

**INTENTIONAL INTERFERENCE WITH EXISTING CONTRACTS  
NOT TERMINABLE AT-WILL**

1. "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."

i. *Restatement Second of Torts* § 766 (1977).

**A. Elements**

1. To prove tortious interference with an at-will contract, claimant must prove the four elements identified in *Chaves v. Johnson*, 230 Va. 112, 120 (1985):

**i. The existence of a valid contractual relationship or business expectancy;**

1. The contract that forms the basis of the claim must be valid.
2. Thus, there is no liability if a defendant interferes with a contract that is unenforceable as against public policy, or if a plaintiff's contract rights are contingent on an event that does not occur.

a. *See America Online, Inc v. GreatDeals.Net*, 49 F. Supp. 2d 851 (E.D. Va. 1999); *Meadow Ltd. P'ship v. Heritage Sav. & Loan Ass'n*, 639 F. Supp. 643 (E.D. Va. 1986).

3. Virginia federal courts have held that it is a fatal to a tortious interference claim for a plaintiff's initial pleadings to fail to identify a specific, existing contract or expectancy that is subject of interference.

a. *Masco Contractor Servs. E., Inc. v. Beals*, 279 F. Supp. 2d 699 (E.D. Va. 2003).

**ii. Knowledge of the relationship or expectancy on the part of the interferer;**

**iii. Intentional interference inducing or causing a breach or termination of the relationship or expectancy; and**

1. The intent requirement may be satisfied when the defendant 1) acts for the primary purpose of interfering with the performance of the contract or 2) knows that interference is certain or substantially certain to result from his or her actions. Malice is not required.

a. *Restatement Second of Torts* § 766 (1977).

2. A plaintiff must show that the defendant induced a nonparty to breach its contract with the plaintiff, and that the contract was actually breached in order to survive demurrer.

a. *Fox v. Deese*, 234 Va. 412 (1987).

**iv. Resultant damage to the party whose relationship or expectancy has been disrupted.**

## **B. Seminal Case**

1. *Chaves v. Johnson*, 230 Va. 112 (1985).
  - i. Chaves won a contract to perform architectural services for the city of Fredericksburg. Johnson, a competing architect, wrote a letter to the city describing Chaves as inexperienced, as well as claiming that Chaves was charging the city excessive fees in connection with the project. Johnson then offered his services to the city and provided a fee schedule and list of qualifications. Three weeks later, the city terminated Chaves's contract, which was terminable only for cause. The city then solicited new bids, and Johnson was awarded the contract.
  - ii. Chaves sued Johnson, seeking damages for Johnson's interference with the Chaves's contract. In finding for Chaves, the Virginia Supreme Court noted that "the right to performance of a contract and the right to reap profits therefrom are property rights which are entitled to protection in courts."

### **TERMINABLE AT-WILL EMPLOYMENT CONTRACTS AND ANALYSIS OF WHAT CONSTITUTES "IMPROPER METHODS" OF INTERFERENCE WITH THOSE PARTICULAR TYPE OF EMPLOYMENT ARRANGEMENTS**

#### **A. Elements**

1. To prove tortious interference with an at-will contract, claimant must prove the four elements identified in *Chaves v. Johnson*, 230 Va. 112, 120 (1985):
2. In addition, the claimant must additionally allege and prove that the defendant interfered through the use of "**improper methods**" for claims involving tortious interference with an at will agreement.
3. A contract terminable at will is essentially only an expectancy of future economic gain and there is no legal assurance that one will realize the expected gain. *Duggin v. Adams*, 234 Va. 221, 226 (1987).

#### **B. Definition of "Improper Methods"**

##### **1. Factors consider in determining whether an actor's methods are improper:**

- i. the nature of the actor's conduct;
- ii. the actor's motive;
- iii. the interests of the other with which the actor's conduct interferes;
- iv. the interests sought to be advanced by the actor;
- v. the social interests in protecting the freedom of action of the actor and the contractual interest of the other;
- vi. the proximity or remoteness of the actor's conduct to the interference; and

- vii. the relations between the parties. **Restatement (Second) of Torts, § 767 (1977).**

## **2. Examples or definitions of improper methods:**

i. “Methods of interference considered improper are those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules . . . Improper methods may include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship . . . Methods also may be improper because they violate an established standard of a trade or profession . . . Sharp dealing, overreaching, or unfair competition may also constitute improper methods.” *Duggin v. Adams*, 234 Va. 221, 228 (1987). In

ii. Improper methods do not have to be independently tortious or inherently illegal. *Maximus, Inc. v. Lockheed Info. Mgm't Sys. Co.*, 254 Va. 408 (1997).

## **3. Not improper methods:**

i. It does not constitute improper means if a defendant acts unwisely in a good faith, but mistaken belief that he/she is protecting his/her own legal interests. *Commerce Funding Corp. v. Worldwide Sec. Services Corp.*, 249 F.3d 204, 214 (4th Cir. 2001).

ii. It does not constitute improper means for former employees to use solely their memories to compile a list of the names of their former employer's customers and solicit business from them, as long as no property or documents were taken from the employer, and the employees did not enter into covenants not to compete. *Peace v. Conway*, 246 Va. 278 (1993).

iii. Actions based on personal spite or ill will or malice are insufficient to constitute an improper method of interference. *Chaves v. Johnson*, 230 Va. 112 (1985).

4. The “requisite improper methods must have occurred prior to the termination of the contract in order to constitute the cause of the termination.” *Perk v. Vector Res. Group, Ltd.*, 253 Va. 310, 315 (1997).

## **C. Cases**

1. ***Preferred Systems Solutions, Inc. v GP Consulting, LLC*, 732 S.E.2d 676 (Va. 2012):** holding that a breach of a noncompete clause is not in itself an improper method or means.

2. *Dunn, McCormack & MacPherson v. Connelly*, 281 Va. 553 (2011): finding that Connelly did not improperly interfere with a terminable at-will contract when he was *solely* motivated by spite, ill will, and malice; “improper interference” is of a limited nature.

3. *Lewis-Gale Medical Center, LLC v. Alldredge*, 282 Va. 141 (2011): finding that the “inherent intimidation or duress experienced as a result of the very nature of an at-will contract” does not rise to the level of improper methods necessary to establish a cause of action for tortious interference.

4. *Maximus v. Lockheed Info. Mgmt. Sys. Co.*, 254 Va. 408 (1997): finding that Lockheed acted with improper methods by asserting false conflicts of interests in a bid protest, and affirming the award of damages to Maximum for intentional interference with a business expectancy.

5. *Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22 (1993): affirming the cause of action for conspiring to breach one’s own contract; Virginia is the only jurisdiction in the country that allows this action.

## INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS OR ECONOMIC ADVANTAGE

### A. Elements

1. The existence of a business relationship or expectancy with a probability of future economic benefit to the plaintiff;
2. The defendant’s knowledge of the relationship or expectancy;
3. A reasonable certainty that, absent the defendant’s intentional misconduct, the plaintiff would have continued in the relationship or realized the expectancy;
4. Intentional interference inducing or causing the breach or termination of the relationship or expectancy;
5. Interference by improper methods; and
6. Damages from the interference.

a. Note: Recently, a Virginia federal district court held that under Virginia law, there are two additional elements: 1) “a competitive relationship between the party interfered with and the interfere” and 2) “contact by the defendant with the source of the plaintiff’s business expectancy, direct or indirect.”

i. *17th Street Assocs., LLP v. Markel Int’l Ins. Co.*, 373 F. Supp. 2d 584 (E.D. Va. 2005).

## **B. Alleging and Proving Expectancy**

1. A plaintiff must allege in his or her pleadings a specific, existing economic interest; a failure to do so is fatal to an intentional interference with prospective business or economic advantage claim.
  - a. For example, “[t]he expectancy of remaining in business is too general to support a tortious interference claim. Instead, there must be a particular expectancy which [the claimant] is reasonably certain will be realized.”
    - i. *Levine v. McLeskey*, 881 F. Supp. 1030 (E.D. Va. 1995).
2. The expectancy must meet an objective test; a plaintiff’s subject expectations will not suffice. There must be more than a plaintiff’s subjective belief or hope that a business relationship will continue.
  - a. *Commercial Bus. Sys., Inc. v. Halifax Corp.*, 253 Va. 292 (1997).
3. Finally, there must be a “probability” of future economic benefit to the plaintiff, meaning more than a possibility. “The evidence of expectancy must establish expectancy by and between two parties at least, based upon something that is a concrete move in that direction.”
  - a. *Moore v. United Int’l Investigative Servs.*, 209 F. Supp. 3d 611 (E.D. Va. 2002).

## **DEFENSES TO A TORTIOUS INFERENCE CLAIM**

### **A. In General**

1. Defendants to a claim of tortious interference may raise an affirmative defense of justification or privilege. Grounds for such a defense are: legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice. *Chaves v. Johnson*, 230 Va. 112 (1985).

### **B. Affirmative Defense of Justification or Privilege**

1. The justification or privilege is “similar but not identical, to the defense of qualified privilege in the law of defamation. It is based upon the relationships between the parties and the balance to be struck between the social desirability of protecting the business relationship, on one hand, and the interferor’s freedom of action on the other.” *Chaves v. Johnson*, 230 Va. 112, 121 (1985). The specific grounds for the defense are “legitimate business competition, financial interest, responsibility for the welfare of another, directing business policy, and the giving of requested advice.” *Chaves*, 230 Va. At 121-22.
2. The defendant asserting justification or privilege carries the burden of proof to show that the interference was justified or privileged and that it did not use wrongful means. *Chaves*, 230 Va. at 121. The defendant retains the burden even where the plaintiff is required to show interference by improper methods as an element of its case. *Maximus, Inc. v. Lockheed Info. Mgmt. Sys. Co.*, 254 Va. 408, 415 (1997).

### **C. Legitimate Business Competition**

1. The defense is available where the defendant's conduct is justified by legitimate business competition.

i. *Peterson v. Cooley*, 142 F.3d 181 (4th Cir. 1998)

ii. *Charles E. Brauer Co. v. NationsBank of Virginia, N.A.*, 251 Va. 28 (1996)

### **D. Financial Interest**

1. To invoke the financial interest defense, one must act for the purpose of protecting a financial interest that one actually possesses. *Commerce Funding Corp. v. Worldwide Sec. Services Corp.*, 249 F.3d 204, 210-11 (4th Cir. 2001).

### **E. Responsibility for Welfare of Another**

1. Actions by a lawyer advising his client to terminate a contract were justified or privileged because the lawyer was responsible for his client's welfare. *Duggin v. Adams*, 234 Va. 221, 230 (1987) (Whiting, J., dissenting).

### **F. Noerr-Pennington Immunity**

1. "Grounded in the constitutional right to free speech and to petition the government, the Noerr-Pennington doctrine provides that persons petitioning the government cannot be charged with violations of the Sherman Antitrust Act for attempts to influence legislative or executive action . . . The doctrine also applies to adjudicatory proceedings before administrative agencies. The . . . doctrine was developed as a protection for entities petitioning the government in relation to legislative or policy making matters. The doctrine was not intended to shield false, misleading, or otherwise improper conduct by bidders for government contracts, particularly when the governmental body is acting as a private commercial entity." *Lockheed Info. Mgmt. Sys. Co., Inc. v. Maximus, Inc.*, 259 Va. 92, 102 (2000).

2. The "protection of First Amendment rights provided by application of the Noerr-Pennington doctrine should be available to a defendant in causes of action for tortious interference with business expectancy and conspiracy." *Titan American, LLC v. Riverton Investment Corp.*, 264 Va. 292 (2002).

### **G. Statute of Limitations (SOL)**

1. The applicable SOL for tortious interference with contract has not been specifically addressed by the Virginia Supreme Court and has been the subject of disagreement among Virginia's state and federal courts.

i. One view: SOL applicable to a claim of conspiracy to breach of a contract because the right to performance of a contract and the right to reap profits therefrom are property rights, entitled to protection in the courts. *Worrie v. Boze*, 198 Va. 533, 536-37 (1956).

ii. Another view: the tort is personal in nature and requires application of the two-year limitations period under either section 8.01-243(A) (fraud/personal injury) or section 8.01-248 (catch-all) of the Virginia Code.

#### **H. Intracorporate Immunity Doctrine**

1. “It is a well-settled rule of law that person cannot interfere with a contract to which he is a party. Furthermore, if an employee is acting within the scope of his employment, he is acting as an agent of his employer and cannot be labeled as ‘an interferer or third party.’” *Hiers v. Cave Hill Corp.*, 2000 WL 145359, \*4 (Va. Cir. Ct. Jan. 6, 2000) (leaving open the door that if sufficiently plead, the personal stake exception *might* apply).