VOLUME 29 SUMMER 2024

I L L I N O I S B U S I N E S S L A W J O U R N A L

A COURSE CORRECTION FOR ANALYZING CLAIMS OF TORTIOUS INTERFERENCE WITH AT-WILL CONTRACTS: ABANDONING A LINE OF ILLINOIS DECISIONS FOUNDED ON A MISTAKE

❖ Article ❖

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I. INTRODUCTION

Illinois recognizes two types of torts to remedy an actor's interference with a party's business relationships: tortious interference with contract and tortious interference with prospective economic advantage.[1] Whether interference with an at-will contract is more appropriately remedied under the interference-with-contract tort or the interference-with-prospective-economic-advantage tort is a distinction with a significant difference. Determining which tort applies may be critical to the outcome of a dispute because the two torts provide different levels of protection against a third party's interference.[2] Contractual relationships enjoy greater protection from interference than relationships based on the mere possibility of future economic advantage.[3]

Contracts that are terminable at-will are valid contracts under Illinois law, but, because they can be terminated at any time,[4] a party's ability to rely on or enforce the

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[1] *See* Fellhauer v. City of Geneva, 568 N.E.2d 870, 877–78 (Ill. 1991); *see also* Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862, 865 (7th Cir. 1999) ("[I]nducing the termination of a contract, even when the termination is not a breach because the contract is terminable at will, can still be actionable under the tort law of Illinois, either as an interference with prospective economic advantage, or as an interference with the contract at will itself.") (internal citations omitted).

[2] Belden Corp. v. Internorth, Inc., 413 N.E.2d 98, 102 (Ill. App. Ct. 1980).

[3] *Id.*

[4] *See* Alderman Drugs, Inc. v. Metro. Life Ins. Co., 515 N.E.2d 689, 694 (Ill. App. Ct. 1987) ("Terminable at will contracts, such as most employment agreements, are generally held to permit termination for any reason, good cause or not, or no cause at all.").

future performance of such contracts is limited.[5] That is a characteristic at-will contracts share with relationships in which parties have only unenforceable prospects of future economic advantages.[6] Historically, the enforceability of a contract was not a factor courts considered when deciding whether an interference-with-contract action or an interference-with-prospective-economic advantage action was more appropriate to remedy interference with an at-will contract.[7] Illinois' long established framework for making those determinations called for a case-by-case assessment of whether, at the time of the alleged interference, the parties expected their contractual relationship to continue.[8] To the extent the courts considered a contract's "enforceability," they asked a different question: they asked whether the contract was void at inception or was merely voidable.[9] Notwithstanding that well-established framework, a line of decisions has arisen that assumes an action for tortious interference with contract will not lie unless the parties to the contract are able to enforce the other party's future contractual performance.[10]

In an otherwise reliable discussion of the interference torts, one Illinois Appellate Court misapprehended the phrase "enforceable contract," mistakenly believing it referred to whether one party could enforce its right to future contractual performance against another.[11] Not appreciating the court's error, other state and federal courts applying Illinois law followed it.[12] The error created a branch of authority that conflicts with Illinois' long-established framework for interference claims involving at-will contracts, holding that all such interference claims are actionable only as claims for tortious interference with prospective economic advantage.[13]

This article examines the origins of the interference torts in Illinois, the interests they protect, and the seminal decisions that established Illinois' analytical framework for determining whether the appropriate action to remedy a third party's interference with an at-will contract is a claim for tortious interference with contract or tortious interference with prospective economic advantage. Section II discusses a cause of action under Illinois law for tortious interference with parties' at-will contracts.[14] Section III focuses on the line of decisions that misapprehended the meaning of an "enforceable contract" to find that interference with an at-will contract

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[5] *See, e.g.*, London Guarantee & Accident Co. v. Horn, 69 N.E. 526, 527-28 (Ill. 1903); Fellhauer v. City of Geneva, 546 N.E.2d 791, 800 (Ill. App. Ct. 1989).

[6] *See, e.g.*, Fellhauer, 546 N.E.2d at 800.

[7] *See, e.g.*, London Guarantee & Accident Co., 69 N.E. at 527–28; TAD, Inc. v. Siebert, 380 N.E.2d 963, 967 (Ill. App. Ct. 1978).

[8] *See, e.g.*, London Guarantee & Accident Co., 69 N.E. at 527–28; TAD, Inc., 380 N.E.2d at 967.

[9] *See, e.g.*, Zamouski v. Gerrard, 275 N.E.2d 429, 433 (Ill. App. Ct. 1971).

[10] *See infra* note 110.

[11] Belden Corp., 413 N.E.2d at 102.

[12] *See* Fellhauer v. City of Geneva, 546 N.E.2d at 800.

[13] *See infra* note 110.

[14] *See infra* Section II.

was actionable only as a claim for tortious interference with prospective economic advantage.[15] Section III next explains that when a court considers whether a contract is "enforceable" within the context of the interference torts it is asking whether a contract is void or merely voidable.[16] Finally, Section IV recommends that courts applying Illinois law should acknowledge and correct the erroneous analysis in the ahistorical line of decisions before the conflict between the two lines of decisions spreads further.[17] More specifically, those courts should repudiate the line of decisions that says the interference-with-prospective-economic-advantage tort is the only action available when a third party interferes with a plaintiff's at-will contract, and they should correct the misapprehension of what it means for a contract to be "enforceable" in the context of the interference torts.[18]

II. SETTING A COURSE: ILLINOIS RECOGNIZES A CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH PARTIES' AT-WILL CONTRACTS

A. Illinois Law Holds that Parties have a Right to be Free from Another's Interference with Their Business Relationships.

The Illinois Supreme Court first recognized a cause of action arising from a third party's interference with another's business relationships in *Doremus v. Hennessy*.[19] Mary Hennessy operated a laundry service in Chicago in which she collected her customers' clothing, sent it to laundry plants, and later returned her clients' laundered clothing to them.[20] The Chicago Laundrymen's Association pressured Ms. Hennessy to raise her prices to match those charged by the Association's members.[21] When she refused, the Association "willfully and unlawfully, by intimidation and unlawful inducements, caused parties who were doing her work . . . to refuse to longer do the same, and by threats, intimidation, false representations, and unlawful inducements caused others . . . to refuse to take or do her work,"[22] thereby breaking their contracts with her.[23] The defendants argued they could not be liable "for merely inducing others to break their contracts."[24] According to them, the "parties who broke their contracts were the only ones liable."[25] The Court rejected that argument, finding:

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[15] *See infra* Section III.
[16] *See infra* Section III.
[17] *See infra* Section IV.
[18] *See id.*
[19] Doremus v. Hennessy, 52 N.E. 924 (Ill. 1898).
[20] *Id.* at 925.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

> No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require . . . . Every man has a right, under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong; and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong.[26]

A few years after its holding in *Doremus*, the Illinois Supreme Court in *London Guarantee & Accident Co. v. Horn* considered whether interference with an at-will contract was actionable.[27]

Gustave Horn was the "foreman of the frame department" for the Arnold, Schwinn & Co. bicycle factory.[28] He suffered a work-related injury, and a representative of Schwinn's indemnity carrier, London Guarantee & Accident Co., made several offers to settle Mr. Horn's claim for small amounts of money, which Mr. Horn rejected.[29] At one point after making a new settlement offer, the carrier's representative told Mr. Horn that if he rejected the offer, the representative "would see to it that [Mr. Horn] was not re-employed by [Schwinn], and would also see that [Mr. Horn] did not get work anywhere else."[30] When Mr. Horn rejected that offer, the representative told the factory manager that if Mr. Horn was not fired, the carrier would cancel its coverage. At the manager's direction, Mr. Horn completed his work and then quit.[31]

The Illinois Supreme Court noted that Mr. Horn's employment was not for a set period of time and that Schwinn did not want to terminate Mr. Horn's employment.[32] To the contrary, Schwinn "desired to retain his services as a foreman indefinitely"[33] and only discharged him "because of [London Guarantee & Accident Co.'s] threat to cancel its policy of insurance" if Schwinn did not comply with its demands.[34] The Court recognized that Schwinn could have terminated Horn's employment at any time and for any reason, but it rejected the notion that the at-will nature of Horn's employment meant London Guarantee & Accident Co. could

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[26] *Id.* at 925–26.
[27] London Guarantee & Accident Co., 69 N.E. at 526.
[28] *Id.* at 527.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

interfere with the relationship that Schwinn and Horn desired to continue.[35] "[T]he clear weight of authority," the Court concluded, was that when it comes to a business relationship that has been reduced to a contract "it is immaterial whether [the contract] is for a fixed period, or is one which is terminable by either party at will, [if] both parties [are] willing and desiring to continue the employment under that contract for an indefinite period."[36] In that instance, a third party's unjustified interference with the contract is actionable as a tortious interference.[37]

The interference torts "recognize that a person's business relationships constitute a property interest and as such are entitled to protection from unjustified tampering by another."[38] That protection is not unbounded, as individuals may have a privilege to interfere with business relationships as long as the interference "takes a socially sanctioned form, such as lawful competition."[39] In sum, Illinois law holds that "the tort of interference . . . draws a line beyond which no member of the community may go in intentionally intermeddling with the business affairs of others."[40] The line reflects a balancing of societal values and community ethical standards, and if a member of the community crosses it without "some legitimate interest . . . the ensuing loss should be redressed."[41]

A plaintiff seeking to recover under a claim for tortious interference with a contract must establish: (1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a breach by the other party to the contract, caused by the defendant's wrongful conduct; and (5) damages to the plaintiff as a result of the breach.[42] The facts a plaintiff must prove to recover for another's tortious interference with a prospective economic advantage are similar: (1) the plaintiff must have a reasonable expectation of entering into and/or continuing a valid business relationship; (2) the defendant must have knowledge of the plaintiff's expectancy; (3) the defendant must purposefully interfere in a way that prevents the plaintiff's legitimate expectancy from ripening into a valid

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[35] *Id.*

[36] *Id.* at 531.

[37] *Id.*

[38] Belden Corp., 413 N.E.2d at 101; *see also* Certified Mechanical Contractors, Inc. v. Wight & Co., Inc., 515 N.E.2d 1047, 1051 (Ill. App. Ct. 1987) ("The tort of interference with contractual relations recognizes that a person's business relationships constitute a property interest and, as such, are entitled to protection from unjustified tampering by another."); Hi-Tek Consulting Services, Inc. v. Bar-Nahum, 578 N.E.2d 993, 997 (Ill. App. Ct. 1991); Santucci Const. Co. v. Baxter & Woodman, Inc., 502 N.E.2d 1134, 1139 (Ill. App. Ct. 1986) ("Because the very interest protected by the torts of intentional interference with contractual relations and prospective economic advantage is the reasonable expectation of economic advantage, economic losses are the damages recoverable.").

[39] Belden Corp., 413 N.E.2d at 101.

[40] City of Rock Falls v. Chicago Title & Trust Co., 300 N.E.2d 331, 333 (Ill. App. Ct. 1973).

[41] *Id.*

[42] HPI Health Care Services, Inc. v. Mt. Vernon Hosp., Inc., 545 N.E.2d 672, 676 (Ill. 1989).

business relationship; and (4) the plaintiff must have suffered damages as a result of the defendant's interference.[43]

The distinction between the two torts is most evident in the balances they strike in favor of and/or against a third party's right to interfere.[44] Contractual relations are "sacrosanct" in Illinois and "take[] precedence over the conflicting rights of any presumptive interferor, including his right to compete and his own prospective advantage."[45] Contractual relationships, therefore, are entitled to greater protection from interference than are relationships that give rise to prospective economic advantages.[46] A third party may be privileged to interfere with another's prospective economic advantage but not with another's contract.[47] That difference between the two torts commonly drives disputes about which tort is appropriate to redress interference with an at-will contract.[48]

B. An Action for Tortious Interference with Contract is Appropriate to Remedy Interference with an At-Will Contract that the Parties Desire and Intend to Continue.

Illinois case law confirms that at-will contracts are valid and subsisting contracts up until the point they are terminated, and a third party may not improperly interfere with them.[49] And, as discussed above, the Supreme Court's 1903 decision in *London Guarantee & Accident Co. v. Horn* established that if, at the time of another party's interference, the parties to an at-will contract intended to continue their relationship, the interference is redressable via a claim for tortious interference with contract.[50] The

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[43] Fellhauer, 568 N.E.2d at 878.

[44] *See* Belden Corp., 413 N.E.2d at 101.

[45] *Id.* (citing Prosser, Torts § 129, at 945 (4th ed. 1971)).

[46] *See id.* ("[T]he signal difference between the two torts . . . is the inviolability of the contractual right, and the greater protection given that right."); The Film and Tape Works, Inc. v. Junetwenty Films, Inc., 856 N.E.2d 612, 619 (Ill. App. Ct. 2006) ("When a business relationship affords the parties . . . only the hope of continued benefits, the parties must allow for the rights of others. They therefore have no cause of action against a bona fide competitor unless the circumstances indicate unfair competition, that is, an unprivileged interference with prospective advantage.").

[47] *See id.*

[48] *See id.*

[49] Kemper v. Worcester, 435 N.E.2d 827, 830 (Ill. App. Ct. 1982) ("Although there is some contrary authority, the better view with regard to contracts terminable at will is that they are actionable 'since until it is terminated the contract is a subsisting relation, of value to the plaintiff, and presumably to continue in effect.'") (quoting Prosser, Torts § 129 at 933 (4th Edition 1971); *see also* RESTATEMENT (SECOND) OF TORTS § 766, comment g (discussing a contract that may be terminated at will and explaining, "[u]ntil he has so terminated it, the contract is valid and subsisting, and the defendant may not improperly interfere with it.").

[50] *See* London Guarantee & Accident Co., 69 N.E. at 531 ("We therefore conclude, both upon reason and authority, that where a third party induces an employer to discharge his employe[e] who is working under a contract terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, except for such interference, and where the only motive moving the third party is a desire to injure the employe[e] and to benefit himself at the

decisions discussed in the remainder of this Section illustrate how the framework articulated in *London Guarantee & Accident Co.* has been applied in the years since it was decided.[51]

The plaintiff in *Kemper v. Worcester* was a bank president who alleged that after two months of employment two directors tortiously interfered with his at-will employment contract.[52] The directors moved to dismiss, arguing the contract was not enforceable and, therefore, it did not give rise to a "legitimate expectation of future employment" sufficient to support a claim.[53] The court rejected that argument, noting that an at-will contract, "until it is terminated[,] . . . is a subsisting relation, of value to plaintiff, and presumably to continue in effect."[54] The president therefore had a legitimate expectation of continued employment under his at-will contract.[55] The court concluded the at-will employment contract was a "sufficient relationship or agreement" to support a claim for tortious interference with contract.[56]

The relationship in *TAD, Inc. v. Siebert* was different. The plaintiff was not entitled to relief for the defendants' alleged interference with several of the plaintiff's at-will contracts because there was no mutual expectation at the time of the alleged interference that the parties' relationships would continue.[57] The plaintiff provided contract engineering services to its customers[58] and entered into at-will contracts with the individual engineers it used to provide those services. The engineers often worked for more than one contractor, sometimes simultaneously.[59] According to the plaintiff, the defendants tortiously interfered with its contracts by inducing several engineers to terminate their employment relationships with the plaintiff to work for the defendant.[60] The court explained that actions for interference with contract were appropriate "where there is malicious interference with an employment contract" and further explained that "it is immaterial whether [the contract] is for a fixed period or [is] a contract terminable at will if both parties would have been willing and desirous of continuing the employment under that contract for an indefinite period of time."[61] Because there was no mutual desire or expectation at the time of the alleged interference that the relationships between the plaintiff and the engineers would be

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expense of the employe[e] ... a cause of action arises in favor of the employe[e] and against the third party.").

[51] *See* Kemper, 435 N.E.2d at 830.

[52] *Id.*

[53] *Id.*

[54] *Id.*; *see also* Prosser, Torts § 129 at 995-96 (5th ed. 1984).

[55] Kemper, 435 N.E.2d at 830–31 (citing Prosser, Torts § 129 at 932 (4th ed. 1971)).

[56] *Id.* at 830; *see also* Getschow v. Commonwealth Edison Company, 444 N.E.2d 579, 584 (Ill. App. Ct. 1982), *rev'd in part on other grounds*, 459 N.E.2d 1332 (Ill. 1984).

[57] TAD, Inc., 380 N.E.2d at 967.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* (citing London Guarantee & Accident Co. v. Horn, 69 N.E. 526, 531 (Ill. 1903)).

exclusive or that they would continue indefinitely, the plaintiff could not support a claim for tortious interference with contract.[62]

The plaintiff in *Cashman v. Shinn* was a bank president who, after resigning, accused the director-defendants of interfering with his employment contract.[63] The *Cashman* court acknowledged that under *Kemper* interference with an at-will contract could be actionable as a claim for tortious interference with a contract.[64] But the court also perceived *Kemper* to have concluded that the interference-with-contract action was appropriate in that case because the law presumed the at-will employment contract would have continued absent the defendants' alleged interference.[65] Citing *TAD, Inc.*, the *Cashman* court explained that the presumption was unwarranted in the case before it because the evidence showed that each of the bank's directors (except for the plaintiff) wanted to terminate the plaintiff's employment and would have fired him had he not resigned.[66] Because the bank president was the only party to the at-will employment relationship who wanted his employment to continue, he did not have a reasonable expectation of continued employment under the contract, and his interference-with-contract action failed.[67]

Finally, the contract at issue in *W.P. Iverson and Co. v. Dunham Mfg. Co.* was not terminable at will, but it was terminable on 60 days' notice. [68] That feature led the defendants to argue the plaintiff's tortious interference claim failed because the contract with which they interfered could have been terminated before the interference.[69] The defendants were the owners of Motor Chemical Corporation, the entity with which the plaintiff had a contractual relationship.[70] The defendants interfered with that contract by causing Motor to be dissolved so that Motor's assets could be transferred to another entity the defendants owned and the services the plaintiff provided could be provided by one of the defendants.[71] The defendants argued the plaintiff's tortious interference action failed because Motor had the right to terminate the contract irrespective of the defendants' interference.[72] Citing *London Guarantee & Accident Co.*, the court rejected that argument. It found that "the fact that Motor could on its own option have terminated the contract . . . was not a defense" to the plaintiff's claim that the defendants interfered with the contract.[73] The issue that mattered for purposes of the plaintiff's claim was whether "the defendants have by

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[62] *Id.*
[63] Cashman v. Shinn, 441 N.E.2d 940 (Ill. App. Ct. 1982).
[64] *Id.* at 944.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 944–45.
[68] W.P. Iverson and Co. v. Dunham Mfg. Co., 152 N.E.2d 615 (Ill. App. Ct. 1958).
[69] *Id.* at 619.
[70] *Id.*
[71] *Id.* at 617–18.
[72] *Id.* at 621.
[73] *Id.*

malicious interference caused Motor to do an act which it otherwise would not have done."[74]

Illinois' framework for determining whether a third party's interference with an at-will contract is actionable as a tort for interference with contract is well established.[75] This Article now turns to the decisions that erroneously (and apparently inadvertently) created a line of authorities that conflicts with that longstanding framework.[76]

III. BLOWN OFF COURSE: ONE ILLINOIS COURT MISAPPREHENDED THE MEANING OF AN "ENFORCEABLE CONTRACT" AND CREATED A CONFLICTING LINE OF CASE LAW.

A. The Belden Court's Misapprehension of "Enforceable Contract."

The line of Illinois authorities that says a defendant's interference with an at-will contract is not actionable as a claim for tortious interference with contract because those contracts are not prospectively enforceable began with the decision in *Belden Corp. v. Internorth, Inc.*[77] The dispute in *Belden* did not involve an at-will contract but the court's description of the interference torts, particularly its erroneous understanding of the prima facie "enforceability" element of a claim for tortious interference with contract, has been relied on repeatedly by state and federal courts.[78]

The dispute in *Belden* arose out of a merger agreement between the plaintiff and Crouse-Hinds, Inc.[79] The merger contract required the officers of Crouse-Hinds to present the plaintiff's tender offer to the company's shareholders for approval.[80] The defendant submitted a competing tender offer, which the plaintiff complained interfered with its contract and/or prospective economic advantage.[81]

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[74] *Id.*

[75] *See supra* Section II.

[76] *See supra* Section III.

[77] Belden Corp., 413 N.E.2d at 98. The plaintiff also asserted a claim for tortious interference with prospective economic advantage. *Id.* at 100.

[78] *See* Delphi Industries, Inc. v. Stroh Brewery Co., 945 F.2d 215, 220 (7th Cir. 1991); Bommiasamy v. Conway, 2020 IL App (1st) 190339-U, ¶ 37; Atanus v. American Airlines, Inc., 932 N.E.2d 1044, 1048 (Ill. App. Ct. 2010); Canel and Hale, Ltd. v. Tobin, 710 N.E.2d 861, 871 (Ill. App. Ct. 1999); Larry Karchmar, Ltd. v. Nevoral, 707 N.E.2d 223, 228 (Ill. App. Ct. 1999).

[79] Belden Corp., 413 N.E.2d at 99–100.

[80] *Id.*

[81] *Id.* The disposition in *Belden* is not relevant to the issues discussed in this article. Nevertheless, the court held that the defendant did not interfere with the performance of the plaintiff's contract; *i.e.*, to present the plaintiff's offer to the company's shareholders. Rather, the defendant interfered with the shareholder's *potential acceptance* of the plaintiff's offer. The plaintiff's interest in the shareholder's potential acceptance of its offer, the court explained, was a mere expectancy (*i.e.*, a prospective economic advantage) with which the defendant, a competitor, was privileged to interfere. The court vacated the

The court began its analysis by reciting the prima facie elements of both interference torts. Citing *Zamouski v. Gerrard,* the court observed that the first element of an interference-with-contract tort was that there be "a valid and enforceable contract between the plaintiff and another."[82] The holding and reasoning of *Zamouski* are discussed in detail below but, in sum, the "enforceability" issue *Zamouski* examined was whether a contract was void at inception or merely voidable.[83] The *Belden* court overlooked that critical context and, as a result, mischaracterized the enforceability element.[84] In attempting to identify the distinctions between the two torts, the court suggested that the "enforceable" element of the interference-with-contract tort meant no action would lie unless the parties to the contract could enforce the expected future performance of the other party.[85] It observed, for instance, that "[w]hen a business relationship affords the parties no enforceable expectations, but only the hope of continued benefits, the parties must allow for the rights of [competitors]."[86] And in a footnote, the court cited Section 768 of the RESTATEMENT (SECOND) OF TORTS, stating in a parenthetical that the Section means "interference with a contract terminable at will [is] actionable only on the basis of prospective advantage, as plaintiff has no legal assurance of future performance."[87] Regrettably, that misstates what Section 768 says. The Section is entitled "Competition as Proper or Improper Interference," and it discusses the circumstances under which a competitor may interfere with prospective economic advantages, contracts that are terminable at will, and contracts that are not terminable at will.[88] Contrary to *Belden's* parenthetical, Section 768 unquestionably does not state that interference with an at-will contract is actionable only as an interference with prospective economic advantage.[89]

Belden's erroneous understanding of what "enforceable" meant in the context of an interference-with-contract action has proved problematic because it led subsequent courts to adopt the same misunderstanding and, thus, perpetuated the misapplication of Illinois precedent.[90] The most significant of those decisions was the Appellate Court's opinion in *Fellhauer v. City of Geneva*.[91] The decision in that case,

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preliminary injunction that was the subject of the appeal and remanded the matter to the trial court. *Id.* at 102–03.

[82] *Id.* at 101.

[83] *See* Zamouski, 275 N.E.2d at 432 ("Since no issue of mistake or fraud was presented by the pleadings, the oral settlement could not be said to be unenforceable as a matter of law and the dismissal on this basis would have been improper.") (emphasis added).

[84] Belden Corp., 413 N.E.2d at 101.

[85] *Id.* at 102.

[86] *Id.*

[87] *Id.*

[88] RESTATEMENT (SECOND) OF TORTS § 768.

[89] *Id.*

[90] *See* Fellhauer, 546 N.E.2d at 791.

[91] *Id.*

together with the nature of the Illinois Supreme Court's reversal,[92] illustrates how *Belden's* misapprehension of "enforceable contract" took root.

The plaintiff in *Fellhauer* was an employee of the City of Geneva and was responsible for negotiating the city's power-supply contracts with third parties.[93] The defendant was a candidate for and ultimately was elected mayor.[94] During the campaign, the defendant asked the plaintiff to slow down the course of negotiations with a power supply company so the incumbent would not be able to benefit from their successful completion.[95] The plaintiff refused, the negotiations were completed, the defendant was elected mayor, and conflicts between the plaintiff and the new mayor continued.[96] The defendant ultimately terminated the plaintiff's employment with the city.[97] The plaintiff sued alleging "tortious interference with an employment relationship."[98] The trial court dismissed the claim and the appeals court reversed.[99] Citing *Belden*, the appeals court found that actions for interference with a contract required that there be "a valid and enforceable contract."[100] It reasoned that because an at-will employment contract affords "no enforceable contractual right to continued employment," the plaintiff's "expectation of continued employment [was] an expectation of future economic advantage."[101] Interference with that interest, the court held, was redressable only as an action for tortious interference with prospective economic advantage.[102] The appeals court next concluded that the plaintiff stated a claim for relief under that tort.[103]

The Illinois Supreme Court reversed but made clear that the plaintiff did not appeal—and therefore the Court did not analyze—the Appellate Court's determination that interference with an at-will contract was actionable only as tortious interference with a prospective economic advantage: "We note that plaintiff makes no challenge to the appellate court's conclusion that the appropriate theory in the present case is the tort of intentional interference with a prospective economic advantage."[104] The Court's decision, therefore, was limited to reviewing the appeals court's determination that the plaintiff stated a claim for tortious interference with prospective

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[92] Fellhauer, 568 N.E.2d 870.

[93] *Id.* at 872.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 873.

[98] *Id.*

[99] Fellhauer, 546 N.E.2d at 795, 801–02.

[100] *Id.* at 799.

[101] *Id.* at 800 ("Accordingly, a claim that an employee at will was terminated by his employer as a result of the intentional and unjustified actions of another sounds in the tort of intentional interference with a prospective economic advantage.") (citing Belden Corp., 413 N.E.2d at 98).

[102] *Id.* at 800.

[103] *Id.* at 800–01.

[104] Fellhauer, 568 N.E.2d at 877.

economic advantage.[105] The Court reversed, finding the plaintiff had failed to state such a claim.[106]

Unfortunately, several state and federal courts in the years since *Fellhauer* overlooked the limited nature of the Supreme Court's analysis.[107] Typically, those courts noted the at-will nature of the contract at issue in *Fellhauer* and the Court's focus on the interference-with-prospective-economic-advantage tort and concluded *Fellhauer* meant that the only appropriate action for interference with at-will contracts was an action for tortious interference with prospective economic advantage.[108] There are other decisions that reach the same conclusion but do not cite the Supreme Court's decision in *Fellhauer*. In most of those decisions, however, the courts' holdings can be traced back to *Fellhauer* because the authorities on which those courts relied cited *Fellhauer* or its progeny.[109]

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[105] *See id.* at 877–78.

[106] *Id.* at 879, 882.

[107] *See, e.g.*, Bommiasamy v. Conway, 2020 IL App (1st) 190339-U, ¶ 37; Atanus v. American Airlines, Inc., 932 N.E.2d 1044, 1048 (Ill. App. Ct. 2010); Canel and Hale, Ltd. v. Tobin, 710 N.E.2d 861, 871 (Ill. App. Ct. 1999); Larry Karchmar, Ltd. v. Nevoral, 707 N.E.2d 223, 228 (Ill. App. Ct. 1999); Delphi Industries, Inc. v. Stroh Brewery Co., 945 F.2d 215, 220 (7th Cir. 1991); Anderson v. Anchor Organization for Health Maintenance, 654 N.E.2d 675, 685 (Ill. App. Ct. 1995); Buckley v. Peak6 Investments, LP, 827 F. Supp. 2d 846, 852 (N.D. Ill. 2011).

[108] The following all cite the Supreme Court's decision in *Fellhauer* as support for their determinations that the interference-with-contract action is not appropriate for claims alleging interference with an at-will contract: Bommiasamy, 2020 IL App (1st) 190339-U, ¶ 37 ("[W]here the contract is one that can be terminated at-will by either party, the cause of action is classified as one for tortious interference with a prospective economic advantage, not tortious interference with contract.") (also citing Canel and Hale, Ltd. v. Tobin, 710 N.E.2d 861, 871 (Ill. App. Ct. 1999)); Atanus, 932 N.E.2d at 1048 ("As an at-will employee, plaintiff must plead tortious interference with a prospective business expectancy, rather than tortious interference with contractual relations."); Canel and Hale, Ltd., 710 N.E.2d at 871 ("An action for tortious interference with contractual relations is not the proper vehicle for a discharged attorney seeking to recover damages."); Larry Karchmar, Ltd., 707 N.E.2d at 228 ("An action for tortious interference with a contract terminable at will is classified as one for intentional interference with prospective economic advantage."); Delphi Industries, Inc., 945 F.2d at 220 ("The [Fellhauer] court initially noted that an at-will employee has no contract right to employment, and therefore has no right of action for tortious interference with contract."); Anderson, 654 N.E.2d at 685 ("An action for tortious interference with a contract terminable at will is classified as one for intentional interference with prospective economic advantage."); Buckley, 827 F.Supp. 2d at 852 (addressing assertion that "Illinois cases allow claims for interference with at-will contract[s]" by responding that "there is authority on the other side, *see* Fellhauer, 568 N.E.2d at 877).

[109] *See* Grund v. Donegan, 700 N.E.2d 157, 161 (Ill. App. Ct. 1998) ("As we held in Anderson v. Anchor Organization for Health Maintenance, 274 Ill. App. 3d 1001, 1013-14, 211 Ill. Dec. 213, 654 N.E.2d 675 (1995): 'An action for tortious interference with a contract terminable at will is classified as one for intentional interference with prospective economic advantage.'") (also citing Fellhauer, 568 N.E.2d at 877); Storm & Assoc., Ltd. v. Cuculich, 700 N.E.2d 202, 210 (Ill. App. Ct. 1998) ("An action for tortious interference with a contract which is terminable at will, however, is classified as one for intentional interference with prospective economic advantage.") (citing Anderson, 654 N.E.2d at 685).

B. The Meaning of an "Enforceable Contract."

In the context of an action for tortious interference with a contract, an at-will contract is "unenforceable" only where the contract was void at inception due to its subject matter (*e.g.*, an illegal purpose) or to the lack of the necessary formation requisites.[110] Thus, so long as the parties to a voidable but not void at-will contract desire and intend to continue it, it is a "valid and enforceable contract" for purposes of the first prima facie element of an action for tortious interference with a contract.[111]

The earliest Illinois decision to identify "enforceability" as a component of an interference-with-contract claim was *Zamouski v. Gerrard*.[112] The plaintiff in that case alleged one of the defendants' attorneys orally agreed to a settlement of his tort claim, but a different set of attorneys representing the defendants argued the attorney did not represent the defendants and, therefore, there was no settlement agreement.[113] When the defendants refused to honor or perform the purported agreement, the plaintiff sued alleging, *inter alia*, that the second set of attorneys tortiously interfered with the defendants' performance of the alleged oral settlement agreement.[114] One of the issues the court considered was whether, as a matter of public policy, oral settlement agreements of tort claims were enforceable in Illinois, or whether they were void at inception.[115] The court concluded the agreements were enforceable.[116] That appears to have led the court to assert in addressing the plaintiff's interference-with-contract claim that "[t]he essential elements of [the] tort have been stated to" require, *inter alia*, "[t]he existence of a valid and enforceable contract."[117] In that context, "enforceable" plainly referred to the void-/not-void-at-inception issue that was before the court.[118]

Belden relied exclusively on *Zamouski* to declare that the "enforceability" of a contract was a component of a prima facie claim for tortious interference with contract,[119] but it completely ignored the intent behind the *Zamouski* court's use of the term.[120] In the years that followed, several Illinois courts of appeal adopted *Belden's*

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[110] Zamouski, 275 N.E.2d at 433.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 431–32.

[116] *Id.* at 433.

[117] *Id.*

[118] *Id.* ("Since no issue of mistake or fraud was presented by the pleadings, the oral settlement could not be said to be unenforceable as a matter of law and the dismissal on this basis would have been improper.").

[119] Belden Corp., 413 N.E.2d at 101.

[120] *Id.*

recitation of the elements of a tortious interference with contract action without ever examining the meaning of "enforceability."[121]

The court in *Malatesta v. Leichter*, like *Zamouski*, addressed a voidable-not-void issue in the context of the plaintiff's interference claim.[122] The defendant allegedly interfered with the plaintiff's contract to purchase an automobile dealership.[123] The plaintiff's contract, however, was contingent on General Motors' approval of the sale.[124] The defendant argued the plaintiff was not entitled to relief because there "is a general rule that a person cannot sue for interference with a contract that is unenforceable," citing GM's approval as a contingency that purportedly made the contract unenforceable.[125] The court acknowledged the general rule but explained it "ha[d] been applied only to contracts that are void from their inception due to their subject matter or the lack of the necessary formation requisites."[126] Because the plaintiff's contract was voidable but not void, it was "enforceable" for purposes of a tortious-interference claim.[127]

The construction of "enforceable" announced in *Zamouski* and *Malatesta* finds support in the Restatement (Second) of Torts. To recover under a cause of action for interference with a contract, "[t]he particular agreement must be in force and effect at the time of the breach that the actor has caused; *and if for any reason [the contract] is entirely void, there is no liability for causing the breach*."[128] In a circumstance analogous to one party's right to terminate an at-will contract, the Restatement goes on to explain that a party may have an action for interference with a valid and subsisting contract even if it is voidable by one of the parties by reason of, for example, the statue of frauds, lack of consideration, unconscionability, or failure of condition precedent:

> It is not . . . necessary that the contract be legally enforceable against the [other party]. A promise may be valid and a subsisting contract even though it is voidable. (*See* Restatement, Second, Contracts § 13). The [other party to the contract] may have a defense against an action that would permit him to avoid it and escape liability on it if he sees fit to do so. Until he does, the contract is a valid and subsisting relation,

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[121] *See, e.g.*, HPI Health Care Services, Inc. v. Mt. Vernon Hosp., Inc., 545 N.E.2d 672, 675 (Ill. 1989); Connaughton v. Gertz, 418 N.E.2d 858, 861 (Ill. App. Ct. 1981); Schott v. Glover, 440 N.E.2d 376, 379 (Ill. App. Ct. 1982).

[122] The plaintiff asserted a claim for interference with prospective economic advantage only. Malatesta, 542 N.E.2d at 776–77. Presumably, the plaintiff selected that tort because he believed that until General Motors approved of the sale of the dealership, the contract gave rise to an expectancy only. *Id.* at 777–78.

[123] *Id.* at 777–78.

[124] *Id.*

[125] *Id.* at 777.

[126] *Id.*

[127] *Id.* at 777–78.

[128] RESTATEMENT (SECOND) OF TORTS, § 766, comment f (emphasis added).

> with which the actor is not permitted to interfere improperly. Thus, by reason of the statute of frauds, formal defects, lack of mutuality, infancy, unconscionable provisions, conditions precedent to the obligation or even uncertainty of particular terms, [a party to the contract] may be in a position to avoid liability for any breach. The defendant actor is not, however, for that reason free to interfere with performance of the contract before it is avoided.[129]

The requirement that a contract be "valid and enforceable" in order to recover under an interference-with-contract claim asks only whether the defendant interfered with a contract that was void at its inception.[130] It does not require courts to consider whether the parties to the contract are able to prospectively enforce the other party's performance.[131] For the reasons discussed below, Illinois courts (and those applying Illinois law) should acknowledge and correct the misapprehension of what constitutes an "enforceable contract" for purposes of a tortious interference with contract claim.[132]

IV. CORRECTING COURSE: RECOMMENDATIONS FOR STEERING ANALYSIS OF CLAIMS OF TORTIOUS INTERFERENCE WITH AT-WILL CONTRACTS BACK TO ILLINOIS' HISTORICAL ANALYTICAL FRAMEWORK.

Before *Belden* and its misguided progeny, the ability to enforce the future performance of one's at-will contract was not a factor, much less *the* decisive factor, in determining whether interference with such a contract could be remedied by an action for tortious interference with contract.[133] Instead, the at-will contract's status as voidable-but-not-void and the parties' desire and intent to continue their relationship were the factors that historically dictated whether an interference-with-contract-action was appropriate to remedy a third party's interference.[134] So, how to address that

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[129] *Id.*; *see also* Prosser, Torts § 129 at 995-96 (5th ed. 1984):

> The law of course does not object to the voluntary performance of agreements merely because it will not enforce them, and it indulges in the assumption that even unenforceable promises will be carried out if no third person interferes. Accordingly, it has been held that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, or harsh and unconscionable provisions, or conditions precedent to the existence of the obligation can still afford a basis for a tort action when the defendant interferes with [the contracts'] performance.

[130] RESTATEMENT (SECOND) OF TORTS, § 766, comment f.

[131] *Id.*

[132] *See supra* Section IV.

[133] *Compare* Doremus, 52 N.E. at 925, London Guarantee & Accident Co., 69 N.E. at 531, TAD, Inc., 380 N.E.2d at 967 *with*, Belden Corp., 413 N.E.2d at 101 and Fellhauer, 568 N.E.2d at 877.

[134] *See, e.g.*, London Guarantee & Accident Co., 69 N.E. at 531 and Zamouski, 275 N.E.2d at 431, 433.

deviation from precedent before it gains a critical mass in Illinois case law that cannot easily be reversed? The wisdom of the so-called First Rule of Holes—"if you find yourself in a hole, stop digging"—is a good place to start. Courts applying Illinois law need to acknowledge that the Illinois Supreme Court's decision in *Fellhauer* said nothing that would preclude a plaintiff from bringing an action for tortious interference with contract when a third party interferes with a plaintiff's at-will contract.[135]

In a positive development along those lines, two recent state and federal court decisions did just that. In *Webb v. Frawley*, the United States Court of Appeals for the Seventh Circuit observed that, "[B]ecause the plaintiff in *Fellhauer* did not challenge the appellate court's conclusion that the appropriate tort was that of intentional interference with prospective economic advantage, the Illinois Supreme Court did not resolve the confusion among appellate districts" over "[t]he issue of whether at-will employees may bring tortious interference with contract claims" in Illinois.[136] And in *Grako v. Bill Walsh Chevrolet-Cadillac, Inc.*, the Appellate Court for Illinois' Third District confirmed *Webb's* understanding of *Fellhauer*:

> Our supreme court in *Fellhauer* merely addressed a division among appellate districts on whether an at-will employee may make a claim for tortious interference with contractual relations. *Fellhauer* did not resolve this division, as noted in *Webb*, because the supreme court did not challenge the appellate court's determination that the at-will plaintiff's claim sounded in intentional interference with prospective economic advantage.[137]

The next step is for courts to make clear that, in the context of the interference-with-contract tort, the prima facie requirement that a contract be "enforceable" asks only whether a contract is void.[138] This would ensure the analysis for deciding which tort is appropriate to remedy interference with an at-will contract is consistent with Illinois' historical practices. It also would ensure that at-will contracts are treated as valid and subsisting contracts and enjoy the protections that prospectively enforceable contracts enjoy.[139]

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[135] Fellhauer, 568 N.E.2d at 877–78.

[136] Webb v. Frawley, 906 F.3d 569, 580 (7th Cir. 2018).

[137] Grako v. Bill Walsh Chevrolet-Cadillac, Inc., 229 N.E.3d 869, 875 (Ill. App. Ct. 2023) (citations omitted).

[138] *See* Zamouski, 275 N.E.2d at 432; Malatesta v. Leichter, 542 N.E.2d 768, 777–78 (Ill. App. Ct. 1989).

[139] *See* Zamouski, 275 N.E.2d at 432; Malatesta v. Leichter, 542 N.E.2d 768, 777–78 (Ill. App. Ct. 1989); *see also* London Guarantee & Accident Co., 69 N.E.2d at 531 ("[T]he clear weight of authority is to the effect that, where the contract is one of employment, it is immaterial whether it is for a fixed period, or is one which is terminable by either party at will, both parties being willing and desiring to continue the employment under that contract for an indefinite period.").

There are no obvious benefits to adopting or continuing *Belden's* misapprehension of what it means for a contract to be "enforceable" in the context of the interference torts. Put another way, there is no reason why Illinois law should not protect at-will contracts from third party interference to the same degree and extent as contracts that are prospectively enforceable, as long as the at-will contracts enjoy the continuing support of the parties to them.

Notably, the court in *Belden* does not appear to have recognized the implications of its erroneous construction of the phrase "enforceable contract."[140] Its construction represented a change in the law, yet *Belden* did not acknowledge the change or take any of the steps one might expect when announcing such a change.[141] For instance, it did not discuss the development of the law it sought to change or explain why it believed a change was in order.[142] Did the *Belden* court expect future courts to abandon the line of decisions that says the parties' desire and intent to continue their at-will contracts dictates whether the interference-with-contract tort is appropriate to remedy interference with such a contract? If it did, it presumably would have explained why they should. Or did the *Belden* court believe its version of enforceability would bow to the parties' desire and intent to continue the contract? Again, the *Belden* court did not say.[143] The impression left by *Belden's* lack of discussion of those issues is that it did not intend to change the law; it simply misapprehended and misstated what the law was.

Illinois courts should make a clean break with *Belden's* construction of "enforceable contract" and unambiguously state that the tort's "enforceable contract" element asks only whether a contract is void and, at the same time, confirm that the element does *not* ask whether a plaintiff can enforce the future performance of its contract against its contracting partners.

Addressing both sets of erroneous understandings—the misunderstanding of what *Fellhauer* decided and the misapprehension of what constitutes an "enforceable contract"—is critical for returning to Illinois' long-established framework for determining which tort is appropriate to remedy interference with an at-will contract. Both errors have worked in tandem to perpetuate the other. The notion that the interference-with-contract tort was not the appropriate remedy for interfering with an at-will contract because at-will contracts are not "enforceable" appeared to be consistent with the mistaken understanding that *Fellhauer* concluded interference with such contracts was actionable only under the interference-with-prospective-economic-advantage tort. Likewise, the misunderstanding of what *Fellhauer* decided had the effect of reinforcing (or at least causing courts not to question) *Belden's* erroneous understanding of what it meant for a contract to be "enforceable" for purposes of the interference-with-contract tort.

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[140] *See generally* Belden Corp., 413 N.E.2d at 98.

[141] *See generally id.*

[142] *See generally id.*

[143] *See generally id.*

Taking these steps would ensure that the only analysis for determining which interference tort is appropriate to remedy a defendant's interference with an at-will contract would be the analysis that predated *Belden*: *i.e.*, courts would consider whether an at-will contract was void and whether the parties to the contract desired and intended to continue it at the time of the defendant's interference.[144] That analysis better serves the interference tort's purpose of protecting business relationships from the unjustified interference of others, and it would ensure that all business relationships that have been reduced to valid and subsisting contracts are treated as "sacrosanct" under Illinois law and receive the same protections from interference by third parties.[145]

V. CONCLUSION

It is time for Illinois courts to definitively embrace the better reasoned and historically sound line of decisions that holds that interference with an at-will contract can be remedied by a claim for tortious interference with contract if the parties to the contract intended it would continue. At the same time, Illinois courts should make clear that they reject the line of decisions founded on the mistaken understanding that the parties to a contract must be able to prospectively enforce its provisions to recover under the interference-with-contract tort. The failure to address those issues sooner rather than later will allow a critical mass of erroneously reasoned decisions to build, making later attempts to resolve the conflicting lines of decisions more disruptive. To borrow from the arguments above, it is time to stop digging holes and return to Illinois' longstanding framework for deciding which tort is appropriate to remedy interference with at-will contracts.

[144] *See, e.g.*, London Guarantee & Accident Co., 69 N.E. at 531; Kemper, 435 N.E.2d at 830; TAD, Inc., 380 N.E.2d at 967; Cashman, 441 N.E.2d at 940.