) (Perlman notes that courts applying tortious interference with contract and interference with business expectancy "have failed to develop common or consistent doctrines.").

4. The Arkansas Supreme Court first recognized tortious interference in *Mahoney v. Roberts*, 86 Ark. 130, 110 S.W. 225 (1908); the court has not altered the rule since *Mason v. Wal-Mart Stores, Inc.*, 333 Ark. 3, 969 S.W.2d 160 (1998).

5. 2 DAN B. DOBBS, THE LAW OF TORTS §§ 448–52 (2001). Although tortious interference with contract and with business expectancy are the primary intentional tort doctrines under which plaintiffs litigate within the larger body of interference torts, there are other economic harm torts that constitute tortious interference, including interference with an inheritance or gift, interference with evidence in a civil suit, and negligent interference with contract or economic interests. *Id.*

6. The first time a court recognized interference with contract as actionable—where the interference was not independently tortious, such as with fraud or defamation—was in *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (K.B.) 752–53; 2 KL & BL 216, 224. *See* RESTATEMENT (SECOND) OF TORTS § 766B cmt. b (1979).

7. Lyn L. Stevens, *Interference with Economic Relations—Some Aspects of the Turmoil in the Intentional Torts*, 12 OSGOODE HALL L.J. 595, 595 (1974).

8. DOBBS, *supra* note 5, § 445.

9. *See* RESTATEMENT (SECOND) OF TORTS § 766B cmt. a.

10. Mason v. Funderburk, 247 Ark. 521, 526–27, 446 S.W.2d. 543, 547 (1969) (The court noted that tortious interference with contract and tortious interference with business expectancy are different: Tortious interference with contract needs "greater protection" whereas tortious interference with business expectancy only needs "some protection."); Walt Bennett Ford, Inc., v. Pulaski Cnty. Special Sch. Dist., 274 Ark. 208, 214-A to 214-B, 624 S.W.2d 426, 429–30 (1981) (supplemental opinion on denial of rehearing) (Tortious interference with contract and tortious interference with business expectancy are different, and "[t]he chief difference lies in the recognition of more extensive privileges in the case of business expectations."). *See also* Stebbins & Roberts, Inc. v. Halsey, 265 Ark. 903, 906–07, 582 S.W.2d 266, 267 (1979) (discussing the sanctity of existing contract relations).

11. *Funderburk*, 247 Ark. 521, 526–27, 446 S.W.2d. 543, 547 (1969) (The difference between interference with contract and interference with business expectancy involves the "kind and amount of interference that is justifiable.").

12. Interference with prospective contract is commonly used interchangeably with interference with business expectancy. Arkansas uses "interference with business expectancy" terminology. *Walt Bennett Ford, Inc.*, 274 Ark. 208, 213–14, 624 S.W.2d 426, 429 (1981). The Restatement, however, uses "interference with prospective contract" terminology. RESTATEMENT (SECOND) OF TORTS § 766B. Regardless of terminology, the tort requires "intentional interference with prospective contractual relations, not yet reduced to contract." *Id.* § 766B cmt. a. Although this note uses the Arkansas terminology, interference with business expectancy has other names, including interference with prospective economic advantage and interference with prospective economic relations. *See, e.g.*, Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 741 (Cal. 1995).

13. *See* 2 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS § 6.11 (3d ed. 2006) ("the law does not extend its protection as far in the case of precontractual interferences as it does when existing contracts have been interfered with" because the interest in contract cases is contractual security, whereas the interest in prospective contract cases is a "reasonable expectation[ ] of economic advantage").

14. *See id*. The fact that courts recognize a privilege to compete in interference with business expectancy cases, which is sufficient to justify a defendant's interference, demonstrates that the law seeks to promote competition in expectancy cases; there is no recognized privilege to compete in interference with contract cases. As Dobbs notes, "you are thus free to induce my customers, employees, or suppliers to deal with you instead of me, as long [as] they are not bound to me by contract." DOBBS, *supra* note 5, § 450; *See also* RESTATEMENT (SECOND) OF TORTS § 768 cmt. a, b (1979).

15. The greatest criticism of tortious interference with contract involves how this area of the law affects an efficient breach. *See generally* Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 132 (1999) ("[T]he interference tort penalizes, and may even nullify, the possibility of 'efficient breach' of contract, a fundamental construct described as "[o]ne of the most enlightening insights of law and economics.'").

16. Although the background section of this note is essential to understanding the proposal, the background section was written with the additional purpose of aiding practitioners who encounter tortious interference in litigation.

17. *See infra* Part III.

18. *See infra* Part III.A.2.

19. *See infra* Part III.B.2. An unlawful act is any act prohibited by statute, regulation, or common law (assault, violating tax laws, etc.). An independent tort is any recognized tort within a jurisdiction (defamation, outrage, etc.).

20. (1853) 118 Eng. Rep. 749 (K.B.) 752–53; 2 KL & BL 216, 224 (the first time tortious interference was recognized in an English or American court).

21. *Id.*; RESTATEMENT (SECOND) OF TORTS § 766B cmt. b (1979).

22. *Lumley*, 118 Eng. Rep. at 755; 2 KL & BL at 231.

23. Temperton v. Russell, [1893] 1 Q.B. 715 at 723 (Eng.); RESTATEMENT (SECOND) OF TORTS § 766B cmt. b.

24. *Id.* at 723 ("It is further submitted that it is clearly actionable to conspire maliciously to prevent persons from contracting with a particular individual if actual damage is proved.").

25. Angle v. Chicago, St. P., M. & O. Ry. Co., 151 U.S. 1, 14 (1894).

26. *Id*. at 13.

27. Mahoney v. Roberts, 86 Ark. 130, 110 S.W. 225 (1908). The dispute in this case involved a non-compete agreement between two parties, and one party, Mahoney, breached the agreement by competing against Roberts, the other party to the agreement. *Id*. at 133, 110 S.W. at 226. Mahoney started a new company that did business under his stepson's name, who, along with Mahoney's wife, pretended to operate the company. *Id.* at 133–34, 110 S.W. at 226. The court held that Mahoney's wife and stepson, co-defendants with Mahoney, induced Mahoney to violate his agreement with Roberts. *Id.* at 139, 110 S.W. at 228. Because the record clearly established that Mahoney's wife merely aided Mahoney in establishing a competing business, it seems strange that the court would hold she induced Mahoney to violate the Roberts agreement. *See id.* at 138–39, 110 S.W. at 228.

28. *Id*. at 139, 110 S.W. at 228.

29. *Id.*, 110 S.W. at 228.

30. Mason v. Funderburk, 247 Ark. 521, 526–27, 446 S.W.2d 543, 546–47 (1969).

31. *Id.*, 446 S.W.2d at 546–47.

32. *Id*. at 527, 446 S.W.2d at 547 (citing RESTATEMENT (FIRST) OF TORTS § 766 (1939)).

33. *Id.*, 446 S.W.2d at 547.

34. *See id.* at 525–26, 446 S.W.2d at 546.

35. Stebbins & Roberts, Inc. v. Halsey, 265 Ark. 903, 906, 582 S.W. 2d 266, 267 (1979) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129 (4th ed. 1971)).

36. Walt Bennett Ford, Inc., v. Pulaski Cnty. Special Sch. Dist., 274 Ark. 208, 624 S.W.2d 426 (1981) (supplemental opinion on denial of rehearing) (confirming the rule and holding that "[t]he general rule is that an improper motive or bad faith is no longer an essential part of the plaintiff's case in the tort of interference with existing contractual relations. However, the defendant may show that his interference was privileged.").

37. United Bilt Homes v. Sampson, 310 Ark. 47, 51, 832 S.W.2d 502, 503 (1992).

38. Cross v. Ark. Livestock & Poultry Comm'n, 328 Ark. 255, 262, 943 S.W.2d 230, 234 (1997).

39. *See* Fisher v. Jones, 311 Ark. 450, 458–59, 844 S.W.2d 954, 959 (1993) (adopting the "improper" element of tortious interference as defined in the Restatement (Second) of Torts § 767 (1979), which conflicts with the requirement that the interference be malicious).

40. Mason v. Wal-Mart Stores, Inc., 333 Ark. 3, 7–14, 969 S.W.2d 160, 162–65 (1998).

41. The core elements "are (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted." Mason v. Funderburk, 247 Ark. 521, 527, 446 S.W.2d 543, 547 (1969).

42. *Wal-Mart Stores, Inc.*, 333 Ark. at 10, 12–13, 969 S.W.2d at 163–65.

43. *Id.* at 14, 969 S.W.2d at 165.

44. *Id.* at 12, 969 S.W.2d at 164.

45. *Id.*, 969 S.W.2d at 164.

46. *See e.g.*, Stewart Title Guar. Co. v. American Abstract & Title Co., 363 Ark. 530, 540, 215 S.W.3d 596, 601 (2005). In *Stewart*, the Arkansas Supreme Court applied the tortious interference rule to a case where two affiliated title companies collaborated with other real estate companies to establish control of the title services market through "sham transactions" and "kickback schemes." *Id.* at 537, 215 S.W.3d at 599. The court acknowledged that the Restatement's improper factors in § 767 are the tools it uses to determine improper interference, but then the court proceeded to discuss how the defendant's interference was improper because the defendant violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617 (1994). *Id.* at 549–50, 215 S.W.3d at 607–08. Unlawful behavior, the court implicitly held, is improper. *Id.* at 552, 215 S.W.3d at 609.

47. *See, e.g.*, Knox v. Regions Bank, 103 Ark. App. 99, 105, 286 S.W.3d 737, 742 (2008) (listing the core elements of tortious interference as well as the improper element in an interference with contract action).

48. *See Stewart*, 363 Ark. at 552, 215 S.W.3d at 609; Vowell v. Fairfield Bay Cmty. Club, Inc., 346 Ark. 270, 277, 58 S.W.3d 324, 329 (2001*). Vowell* involved an investor interfering with a property management company's expected revenue from a lot owner's deed covenants and restrictions. *Id.* at 273–74, 58 S.W.3d at 326–27. Interestingly, the defendant in *Vowell* engaged in a type of fraud, and this fraudulent behavior formed the basis for the tortious interference claim. *See id.*, 58 S.W.3d at 326–27. The property management group in *Vowell*, the Club, should have sued under tortious interference with contract because the dispute involved an agreement the lot owners made to pay dues to the Club when the owners purchased land. *Id.* at 274, 58 S.W.3d at 327. The owners were required to pay dues until Vowell interfered, purchased the lots for a nominal rate, and then transferred the deeds to an offshore corporation in order to transfer liability away from himself and to frustrate the Club's future collection efforts. *Id.* at 273–74, 58 S.W.3d at 326–27. Since tortious interference with business expectancy by definition does not involve preexisting binding agreements, such as the agreements of lot owners to pay dues to the Club, it is difficult to understand why the trial court allowed a tortious interference with business expectancy claim in this contract

matter. Indeed, the supreme court even admits in the opinion that the claim alleged that "Vowell tortiously interfered with [the Club's] business expectancy by terminating its contractual relationships with nonresident property owners." *Id.* at 274, 58 S.W.3d at 327.

49. In *Vowell*, the court's application of the Restatement factors consisted of the following: "Pursuant to the Restatement guidelines, we may also describe Vowell's conduct, motives, and interests, as 'improper.'" 346 Ark. at 277, 58 S.W.3d at 329. Similarly, in *Stewart*, the court thoroughly discussed the defendant's violations of federal law, but it only discussed the Restatement factors by stating the defendant "engaged in improper conduct as described in Vowell." 363 Ark. at 552, 215 S.W.3d at 609.

50. *See supra* notes 48–49 and accompanying text.

51. Office Machs., Inc. v. Mitchell, 95 Ark. App. 128, 130, 234 S.W.3d 906, 908 (2006).

52. DOBBS, *supra* note 5, § 450.

53. *Id.*

54. *Mitchell*, 95 Ark. App. at 130, 234 S.W.3d at 908 (citing Kinco, Inc. v. Schueck Steel, Inc., 283 Ark. 72, 78, 671 S.W.2d 178, 181–82 (1984)). In *Kinco*, the Arkansas Supreme Court quoted this rule from the Restatement (Second) of Torts § 768 (1979).

55. RESTATEMENT (SECOND) OF TORTS § 768 (1979).

56. *See Mitchell*, 95 Ark. App. at 130, 234 S.W.3d at 908.

57. RESTATEMENT (SECOND) OF TORTS § 768 cmt. a, b.

58. *See id.*

59. *See* Crockett v. C.A.G. Inv., Inc., 2010 Ark. 90, at 9, __ S.W.3d __, __ (confirming the core elements as well as the improper element of tortious interference with business expectancy and tortious interference with contract).

60. *See supra* note 41 and accompanying text.

61. *See supra* notes 40, 43–45 and accompanying text.

62. *See supra* notes 51–56 and accompanying text.

63. *See* DOBBS, *supra* note 5, § 446 (arguing that judicial application of tortious interference and its effects on litigants create a "judicial process" that is "dubious").

64. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

65. HOLMES, *supra* note 2, at 75.

> Finally, any legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was. If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court.

Id.

66. The Supreme Court only applies void for vagueness to free speech (*Williams*) and criminal prosecution (*Rogers*). However, vague law is bad law even if it does not violate the Constitution. U.S. v. Williams, 553 U.S. 285, 304 (2008); Rogers v. Tennessee, 532 U.S. 451, 457 (2001).

67. Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV 335, 345 (1980).

68. *See id.*; DOBBS, *supra* note 5, § 446 ("In neither interference with contract nor interference with opportunity torts have courts been able to provide any concept of what counts as wrongful or improper."); Stevens, *supra* note 7, at 595 (stating that tortious interference has developed in an "illogical and piecemeal fashion").

69. Mason v. Funderburk, 247 Ark. 521, 527, 446 S.W.2d 543, 547 (1969) (interference with business expectancy); Knox v. Regions Bank, 103 Ark. App. 99, 105, 286 S.W.3d 737, 742 (2008) (interference with contract).

70. *See supra* notes 10–11 and accompanying text.

71. *See generally* Hayes v. Advanced Towing Servs., Inc., 73 Ark. App. 36, 40 S.W.3d. 800 (2001). In *Hayes*, the court decided a tortious interference case using the wrong rule for tortious interference with contract. *Id.* at 39, 40 S.W.3d at 802. The *Hayes* court incorrectly stated that in *Mason v. Wal-Mart Stores, Inc*. the supreme court previously adopted the following rule:

> 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.

Id., 40 S.W.3d at 802. The *Hayes* court contended that the court had adopted the Restatement (Second) of Torts § 766 (1979) in *Mason v. Wal-Mart Stores, Inc*. *Id.*, 40 S.W.3d at 802. On the contrary, this Restatement rule is significantly different from the tortious interference rule Arkansas courts have used since 1969, and, thus, the court's statement was in error. The supreme court only adopted the *improper* element from § 766 in *Mason v. Wal-Mart Stores, Inc*. *See* 333 Ark. 3, 12–14, 969 S.W.2d 160, 164–165 (1998).

72. *See infra* section II.B. Arkansas courts have consistently used the original tortious interference rule, which was established in 1969. Mason v. Funderburk, 247 Ark. 521, 527, 446 S.W.2d 543, 547 (1969) (interference with business expectancy). *See also* Knox v. Regions Bank, 103 Ark. App. 99, 105, 286 S.W.3d 737, 742 (2008) (interference with contract action where the court confirmed the original tortious interference rule, but added the improper element).

73. 274 Ark. 208, 624 S.W.2d 426 (1981).

74. *See id.* at 210, 624 S.W.2d at 427.

75. *Id.*, 624 S.W.2d at 427.

76. *Id.* at 213, 624 S.W.2d at 429.

77. *See id.* at 214-A to 214-B, 624 S.W.2d at 429.

78. *Id.*, 624 S.W.2d at 429.

79. *Walt Bennett Ford, Inc.*, 274 Ark. at 210, 213, 624 S.W.2d at 427, 429.

80. 95 Ark. App. 128, 234 S.W.3d 906 (2006).

81. *Id.* at 129, 234 S.W.3d at 908.

82. *Id.*, 234 S.W.3d at 908.

83. *Id.*, 234 S.W.3d at 908.

84. 371 Ark. 634, 269 S.W.3d 362 (2007).

85. *Id.* at 647, 269 S.W.3d at 373.

86. *Id.* at 648, 269 S.W.3d at 373–74. Tortious interference with contract requires that the interfering party induce or cause a breach or termination of another's contractual relationship. A valid contract and a breach of that contract are required. *E.g.*, Mason v. Funderburk, 247 Ark. 521, 527, 446 S.W.2d. 543, 547 (1969).

87. *El Paso*, 371 Ark. at 640, 269 S.W.3d at 368.

88. *Id.* at 647, 269 S.W.3d at 373.

89. 103 Ark. App. 99, 286 S.W.3d 737 (2008).

90. *Id.* at 105, 286 S.W.3d at 741.

91. 2010 Ark. App. 450, __ S.W.3d __, __.

92. *Id.* at 2, __ S.W.3d at __.

93. *Id.* at 5–9, __ S.W.3d at __.

94. *Id.* at 9–12, __ S.W.3d at __.
95. *Id.* at 11–12, __ S.W.3d at __.
96. *See* discussion *supra* Part I.C.
97. Tortious interference with contract requires a contract and a breach. There is no privilege to compete defense for this tort. Tortious interference with business expectancy involves a *prospective* contract and the privilege to compete defense (or negation of improper interference) is available for this tort. Thus, applying the wrong elements could certainly alter the outcome of a tortious interference case. *See* discussion *supra* Part I.C.
98. RESTATEMENT (SECOND) OF TORTS ch. 37, intro. note (1979). "First, the law in this area has not fully congealed but is still in a formative stage. The several forms of the tort set forth in §§ 766 to 766B are often not distinguished by the courts . . . ." *Id.* In the Second Restatement, interference with contract and prospective contracts are two distinct rules under § 766 and § 766B respectively.
99. Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 750 (Cal. 1995) (emphasizing "the need [for courts] to draw and enforce a sharpened distinction between claims for the tortious disruption of an *existing* contract and claims that a *prospective* contractual or economic relationship has been interfered with by the defendant.").
100. Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 717 (Tex. 2001).
101. *See* discussion *supra* III.A.2.
102. Mason v. Wal-Mart Stores, Inc., 333 Ark. 3, 12–14, 969 S.W.2d 160, 164–65 (1998).
103. Alex. B. Long, *The Business of Law and Tortious Interference*, 36 ST. MARY'S L.J. 925, 932 (2005) (Discussing the factors in § 767, Professor Long states "One of the chief criticisms of tortious interference claims is the lack of clarity concerning when an interference becomes 'improper.'").
104. Dobbs, *supra* note 67, at 346 (discussing problems with judicial fairness because factors are vague and indeterminate).
105. Perlman, *supra* note 3, at 67–68.
106. Long, *supra* note 103, at 931.
107. *See* Eric P. Voigt, *Driving Through the Dense Fog: Analysis of and Proposed Changes to Ohio Tortious Interference Law*, 55 CLEV. ST. L. REV. 339, 362 (2007).
108. Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 823 (1983) ("Improving the quality of notice given to defendants is one of the goals toward which a civilized law of torts should strive.").
109. *See* Mason v. Wal-Mart Stores, Inc., 333 Ark. 3, 12–14, 969 S.W.2d 160, 164–65 (1998). Prior to adopting the *improper* element and placing the burden on the plaintiff in this case, Arkansas courts had no prior experience with either applying *improper* or the § 767 factors.
110. *Id.* at 6–7, 969 S.W.2d at 161–62.
111. Vowell v. Fairfield Bay Cmty. Club, Inc., 346 Ark. 270, 273–74, 58 S.W.3d 324, 326–27 (2001).
112. 346 Ark. 270, 58 S.W.3d 324 (2001).
113. *Id.* at 274, 58 S.W.3d at 327.
114. *Id.*, 58 S.W.3d at 327.
115. *Id.* at 276, 58 S.W.3d at 328.
116. *Id.* at 277, 58 S.W.3d at 329.
117. *Id.*, 58 S.W.2d at 324.
118. Stewart Title Guar. Co. v. American Abstract & Title Co., 363 Ark. 530, 548–50, 215 S.W.3d 596, 607–08 (2005).
119. 363 Ark. 530, 215 S.W.3d 596 (2005).
120. *Id.* at 544, 215 S.W.3d at 604.

121. *Id.* at 552, 215 S.W.3d at 609.
122. *Id.* at 550, 215 S.W.3d at 607.
123. *Id.* at 550–53, 215 S.W.3d at 607–09.
124. *Id.* at 552, 215 S.W.3d at 609.
125. Baptist Health v. Murphy, 365 Ark. 115, 125, 226 S.W.3d 800, 809 (2006).
126. 365 Ark. 115, 226 S.W.3d 800 (2006).
127. *Id.* at 129, 226 S.W.3d at 811.
128. *Id.* at 125–29, 226 S.W.3d at 809–11.
129. Voigt, *supra* note 107, at 362.
130. Mason v. Wal-Mart Stores, Inc., 333 Ark. 3, 12, 14, 969 S.W.2d 160, 164–65 (1998) ("our law requires that the conduct of the defendant be at least 'improper,'" which is determined by applying the Restatement (Second) of Torts § 767: (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 social 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).
131. DOBBS, *supra* note 5, § 446 ("[These] factors are so abstract that they might apply to almost any decision in torts. The result is that the rules are vague and indeterminate.").
132. *Id.*
133. This note argues that *improper* should be redefined for tortious interference with business expectancy. The vagueness arguments in this subsection also apply to the *improper* element in tortious interference with contract—to a lesser degree. However, interference with contract arguments are outside of the scope of this note.
134. Havensure, LLC v. Prudential Ins. Co. of Am., 595 F.3d 312 (6th Cir. 2010) (applying Ohio law); White Sands Grp., LLC v. PRS II, LLC, 32 So. 3d 5 (Ala. 2009); Safeway Ins. Co., v. Guerrero, 106 P.3d 1020 (Ariz. 2005); Mason v. Wal-Mart Stores, Inc., 333 Ark. 3, 969 S.W.2d 160 (1998); BECO Const. Co., v. J-U-B Eng'rs, Inc., 184 P.3d 844 (Idaho 2008); Dillon v. Ruperto, 786 N.W.2d 873 (Iowa Ct. App. 2010); United Truck Leasing Corp. v. Geltman, 551 N.E.2d 20 (Mass. 1990); Jay Edwards, Inc. v. Baker, 534 A.2d 706 (N.H. 1987); Wilspec Techs., Inc. v. DunAn Holding Grp., Co., 204 P.3d 69 (Okla. 2009); Skiff re Business, Inc. v. Buckingham Ridgeview, LP, 991 A.2d 956 (Pa. Super. Ct. 2010); Avilla v. Newport Grand Jai Alai, LLC, 935 A.2d 91 (R.I. 2007); Dykstra v. Page Holding Co., 766 N.W.2d 491 (S.D. 2009); Carlson v. Carlson, 775 P.2d 478 (Wyo. 1989).
135. J & S Servs., Inc. v. Tomter, 139 P.3d 544 (Alaska 2006); Marquez v. PanAmerican Bank, 943 So. 2d 284 (Fla. Dist. Ct. App. 2006); Tom's Amusement Co., Inc. v. Total Vending Servs., 533 S.E.2d 413 (Ga. Ct. App. 2000); Kutcher v. Zimmerman, 957 P.2d 1076 (Haw. Ct. App. 1998); Romanek v. Connelly, 753 N.E.2d 1062 (Ill. App. Ct. 2001); Byers v. Snyder, 237 P.3d 1258 (Kan. Ct. App. 2010); Thompson v. Sysco Louisville Food Servs. Co., No. 2006-CA-001848-MR, 2008 WL 2065238 (Ky. Ct. App. 2008); Polar Bear Ice Co. v. Williamson, 883 So. 2d 1134 (La. Ct. App. 2004); Mino v. Clio Sch. Dist., 661 N.W.2d 586 (Mich. 2003); PDN, Inc. v. Loring, 843 So. 2d 685 (Miss. 2003); Hardy v. Vision Serv. Plan, 120 P.3d 402 (Mont. 2005); The Lamar Co., LLC v. City of Fremont, 771 N.W.2d 894 (Neb. 2009); Crockett v. Sahara Realty Corp., 591 P.2d 1135 (Nev. 1979); Lamorte Burns & Co., v. Walters, 770 A.2d 1158 (N.J. 2001); Ettenson v. Burke, 17 P.3d 440 (N.M. Ct. App. 2000); MLC Auto., LLC v. Town of Southern Pines, 702 S.E.2d 68 (N.C. Ct. App. 2010); Straube v. Larson, 600 P.2d 371 (Or. 1979); Santoro v. Schulthess, 681 S.E.2d 897 (S.C. Ct. App. 2009); Gifford v. Sun Data, Inc., 686 A.2d 472 (Vt. 1996); Pleas v. City of Seattle, 774 P.2d 1158 (Wash. 1989); Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578 (W. Va. 1998); Stapel v. Stapel, 789 N.W.2d 753 (Wis. Ct. App. 2010).
136. Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740 (Cal. 1995); Harris Grp., Inc. v. Robinson, 209 P.3d 1188 (Colo. App. 2009); Biro v. Hirsch, 771 A.2d 129

(Conn. App. Ct. 2001); Boyce Thompson Inst. v. MedImmune, Inc., No. 07C-11-217 JRS, 2009 WL 1482237 (Del. Super. Ct. 2009); Levee v. Beeching, 729 N.E.2d 215 (Ind. Ct. App. 2000); Currie v. Indus. Sec., Inc., 915 A.2d 400 (Me. 2007); Berry & Gould, P.A. v. Berry, 757 A.2d 108 (Md. 2000); Harman v. Heartland Food Co., 614 N.W.2d 236 (Minn. Ct. App. 2000); Hair Say, Ltd. v. Salon Opus, Inc., 800 N.Y.S.2d 347 (N.Y. Sup. Ct. 2005); Trade'n Post, LLC. v. World Duty Free Americas, Inc., 628 N.W.2d 707 (N.D. 2001); Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691 (Tenn. 2002); Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711 (Tex. 2001); Overstock.com, Inc. v. SmartBargains, Inc., 192 P.3d 858 (Utah 2008); Wachovia Bank, N.A. v. Ranson Tyler Chevrolet, LLC, No. CL05000199-00, 2007 WL 6013146 (Va. Cir. Ct. 2007).

137. Perlman, *supra* note 3, at 97 (This "interference tort should be limited to cases in which the defendant's acts are independently unlawful."); *See* Dobbs, *supra* note 67, at 365 ("The most obvious case for imposing liability for interference is the case in which the defendant commits acts which constitute a tort, independent of the interference analysis . . . .").

138. DOBBS, *supra* note 5, § 446 (Supp. 2010).

139. Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 751 (Cal. 1995).

140. *See id.* at 750–51.

141. *Id.*

142. *Id.* at 751.

143. *Id.*

144. *Id.*

145. Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 713 (Tex. 2001).

146. *Id.*

147. *Id.*

148. *Id.* at 721.

149. *Id.* at 720.

150. *Id.* at 721.

151. Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 725 (Tex. 2001).

152. *Id.* at 727.

153. *See id.* at 726.

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