

Virginia

Regulatory Hot Tip 2016 – 2

Professional Insurance Agents Association of Virginia and DC, Inc.

HAD ENOUGH?

In the rough and tumble world of private enterprise, business owners look for an edge over their competition. Aggressive tactics have built and sustained many successful companies. Those who have been the victims of such tactics have felt somewhat helpless in responding to a loss of market share or personnel.

In recent years, however, there have been significant developments in the law of business torts. Conduct that once was accepted as “hardball” has come under close scrutiny by the courts. Businesses that have sustained injuries are finding numerous ways to recover damages and put an end to the foul play. Today’s agency owners must be aware of the rapidly changing legal environment and govern their behavior accordingly.

It is beyond the scope of this article to provide a detailed analysis of business tort law. Instead, the reader should come away with a general understanding of those business practices that may lead to liability in a courtroom.

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One basis of recovery is *tortious interference with contract*. There are five elements to this offense: (i) the existence of a contract between two parties; (ii) the wrongdoer's awareness of the contract; (iii) the wrongdoer's intentional interference with the contract so as to induce a breach; (iv) an actual breach resulting from the interference; and (v) damages suffered by the non-breaching party. While there is a "fair competition" defense to this tort, many competitive practices are actionable. For example, Wrongdoer Company is aware that its competitor, Innocent Company, has a three-year contract to provide all the insurance coverage needed by XYZ Corporation. Nonetheless, Wrongdoer bribes XYZ to discontinue doing business with Innocent and to begin purchasing coverage from Wrongdoer. If XYZ breaches its contract with Innocent, Wrongdoer is liable to its competitor. This tort is not limited to existing contracts. There is also a cause of action for *tortious interference with business expectancy*. Note, however, that proving tortious interference with business expectancy is more difficult.

Another basis for a lawsuit that provides relief to the victim of improper business conduct is that of *civil conspiracy*. At common law, a conspiracy is a combination of two or more individuals or entities working in concert to accomplish (i) an unlawful or oppressive objective or (ii) a lawful objective through unlawful or oppressive means. Our General Assembly has codified civil conspiracy in Virginia Code Section 18.2-499, which defines the offense as two or more persons combining for the purposes of willfully and maliciously injuring another in his reputation, trade, business or profession by any means. Punitive damages are recoverable for common law conspiracy, and treble (or three-fold) damages plus attorney's fees are recoverable for a statutory conspiracy. The key in each instance is demonstrating that more than one individual or entity was involved in the misconduct. Without special circumstances, two or more individuals working for the same business are not viewed as co-conspirators – there must be an individual or entity outside of the business to form an actionable conspiracy.

Business disparagement is simply another way of describing the tort of *defamation*. This offense consists of a statement of fact (not opinion) that is both false and necessarily injurious by one individual or entity about another individual or entity that is published to a third party where the target of the defamation suffers damages. If Wrongdoer Company falsely advertises that Innocent Company is selling an illegal insurance product and Innocent can prove a resulting diminution in revenues, then it has legal recourse against Wrongdoer predicated on defamation.

Disputes involving businesses and their employees frequently fall in the realm of *breach of fiduciary duty*. An employee owes a duty of loyalty to his employer. If an

insurance agent or other employee misuses his position by, for example, using confidential or proprietary information gained through his employment for either his own benefit or the benefit of a competitor, the agent or employee may be liable for the resulting damages. The competitor who benefits from the misconduct may be liable for aiding and abetting the breach of fiduciary duty. Savvy agency owners will also inquire about the source of a new employee's insights and information before inadvertently misusing such valuable material.

Finally, an agency may be the victim of *actual or constructive fraud*. Actual fraud consists of a misrepresentation of a material fact, knowingly and intentionally made, with the intent to mislead another which is relied upon by the victim to his detriment. Constructive fraud differs only in the sense that the misrepresentation is innocently or negligently made. Proof of fraud requires stronger evidence than in a typical civil case. As with other intentional business torts, both compensatory and punitive damages are recoverable under the appropriate circumstance.

If your agency has suffered as a result of the commission of one or more of these offenses, you're not limited to simply striking back in the marketplace. Seeking legal advice while (i) the evidence is fresh and (ii) the damages can be mitigated could be the best course of action. You are not compelled to pursue a claim, but you should at least be aware of your legal rights and remedies.