

Tortious Interference with Contract or Business Expectancy: An Overview of Virginia Law

BY DAVID N. ANTHONY

Tortious interference with contract or business expectancy occurs when a person intentionally damages the plaintiff's contractual or other business relationship with a third person. This common law tort strikes a delicate balance between two ideals: the promotion of healthy economic competition and the protection of existing or reasonably certain prospective contractual relations. American contract law encourages lawful, free market competition, yet also recognizes that vital interests, rights and obligations worthy of protection arise once a contract exists between parties. If contracts are not given protection from intentional interference by others, then the certainty of their duration is at risk thereby jeopardizing the incentive to do business by contract. Given these competing interests, Virginia courts routinely address disputes that straddle the fine line between vigorous, hardnosed competition and intentional interference with contracts or business expectancies.

Background

Tortious interference claims originated in early Roman law, where the head of a household could bring an action against some third party who injured a member of his household.¹ The modern history of the claim for tortious interference with contractual relations claims traces to 19th century England.² In the seminal case of *Lumley v. Gye*, an English court recognized a claim brought by a theater owner against a rival theater owner's interference with his contract with a well-known singer.³

Subsequent decisions expanded the

tort beyond personal service contracts to contracts of virtually any type or character.⁴ After significant disagreement, most American courts eventually recognized the tort.⁵ In *Worrie v. Boze*, the Supreme Court of Virginia first acknowledged that "the right to performance of a contract and the right to reap profits therefrom are property rights which are entitled to protection from the courts."⁶ Since *Worrie*, Virginia courts have continued to develop the nuances of the claim, occasionally by drawing from analogous claims.⁷

Stating a Claim for Tortious Interference with Existing Contract Under Virginia Law

Under Virginia law, a claimant must prove at least four elements to maintain a viable claim for tortious interference. The elements for a claim differ slightly depending on whether the basis for the claim for interference is an existing contract or prospective business expectancy, business relationship or economic advantage.

Basic Elements

A plaintiff must establish four elements in order to state a *prima facie* cause of action for tortious interference with an existing contract:

1. Existence of a valid contractual relationship or business expectancy;
2. Knowledge of the contractual relationship or expectancy by the defendant;
3. Intentional interference inducing or causing a breach or termination of the contractual relationship or expectancy; and
4. Resultant damage to the party whose contractual relationship or expectancy has been disrupted.⁸

Actual Malice is not an Essential Element of the Claim

A key component of a tortious interference with contract claim is the third party's intent as summarized by a noted treatise as follows: "[i]t is clear that liability is to be imposed only if the defendant intends to interfere with the plaintiff's contractual relations, at least in the sense that he acts with knowledge that interference will result, and if, in addition, he acts for an improper purpose."⁹ This emphasis on intent occasionally misleads counsel into believing that that a plaintiff must prove malice in the traditional sense of ill-will or spite. However, the Supreme Court of Virginia has made clear that actual malice is not an essential element to prove a claim for tortious interference with a contract.¹⁰ All that is required is that the plaintiff demonstrate that the defendant intentionally engaged in the conduct with the primary purpose of interfering with the plaintiff's existing contractual or business relationship with the third party.

Additional Element if the Existing Contract is Terminable at Will

Counsel are cautioned that, if the contract at issue is terminable "at will," a plaintiff also must establish that the defendant interfered through the use of "improper methods."¹¹ As the Supreme Court of Virginia has held:

Unlike a party to a contract for a definite term, however, an individual's interest in a contract terminable at will is essentially only an expectancy of future economic gain, and he has no legal assurance that he will realize the

expected gain. See Restatement (Second) of Torts § 766 comment g (1979). Thus, the cause of action for interference with contractual rights provides no protection from the mere intentional interference with a contract terminable at will.¹²

This distinction makes logical and practical sense, as a contract terminable at will may be ended at any time by the parties; however, "the fact that a contract is terminable at the will of the parties does not make it terminable at the will of others."¹³ Given the more tenuous nature of a contract terminable at will, the Supreme Court of Virginia requires a plaintiff to prove more than mere intentional interference with the at will contract by a third party.¹⁴ See *infra* for a fuller discussion of the meaning of "improper means or methods."

Stating a Claim for Tortious Interference with Contract Expectancy, Prospective Business Relationship or Economic Advantage Basic Elements

Under Virginia law, the basic elements for a claim for tortious interference with a contract expectancy, prospective business relationship or economic advantage differ slightly from those required for a claim for tortious interference with existing contract. The elements are:

1. The existence of a contract expectancy, prospective business relationship or economic advantage;
2. Knowledge of the contract expectancy, prospective business relationship or economic advantage by the defendant;
3. A reasonable certainty that, absent defendant's intentional misconduct, plaintiff would have continued in the relationship or realized the expectancy;
4. The defendant used improper means or methods to intentionally interfere with the contract expectancy, prospective business relationships and economic advantage; and
5. Resultant damage to the plaintiff.¹⁵

Proving a Claim for Tortious Interference

Regardless of whether a claim is one for tortious interference with an existing contract or tortious interference with business expectancy, many of the elements and necessary proof are substantially the same.

Existence of an Enforceable Contract

In the context of a claim for tortious interference with an existing contract, counsel may overlook the requirement that a plaintiff must allege¹⁶ and prove that it was a party to a valid existing contract.¹⁷ While the existence of a valid contract is not at issue in many cases, courts have identified a number of circumstances where the alleged underlying contract is *not* enforceable, such that the plaintiff cannot satisfy this element of a tortious interference claim. Examples include:

- a contract violating a rule of law;¹⁸
- a contract against the public policy of Virginia;¹⁹
- a lawfully terminated lease;²⁰
- a contract to which the defendant himself is a party;²¹
- an employee's ERISA benefits preempted by federal law;²²
- an unenforceable covenant not to compete;²³
- a contract providing easement rights;²⁴
- an assignee of a contract not a party to the contract at issue;²⁵ and
- a non-binding letter of intent to negotiate in good faith.²⁶

Courts outside of Virginia have considered the enforceability of the underlying contract within the context of a tortious interference claim, including violations of federal law, restraint of trade, usury laws, the statute of frauds, invalid agreements, want of consideration, mutuality or certainty.²⁷

Existence of a Business Expectancy with a Reasonable Certainty of Being Realized

Where the claim involves an anticipated business relationship, a plaintiff must establish a specific opportunity that is reasonably certain to be realized in order to prove the existence of a valid business expectancy.²⁸ Courts routinely have dismissed claims for tortious interference with business expectancy where the plaintiff merely alleges, in general terms, that a defendant has interfered with potential or hoped-for²⁹ business opportunities rather than a particular business expectancy or relationship.³⁰ Instead, a plaintiff must prove the existence of the alleged business expectancy "based upon something that is a concrete move in that direction"³¹ or "at least a reasonable probability rather than

merely one of several equally surmisable possibilities."³² As *Prosser* has stated, "[i]n such cases there is a background of business experience on the basis of which it is possible to estimate with some fair amount of success both the value of what has been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered."³³

Virginia courts have held that a variety of asserted business expectancies do not satisfy the requisite standard of reasonable certainty, including:

- continuing to do or remaining in business;³⁴
- retroactive promotions;³⁵
- real estate sale purchase contracts;³⁶
- sales to unidentified, and unidentifiable, "potential" buyers³⁷ and
- consulting contracts with nothing more than a hope that the business relationship would continue in the future.³⁸

Knowledge of the Contract or Business Expectancy

Virginia law also requires a plaintiff to establish that the defendant had knowledge of either the contract or the expectancy and of the fact that he was interfering with the performance of the contract.³⁹ Indeed, a court will dismiss a tortious interference claim where the defendant does not have knowledge of the alleged contract.⁴⁰ In many circumstances, a defendant has actual knowledge of the existence of a contract or business expectancy, and a plaintiff easily can satisfy this element. Further, at least one Virginia trial court has set a more relaxed standard than requiring actual knowledge of the potential business relationship, by allowing a plaintiff to satisfy the knowledge element by proving that the defendant had "knowledge of fact that, upon reasonable inquiry, should lead to disclosure of the existence of the contract or potential business relationship."⁴¹ However, the knowledge requirement does not mean that the defendant must appreciate fully the legal significance of the facts giving rise to the contractual relationship.⁴²

Intentional Interference by the Defendant

The plaintiff also must show the

defendant, through his conduct, intended to interfere with the plaintiff's contract or expectancy. Case law in Virginia has not provided a thorough analysis of what constitutes "interference." Generally, a plaintiff simply must show some type of intentional⁴³ act or conduct by the defendant,⁴⁴ as not every interference is actionable.⁴⁵ The *Restatement (Second) of Torts* has noted that:

There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. The interference is often by inducement. The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person or to persons in whose welfare he is interested. Or it may be the promise of a benefit to the third person if he will refrain from dealing with the other.⁴⁶

Examples of interference include threats, economic coercion, persuasion based on mutual interests, a more attractive contract, false statements, defamation, physical violence, unfair competition, intimidation, unfair competition, bribery and constitutional violations.⁴⁷ However, Virginia law does not require that the conduct constituting interference rise to the level of an independent tort.⁴⁸

Causation

As with any other tort, a plaintiff must prove proximate causation in order to recover for a claim for tortious interference.⁴⁹ Virginia law defines "proximate cause" as "that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred."⁵⁰ The Supreme Court of Virginia has clarified that "[b]efore the issue of proximate cause may be properly submitted to the jury, however, the evidence proving a causal connection must be 'sufficient to take the question out of the realm of mere conjecture, or

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speculation, and into the realm of legitimate inference."⁵¹ Significantly, the improper conduct must have been intended to cause the interference with the plaintiff's contract expectancy.⁵²

Improper Means or Methods

When dealing with an "at will" or expectancy case, the Supreme Court of Virginia requires a plaintiff also to prove the additional element that the interference occurred through "improper means or methods."⁵³ Indeed, intentional interference claims commonly hinge on the question of whether the defendant used "improper means or methods" while interfering with the contract or expectancy at issue.

"Improper Means or Methods" Discussed in the Restatement (Second) of Torts

The *Restatement (Second) of Torts* sets forth a helpful list of certain factors to consider in determining whether the conduct of a defendant who interferes with a contract or prospective contractual relation is "improper." These factors include: "(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."⁵⁴

What Are and Are Not "Improper Means or Methods" Under Virginia Law

In describing generally what does and does not constitute "improper means or methods," the Supreme Court of Virginia has stated that:

While we have identified actions as improper which were also independently tortious or illegal,

. . . we have also identified actions as improper which are not themselves tortious or illegal, such as unfair competition or unethical conduct. . . . Nor does the name given the cause of action impart a requirement of independently tortious acts. 'Tortious interference' means only that the interference was intentional and improper under the circumstances, not that the 'improper methods' used were inherently illegal or tortious.⁵⁵

Given this broad standard, Virginia courts have identified a number of examples of what conduct may or may not constitute "improper means or methods."

Defamation

Evidence of defamation that might not rise to the level of an actionable tort is sufficient to create a jury issue with respect to improper methods.⁵⁶ Similarly, specific allegations of defamatory statements are sufficient to withstand a demurrer.⁵⁷ Improper methods, however, do not include stating true facts regarding a competitor or competing markets to customers.⁵⁸

Misuse of Inside or Confidential Information

Improper methods may include misappropriation of client information or trade secrets.⁵⁹ However, where there is no non-compete or confidentiality covenant between a company and its former employees, the Court has held that former employees are not using improper methods when they compile from memory a list of the company's clients and solicit their business.⁶⁰

Violations of Established Standard of a Trade or Profession

Improper methods also may be established by a showing that the defendant's actions "violate an established standard of a trade or profession."⁶¹ The investigation and review of a debtor's credit and loan

information by a purchaser of credit is a "lawful acquisition of information necessary for sound business decisions" and not considered a tortious act.⁶²

Unethical Conduct

The Supreme Court of Virginia has stated that methods may also be improper because they involve "unethical conduct," although the Court has not provided detailed guidance as to what types of unethical conduct will rise to the level of being deemed "improper" in this context.⁶³

Litigation Initiated for the Wrong Reasons

Evidence of conduct otherwise permitted by statute – such as the initiation of litigation – may still be considered improper for purposes of a tortious interference claim.⁶⁴ However, when a defendant acts in accordance with published court decisions and engages in conduct that is encouraged by federal law, such actions cannot establish the basis for improper methods of interference.⁶⁵

Other Examples of "Improper Methods or Means"

In *Duggin v. Adams*,⁶⁶ the Supreme Court of Virginia delineated numerous other examples of conduct by a defendant that may constitute improper methods, including:

- Means that are illegal or independently tortious, such as violations of statutes, regulations or recognized common law rules;⁶⁷
 - Violence, threats or intimidation;
 - Bribery;
 - Unfounded litigation;
 - Fraud,⁶⁸ misrepresentation⁶⁹ or deceit;
 - Duress or undue influence;
 - Breach of a fiduciary relationship;⁷⁰
 - Sharp dealing and overreaching;
- and
- Unfair competition.⁷¹

Examples of Methods or Means That Are Not "Improper"

Virginia courts also have determined that some methods or means are not "improper" as a matter of law, and thereby fail to satisfy this element, including:

- Interference occurring after termination of the contract;⁷²
- Utilizing one's memory to compile a list of the names of the plaintiff's customers and soliciting business

from those customers;⁷³ and

- Exercise of a lawful right such as a bank's foreclosure on its UCC lien on a debtor's property after the debtor had arranged a sale to a third party⁷⁴ or termination of agreement as provided for by its plain terms.⁷⁵

Resultant Damage to the Plaintiff

Compensatory Damages

As with any other claim, the plaintiff must prove that it sustained damages from the alleged interference.⁷⁶ Since tortious interference is an economic tort, a plaintiff potentially may recover monetary damages in the form of: (1) the plaintiff's direct expenses;⁷⁷ (2) lost profits;⁷⁸ (3) damages for partially completed projects; (4) contracts that had been awarded but no work performed; (5) future contracts that had been promised but not awarded; (6) permanent destruction of the business relationship; and (7) damage to the plaintiff's business reputation.⁷⁹ While a plaintiff must provide sufficient facts and circumstances concerning his damages, a plaintiff need not prove his compensatory damages to an exact amount.⁸⁰ However, a plaintiff must demonstrate with reasonable certainty that the defendant was the proximate cause of each claimed damage.⁸¹

Punitive Damages

As with other torts, punitive damages are an available remedy provided the plaintiff can prove that the defendant willfully interfered with or destroyed the business relationship.⁸² However, the defendant's conduct must be particularly "egregious."⁸³ The plaintiff must show that the defendant acted with actual malice or such recklessness or negligence to evince a conscious disregard of the rights of others.⁸⁴ The standard to recover punitive damages is a high one, and plaintiffs should not assume that a court will view defendant's actions as being sufficiently egregious to justify an award of punitive damages merely because they were intentional.⁸⁵

Defenses to Tortious Interference Claims

In acknowledgment of the tension between the protection of contractual relations or business expectancies with the defendant's freedom of fair and lawful competition, the Supreme

Court of Virginia has recognized justification or privilege as an affirmative defense to tortious interference claims.⁸⁶ In *Chaves v. Johnson*, the Court provided five grounds for this affirmative defense:

- Legitimate business competition;
- Financial interest;
- Responsibility for the welfare of another;
- Directing business policy; and
- The giving or requested advice.⁸⁷

Generally, however, the Supreme Court of Virginia has not provided its own extensive, independent analysis of the type of conduct that would qualify as "justified" or "privileged" activity in the context of this affirmative defense, instead citing generally to the discussion of this defense set forth in the *Restatement*. As with any affirmative defense, the burden of proof rests on the defendant to prove that its interference was justified or privileged under the circumstances.⁸⁸

Conclusion

Ordinarily, disputes involving commercial transactions do not give rise to any type of tort claim under Virginia law. However, Virginia courts have demonstrated a willingness to protect the sanctity of contracts, in part, through the doctrine of tortious interference with contracts. This willingness does not mean that a Virginia court will allow every commercial dispute between business competitors to be turned into a business tort. Thus, Virginia courts afford existing contracts that are not terminable at will a greater degree of protection than terminable at will contracts or prospective contractual relationships that are only tentative. Further, the Supreme Court of Virginia in *Duggin* and *Maximus* made clear that, where the claim involves interference with a contract that is terminable at will, or a future business expectancy, the plaintiff must demonstrate that the defendant used "improper means or methods." This element may be the most difficult for a plaintiff to establish, and Virginia case law has demonstrated that cases involving a terminable at will contract or interference with a prospective contractual relationship will survive or fail based upon whether the defendant used "improper methods"

to interfere. Since what conduct actually constitutes "improper means or methods" is fact driven and constantly evolving, lawyers can expect to see many more cases reach the Supreme Court of Virginia on precisely this issue. **VBA**

NOTES

1. See W. Page Keeton, *Prosser & Keaton On The Law Of Torts* § 129, at 970-80 (5th ed. 1984) (observing that the status or relation in which the parties stood toward one another and with which the defendant interfered was the focus, rather than the existence of a contract, as the theory was that the head of the household's wife, children, slaves or other members of his establishment were so associated with him as to constitute a wrong against the head of the household) (hereinafter, "Prosser").

2. *Restatement (Second) of Torts* § 766, at 8-9 (1979).

3. 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853); see generally *Tortious Interference With Contractual Relations In The Nineteenth Century: The Transformation of Property, Contract, And Tort*, 93 Harv. L. Rev. 1510 (1980).

4. *Restatement (Second) of Torts* § 766 at 9; *Prosser* § 129, at 980-81.

5. *Prosser* § 129, at 980-81.

6. 198 Va. 533, 536, 95 S.E.2d 192, 196 (1956) (holding that "under these allegations, the wrong done and damage done are directed to the estate or property of the plaintiffs and not to them personally") (citations omitted).

7. See *Watson v. Lee Bank & Trust Co.*, 22 Va. Cir. 495, 505 (County of Lee May 7, 1982) (noting that "Virginia does not appear to have developed a well-defined body of law for tortious interference with contractual or business relations, the most analogous cases being conspiracy to induce breach of contract or misrepresentations or fraud or deceit or libel or slander which results in breaches of contract or tend to injure others in their trade or business.") (citing *Worrie and M. Rosenberg & Sons v. Craft*, 182 Va. 512, 29 S.E.2d 375 (1944)).

8. *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985); see also *Instruction 40.150, II Va. Model Jury Instructions* (setting forth the elements a verdict must be based upon to recover for tortious interference with a contract that is not terminable at will).

9. *Prosser* § 129, at 982.

10. *Chaves*, 230 Va. at 121, 335 S.E.2d at 102-03; see also *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co.*, 254 Va. 408, 414, 493 S.E.2d 375, 378 (1997) (holding that plaintiff was not required to prove malice or other egregious conduct in order to prove its tortious interference claim); *Simbeck, Inc. v. Dodd-Sisk Whitlock Corp.*, 44 Va. Cir. 54, 65 (City of Winchester 1997) (stating that "proof of actual malice or ill will is not necessary in order to recover for tortious interference with an existing contract that is not terminable at will"), *aff'd*, 257 Va. 53, 508 S.E.2d 601 (1999); *Prosser* § 129, at 982-89 (discussing intent requirement).

11. *Duggin v. Adams*, 234 Va. 221, 227-28, 360 S.E.2d 832, 836 (1987);

12. *Id.* at 226, 360 S.E.2d at 836 (citing *Hechler Chevrolet v. Gen. Motors Corp.*, 230 Va. 396, 402, 337 S.E.2d 744, 748 (1985)); accord *Rappahannock Pistol & Rifle Club, Inc. v. Bennett*, 262 Va. 5, 546 S.E.2d 440 (2001); see also *George K. Degnon Assocs. v. Acad. for Eating Disorders*, Law No. 227768, 2005 Va. Cir. LEXIS 202 (County of Fairfax Circuit Ct. Nov. 29, 2005) (holding that three year contract was not terminable at will because defendant did not give notice to terminate the contract as

required by its terms); *Prof'l Heating & Cooling, Inc. v. Smith*, 64 Va. Cir. 313 (City of Norfolk 2004) (ruling that plaintiff had to demonstrate improper methods because preventive maintenance contracts were terminable at will); *Instruction 40.150, II Va. Model Jury Instructions* (setting forth the elements a verdict must be based upon to recover for tortious interference with a contract terminable at will).

13. *Duggin*, 234 Va. at 226, 360 S.E.2d at 836 (citing *Truax v. Raich*, 239 U.S. 33, 38 (1915)).

14. *Duggin*, 234 Va. at 226-27, 360 S.E.2d at 836; see also *Maximus*, 254 Va. at 414, 493 S.E.2d at 378 (noting that "not all business relationships are entitled to the same level of protection and . . . that a contract not terminable at will was entitled to more protection than a contract terminable at will") (citing *Duggin*).

15. *Maximus*, 254 Va. at 414, 493 S.E.2d at 378; accord *Williams v. Dominion Tech. Partners, L.L.C.*, 265 Va. 280, 289-90, 576 S.E.2d 752, 757 (2003) (quoting *Glass v. Glass*, 228 Va. 39, 51-52, 321 S.E.2d 69, 76-77 (1984)).

16. See *Masco Contractor Servs. E., Inc. v. Beals*, 279 F. Supp. 2d 699, 710 (E.D. Va. 2003) (dismissing tortious interference counterclaim in ruling that "[t]he counterclaim makes absolutely no mention of any particular contract" or existing business relationship); accord *Commerce Funding Corp. v. Worldwide Sec. Servs. Corp.*, 249 F.3d 204, 213 (4th Cir. 2001); see also *Cranor v. Homebuyers Inspections, Inc.*, 69 Va. Cir. 10, 11 (City of Richmond 2005) (ruling that plaintiff sufficiently alleged the elements of a tortious interference claim).

17. *SunSport, Inc. v. Barclay Ltd.*, 984 F. Supp. 418, 423 (E.D. Va. 1997).

18. *Marina Shores, Ltd. v. Cohn-Phillips, Ltd.*, 246 Va. 222, 226, 435 S.E.2d 136, 138 (1993) (citing *Winn v. Aleda Constr. Co.*, 227 Va. 304, 307, 315 S.E.2d 193, 194 (1984)).

19. *Marina Shores, Ltd.*, 246 Va. at 226, 435 S.E.2d at 138 (citation omitted).

20. *Id.*

21. *Fox v. Deese*, 234 Va. 412, 427, 362 S.E.2d 699, 708 (1987); see also *Hatten v. Campbell*, No. CLO6-259, 2006 Va. Cir. LEXIS 118, at *10 (County of Chesterfield Circuit Ct. June 5, 2006) (holding that "a person cannot intentionally interfere with his own contract"); *Britt Constr., Inc. v. Magazine Clean, L.L.C.*, 69 Va. Cir. 478, 480 (County of Loudoun 2006) (holding that the general contractor's allegations sufficiently stated an action for tortious interference despite the architect's agency relationship with the owner based upon the contractually expressed limitation upon the nature of the architect company's relationship with the owner).

22. *Smith v. Logan*, 363 F. Supp. 2d 804, 813 (E.D. Va. 2004).

23. *Power Distrib. v. Emergency Power Eng'g*, 569 F. Supp. 54, 56 (E.D. Va. 1983).

24. *Ortiz v. Flattery*, 63 Va. Cir. 309, 312 (County of Fairfax 2003).

25. *SunSport, Inc.*, 984 F. Supp. at 423.

26. *Marketplace Holdings, Inc. v. Camellia Food Stores, Inc.*, At Law No. L03-2601 (City of Norfolk Circuit Ct. Feb. 27, 2004).

27. See James D. Pearson, Annot., *Liability for Interference with Invalid or Unenforceable Contract*, 96 A.L.R.3d 1294 (1979) (discussing examples in a wide variety of states throughout the United States); see also *Restatement (Second) of Torts* § 766 comment f (stating that a third party is not free to interfere with the performance of a contract even if the third party may have a technical defense to avoid liability, such as "the statute of frauds, formal defects, lack of mutuality, infancy, unconscionable provisions, conditions precedent to the obligation or even uncertainty of particular terms").

28. See *Am. Tel. & Tel. Co. v. E. Pay Phones, Inc.*,

767 F. Supp. 1335, 1340 (E.D. Va. 1991) (citing *Glass v. Glass*); *Levine v. McLesky*, 881 F. Supp. 1030, 1057 (E.D. Va. 1995) (concluding that "the expectancy of remaining in business is too general to support a tortious interference claim"), *aff'd in part, rev'd in part*, 164 F.3d 210 (4th Cir. 1998).

29. *Commercial Bus. Sys., Inc. v. Halifax Corp.*, 253 Va. 292, 301, 484 S.E.2d 892, 897 (1997) (ruling that "mere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate to sustain the cause of action").

30. See *RFE Indus., Inc. v. SPM Corp.*, 105 F.3d 923, 927 (4th Cir. 1997) (concluding that plaintiff's selling products on an as-needed basis to its customers with no firm commitment for future purchases only provided plaintiff with an expectation that it "would retain its customers only so long as it met their demand for a quality product at a competitive price"); *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385, 391 (E.D. Va. 2002) (holding that "[b]ecause plaintiffs do not identify the specific business relationships with which defendant has interfered, plaintiffs' tortious interference claim fails"); see also *Levine*, 881 F. Supp. at 1057-58 (finding insufficient plaintiff's contention that its members expects to renew their memberships was specific enough); *McDonald's Corp. v. Turner-James*, No. 05-804, 2005 U.S. Dist. LEXIS 42755, at *13 (E.D. Va. Nov. 29, 2005) (ruling that "merely identifying the parties with whom Defendants had discussions in 'several telephone calls' about 'various aspect of the restaurant and its operations' . . . would still fall far short of what they must allege to proceed with their claims"); *Williams*, 265 Va. at 292, 576 S.E.2d at 758 (quoting *Commercial Bus. Sys., Inc.*, 253 Va. at 303, 484 S.E.2d at 898).

31. *Moore v. United Int'l Investigative Servs., Inc.*, 209 F. Supp. 2d 611, 619-20 (E.D. Va. 2002).

32. *Charleston Area Med. Ctr., Inc. v. Blue Cross & Blue Shield Mut. of Ohio, Inc.*, 6 F.3d 243, 247 (4th Cir. 1993); *Levine*, 881 F. Supp. at 1058.

33. *Prosser* § 130, at 1006.

34. *Levine*, 881 F. Supp. at 1058; *Am. Tel. & Tel. Co.*, 767 F. Supp. at 1340.

35. *Morris v. Massingill*, 64 Va. Cir. 202, 203 (City of Norfolk 2004).

36. *French v. Garraghty*, Case No. CH05-1285, 2006 Va. Cir. LEXIS 125, at *3 (City of Richmond Circuit Ct. June 1, 2006).

37. *McDonalds Corp. v. Turner-James*, No. 05-804, 2005 U.S. Dist. LEXIS 42755, at **12-14.

38. *Williams*, 265 Va. 292, 576 S.E.2d at 758; see also *Simbeck*, 44 Va. Cir. at 62 (observing that "the business expectancy of a renewal insurance policy was on the outer reaches of the concept of a cognizable business expectancy").

39. *Glass*, 228 Va. at 51-52, 321 S.E.2d at 77.

40. *Meadow Ltd. P'ship v. Heritage Sav. & Loan Ass'n.*, 639 F. Supp. 643, 651 (E.D. Va. 1986).

41. *Simbeck, Inc.*, 44 Va. Cir. at 62 (citing *Restatement (Second) of Torts* § 766, comment i).

42. *Restatement (Second) of Torts* § 766 comment i.

43. See John L. Costello, *Virginia Remedies* § 17A.02[5][a], at 17A-20 (3d ed. 2005) (noting that no independent tort exists in Virginia for the negligent interference with contract).

44. *Duggin*, 234 Va. at 226, 360 S.E.2d at 835.

45. *Nida v. Bus. Advisory Sys., Inc.*, 44 Va. Cir. 487, 501 (City of Winchester 1998) (holding that "the fact that defendant's activity has injured plaintiff's business does not mean that plaintiff necessarily is entitled to a remedy" as "[a]n injury may be of the kind which, in a relatively free economy, a citizen is obliged to suffer, an injury resulting from lawful competition of which he cannot complain.").

46. *Restatement (Second) of Torts* § 766, comment k.

47. *Prosser* § 129, at 90-94 (citations omitted).
48. See *Maximus*, 254 Va. at 414-15 n.7, 493 S.E.2d at 378-79; accord *Prosser* § 129, at 993; see also *Virginia Remedies* § 17A.02[5], at 17A-20 (stating that "[t]he methods of interference need not be tortious themselves").
49. *Chaves*, 230 Va. at 120, 335 S.E.2d at 102.
50. *Beale v. Jones*, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970); Instruction 5.000, 1 Va. Model Jury Instructions.
51. *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 369, 585 S.E.2d 578, 582 (2003) (quoting *Beale*, 210 Va. at 522, 171 S.E.2d at 853 and *Hawkins v. Beecham*, 168 Va. 553, 561, 191 S.E. 640, 643 (1937)).
52. *Magnuson v. Peak Tech. Servs., Inc.*, 808 F. Supp. 500, 516-17 (E.D. Va. 1992); see also *Restatement (Second) of Torts* § 766, comment h (stating that "[t]he essential thing is the intent to cause the result. If the actor does not have this intent, his conduct does not subject him to liability under this rule even if it has the unintended effect of deterring the third person from dealing with the other.>").
53. *Duggin*, 234 Va. at 227-28, 360 S.E.2d at 836.
54. *Restatement (Second) of Torts* § 767, at 26-39; see also *Belena v. Air Line Pilots' Assn.*, 31 Va. Cir. 413, 415-16 (County of Fairfax Sept. 1, 1993) (citing *Restatement (Second) of Torts* § 167).
55. *Maximus, Inc.*, 254 Va. at 414, 493 S.E.2d at 378 (citing *Duggin*, 234 Va. at 227-28, 360 S.E.2d at 836-37) (footnote omitted).
56. *Stamathis v. Flying J., Inc.*, No. 7:01cv00838, 2002 U.S. Dist. LEXIS 12398 (W.D. Va. July 9, 2002); see also *Douty v. Irwin Mortgage Corp.*, 70 F. Supp. 2d 626, 634 (E.D. Va. 1999) (holding that plaintiff's allegations, while extremely vague, were sufficient to satisfy the "improper means" requirement).
57. *Eslami v. Global One Commc'ns, Inc.*, 48 Va. Cir. 17, 24 (County of Fairfax 1999).
58. See *Hechler Chevrolet*, 230 Va. at 402, 337 S.E.2d at 748 ("If a competitor is in fact about to cease marketing a competing product, it is not unlawful to state that fact truthfully to customers"); see also *Bridge Tech. Corp. v. Kenjya Group, Inc.*, 65 Va. Cir. 23, 28 (County of Fairfax 2004) (holding that contractor's alleged defamatory remarks to the N.S.A. could not be the basis of a civil conspiracy claim because they are privileged).
59. See *McGladrey & Pullen, L.L.P. v. Shrader*, 62 Va. Cir. 401, 412 (County of Rockingham 2003) (given the confidentiality and non-solicitation agreement signed by defendant, his employer "had a reasonable expectancy" that defendant would not "purloin[] confidential client information . . . and use[] it . . . to solicit [the employer's] clients"); *Int'l Paper Co. v. Gilliam*, 63 Va. Cir. 485, 492 (City of Roanoke 2003) (involving an alleged violation of a confidentiality agreement and misappropriation of a trade secret); *Stone Castle Fin. v. Friedman, Billings, Ramsey & Co.*, 191 F. Supp. 2d 652, 660 (E.D. Va. 2002) (alleged breach of confidentiality agreement).
60. See *Check 'n Go of Va. Inc. v. Laserre*, No. 6:04-CV-00050, 2005 U.S. Dist. LEXIS 16591 (W.D. Va. Aug. 9, 2005) (plaintiff was able to prove a misappropriation of trade secrets by a former employee who took plaintiff's policy and procedure manual for development of a similar manual for a competitor); *Peace v. Conway*, 246 Va. 278, 282, 435 S.E.2d 133, 135 (1993) (ruling that plaintiff had to demonstrate defendant used improper methods to interfere with a terminable
- at will sales contract and plaintiff was entitled to use general information, including customer names to begin a new business so long as information was not acquired in violation of their duties as agents); *Deepwood Veterinary Clinic, Inc. v. Sabo*, 45 Va. Cir. 508, 509 (County of Fairfax 1998) (holding that solicitation of customers through use of list compiled by memory was not actionable absent a covenant not compete or improper methods).
61. *Duggin*, 234 Va. at 228, 360 S.E.2d at 837; see *Simbeck*, 257 Va. at 57, 508 S.E.2d at 603 (holding that defendant's attempt to recoup money owed by plaintiff by refusing to release an insurance quote unless plaintiff executed a note was a deviation of established custom and practice in the trucking insurance industry and "totally improper").
62. *Peterson v. Cooley*, 142 F.3d 181, 187 (4th Cir. 1998).
63. *Duggin*, 234 Va. at 228, 360 S.E.2d at 836; *Wuchenich v. Shenandoah Mem'l Hosp.*, No. 99-1273, 2000 U.S. App. LEXIS 11557 (4th Cir. May 22, 2000) (suspending plaintiff's medical staff privileges without just cause and reporting two of plaintiff's cases to peer review without just cause constitute unethical conduct and improper methods); *Commerce Funding Corp. v. Worldwide Sec. Servs.*, 249 F.3d 204, 214 (4th Cir. 2001) (holding that the conduct of a party who, based on good faith belief, asserted claims to funds in an interpleader action in which it had no legal interest was not considered unethical or on the level of improper conduct).
64. See *Maximus*, 254 Va. at 414-15, 493 S.E.2d at 378-79 (evidence that defendant filed a protest to a government agency's Notice of Intent to Award a contract to the plaintiff in which defendant alleged that two members of the agency's proposal evaluation panel had undisclosed conflicts of interest — allegations which caused the agency to withdraw the NIA for fear of a delay in proceedings and public criticism, and which proved to be false — was sufficient to present a prima facie case that defendant's actions were improper, despite the fact that defendant had a statutory right to file a protest).
65. See *Am. Online v. GreatDeals.net*, 49 F. Supp. 2d 851, 863-64 (E.D. Va. 1999) (holding that AOL had a right to prevent trespass to chattels by blocking plaintiff's transmission of unsolicited bulk e-mail, which is encouraged by federal law, to its subscribers).
66. *Duggin*, 234 Va. at 227, 360 S.E.2d at 835 (citations omitted).
67. See *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 31 Va. Cir. 551, 552-53 (City of Charlottesville 1992) (plaintiff claimed that Adelphia's violation of statute was improper methods).
68. See *Williams v. Omana*, 18 Va. Cir. 165, 167 (County of Fairfax 1989) (holding that a fraudulent conveyance is an improper method). While fraud may serve as an "improper method," the Supreme Court of Virginia has refused to address fraud within the context of a Pastor's tortious interference claim against officials of his church for termination of his employment. See *Cha v. Korean Presbyterian Church of Washington*, 262 Va. 604, 613-14, 553 S.E.2d 511, 515-16 (2001). The Court reasoned that "the court could not adjudicate such claim without considering issues regarding the church's governance, faith and doctrine." *Id.* at 613 n.1, 553 S.E.2d at 515.
69. See *Magnuson*, 808 F. Supp. at 516-17 (concluding that false statements regarding work performance constituted improper conduct).
70. See *Hilb, Rogal & Hamilton Co. v. DePew*, 247 Va. 240, 249, 440 S.E.2d 918, 923 (1994) (holding that breach of a fiduciary relationship is evidence of the required improper methods. The court, however found that post-termination activities were not a violation of a fiduciary duty said to have been owed by a former employee to a former employer); *Appleton v. Bondurant & Appleton, P.C.*, 68 Va. Cir. 208 (City of Portsmouth 2005) (holding that breach of a fiduciary duty would be the basis for improper methods, however, the former employees did not commit a breach of their fiduciary duties).
71. *Duggin*, 234 Va. at 227-28, 360 S.E.2d at 836 (citations omitted).
72. *Perk v. Vector Res. Group*, 253 Va. 310, 313, 485 S.E.2d 140, 143 (1997).
73. *Peace*, 246 Va. at 282, 435 Va. at 135.
74. *Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 251 Va. 28, 36, 466 S.E.2d 382, 387 (1996).
75. *R&D 2001, L.L.C. v. Collins*, No. Cl-2005-7021 2006 Va. Cir. LEXIS 131 (County of Fairfax Circuit Ct. July 12, 2006).
76. *Masco Contractor Servs. E.*, 279 F. Supp. 2d at 709.
77. *Simbeck*, 44 Va. Cir. at 63 (citing *Bettius & Sanderson, P.C. v. Nat'l Fire Ins. Co.*, 839 F.2d 1009, 1012 (4th Cir. 1988)).
78. See *Hop-In Food Stores, Inc. v. Serv-N-Save, Inc.*, 247 Va. 187, 190-91, 440 S.E.2d 606, 608 (1994) (holding that a plaintiff may recover lost profits proximately caused by the defendant's wrongful conduct "provided the lost profits are capable of reasonable ascertainment and are not uncertain, speculative, or remote") (citing *United Constr. Workers v. Laburnum Constr. Corp.*, 194 Va. 872, 887, 75 S.E.2d 694, 704 (1953), *aff'd*, 347 U.S. 656 (1954); see also *Boggs v. Duncan*, 202 Va. 877, 883, 121 S.E.2d 359, 363 (1961) (requiring a plaintiff to provide sufficient evidence to estimate lost profits with reasonable certainty); Va. Code Ann. § 8.01-221.1 (allowing new or unestablished businesses to recover lost profits upon proper proof).
79. *United Constr. Workers*, 194 Va. at 887-93, 75 S.E.2d at 704-08.
80. *Murray v. Hadid*, 238 Va. 722, 731, 385 S.E.2d 898, 904 (1989); see also *Worrie*, 198 Va. at 542, 95 S.E.2d at 200 (stating that a plaintiff does not to prove the quantum of its damages with absolute certainty).
81. See *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1361 (Fed. Cir. 2005) (finding that plaintiff "MicroStrategy did not account for other potential causes for its loss of business and [defendant] Business Objects' gain in business over the same period").
82. *United Constr. Workers*, 194 Va. at 894, 75 S.E.2d at 708.
83. *Ross v. Sigley*, No. 96-00129-H, 1998 U.S. Dist. LEXIS 3300, at *4 (E.D. Va. Jan. 30, 1998).
84. *Puent v. Dickens*, 245 Va. 217, 219, 427 S.E.2d 340, 342 (1993).
85. See *Simbeck*, 44 Va. Cir. at 65 (nothing the "lesser scienter requirement for proof of the tort is not to be confused with the concepts of 'malice' and 'wanton' conduct which are the underlying justification for an award of punitive damages").
86. *Chaves*, 230 Va. at 121, 335 S.E.2d at 103.
87. *Id.* (citing *Restatement (Second) of Torts* §§ 768-72 and *Calbom v. Knudtson*, 396 P.2d 148, 151 (Wash. 1964)).
88. *Commerce Funding Corp.*, 249 F.3d at 210 (citing *Chaves*, 230 Va. at 121, 335 S.E.2d at 103)).