American Bar Association
Section of Litigation

Committee on
Business Torts Litigation

Business Torts Journal is published quarterly by the Committee on Business Torts Litigation, Section of Litigation, American Bar Association, 321 N. Clark Street, Chicago, IL 60610.

www.abanet.org/litigation/committee/business/home.html

SECTION of LITIGATION
AMERICAN BAR ASSOCIATION

Business Torts Journal

Tortious Interference Issue

VOL. 14 NUMBER 2 ■ WINTER 2007

How Certain Must a Prospective Contract or Business Relationship Be?

By Lisa Darnley Cooper

Nearly all American jurisdictions impose liability for wrongful and tortious interference with business relationships that have not become the subject of an existing contract. Courts use a myriad of names to refer to the tort providing protection from such interference,[1] including: tortious interference with prospective business or contract,[2] tortious interference with prospective economic advantage;[3] tortious interference with business expectancies;[4] tortious interference with business relations,[5] tortious interference with prospective business relations,[6] and tortious interference with prospective business advantage.[7]

Regardless of the name used, tortious interference with prospective business or contract allows a plaintiff to recover even though a valid, existing contract with a third party is not at issue. The complaining party may recover if it reasonably expected to enter into a profitable contract or business relationship with a third party and a defendant knowingly and wrongfully interfered with that relationship or prospective contract. The policy allowing for recovery in such circumstances is identical to the policy underlying its companion tort, tortious interference with contract: Valid business relationships and reasonable commercial expectations are entitled to protection from unjustified interference, even when a contract is lacking.[8]

However, because tortious interference with prospective business or contract involves the complaining party's mere economic expectancies, the question arises: How realistic must a plaintiff's expectancies be to deserve protection under the law? Stated another way, how certain or definite must the business relationship or prospective contract be before interference with the relationship becomes actionable?

While there is no single approach to establishing that a relationship has "reached the point of a reasonable expectancy of economic gain,"[9] this article showcases some representative cases where plaintiffs prove their commercial expectations with sufficient detail and where plaintiffs miss the mark. A review of these cases reveals that the answer to the question posed is: A business relationship with reasonable expectancy of future economic benefit falls somewhere between "wishful thinking" and "a done deal."

A Prospective Business Relationship Under the *Restatement*

As an initial matter, one should consider what types of relationships can be considered business expectancies. The potential relationships at issue include established business relationships, new

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relationships that are expected to mature into contractual relationships, and new relationships never expected to be formalized to the point of contract but where there is a reasonable economic expectancy.

Most jurisdictions recognizing the tort of interference with prospective contract or business relations follow the pronouncement of the *Restatement (Second) of Torts* Section 766B. Under the *Restatement*:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.[10]

According to the *Restatement*'s comments, the type of relationship protected:

> include[s] any prospective contractual relations, except those leading to contracts to marry, if the potential contract would be of pecuniary value to the plaintiff. Included are interferences with the prospect of obtaining employment or employees, the opportunity of selling or buying land or chattels or services, and any other relations leading to potentially profitable contracts.[11]

And while the *Restatement* uses the language "prospective contractual relation," the comments make clear, and most courts agree,[12] the term is not used in its technical sense. The tort governs "interference with a continuing business or other customary relationship not amounting to a formal contract," as well as quasi-contractual rights.[13]

Nonetheless, a plaintiff cannot recover with the mere allegation of an existing relationship or anticipated business relationship or contract. "[The] business relationship [must] be proved with some degree of specificity, at least to the point that future profit be a realistic expectation and not merely wishful thinking."[14] Courts appear to consider this threshold level of certainty either an independent element of the tort or an evidentiary hurdle on causation. For example, in many states, to prove a claim of interference, the plaintiff must prove the existence of a valid business relationship or a prospective advantage that is sufficiently definite in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff.[15] Other states focus on whether the plaintiff can establish "but for" the defendant's conduct, the business relationship was reasonably certain to have occurred, continued, or realized its expectancy.[16] Regardless, every state that has addressed the issue finds that the party alleging interference must be able to show with some specificity that the prospective business relationship was likely to occur and that it was likely to be profitable or result in economic advantage.[17]

Maturity of the Relationship or a Third-Party Understanding

One way to demonstrate a valid business expectancy is to show that the relationship with a third party sufficiently progressed to the point that it was likely to yield a contract or an economic benefit had the defendant not wrongfully intervened. For example, in *Landry v. Hornstein,* a pharmacist brought suit against his landlord when the landlord interfered with his attempt to sell his business and assign his lease for the drugstore premises to a prospective buyer.[18] Negotiations between the pharmacist and the prospective buyer ceased after the landlord told the prospective buyer that he was getting rid of the pharmacist and that he would rent the premises directly to the buyer. The prospective buyer leased the drugstore directly through the landlord and did not purchase the business from the pharmacist.[19] Finding that the prospective relationship between the pharmacist and the prospective buyer was sufficiently mature, the Florida Court of Appeals observed:

> [T]he negotiations had progressed beyond the stage of a mere offer, to an understanding between [the pharmacist and the prospective buyer] for the sale of the business and assignment of the lease, transactions which would have been consummated had [the landlord] not interfered. Evidence disclosed that [the landlord] or his attorney had undertaken their own negotiations with [the buyer] regarding the rental of the drugstore premises while [the buyer and the pharmacist] were still involved in negotiations.[20]

Thus, while there was no formal agreement between the pharmacist and the buyer, the parties had reached some sort of understanding making it reasonable to expect a consummation of the transaction absent the interference.

As one might expect, the more details of the transaction the

> The more details the plaintiff and the third party have worked out, the more likely a court is to find that the plaintiff has a legitimate business expectancy.

plaintiff and the third party have worked out, the more likely a court is to find that the plaintiff has a legitimate business expectancy. In *Zippertubing Co. v Teleflex Inc.*, a supplier and an installer had agreed on almost all of the details of an agreement to supply insulation for use in subway cars of the New York City Transit Authority when the interference occurred.[21] Because the only remaining hurdle to the consummation of the contract was that the installer wanted to view the facility where the material used in the insulation was to be extruded, the Third Circuit Court of Appeals affirmed a jury verdict in favor of the plaintiff, finding that there was sufficient evidence of prospective advantage.[22]

> Merely being in the running for a contract is not sufficient evidence to establish a prospective economic relation with reasonable certainty.

On the other hand, if negotiations were only in the preliminarily stages or even had ceased, courts are quick to find that the facts will not support a claim for tortious interference with prospective business or contract. In *Gore v. Sherard,* the Wyoming Supreme Court addressed the claim of the lessees of a ranch who failed to present evidence that a valid contractual relationship or business expectancy existed for the purchase of the ranch.[23] The oral lease between the plaintiffs and the ranch owners had expired, and contract negotiations had stalled and had not proceeded for months. Moreover, there was no agreement regarding any terms for any future contract for sale of the ranch. Accordingly, the plaintiffs' "unilateral belief and hope that a contract would result was inadequate to sustain a cause of action. A reasonable probability of a contract is shown if there is a reasonable assurance of a contract in view of all the circumstances. In this case there was no such reasonable probability."[24]

Likewise, merely being "in the running" for a contract is not sufficient evidence to establish a prospective economic relation or contract with reasonable certainty. In *APG, Inc. v. MCI Telecommunications Co.*, the First Circuit Court of Appeals held that the business expectancy of a sub-distributor for prepaid telephone cards was far too speculative to support a claim for interference.[25] The sub-distributor claimed it would have been the beneficiary of a contract that would have been awarded to its distributor if MCI had not improperly interfered. While there was substantial evidence that the plaintiff sub-distributor and the distributor had a "real chance of being chosen" for the contract, the outcome was not "reasonably definite." Moreover, because there was no showing that the contracting third party had a unique interest in the distributor, the plaintiff could not show that "but for" MCI's interference, it would have be awarded the contract.[26]

Ongoing Relationship with Identifiable Third Party

Courts also find that proof of a long-term or ongoing relationship with a third party or identifiable class of persons is generally sufficient to show that there is a reasonable expectancy of continued economic gain. For example, in *Insurance Field Services, Inc. v. White & White Inspection & Audit Service, Inc.*, a Florida Court of Appeals "held that the plaintiff, who had regularly been performing underwriting inspections, premium audits, and loss control work for 16 insurance company clients, could establish a business relationship with these companies even though the plaintiff and his clients did not have written agreements."[27] Also, in *Techno Corp. v. Dahl Associates, Inc.*, with no analysis, the federal district court in Pennsylvania held that Techno's "mere recital of an on-going five year relationship between Techno and Ebasco, and its description of the efforts made by Techno to procure Ebasco's business, [was] clearly . . . sufficient to establish that a prospective contractual relationship existed between the parties" and to survive a motion to dismiss.[28]

Similarly, in *Lucas v. Monroe County*, the Sixth Circuit found that wrecker service operators established a reasonable expectancy of an economic relationship with stranded motorists who arranged for towing services via the call list maintained by the Sheriff's Department. The court wrote, "[t]he [business relationship or expectancy of a relationship] must be a reasonable likelihood or a probability, not mere wishful thinking. To demonstrate such a realistic expectation, Plaintiffs must prove an anticipated business relationship with an identifiable class of third parties."[29] Specifically, the court noted:

> Plaintiffs have presented evidence (i) that but for the Sheriff's unlawful and improper conduct—specifically, his patronage practices—Plaintiffs would have been placed on the regular rotation upon satisfying the requirements of the Sheriff's Department; and (ii) that placement on the list entitles a tow company to calls and contracts within its geographic area that the company would not otherwise receive. While the amount of towing business Plaintiffs would have received if placed on the call list cannot be specifically determined, this issue goes only to damages.[30]

In contrast, if a plaintiff fails to specifically identify a third party or present an identifiable prospective class of third persons with whom it would have contracted or done business absent the interference, then the prospective business is likely too tenuous to allow recovery.[31] Often the problem is that the plaintiff is attempting to rely on the hope of future sales to a class of past customers or clients. Courts generally observe that "a previous business relationship does not ensure a future relationship" and require a showing that the plaintiff and the prospective customer have reached

some sort of understanding concerning the future business.[32]

For example, in *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, the Florida Supreme Court held that the plaintiff's relationship with its past customers was not one upon which a claim for tortious interference with a business relationship could be based. The court noted:

> Georgetown had no identifiable agreement with its past customers that they would return to Georgetown to purchase furniture in the future. The mere hope that some of its past customers may choose to buy again cannot be the basis for a tortious interference claim. Accordingly, Georgetown may not recover, in a tortious interference with a business relationship tort action, damages where the 'relationship' is based on speculation regarding future sales to past customers.[33]

A business that sold study aids to military personnel also could not establish that it had a reasonable probability of entering into specific contracts with personnel. In *United Distributors, LLC v. Educational Testing Service,* a South Carolina court found that the plaintiff's allegations that, based on past experience, it would have received a response from 10 percent of its mailings were insufficient; the plaintiff acknowledged that it had no way of knowing who did not respond and why they did not respond. In addition, the plaintiff could not show that its past customers had provided repeat business.[34]

The Fourth Circuit arrived at the same result in *American Chiropractic Ass'n v. Trigon Healthcare, Inc.*[35] In that case, a chiropractic organization lacked sufficient proof to support its business expectancy that its patients would continue to seek treatment from it if an insurer had not placed a coverage cap on spinal manipulations. The court explained that a plaintiff must set forth "objective" proof of the relationship or expectancy and that there was a reasonable certainty that plaintiff would have continued in the relationship or realized the expectancy. "[M]ere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate to sustain the cause of action. . . . a plaintiff must establish a *probability* of future economic benefit, not a mere possibility."[36] The organization failed to meet this standard because, as the court noted, the patients had the right to terminate the relationship at any time, and some had unilaterally done so, and there were never written contracts or understandings between the chiropractors and patients.[37]

Factual Support for Reasonable Expectancy of Relationship

In certain cases, the reasonableness or validity of the plaintiff's business expectancy is fact-driven and is shown simply by illustrating that, under the circumstances of the case, the plaintiff would have likely realized a contract or business relationship if the defendant had not intervened. In *Glenn v. Point Park College*, for example, two real estate brokers who were denied a commission stated a valid claim for tortious interference with prospective contractual relations against the buyer of a hotel.[38] The two brokers informed Point Park College that the Sheraton wanted to sell the Sherwyn Hotel. One broker showed the hotel to Point Park and told the college that Sheraton would entertain offers through brokers and would pay a commission, quoting a possible sales price of $790,000 for the property, including furnishings. Later one of the brokers met with officers of the college and gave them considerable information about the hotel, including a memorandum containing suggested terms of sale. Point Park used the information the broker provided to negotiate the purchase of the hotel directly with Sheraton, for a price of $700,000, excluding furnishings. Point Park told Sheraton that no brokers were involved in the sale. The Pennsylvania Supreme Court held that the complaint sufficiently averred that there was a reasonable probability that the plaintiffs would have become the recognized broker in the transaction if they had been permitted to submit an offer. The court observed:

> The possible sale price of $790,000, including furnishings . . . was not so far beyond the actual consideration of $700,000 (possibly without furnishings) as to make plaintiffs' prospective position as the efficient cause of a sale unrealistic and merely wishful thinking. It is true that there could be no guarantee of Sheraton's reaction to any offer that might be submitted, and it of course was under no compulsion to deal with either [the brokers] or [college]. But anything that is prospective in nature is necessarily uncertain. We are not here dealing with certainties, but with reasonable likelihood or probability. This must be something more than a mere hope or the innate optimism of the salesman. . . . [T]he broker may recover when the jury is satisfied that but for the wrongful acts of the defendant it is reasonably probable that the plaintiff would have effected the sale of the property and received a commission.[39]

A party must be prepared to establish with adequate proof that its expectation of a relationship was reasonably certain to result absent interference.

In comparison, in *Service Vending Co. v. Wal-Mart Stores, Inc.*, a Missouri court found that the factual circumstances did not support the expectation of plaintiff SVC, a vending-machine company, that it could leave its vending machines in place in Wal-Mart stores and subsequently sell the machines to vendors replacing SVC. First, the court noted that:

> The existence of a valid business expectancy will not be found where the facts showed a mere hope of establishing a business relationship which was tenuous. In order to have a claim for interference with a valid business expectancy, it is necessary to determine if the expectancy claimed was reasonable and valid under the circumstances alleged. If it is not, there was nothing for defendants to have interfered with.[40]

The court rejected SVC's claim against Wal-Mart for allegedly interfering with the sale of the equipment because Wal-Mart insisted that, if there were a sale, the equipment be removed by SVC, just to be reinstalled by the new vender. The court found that SVC had no valid business expectancy that it could leave its equipment in place because the plain language of SVC's contract with Wal-Mart required that the equipment be moved. Thus, "[a]ny hope that Wal-Mart would permit this to occur, contrary to the terms of the contract, was, at best, tenuous. SVC's claimed expectancy was, as a matter of law, neither reasonable nor valid in view of the terms of the contract."[41]

Conclusion

Prospective relationships are inherently uncertain. Accordingly, courts do not require that a plaintiff show with absolute certainty that it would have realized a contract or its business expectancy to state a claim for tortious interference with prospective business or contract. However, because the law only protects against interference with "reasonable" business expectations, a party must be prepared to establish with adequate proof that its expectation of a contract or relationship was more than a hope and that it was reasonably certain to result absent interference. How a plaintiff goes about doing that obviously depends on the circumstances of the case, but as a general rule, a legitimate business expectancy or interest requires evidence of a sufficiently advanced or mature relationship between the plaintiff and an identifiable third party (or class of parties) and a reasonable probability of entering into a specific contract or noncontractual agreement with that party absent the interference.[42] ■

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Endnotes

1. Orrin K. Ames, *Tortious Interference With Business Relationships: The Changing Contours of This Commercial Tort*, 35 CUMB. L. REV. 317, 323 (2005).

2. *See, e.g.,* MGE UPS Sys., Inc. v. Fakery Elec. Eng'g, Inc., 422 F. Supp. 2d 724, 740 (N.D. Tex. 2006) (Texas law); DP-Tek, Inc., v. AT&T Global Info. Solutions Co., 100 F.3d 828 (10th Cir. 1996) (Kansas law).

3. *See, e.g.,* Hsu v. OZ Optics Ltd., 211 F.R.D. 615 (N.D. Cal. 2002) (applying California law).

4. *See, e.g.,* New Horizon Fin. Serv., LLC v. First Fin. Equities, Inc., 175 F. Supp. 2d 348 (D.D.C. 2001).

5. *See, e.g.,* Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143 (Ala. 2003).

6. *See, e.g.,* Labor Ready v. Williams Staffing, 149 F. Supp. 2d 398 (N.D. Ill. 2001).

7. *See, e.g.,* Zippertubing Co. v. Teleflex Inc., 757 F.2d 1401 (3d Cir. 1985).

8. *Ex parte* Ala. Dept. of Transp., 764 So. 2d 1263, 1270 (Ala. 2000) ("Protection is appropriate against improper interference with reasonable expectancies of commercial relations."); Hayes v. N. Hills Gen. Hosp., 590 N.W.2d 243, 250 (S.D. 1999); THE RESTATEMENT (SECOND) OF TORTS § 766, cmt. c (1979).

9. 16 CAUSES OF ACTION 569 § 7 (2005).

10. THE RESTATEMENT (SECOND) OF TORTS § 766B (1979).

11. *Id.* at cmt. c.

12. While most courts allow recovery for tortious interference with prospective business or economic advantage, Wisconsin recognizes only tortious interference with prospective contract. *See* Baron Fin. Corp. v. Natanzon, Case No. SKG-03-3563, 2006 WL 1966754, *5 (D. Md. July 11, 2006) (citing Shank v. William R. Hague, Inc., 192 F.3d 675 (7th Cir. 1999)).

13. *Id.*; 16 CAUSES OF ACTION 569 § 5 (2005) (citations omitted).

14. Behrend v Bell Tel. Co., 363 A.2d 1152 (Pa. Super. 1976), vacated on other grounds, 374 A.2d 536 (Pa. Super 1977), appeal after remand, 390 A.2d 233 (Pa. Super. 1978).

15. Miracle v. New Yorker Magazine, 190 F. Supp. 2d 1192, 1203 (D. Haw. 2001); *see also* Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 228 (4th Cir. 2004) (Virginia law permits recovery where a party can show the existence of a business relationship or expectancy, with a probability of future economic benefit to the plaintiff.); Int'l Sales & Serv. v. Austral, 262 F.3d 1152 (11th Cir. 2001) (under Florida law, the business relationship required is one in which there is an understanding that there would have been a completed contract had the defendant not interfered.); Kwang Dong v. Han, 205 F. Supp. 2d 489 (D. Md. 2002) (plaintiff must allege business expectancies that are commercially reasonable to expect profit); Sole Energy Co. v. Petrominerals Corp., 26 Cal. Rptr. 3d 798 (Cal. Ct. App. 2005) (elements of cause of action include economic relationship with the probability of future economic benefit to the plaintiff).

16. APG, Inc. v. MCI Telecomm. Corp., 436 F.3d 294, 304 (1st Cir. 2006) (applying plaintiff must prove that it is at least "reasonably probable" that plaintiff would have been chosen by third party and would have completed the deal); Pepsi-Cola Bottling Co. of Pittsburgh, Inc. v. PepisoCo, Inc., 431 F.3d 1241, 1263–64 (10th Cir. 2005) (except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship; applying Kansas law); Calvin Kline Trademark Trust v. Wachner, 129 F. Supp. 2d 248 (S.D.N.Y. 2001) (to state a cause of action for tortious interference with prospective economic advantage, the defendant must show that but for the defendant's interference the plaintiff would have entered

into the business relationship). *But see* K.W. Plastics v. U.S. Can. Co., 131 F. Supp. 2d 1262, 1270 (M.D.Ala. 2001) (rejecting the "but for" standard).

17. Baron Fin. Corp. v. Natanzon, Case No. SKG-03-3563, 2006 WL 1966754, *5 (D. Md. July 11, 2006). The *Baron* decision specifically addresses how "certain the anticipated business relationship must be before a party may bring a claim seeking damages for the disruption of the relationship," and the decision includes an excellent catalog of relevant cases on this precise issue. According to the *Baron* court, only Arizona, Kentucky, Louisiana, New Mexico, Ohio, and Oregon have failed to address the issue.

18. Landry v. Hornstein 462 So. 2d 844 (Fla. Ct. App. 1985).

19. *Id.* at 847.

20. *Id.*

21. Zippertubing Co. v Teleflex Inc., 757 F.2d 1401 (3d Cir 1985).

22. *Id.* at 1405; Martin v. Wing, 667 P.2d 1159 (Wyo. 1983) (where offer lapsed due to contingency but prospective purchasers remained in contact with prospective vendors, had sufficient money to purchase property, prepared purchase contracts, and intended to complete transaction after final inspection of property, there was a prospective contractual relation between prospective purchasers and vendors); *cf.* Sole Energy Co. v. Petrominerals Corp., 26 Cal. Rptr. 3d 798, 821 (Cal. Ct. App. 2005) (putative shareholders failed to establish a corporate officer's tortious interference with prospective economic advantage in connection with a unconsummated stock transaction; discussions about purchasing the stock had just begun in earnest).

23. Gore v. Sherard, 50 P.3d 705, 710–11 (Wyo. 2002).

24. *Id.* at 710–11; *see also* United Distrib., LLC v. Educ. Testing Servs., 564 S.E.2d 324, 326 (S.C. Ct. App. 2002) ("[T]he agreement must be a close certainty; thus, a mere offer to sell, for example, does not, by itself, give rise to sufficient legal rights to support a claim of intentional interference with a business relationship.").

25. APG, Inc. v. MCI Telecomm. Corp., 436 F.3d 294, 304 (1st Cir. 2006).

26. *Id.* at 305.

27. Int'l Sales & Serv. v. Austral, 262 F.3d 1152, 1155 (11th Cir. 2001) (citing Ins. Field Servs., Inc. v. White & White Inspection & Audit Serv., Inc., 384 So. 2d 303 (Fla. Ct. App. 1980)).

28. Techno Corp. v. Dahl Assocs., Inc., 535 F. Supp. 303, 306 (W.D. Pa. 1982).

29. Lucas v. Monroe County, 203 F.3d 964, 979 (6th Cir. 2000).

30. *Id.*

31. United Distribs., LLC v. Educ. Testing Servs., 564 S.E.2d 324, 329 (S.C. Ct. App. 2002).

32. Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp., Case No. 3:02cv514, 2006 WL 2129498, *14 (M.D. Pa. July 31, 2006).

33. Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 815 (Fla. 1994).

34. *United Distribs.*, 564 S.E.2d at 330; *see also* Baron Fin. Corp. v. Natanzon, Case No. SKG-03-3563, 2006 WL 1966754, *6 (D. Md. July 11, 2006) (plaintiff failed to sufficiently identify the third party with whom it claimed to have a business relationship or potential relationship); U.S. West, Inc. v. Bus. Discount Plan, Inc., 196 F.R.D. 576, 594 (D. Colo. 2000) (same).

35. Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 228 (4th Cir. 2004).

36. *Id.* at 228 (internal citations and quotations omitted).

37. *Id.; see also* Kidd v. Bass Hotels & Resorts, Inc., 136 F. Supp. 2d 965, 969 (E.D. Ark. 2000) (past business relationships with former customers not sufficiently certain, concrete and definite to establish prospective relationship).

38. Glenn v. Point Park College, 272 A.2d 895 (Pa. 1971).

39. *Id.* at 898–99.

40. Serv. Vending Co. v. Wal-Mart Stores, Inc., 93 S.W.3d 764, 769 (Mo. Ct. .App. 2002).

41. *Id.* at 770.

42. While outside the scope of this article, the reader should also be aware that (1) whether a business expectancy is reasonable and valid will also often turn on the motives or methods used by the defendant in interfering, and (2) the prospective nature of the business relationship may make it difficult for the plaintiff to prove causation and damages. *See* 16 CAUSES OF ACTION 569 (2005).