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Protecting Workers from Unlawful Interference with Their Jobs

Allan Kanner

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# PROTECTING WORKERS FROM UNLAWFUL INTERFERENCE WITH THEIR JOBS

*Allan Kanner*

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INTRODUCTION

Varieties of aggressive and improper forms of economic activity have existed as threats to civil order since at least biblical times. From this historical perspective, the capacity of some individuals to generate the destructive impact of "merger mania" run amok hardly seems shocking. Yet there is something profoundly threatening to civil order whenever a cabal of conspirators can, in the name of greed or avarice alone, destroy the lives and jobs of tens of thousands of individuals. However, civil society rarely allows itself to

1. Exodus 21:37 (stating that "[w]hen a man steals an ox or a sheep and slaughters or sells it, he shall restore five oxen for the one ox, and four sheep for the one sheep"). The redress of anti-social behavior with punitive damages in addition to compensation were "for example's sake, to prevent such offences in future." Coryell v. Colbaugh, 1 N.J.L. 77 (1791).

2. Rosabeth M. Kanter & Tobias K. Seggerman, Managing Mergers, Acquisitions, and Divestitures, MGMT. REV., Oct. 1986, at 16 (stating that over 3,000 mergers took place in 1985). See BUREAU OF NAT'L AFF., LAYOFFS, PLANT CLOSINGS AND CONCESSION BARGAINING-BNA'S SUMMARY REP. FOR 1982, at 3 (1983) (during 1982 more than 1.2 million workers were placed on either temporary or permanent layoff in more than 2,700 separate incidents, 600 of which were permanent plant shutdowns affecting more than 215,000 workers).

3. See CONNIE BRUCK, THE PREDATOR'S BALL (1988) (giving an overview). For a contrary, and felonious, view that unbridled greed is good, see IVAN BOESKY, MERGER MANIA (Jeffrey Madrick ed., 1985); ROBERT SLATER, THE TITANS OF TAKEOVER 132-33 (1987) (quoting Boesky's 1985 Berkeley commencement address, "Greed is all right, by the way. I want you to know that. I think greed is healthy. You can be greedy and still feel good about yourself.").

4. If society cannot guarantee order in the sense of equal security of person and property, and facilitate long term investments in jobs and businesses — impairments of the obligations of contracts, cf. U.S. CONST. art. I, § 10 — the authority of the law will suffer irreparably. HENRY S. MAINE, POPULAR GOVERNMENT 247-48 (1885) (referring to the contract clause as "the bulwark of American individualism against democratic impatience and socialist fantasy").


6. Even if a merger or takeover fails to materialize, severe human costs and repercussions can still occur. For example, the Revlon Group's well-publicized attempt to take over the Gillette Company led to a major restructuring program to keep future raiders at bay. Gillette laid off 2,400 employees, sold off several marginal businesses, wrote off $205 million in termination costs and operating losses, and more than doubled its long-term debt to $1 billion in a "poison pill" attempt to make the firm less attractive to potential acquirers. Alex Beam, For Gillette, Life not the Same After Arrival of Perelman, BOSTON GLOBE, June 19, 1987, at 69. Unfortunately, such radical efforts may not save the independent company. Gillette continued to be a takeover target as Revlon persisted in its advances and Coniston Partners, a New York-based investment firm, has also gotten into the act. Alex Beam, Gillette a Takeover Target for the Fourth Time in 2 Years, BOSTON GLOBE, Feb. 12, 1988, at 1, 69.
fall prey to such misconduct for long.

A fundamental tenet of social life is that one may not harm another without some justification or consent. Thus, if an otherwise permissible activity of everyday life gives rise to a harm, the responsible party must still remedy that unjustified harm. Compensation for these harms is the traditional province of tort law.

From time to time, government has added or substituted remedies available to the individual. In addition, the underlying harm-creating conduct may be deemed significant enough to warrant government civil or criminal sanctions, but these sanctions are generally additive and do not interfere with the individual's right to pursue a tort compensation remedy.

These basic tenets are constantly being reapplied as life in civil society changes — as we move from agrarian to industrial to petrochemical modes of production — and as our understanding of that social life and our roles therein grow. Such changes and growth

See infra note 102 and accompanying text.

7. JOHN S. MILL, ON LIBERTY (1859). This is similar to saying that "[l]aw is something more than mere will exerted as an act of power . . . . Arbitrary power, enforcing its edicts to the injury of the persons and property [of the citizenry], is not law." Hurtado v. California, 110 U.S. 516, 535-36 (1884).


9. 3 BLACKSTONE, COMMENTARIES 2 (stating that it is the function of the common law "to protect the weak from the insults [sic] of the stronger"). See Allan Kanner, Emerging Conceptions of Latent Personal Injuries in Toxic Tort Litigation, 18 RUTGERS L.J. 343 (1987).

10. New Jersey Ass'n for Retarded Citizens v. New Jersey Dep't of Human Servs., 445 A.2d 704, 713 (N.J. 1982) (quoting Judge Pashman stating "[i]n this State, we do not set people adrift because they are the victims of misfortune. We take care of each other").

11. E.g., 15 U.S.C. § 78bb(a) (1988) (stating that there is no preemption of tort remedies provided by federal securities laws); see infra notes 351-56 and accompanying text.


13. E.g., Karl N. Llewellyn, What Price Contract? An Essay in Perspective, 40 YALE L.J. 704 (1931) (stating that the system of "free" contract described by nineteenth century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond with reality. With new vision has come a more conscious and sustained effort to select the forms of permissible pressure and to control the manner of its exercise); Friedrich Kessler, Contracts of Adhesion — Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629, 631 (1943) (acknowledging the fact that individuals lack bargaining power in mass production society).

14. E.g., Clyde W. Summers, Codetermination in the United States: A Projection of
create new types of harm, which in turn moves the law's development forward.\textsuperscript{15}

The junk bond funded hostile takeover is perhaps the most shocking economic development in recent times.\textsuperscript{16} Although mergers and acquisitions are not new,\textsuperscript{17} the potential for harm created by the junk bond is novel.\textsuperscript{18} From 1975 to 1980 there were approximately 13,000 mergers and acquisitions, with an estimated value of $175 billion.\textsuperscript{19} While the rate of mergers continued unabated during the

\textit{Problems and Potentials}, 4 J. COMP. CORP. L. & SEC. REG. 155, 170 (1982) ("[T]he corporation is more than the shareholders and includes the employees . . . . Indeed, the employees may have made a much greater investment in the enterprise by their years of service, may have much less ability to withdraw, and may have a greater stake in the future of the enterprise than many of the stockholders.").

15. As Brandeis told a Senate committee investigating business practices in 1911, there was serious danger of social unrest in "letting the people learn that our sacred Constitution protects not only vested rights but vested wrongs." \textit{Hearings Before the Committee on Interstate Commerce of the Senate}, 62d Cong., 2d Sess., pt. 15, at 1166 (1911); see \textit{Truax v. Corrigan}, 257 U.S. 312, 354, 368 (1921) (Brandeis, J., dissenting).

16. Essentially, "junk bonds" are bonds rated at below "investment grade" by the two principal bond-rating agencies (Moody's or Standard & Poor's). Such bonds pay a correspondingly high interest rate, with current rates equaling 16% or more. Prior to 1976, no well-known investment banking house would underwrite the original issue of such low-rated bonds, but in that year Drexel Burnham Lambert, which had previously made a secondary market in these bonds, began also to underwrite them. The use of junk bonds to finance takeovers apparently dates from the "latter part of 1983." \textit{See Congressional Research Service for the House Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, The Role of High Yield Bonds [Junk Bonds] in Capital Markets and Corporate Takeovers: Public Policy Implications,} 99 Cong., 1st Sess. 23 (1985). [hereinafter \textit{Congressional Research Service Report}]. The significance of the junk bond's appearance is twofold: First, bidders, such as Boone Pickens, Victor Posner, Saul Steinberg, or Pantry Pride (all of whom have financed tender offers through Drexel Burnham), previously had difficulty in obtaining credit from banks, some of whom have refused to finance "raiders" as a matter of policy. Second, commercial banks have traditionally followed conservative lending policies and have seldom been willing to finance more than 50% of the acquisition cost of a target. Bidders were compelled to incur additional debt that was subordinated to their own loans because from the standpoint of these banks such subordinated debt is the equivalent of equity. Thus, a bidder who can issue subordinated junk bonds (at a high interest rate) after first borrowing from commercial lenders (at a lower rate) can finance as much as 90% of the acquisition cost. This fact explains much about the newfound ability of small bidders to tender for much larger targets.

17. United States industrial history has been marked by four great merger or acquisition waves. The first began late in the 19th century and peaked in 1901; a second, milder episode occurred during the late 1920's; the third peaked in 1968, and the fourth, which continues as this Article is being written, began to flourish in the early 1980's. \textit{See David Ravesnecraft & Frederick Scherer, Mergers, Sell-Offs and Economic Efficiency} 21-22 (1987).


1980's, the estimated dollar value rose dramatically. The year 1984 witnessed more than 2,500 deals, worth $122 billion. In 1985, more than 3,000 mergers and acquisitions were announced, with a total value of $180 billion. In 1986, there were more than 4,200 mergers among U.S. firms, involving almost $200 billion. In the first quarter of 1987 alone, 936 mergers and acquisitions were reported, involving almost $32 billion.

The magnitude of the adverse impact on workers caused by this merger mania was at first masked by Wall Street's claim that such ravages represented a short-term downturn prior to the emergence of a leaner, meaner and full employment economy. Wall Street asked us to believe that as bad as everything seemed in terms of lost jobs, in reality, everything was really good. As it turned out, Wall Street made money, workers lost jobs, long term investments dried up, research and development began to disappear, and communities suffered.

at E4 (relying on W.T. Grim & Company data).


22. In 1987 preliminary estimates of the job losses at several acquisition targets were reported to the Senate Committee on Banking, Housing, and Urban Affairs. In the deal that created the company now known as Unisys, Burroughs Corp.'s hostile bid for Sperry Corporation purportedly cost 9,600 jobs. Hostile Takeovers: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs, 100th Cong., 1st Sess. 504 (1987) (including a letter of Robert E. Mercer, Chairman of the Board, Goodyear Tire and Rubber Co., dated April 17, 1987) [hereinafter Senate 1987 Takeover Hearings]. The post-bid leveraged buyout of Safeway by an investor group put 3,500 employees out of work. Id. After Midcon was subjected to a hostile bid, Occidental Petroleum acquired it and phased out 2,000 jobs with plans to cut 1,000 more. Id. After acquiring American Hospital Supply, Baxter Travenol Laboratories, Inc. established a four-year schedule to eliminate 6,500 jobs. Id. Finally, T. Boone Pickens' unsuccessful hostile bid for Gulf Oil precipitated Socal's acquisition of Gulf. The resulting company, Chevron Corp., cut its workforce from 79,000 immediately following the merger to 52,000 in June 1986. Id.


26. In criticizing the takeover process, labor representatives have presented numerous takeover-induced layoffs. The AFL-CIO suggests that Safeway's job dislocations actually were as high as 9,500. Senate 1987 Takeover Hearings, supra note 22, at 536 (including a written submission by Thomas R. Donahue. AFL-CIO Secretary-Treasurer). Lucky Stores' successful
A TRIP TO FANTASYLAND

The reality of lost jobs, economic dislocation and human suffering was coyly hidden beneath the imagery, excitement and military jingoism that hostile takeovers brought, first, to the formerly staid confines of Wall Street, and, later, to the rest of America. Wall Street "raiders,"27 "arbs"28 and "white knights"29 scoured the land in search of huge fees, profits and "crown jewels"30 that come from putting "targets" "in play" where their "bloodied" remains are fought over with an array of tactics, including "lock ups,"31 "poisoned pills,"32 "tender offers,"33 "shark repellents,"34 "prisoner's dilem-

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29. E.g., Clifford Holderness, et al., Raiders or Saviors? The Evidence on Six Controversial Investors, 14 J. Fin. Econ. 555 (1985); see Treadway Cos. v. Care Corp., 638 F.2d 357, 365 (2d Cir. 1980).


32. The term "poison pill" describes rights or warrants granted to shareholders by a target company that become exercisable if a raider obtains a specified percentage of the target's shares and is designed to have unpalatable consequences to the raider. See Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 180 (Del. 1986) (noting that the board of directors has power to adopt a "poison pill" defense in response to a hostile takeover bid); Suzanne S. Dawson et al., Poison Pill Defensive Measures, 42 BUS. LAW. 747 (1987).


mas," "bear hugs," "Pac-Man" defenses, and "golden parachutes."

The "players" — raiders, arbs, targets and white knights — even developed special, if not sociopathic, monikers for themselves as they traveled through this fantasyland. War-like and military names are preferred for the raiders. For example, two "raiders," Sanford Sigoloff and Irwin Jacobs, refer to themselves as "Ming the Merciless" and "Irv the Liquidator," respectively. Neither is as feared as the arb "Ivan the Terrible" was before he went to prison. Their lawyers are known as "field marshals or war ministers," while their investment bankers are described as being like "platoon leader[s] on a beachhead."


35. The "prisoner's dilemma" refers to the coercive nature of two-tier tender offer "which contemplates that even though the shareholders as a group would be better off by not tendering, the coercive nature of tender offers tends to compel individual shareholders to tender anyway." William Harrington, If It Ain't Broke, Don't Fix It: The Legal Properity of Defenses Against Hostile Takeover Bids, 34 SYRACUSE L. REV. 977, 1003 (1983).

36. E.g., JEFFREY MADRICK, TAKING AMERICA 111 (1987) (defining "bear hug" as squeezing management into submission by offering management a premium price for shares).


40. Jensen, supra note 27, at 112.


43. Id. (referring to Ivan Boesky); see also supra note 3.


45. Id. at 71 ("It's just like being in combat"); see also ARTHUR FLEISCHER ET AL., BOARD GAMES 7 (1988) ("And a takeover, like the attack on Pearl Harbor, is 'no drill.'"); but see Bryan Burrough, Top Deal Maker Leaves a Trail of Deception In Wall Street Rise, WALL ST. J., Jan. 22, 1990 at A-1, A-6 (stating that "military phrases dotted his jargon: 'Lock and load!' Mr. Beck was prone to shout before an important meeting. [Jeffrey Beck]
It may well be that this language was less a smokescreen to those who wished to penetrate what was going on than it was a reflection of the psychoses suffered by the "players." 46 It has been argued that when one large business attempts to take over another, the language in which this is conducted reflects all the emotions, fears, and joys that one should expect to find when the consequences of winning and losing are so great. This is the only way to cope with the intense emotion involved. Indeed, one of the fundamental purposes of language is that it helps to insulate both parties, taker and takee, from the intensity of their emotions:

The takeover event in itself clearly conforms to a predictable set of scenarios or scripts. In the most neutral terms, this boils down to: Offer — decisions/actions taken — outcome [that is, if takeovers were expressed solely in the impersonal language of economics]. In the business world, this relatively simple diagram has taken on the far more colorful forms available from such well known popular genres as the western (ambush and shootout replace [the more bland terms] offer and actions taken), the love affair and/or marriage, warfare (replete with sieges, barricades, flak, and soldierly honor), mystery, and piracy on the high seas (with raiders and safe harbors). Generic formulations also entail the frequent appearance of mercenaries or hired guns (investment houses to whom most of the negotiating is delegated), and black and white knights (culled from tales of chivalry in which the distressed damsel is either undone or rescued). In virtually all formulations, the acquiring executive is macho and the target company [i.e., the organization that is being sought to be acquired] is accorded the female gender ("sleeping beauty" or a bride brought to the altar; reference to rape also is not uncommon). 47

As Ming the Merciless admitted, new language was an important part of the "greed and moral laxity" at play:

We needed a new business vocabulary that reflected the decade's


47. Id. at 148; see also IAN I. MITROFF & R.H. KILMAN, CORPORATE TRAGEDIES 113 (1984) ("Thus, archetypal images not only exist in general, but even more important and interesting, they exert their influence in an arena where the uninitiated or the psychologically unsophisticated would least expect to find them, the 'seemingly' all-too-practical world of business.").
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green and moral laxity; terms that emerged from the financial heights and pits, including raider, entrenched management, management buyout, leveraged buyouts, risk arbitrage, junk bonds, vultures, white knights, squires, strips, PIKS, fraudulent conveyance, default rate, and turnaround. Our genius for creating acronyms like DINK (double income no kids), NIMBY (not in my back yard), and MEGO (my eyes glazed over) added to the babblespeak of the times.48

Lawyers and investment bankers may well be criticized for pandering to these delusions, and other sorts of Raider hysteria and “greed run-amok.”49 In any event, it is no accident that they call it “merger mania”50

Outsider challenges to corporate management characteristically take on the dimensions of warfare. Battles are waged by proxy, in the courts and in the press. Military and Arthurian metaphors are applied to the various actors and their maneuvers. The costs, both public and private, are tremendous.51

FANTASYLAND’S ECONOMIC IMPACT ON THE REST OF US

The linguistic imagery of hostile takeovers52 constituted a fantasy world of exaggerated claims, omnivorous appetites, pathological

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49. E.g., CONNIE BRUCK, THE PREDATORS’ BALL 204 (1988):
During the course of the Revlon battle, [Lawyer Marty] Lipton would be moved to new heights, firing off to his corporate clients a memo entitled “Rape and Pillage in the Corporate Takeover Jungle”: “This year has witnessed the demise of the few remaining restraints on corporate raiders. They have been let loose to take over and bust up American corporations at will . . . .”

Id.

50. IVAN F. BOESKY, MERGER MANIA (1985). Mergers go back at least to the turn of the century. See PETER O. STEINER, MERGERS 1-6 (1975). However, the recent wave of junk bond financed mergers are different because of the reliance on debt.


rhetoric, and criminal misconduct. This fantasyland masked, and often still masks, the ugly reality of the "devastating effects" imposed upon the average American worker, and society as a whole, when plants are forced to close. These takeovers are effecting a massive redistribution of wealth in the form of lost jobs for workers, especially in those companies Wall Street finds to be "undervalued," to a newly emerging Wall Street elite that makes fortunes in facilitating transactions of dubious, general economic worth.

Although tens of thousands of jobs have been lost, Congress has not stepped in forcefully enough to regulate the field. The average American does not benefit from this massive and unprecedented redistribution of wealth. Indeed, much of this redistribution arises from, or at least has been tainted by, criminal misconduct. More ominously, the current merger mania will adversely affect the long term competitiveness of American industry in the world and its economic standing.


54. Not only are jobs lost, but it takes longer for a worker who loses his or her job due to a plant closing to find a new job, on average; and when a new job is obtained, it tends to be lower paying, less skilled, and frequently only part time. LAWRENCE E. ROTHSTEIN, PLANT CLOSINGS: POWER, POLITICS, AND WORKERS 14-15 (1986).

55. One to two additional jobs are indirectly lost in a local economy for every one job directly lost due to the closing of a major local employer, such as an automobile plant. BARRY BLUESTONE & BENNETT HARRISON, THE DEINDUSTRIALIZATION OF AMERICA 71 (1982).

56. See Richard G. Swanson, S. 510 and The Regulation of Cash Tender Offers: Distin-
guishing St. George From the Dragon, 5 HARV. J. LEGIS. 431 (1968).

57. Cf. DANIEL WEBSTER, JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS, NOVEMBER 15, 1820 — JANUARY 9, 1821 144 (1821) (stating that "[t]he freest government . . . would not long be acceptable, if the tendency of the laws were to create a rapid accumulation of property in few hands, and to render the great mass of the population dependent and penurious. In such a case, the popular power must break in on the rights of property, or else the influence of property must limit and control the exercise of popular")


59. For example, Wall Street targets "undervalued" companies with large financial commitments to research and development. The debt resulting from the takeover battle, and the need to service it with current cash flow, negatively impacts on future research. See JOHN BROOKS, THE TAKEOVER GAME 19 (1988).

60. Peter F. Drucker, Taming the Corporate Takeover, WALL ST. J. Oct. 30, 1984, at A30 (indicating that management's fear of being taken over is the "main cause of the decline in America's competitive strength in the world economy").
ability to withstand the inevitable ups-and-downs of the marketplace.\textsuperscript{61}

A growing number of studies show that mergers fail to lead to positive performance outcomes,\textsuperscript{62} that acquiring firms often perform more poorly than nonacquiring firms,\textsuperscript{63} that both conglomerate mergers and horizontal acquisitions can lead to substantial losses in market share,\textsuperscript{64} that mergers do not reliably yield the desired financial returns,\textsuperscript{65} and that most firms experience significant difficulties during the post-merger integration period.\textsuperscript{66}

The junk bond, which is a publicly registered noninvestment grade subordinated debt, fueled this dramatic increase in acquisitions, recapitalizations and leveraged buyouts. Strangely, the emergence of the junk bond market gave companies with bad credit—i.e., that lacked investment grade debt ratings—access to a public capital pool aggregating more than $200 billion. In other words, economic power went to those who could not qualify for capital investment through traditional lending resources.\textsuperscript{67} Accordingly, the problems

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\item[\textsuperscript{61}] Christopher Farrell, \textit{Learning to Live with Leverage}, \textit{Bus. Wk.}, Nov. 7, 1988, at 138.
\item[\textsuperscript{66}] William J. Powell, Jr. & Steven E. Prokesch, \textit{Do Mergers Really Work?}, \textit{Bus. Wk.}, June 3, 1985, at 88-100.
\item[\textsuperscript{67}] In late 1985, by a 3-2 vote, the Federal Reserve Board announced a proposed restriction on the use of junk bonds issued by “shell corporations” to finance takeovers. Effectively, the Federal Reserve’s action means that debt securities issued by such shell corporations might not be issued to finance more than 50% of the purchase price in a takeover. Procedurally, the Federal Reserve Board established a presumption that debt securities issued by a shell corporation were “indirectly secured” by the target’s stock when no other credit or assets were pledged. However, the Board defined “shell corporation” narrowly as one having “virtually no business operations, no significant business function other than to acquire and hold the shares of the target company, and substantially no assets or cash flow to support the credit other than the margin stock it has acquired or intends to acquire.” \textit{See Interpretation of Margin Requirements}, 72 \textit{Fed. Reserve Bull.}, 192 (Number 3 Mar. 1986). Given this definition, the professional reaction to the Federal Reserve Board’s ruling was that creative planning by bidders could overcome this presumption, particularly if other security for the loan (such as a guarantee by those who stood behind the shell corporation) also pledged. \textit{See Robert D. Hershey, Jr., Federal Reserve Votes for Limits On Debt Financing of Takeovers, N.Y. Times}, Dec. 7, 1985, at 1, 36. Modest as the proposal was, it still elicited a sharply critical response from the Reagan administration, which saw it as unnecessary intervention in
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caused by these Raiders should hardly be surprising.68

THE HUMAN IMPACT

The personal impact of hostile takeovers on workers and their families is devastating.69 From suicides to shattered dreams, from workers to their families and communities, the violence often wrought by corporate raiders is immense and pervasive:

"Don't go down the cellar," Chris Donahue's suicide note warned his family. That's where the thirty-eight-year-old economist hanged himself recently, four days after he lost his $63,000-a-year job at Heublein, Inc., following a takeover by R.J. Reynolds Industries. A week earlier, he thought he'd been promised an auspicious Reynolds headquarters job. Instead, he got eleven weeks' severance pay. "Tell someone at RJR that I loved their generosity and compassion," his note continues. "They owed me more . . . . I know you will think I failed, and maybe I did . . . . I didn't have the strength to endure the pain that was coming."70

"I worked for 18 years and gave them everything I had. Look how I end up, just like a run-over flat can in the street. There is no loyalty, no commitment, no feeling. When it got tough, they bailed out and let us sink [in a hostile acquisition]."71

Few things are as basic to the individual as his or her ability to earn a livelihood, to achieve security and to provide for loved ones. "Merger mania" tramples these basic needs, except for a few Wall Street workers who are reaping enormous profits.

68. For a revealing description of the unique nature of this "junk bond" market, see Allan Sloan & Howard Rudnitsky, Taking in Each Other's Laundry, FORBES, Nov. 19, 1984, at 207.

69. By one estimate, a 1% increase in the national unemployment rate is associated with 37,000 deaths (20,000 of them heart attacks), 920 suicides, 650 homicides, 4,000 state mental hospital admissions, and 3,300 state prison admissions. See RICHARD B. MCKENZIE, FUllITIVE INDUSTRY: THE ECONOMICS AND POLITICS OF DEINDUSTRIALIZATION 3 (1984).

70. Myron Magnet, Help! My Company Has Just Been Taken Over, FORTUNE, July 9, 1984, at 44-51.

COMMON LAW REMEDIES FOR INJURIES ARISING FROM CORPORATE TAKEOVERS

The legal protection of employees mirrors both ancient notions about the protection of settled expectations and relations in civil society, and modern perceptions of the diminishing opportunities to achieve security through wholly self-reliant means:\footnote{72}{E.g., Adolf A. Berle, Property, Production and Revolution, 65 Colum. L. Rev. 1, 20 (1965) (predicting "a growing demand that significant jobs be available for everyone"); Charles A. Reich, The New Property, 73 Yale L.J. 733 (1964) (referring to expanded notions of property rights necessary to ensure employees' personal autonomy); Philip J. Levine, Comment, Towards a Property Rights in Employment, 22 Buff. L. Rev. 1081, 1084 (1973) (noting that without restraint on power of dismissal, employers exercise dominion over employees' fundamental liberties).}

The observation is not new. We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.\footnote{73}{Frank Tannenbaum, A Philosophy of Labor 9 (1951).}

Jobs are a good to be protected by law, but they are also a bedrock of social life.\footnote{74}{E.g., Pugh v. See's Candy, Inc., 171 Cal. Rptr. 917, 925 (Cal. Ct. App. 1981) (holding that employment contracts are terminable only for good cause whenever there is consideration for the contract or the parties agree to good cause termination).} The fact that they are being disrupted may be evidence of some anti-social developments that need to be remedied.\footnote{75}{Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (forbidding an employer from terminating an employee at will where this termination is motivated by bad faith, since such action affronts public policy).}

Common law remedies thus exist to protect workers,\footnote{76}{E.g., Egerton v. Lord Brownlow, 10 Eng. Rep. 359, 437 (1853) (Truro L.) (indicating that "[p]ublic Policy . . . is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good . . . .").} and common law courts can be expected to fulfill their historic obligation to apply old laws to new facts and developments in the marketplace.\footnote{77}{E.g., Robert E. Keeton, Creative Continuity in the Law of Torts, 75 Harv. L. Rev. 463, 506-09 (1962).}
Specifically, the law protects contracts, and where no contract exists the law protects the expectancy of reasonable prospective economic advantage from interference. In the coming years, this simple principle of right will serve both to compensate victims of merger mania, and to hold wrongdoers accountable for harms and "externalities" caused by their wrongful conduct.

**NOVELTY IS NO BAR**

Although there is no case in which damages have been awarded for unlawful interference with economic advantage resulting from junk bond financed corporate takeover activity, the "novelty of a specific occasion for application of a principle in this field is no reason for according it a chilly reception." As Justice Brandeis and Samuel Warren said:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define new the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth grows to meet the demands of society.

Thus, the nature of the tort of interference, consistent with generally accepted common law methodology, lends itself to a case by case

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78. Fowler v. Harper & Fleming James, Jr., The Law of Torts 493-97 (1956). This is true in virtually every state. In 9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228, 232-34 (La. 1989), the court overruled Kline v. Eubanks, 33 So. 211 (La. 1902), which previously had been considered as establishing the proposition that no action will lie in this state for inducing breach of contract or interference with contractual relations by means which are not otherwise unlawful. The Supreme Court said:

Moreover, a delictual rule such as Kline v. Eubanks that flatly and without good reason deprives an innocent person of any remedy for damage to his contract right caused intentionally and improperly by a corporate official is discordant with the fundamental civil law principle that obliges a person to repair damage caused another by his fault. La. Civ. Code art. § 2315. In truth, the Kline v. Eubanks bar is anachronistically unjust when compared with this court's application of the delictual principles to other issues and circumstances. 583 So.2d at 233-34. (Emphasis added.)


82. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) ("... and the term "property" has grown to comprise every form of possession — intangible as well as tangible.").
analysis and renders a rule of thumb inapplicable.\(^8^3\)

Other torts have already been supplied in the area of hostile takeovers.\(^8^4\) For example, workers have successfully sued under fraudulent conveyance law to enjoin post-taking corporate restructuring for wrongfully jeopardizing their rights.\(^8^5\) The trend appears to be that more aggrieved parties\(^8^6\) are seeking redress now that takeovers — especially those tainted by criminality — have lost their luster.\(^8^7\)

This solicitude for novelty is complemented by the law’s aversion to early motions to dismiss.\(^8^8\) As the New Jersey Supreme court

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\(^8^3\) Fowler V. Harper & Fleming James, Jr., The Law of Torts § 6.12, at 515 (1956); Leslie Blau Co., 384 A.2d at 865.


\(^8^7\) Junk bond takeovers, including leveraged buy-outs, have also arguably trampled the rights of non-workers. See, e.g., James A. White, ITT Sues RJR, Saying Buy-out Devalues Bonds, Wall St. J., Nov. 17, 1988, at CI (noting that the value of old debt and bonds lose value in the face "of the mountain of additional debt needed for buyouts."); Mone W. McDaniel, Bondholders and Corporate Governance, 41 Bus. Law. 413, 452-55 (1986); Christopher Farrell, Takeover and Buyouts Clobber Blue Chip Bondholders, Bus. Wk., Nov. 11, 1985, at 113. Creditors represent an intermediate class of participants in the corporation who appear to have lost more than they have gained, although their long-term reaction may not yet be fully visible. See also Steven E. Prokesch, Merger Wave: How Stocks and Bonds Fare, N.Y. Times, Jan. 7, 1986, at A1 (citing recent examples and quoting securities industry expert, Michael S. Hyland, stating that "bondholders on both sides are often left holding the bag."); Farrell, supra note 86, at 113 (viewing takeovers and buy-outs as wealth transfers from bondholders to stockholders). Although traditional synergistic mergers typically increase the firm’s assets and hence the bondholders’ security, the new generation of highly leveraged takeovers has had the opposite effect. The recent series of credit downgradings by Moody’s and Standard & Poor’s, which have been the by-product of takeovers in a significant percentage of the cases, also provides evidence that creditors may have less ability to monitor risk taking by management than neoclassical theory has assumed. Id.

Franchises may also have legitimate and actionable complaints when corporate mergers damages their interests. See Claudia H. Deutsch, Franchisees Fight Back, N.Y. Times, Dec. 4, 1988, § 3 (Business), at 1 (noting that franchisees are going to court in growing numbers).

87. This erosion of lustre is best illustrated by a comparison of Edgar v. MITE Corp., 457 U.S. 624, 643 (1982) and the more recent CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987). MITE seems to reflect the initial socio-economic glorification of the hostile takeover as a model free market mechanism for efficiently reallocating economic resources. At the time CTS was decided, the Court gave expression to the developing political skepticism about the virtues of the tender offer: "there is no reason to assume that the type of conglomerate corporation that may result from repetitive takeovers will result in more effective management or otherwise be beneficial to shareholders. CTS Corp., 481 U.S. at 92 n.13 (Powell, J).

recently said in reinstating a tortious interference claim dismissed at the pleading stage:

The importance of today's decision lies... in its signal to trial courts to approach with great caution applications for dismissal under Rule 4:6-2(e) for failure of a complaint to state a claim... Such motions, almost always brought at the very earliest stage of the litigation, should be granted in only the rarest of instances.89

THE NATURE OF A RAID

In the ordinary case of a hostile bid, a "Raider" will go after a Target, which employs various workers.90 The raid ordinarily comes in the form of a bid to buy control of the targeted company.91 Instead of financing the bid with money, the Raider is backed by an investment banker which issues a letter indicating that it is "highly confident" that it can get financing for the bid at some rate of interest:

The typical opening maneuver in the new takeover wave — or, very often, the event that starts a chain of events ending in a takeover — is a cash tender offer to which the directors and managers of the target company react with more or less hostility. The offer may be improved upon, either by the original aggressor or by some other company; meanwhile the target company, assisted by its investment bankers, may solicit a bid from yet another company with which it is more content to merge — a white knight. Eventually, either a white knight or a hostile aggressor consummates the deal. Or the takeover attempt may be defeated... sometimes through the target company's satisfying the aggressor by buying back his initial stake in its stock at a premium over the market price — the almost universally-deplored practice known as greenmail.

The economic bases of the takeover wave are usually assumed to be two: the undervaluation (or the perceived undervaluation) of the assets of asset-heavy companies by the stock market and the ready availability of credit in gargantuan amounts from commercial banks and other lenders — which are able to get premium interest rates.

89. Id.
91. Id.
on takeover loans . . . ."92

In the ensuing titanic struggle following the putting of the Target "in play," both companies incur substantial amounts of debt.93 The loser of the struggle is often paid quite handsomely to go away: Greenmail to the unsuccessful raider94, or golden parachutes for the managers who lost the company.95

In either event, the victor must then pay interest on the debt incurred, or pay down the debt.96 Takeovers leave companies indebted. This indebtedness leaves the debtor too hard pressed to invest in long-term growth and, thus, threatens the country's economic strength.97 Limited cash flow goes to debt, not to investments in equipment or to research and development. Busting up the company,98 closing operations producing profits on capital less than the interest on debt,99 or recapitalizing are ways of dealing with the debt that inevitably follows the takeover attempt. Again, the victor is not

92. Id. at 19.

93. A leveraged buy-out ("LBO") is a takeover in which the bidder expects ultimately to pay the purchase price out of the cash flow generated by the target or by selling of the target in toto, or more likely, piecemeal. Such a deal is generally financed through the sale of junk bonds. E.g., United States v. Tabor Court Realty Corp., 803 F.2d 1288, 1292 (3d Cir. 1986) (explaining leveraged buyout), cert. denied, 483 U.S. 1005 (1987).

94. BROOKS, supra note 90, at 20.

95. See supra note 39.

96. This is hardly a controversial allegation in the takeover game. E.g., In re Phillips Petroleum Sec. Regulation, 738 F. Supp. 825, 833 (1989) (concluding that Pickens "from the outset intended to put Unocal 'in play' and thereby either obtain control or 'greenmail' the corporation in exchange for dropping its bid").

97. Accordingly, many state funds are foregoing the short term "takeover" profits for the sake of the economy's long term strength. Anise C. Wallace, Ideas & Trends: Investing Pension Money; For State Funds, Buyouts Raise Skepticism and Cash, N.Y. TIMES, Dec. 4, 1988, § 4, at 32.

98. E.g., Martin Lipton, Corporate Governance in the Age of Finance Capitalism, 136 U. PA. L. REV. 1, 11 n.40 (1987) (noting that in Pantry Pride's acquisition of Revlon, the purchase price of $1.7 billion, financed in part by $725 million in junk bonds, was partially recovered by the sale of Revlon's prescription pharmaceutical business for $690 million, its Noreliff Thayer, Rehis, and Beecham subsidiaries for $395 million, and its Technicon subsidiary for $300 million).

99. See e.g., Carlo M. Sardella, A Town Is Losing Biggest Employer, N.Y. TIMES, Dec. 12, 1986 at 8. According to the article:

The biggest employer in Camden County Borough, the building Material Customer Service Center of Owens-Corning Fiberglass Corporation, has begun a shutdown process that will terminate all but a handful of its 800 workers.

Some 100 were laid off last Monday, and 500 will follow tomorrow because of a "restructuring" brought on by the company's successful but costly defeat last August of a hostile takeover attempt.

Id. [Emphasis added].
necessarily closing "unprofitable" businesses, but is instead seeking a more profitable mix of business usually in the short term. Generally, the target of a tender offer loses its independence. However, all of these ways of dealing with the debt that inevitably follows the takeover attempt foreseeably involve the loss of jobs. Congressman Lantos summed it up best, perhaps, when he reported on hostile takeovers:

However, all too many of the recent wave of takeover attempts involve a profitable, healthy company which is targeted by a corporate raider or by another company seeking to gobble it up for a quick profit. The money-hungry raider or the aggressor company purchases enough stock to put the target company "into play." Whether the bidder is successful in the takeover attempt or whether the target company fends off the attack by restructuring, it spells bad news for the workers. When the takeover is successful, it is frequently highly leveraged and financed by the use of high-yield, high risk or so-called "junk bonds." In order to pay back this bor-

102. E.g., Moran v. Household Int'l, Inc., 500 A.2d 1346, 1349 (Del. 1985) (referring to Household's attorneys explanation that "the possible adverse effect this type of activity could have on employees") (emphasis added); Thomas J. Murray, Here Comes the 'Tin' Parachute, Dunn's Bus. Month, Jan. 1987, at 63 (stating that when a takeover bid is made, "[m]any key employees — well aware of acquisitors' penchant these days for wholesale layoffs and salary and benefit cuts — quit rather than wait out an uncertain future, or are so distracted from their work that the company suffers") (emphasis added).

In the wake of the Chevron-Gulf acquisition in 1984, the combined entity laid off 10,000 employees (or 12% of its work force), and it has further reduced its work force by 2000 more in 1985. Following Texaco's acquisition of Getty Oil, Texaco announced a 26% reduction in its work force. See Richard B. Schmitt, Depleted Field: Despite Raiders' Lust, Oil Industry Is Facing Retrenchment Period, Wall St. J., June 7, 1985, at 1, 9. Nor is this pattern unique to the oil industry. Following Baxter Travenol Laboratories acquisition of American Hospital Supply Corporation, plans were announced to lay off 10% of the combined work force, or 6000 workers. See Baxter Plans Layoffs; Merger Is Completed, N.Y. Times, Nov. 26, 1985, at D-4.

Even when the bidder is defeated, the target may be compelled to trim its work force substantially as the result of the added leveraged it took on in connection with its defense. For descriptions of layoffs at CBS, Martin Marietta and Phillips Petroleum following "successful" takeover defenses, see John Nielsen, Management Layoffs Won't Quit, Fortune, Oct. 28, 1985, at 46.
rowed money, the purchaser breaks up parts of the company for resale, costs are cut, and workers are let go.

Similarly, even when the target company is successful in fighting off a takeover attempt, it does so at a tremendous cost, saddling itself with a huge debt in the process. To deal with this new debt, productive assets are sold, plants are closed, research and development spending is cut back, all of which have negative consequences for workers.

Therein lies the essence of the tort of interference.°

The inevitable adverse impact on workers and the unions is a function of two things. First, debt incurred in legitimately defending the unlawful assault, or in financing the successful takeover. A high yield corporate bond ("junk bond") financed takeover is unique.°° Junk bonds simply are bonds of less than investment grade.°° Junk bonds financing of tender offers involves the use of a highly leveraged shell company that the bidder funds with a minimal amount of cash. The bulk of the shell’s capital derives from a combination of privately placed, high coupon debt instruments,°°° and bank financ-

103. Impacts on Workers of Takeovers, Leveraged Buyouts, Corporate Restructuring, and Greenmail, Before Employment and Housing Subcommittee of Government Operations, 100th Cong., 1st Sess. (1987) (Opening Statement of Chairman Tom Lantos). The problem extends to managers also. See also V.R. Buzzota, A Quiet Crisis in the Work Place, N.Y. TIMES, Sept. 4, 1985, at A-27; Middle Managers Are Still Sitting Ducks, BUS. WK., Sept. 16, 1985, at 34; Steven E. Prokesch, "People Trauma" in Mergers, N.Y. TIMES, Nov. 19, 1985, at D-1; John Nielsen, Management Layoffs Won't Quit, FORTUNE, Oct. 28, 1985, at 46. For companies, such as CBS, which laid off 2000 workers one month after leveraging up its financial structure to defeat Ted Turner’s hostile bid, or Phillips Petroleum, which fought off Boone Pickens, the takeover phenomenon appears to be the principal explanation. See Salley B. Smith, Sweeping Staff Cuts at CBS News, N.Y. TIMES, Sept. 20, 1985, at C30; The Shrinkage at Phillip Pete, BUS. WK., May 27, 1985, at 46 (noting a 10% work force cut).

104. In addition to corporate raiders, their helpers may be liable as aiders and abettors, if they have given "substantial assistance and encouragement" to one whose conduct "constitute[d] a breach of duty." RESTATEMENT (SECOND) OF TORTS § 876(b) (1979); Landy v. FDIC, 486 F.2d 139, 162-63 (3d Cir. 1973).

105. Junk bond financing is a particularly attractive means of acquiring a company whose stock is considered to be undervalued. In some cases companies with large investments in research and development are "undervalued."

106. Junk bonds usually have a rate of return that is three to four percentage points higher than is the typical rate of return on corporate bonds of investment grade. However, junk bonds also have a default rate that is 20 times higher than that on all corporate bonds. The real rate of loss, however, is closer to one percent, because issuers of junk bonds often pay back some of the principal and interest. See, Edward I. Altman & Scott A. Nammacher, The Default Rate Experience in High Yield Corporate Debt, Mar. 1985 (coming from a study conducted for Morgan Stanley & Co.).

107. The financing of Junk bond takeovers frequently occurs through private placements.
ing that is sometimes coupled with preferred stock.\textsuperscript{108}

After completing the acquisition, the bidder often either (1) sells the assets of the target (a "bust-up" takeover) and retires the debt instruments with the proceeds, or (2) restructures the company to meet its increased debt burden.\textsuperscript{109} If the acquisition is successfully defended, the target has the same two limited options. Both options mean that workers lose jobs.\textsuperscript{110} A junk bond takeover or defense leads to either a "bust-up," or recapitalization.\textsuperscript{111} The result of each of these alternatives is, again, a loss of jobs.\textsuperscript{112}

Although bidders have also sold junk bonds to the public. Public offerings may raise the issue whether the bidder has adequately disclosed all material information concerning its acquisition intentions. In particular, information as to whether there has been adequate disclosure of the intended use of proceeds, whether the prospectus speaks generally of possible acquisition, and whether soon after the public offering the bidder intends to start a tender offer for a particular target. Revlon, Inc. v. Pantry Pride, Inc., 621 F. Supp. 804 (D. Del. 1985) (denying preliminary injunction).

\textsuperscript{108}. Id.


\textsuperscript{110}. Some commentators, including Federal Reserve Board Chairman Alan Greenspan, criticized the craze for junk bonds because such financing results in significantly higher leveraging of companies acquired in hostile tender offers, or companies that have successfully defended hostile tender offers. Although bidders assert that companies generally do not make sufficient use of the debt market, their critics equate the increase in leveraging with the market trends that occurred before the stock market crash of 1929. They argue that increased debt may result in more bankruptcies in the future. E.g., Randall Smith \& Kevin G. Salwen, Takeover Stocks Hurt On Concern Over Bids, WALL ST. J., Nov. 17, 1988, at C1.

\textsuperscript{111}. In a recapitalization, borrowed funds are used to finance an exchange by which public shareholders trade their common stock for a substantial amount of cash plus shares of a new class of common stock in the now heavily leveraged company. Management however, elects to forego any cash payment for their stock (or options), instead receiving increased amounts of new common stock. The result of a recapitalization, like that of a Leveraged Buyout (LBO), is a highly leveraged company. In a recapitalization, unlike an LBO, the public shareholders retain an equity position in the company. Lawrence Lederman \& Michael Goroff, Recapitalization Transactions, 19 Rev. Sec. \& Commodities Reg. 241, 24-42 (1986).

\textsuperscript{112}. Workers lose even when jobs are saved. Between 1980 and 1985 employers have terminated over 700 pension plans and collected $6.7 billion in "surplus" assets. Nearly $3 billion was recaptured in 1984 alone. This figure equals the total of the previous three years combined, thus illustrating a rising tide. Probably the largest and best-known recent case involved United Airlines, which announced in 1985 that it intended to recapture over $1 billion for general corporate purposes. See Clyde H. Farnsworth, Washington Watch: Pension Plans' Surplus Assets, N.Y. Times, Aug. 12, 1985, at D2. As of August 28, 1985, $3.1 billion had been recaptured during 1985, thus exceeding 1984's level.

In United's case, the recapture was announced as a defensive move designed to thwart any raiders. The surplus assets were placed in a trust that could only be used to finance corporate expansion. See Harlan S. Byrne, UAL Will Use Some of Unit's Pension Funds, WALL ST. J., June 11, 1985, at A2. In other cases as well, the raiding of the pension fund's assets appears to have been designed to help finance future acquisitions. See Pension Fund
WHY IT PAYS TO PUT A COMPANY IN PLAY: THE PROBLEM OF SECRET ACCUMULATIONS

Current securities and antitrust regulations permit a raider to acquire significant share positions before making any public disclosure concerning its purchases and its intentions with respect to the target.\textsuperscript{113} As such, a raider can reap a tremendous profit simply by acquiring a large stake and then putting the target "into play."\textsuperscript{114} The "play" means that stock prices will rise on the initial purchase. Moreover, once a substantial stock position is obtained, the raider is in a position to attempt a tender offer for the target company or to force a significant corporate restructuring of the company through a proxy contest.

SECTION 13(D)

Through the Williams Act, enacted in 1968, Congress provided for an "early warning" mechanism in corporate acquisitions.\textsuperscript{115} Under Exchange Act Section 13(d), persons acquiring more than five percent of a public company's stock must disclose their ownership and investment intentions.\textsuperscript{116} This provision alerts a target company's management to possible "creeping acquisitions" of the company by outsiders. In 1972, Congress supplemented the Williams Act with Section 13(g), which essentially requires all five percent beneficial owners to disclose their holdings, regardless of when they were acquired.\textsuperscript{117} The net effect of Sections 13(d) and 13(g) is that a target company is alerted to the identity of its major shareholders.\textsuperscript{118} Exchange Act Regulation 13D-G delineates the disclosure

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113. \textit{See Revlon, Inc.}, 621 F. Supp. at 808-09. Although some state takeover statutes (such as Delaware's business combination statute), and flip-in provisions of shareholder rights plans, limit the number of shares which may be purchased by a raider or other investor without potentially serious consequences, these limits are really just ceilings which still allow substantial stock accumulation.

114. \textit{See id.}


118. \textit{See Securities Exchange of 1934 §§ 13(d), 13(g), 15 U.S.C. §§ 78m(d), 78m(g) (1988).}
duties of persons falling under these sections.\textsuperscript{119} Exchange Act Section 13(d) and its regulations provide that any party falling under this rule must file a Schedule 13D form disclosing the interest.\textsuperscript{120} Stock traded on a national securities exchange must be registered under Section 12(b)\textsuperscript{121}, and its ownership would necessarily be subject to Section 13(d).\textsuperscript{122}

Schedule 13D requires the identification of the filing person or group acquiring the securities, and their relation to the target company.\textsuperscript{123} Importantly, the document must disclose the purpose of the securities acquisition.\textsuperscript{124} The reporting persons specifically must describe any plans to acquire additional securities, to take over the company, or to materially affect the issuer’s business.\textsuperscript{125} As a practical matter, securities lawyers generally couch these sections in language that is broad enough to enable the filers to pursue a wide range of options for future acquisitions or control of the issuer’s stock.

A raider can quietly and legally purchase a target company’s stock up to a level just short of 5\% of the outstanding shares, the point at which the SEC requires public disclosure.\textsuperscript{126} The actual purchases are typically made through obscure corporations and partnerships in order to keep secret the identity of the raider. Before crossing the 5\% level, at which point the raider has 10 days to make a public disclosure of its target company holdings, the raider firms up its group and obtains the financing required for its planned stock purchases. Once set, it crosses the 5\% threshold, commencing a vigorous open market purchase program. Often an acquirer will be able to accumulate up to 10\% or 20\% of the target’s share before disclosing such purchases in a Schedule 13D filing.\textsuperscript{127}

A Schedule 13D must be submitted within ten days of the securities acquisition (although in 1985-1986, there was considerable sup-

\begin{thebibliography}{100}
\bibitem{124} See id.
\bibitem{125} Id.
\bibitem{127} A number of legislative proposals have been put forward which would close the 10-day window period under § 13(d) of the Exchange Act, some of which would also reduce the 5\% threshold. However, these proposals have been lost in the broader debate over takeover reform legislation.
\end{thebibliography}
port in Congress and the SEC for “closing the 10-day window”). In addition to filing the Schedule 13D with the SEC and the target, each exchange trading the security must receive a Schedule.128 If any material change occurs in the facts set forth in Schedule 13D, the filing person must promptly amend the Schedule and send it to the SEC, the issuer, and the exchanges.129

SECTION 14(D)

Section 14(d)130, which was enacted as part of the Williams Act, essentially makes it unlawful to initiate a tender offer unless a statement is filed131 with the SEC.132 Any party that makes a tender offer for a Section 12 equity security must file a Tender Offer Statement through a Schedule 14D-1 if such party will own more than 5 percent of a class of the security.133 The 14-D form requires the reporting party to identify itself, and to disclose its sources of funds and the number of shares subject to the offer.134 Other important disclosures include the bidder’s purpose for the offer, business plans for the target, and present or future relationships between the bidder and the target or its executives.135 As with the Schedule 13D language, Schedule 14D filings usually are drafted in such a fashion as to keep the bidder’s option open, pending completion of the tender offer.

Under Rule 14d-3, the Schedule must be filed “as soon as prac-

129. Securities Exchange Act of 1934 § 13(d)(2), 15 U.S.C. § 78m(d)(2) (1988). Similar provisions apply to persons subject to Section 13(g). Certain beneficial owners, usually institutions such as registered investment companies or employee benefit plans, may use the “short form” provided by Schedule 13G. Additionally, the institution must have acquired its holdings in the ordinary course of its business and not with the purpose of affecting control of the issuer. Such “persons,” in lieu of filing a Schedule 13D, may file a Schedule 13G within 45 days of the end of the calendar year in which they obtained their five percent holding. General Rules and Regulations, Securities Exchange Act of 1934, 17 C.F.R. § 240.13d-1 (1992).

The 13G document must be sent to the SEC, the target company, and the principal exchange where the security is traded. Additionally, persons acquiring more than ten percent of an equity security must file a Schedule 13G within ten days of the end of the first month after the transaction. 17 C.F.R. § 240.13d-1(b)(2) (1992). As with the Schedule 13D, any material changes must be reported on a new Schedule 13G, and filed with the SEC, the target, and the exchange.

http://scholarlycommons.law.hofstra.edu/hlelj/vol10/iss1/3
ticable on the date of the commencement of the tender offer.” The schedule must be filed with the SEC, and hand delivered to the target and the competitive bidders. Additionally, the bidder must give telephonic notice to the exchanges where the target’s securities are traded, followed by a mailing of the Schedule. The telephonic notice preferably should be given before the opening of the exchanges. For NASDAQ-listed stocks, similar notification must be given to the NASD. If any material change occurs in the information disclosed in the Schedule 14D-1, the reporting person promptly must amend the Schedule and file it with the SEC, the target company, and the exchanges.

**HART-SCOTT-RODINO ACT**

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HRS Act”) generally requires an acquirer to notify the Federal Trade Commission and the Antitrust Division of the Department of Justice (and the target) and wait 30 days (unless there is early termination) before acquiring $15 million of the target’s stock.

The formal process of obtaining government clearance for a merger begins with the filing of pre-merger notification report forms, when required, with the FTC and the Justice Department in compliance with the Hart-Scott-Rodino Act of 1976. The two agencies then decide which will review the proposed merger, based on their relative workloads and their expertise in a specific industry. The Justice Department tends to review mergers in steel, brewing, telecommunications, and financial services whereas the FTC usually handles the cement, food distribution, professional services, and chemicals industries. When both agencies are in conflict over a high-profile transaction raising serious antitrust question, the one that gets the case usually is decided through bargaining.

Under the Hart-Scott-Rodino Act, the transaction may not go forward for 30 calendar days (15 in the case of a cash tender offer) from the filing of pre-merger notification. If a merger presents no

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antitrust question, the parties may seek early termination of the wait-
ing period.\textsuperscript{142} Otherwise, the reviewing agency will use the waiting
period to conduct a preliminary investigation. If the agency concludes
that the transaction is lawful, it will let the waiting period expire. But
if the preliminary investigation has not satisfied the reviewing agency,
it will ask for more information, a step that automatically extends the
waiting period until 20 calendar days (10 days in the case of a cash
tender offer) after the parties have substantially complied with the re-
quest.\textsuperscript{143}

The HRS Act, however, is not primarily concerned with the full
and fair disclosure of an acquirer’s accumulation of the target’s
shares, and thus provides incomplete protection against secret share
accumulations. First, an acquirer can accumulate in excess of $15
million of a target’s shares up to a 10\% stake if it can establish that
the acquisition “is solely for the purpose of investment.”\textsuperscript{144} Then,
subject to FTC scrutiny (and possible sanctions) if the change occurs
too quickly, the acquiror can change its subjective intent and file for
HSR clearance at a higher threshold level. Moreover, a loophole in
the HSR filing requirements has permitted raiders to avoid the filing
requirements by forming partnerships to accumulate target shares.

Effective July 3, 1987, the FTC promulgated a new rule that
partially closed the “partnership loophole.”\textsuperscript{145} The new rule requires
HSR Act filings in connection with acquisitions by newly-formed
partnerships where one of the partners has the right to 50 percent or
more of (i) the profits of the entity or (ii) the assets of the entity
upon its dissolution.\textsuperscript{146} While the new rule does not apply to part-
nerships in which no partner satisfies the 50 percent standard, the
FTC takes the position that a partnership that is formed for the pur-
pose of avoiding the obligation to comply with the HSR Act filing
requirements will be disregarded.\textsuperscript{147}

In September 1988, the FTC issued a notice of proposed rule-

\begin{footnotesize}
\begin{itemize}
\item 142. 15 U.S.C. \textsuperscript{\textsection} 18a(b)(2) (1988).
\item 143. 15 U.S.C. \textsuperscript{\textsection} 18a(e)(2) (1988).
\item 144. 15 U.S.C. \textsuperscript{\textsection} 18a(e)(11) (1988).
\item 146. 16 C.F.R. \textsuperscript{\textsection} 801.1(b)(1) (1992).
\item 147. \textit{Id}. In an early application of the new rule, the FTC reportedly launched an in-
vestigation of T. Boone Pickens’ role in the purchases by Ivanhoe Partners of Newmont Mining
shares; no action has been taken to date. The FTC also reportedly deadlocked (by a 2-2
vote) on bringing a preliminary injunction action against the Rales brothers’ acquisition of
shares in Interco for violations of the HSR Act’s requirements; the prospect of a civil penalty
case is reportedly still under consideration.
\end{itemize}
\end{footnotesize}
making in which it proposed three alternative rule amendments which would raise the initial reporting threshold under the HSR Act to 10%. According to the FTC, the principal motivations behind the proposed rule change are to (i) reduce the non-antitrust-related incentive to avoid HSR filing obligations; (ii) eliminate any unnecessary burden on the parties; and (iii) avoid unnecessary interference with the securities laws’ disclosure requirements and the market for corporate control.

THE RIGHTS OF WORKERS

"The right of a person to pursue a lawful business and enjoy the fruits and advantages of one’s industries or efforts are rights which the law protects." Workers have a fundamental property right to expect that third parties will not improperly interfere with their expectancy in continued employment. Acquired capital, as much as the labor to create it, enjoys this basic legal protection:

As a part of the right of acquiring property there resides in every man the right of making contracts for the purchase and sale of property, and contracts for personal services which amount to the purchase and sale of labor. It makes little difference whether the right that underlies contracts of the latter sort is called a personal right or a property right. It seems to us impossible to draw a distinction between a right of property and a right of acquiring property that will make a disturbance of the latter right any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it.

The breath of this principle is limited only by the boundaries of industry and imagination. Since a large part of what is most valuable in modern life depends upon "probable expectancies," as social and industrial life becomes more complex the courts must define and pro-

149. Id.
150. See, e.g., MODEL JURY CHARGES, NEW JERSEY — CIVIL, 73, No. 3.18(A); see also supra notes 6-7, 54-55, 71.
tect these interests from undue interference.\textsuperscript{153}

**HISTORICAL ORIGIN OF RULE**

In the early history of the common law, damages were recoverable for the seduction, beating or enticing for misemployment of a servant. That is, an interference with contract by unlawful or improper means were actionable. In *Lumley v. Gye*,\textsuperscript{154} however, the principle was applied to interference with any kind of personal service employment or contractual relation, regardless of the propriety \textit{vel non} of the means used to entice the breach.\textsuperscript{155} In that case, the defendant, with the knowledge that a famous opera singer had contracted with the plaintiff to appear exclusively at his theater, persuaded her to refuse to perform.\textsuperscript{156} In so doing, the defendant did not use force, duress, fraud, defamatory statements, or other unlawful means.\textsuperscript{157} The English Court held that the defendant was nevertheless liable for damages.\textsuperscript{158}

In 1881 in *Bowen v. Hall*,\textsuperscript{159} the English Court solidified the nature of the tort, stating that, if either the ends sought or means applied were improper, an actionable wrong had occurred:

Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie . . . . Merely to persuade a person to break his contract, may not be wrongful in law or fact . . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, . . . and

\textsuperscript{153} See Jersey City Printing Co. v. Cassidy, 53 A. 230 (N.J. Ch. 1902).

\textsuperscript{154} 118 Eng. Rep. 749 (Q.B. 1853).

\textsuperscript{155} Id.

\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} Id. The tort of intentional interference was always a form of law enforcement. The enticement-of-servant action, which in *Lumley* became the tortious interference action, originated not as a recognition of property rights, but as a private remedy to correct a social problem.

The enticement-of-servant action was, in essence, an implied private right of action relative to the goals of the Statute of Laborers, 23 E & W 3 (1349), and was intended to maintain social order by minimizing the movement of menial laborers.

\textsuperscript{159} 6 Q.B.D. 333 (1881).
therefore an actionable act if injury ensues from it.\textsuperscript{160}

The principle of \textit{Lumley v. Gye}\textsuperscript{161}, and \textit{Bowen v. Hall}\textsuperscript{162}, has been generally accepted in the United States and New Jersey, and has been applied to interference with any contractual relation, whether employment or non-employment in nature.\textsuperscript{163} Such interference with employment, whether by improper means or for a wrongful end is clearly actionable.\textsuperscript{164}

\section*{THE RESTATEMENT}

Although the tort of interference may differ among the states, the RESTATEMENT appears to reflect a near consensus in its articulation:

\textbf{§ 766. INTENTIONAL INTERFERENCE WITH PERFORMANCE OF CONTRACT BY THIRD PERSON.}

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.

\textbf{§ 766A. INTENTIONAL INTERFERENCE WITH ANOTHER’S PERFORMANCE OF HIS OWN CONTRACT.}

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.

\begin{footnotes}
\item[160] Id. at 337-38.
\item[162] 6 Q.B.D. 333 (1881).
\end{footnotes}
§ 766B. INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATION.

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relations, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
(b) preventing the other from acquiring or continuing the prospective relation.\(^{165}\)

These sections of the RESTATEMENT clearly provide for the recovery of economic losses where the defendant interferes intentionally. The unanswered question is when is interference improper and who decides what is improper.

ELEMENTS OF UNLAWFUL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

The best way to answer these queries is to break down the tort into its constitutive elements for separate analysis. Such a general statement of the cause of action for unlawful interference with prospective economic advantage is as follows:\(^{166}\)

1. The existence of a contract, or a reasonable expectancy of prospective economic relations, or a legally protected interest between the plaintiff and a third party;
2. The defendant's knowledge of the contract, expectancy or interest;
3. The defendant wrongfully and without justification\(^{167}\) in-

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Alternatively, a cause of action for a tortious interference with prospective economic advantage can be articulated as requiring three showings: (1) a third party intentionally and wrongfully interferes (2) with a present or prospective relationship between two other parties (3) from which relationship the complaining party reasonably expected to receive economic benefit or advantage. Borbely v. Nationwide Mut. Ins. Co., 547 F. Supp. 959, 976 (D.N.J. 1981).
167. This is not true in all states. However, many courts demand as an additional element
interfered with plaintiff’s expectancy of economic advantage or benefit, or otherwise rendered impossible the performance of the contract;
4. It is reasonably probable that plaintiff would have realized his economic advantage or benefit absent the wrongful act of the defendant;
5. Damages to the plaintiff resulting from the foregoing.

JURY INSTRUCTIONS

To further focus the discussion, a set of Model Instructions on interference and wrongfulness is set forth. Although these may not be appropriate in every case, and sometimes differ from the Restatement, their heuristic value here will appear in the course of the discussion.

3.18(a) UNLAWFUL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

The right of a person to pursue a lawful business and to enjoy the fruits and advantages of one’s industry or efforts are rights which the law protects against unjustified and wrongful interference by another person.

Thus, the law protects a person’s interest in reasonable expectations of economic advantage.

In order that the plaintiff may recover damages for a wrongful act, such wrongful act must be found to have interfered with a reasonable expectancy of economic advantage or benefit on the part of the plaintiff.

the allegation that the means or ends were improper:
If the act complained of does not rest upon some legitimate interest [i.e., a proper end], or if there is sharp dealing or over-reaching, or other conduct below the behavior of fair men similarly situated [i.e., an improper means] the ensuing loss to the plaintiff should be redressed.
E.g., MODEL JURY CHARGES, NEW JERSEY — CIVIL, No. 3.18(C). Since many “ raiders,” and other “ players” engage in such objectionable conduct, this added requirement seems not too onerous. See, e.g., Steve Schwartz, Nine Transactions in the Boesky Investigation, WALL ST. J., Dec. 5, 1986, at 23.
Thus, plaintiff must provide the following elements:

1. The existence of a reasonable expectation of economic advantage or benefit belonging or accruing to the plaintiff;

2. That the defendant had knowledge or such expectancy of economic advantage;

3. That the defendant wrongfully and without justification interfered with plaintiff's expectancy of economic advantage or benefits;

4. That in the absence of the wrongful act of the defendant it is reasonably probable that the plaintiff would have realized his economic advantage or benefit (i.e., effected the sale of the property and received a commission); and

5. That the plaintiff sustained damages as a result thereof.

It is for you to determine, therefore, whether the plaintiff has established by a preponderance of the evidence all of the elements outlined above. If you so find, then you should return a verdict in favor of the plaintiff. Otherwise, you should find for the defendant.168

3.18(c) UNLAWFUL INTERFERENCE WITH CONTRACTUAL RELATIONS, etc. WRONGFUL ACT - DEFINITION

In determining whether the defendant committed a wrongful act, the ultimate inquiry is whether defendant unjustifiably interfered with plaintiff's fair opportunity to conduct his legitimate business affairs.

Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry and skill, free from unjustified and wrongful interference. (He has no right to be protected against fair and legitimate competition).

Thus, the law protects a person in the pursuit of his livelihood. (True, he cannot complain of every disappointment; others too, may further their equal interests, if the means are fair).

If the act complained of does not rest upon some legitimate interest, or if there is sharp dealing or overreaching, or other conduct below the behavior of fair men similarly situated, the ensuing loss to the plaintiff should be redressed.

Hence one who unjustifiably interferes with the contract (or reasonably expectation of economic advantage) of another has committed a wrongful act. 169

**EACH CASE IS FACT SPECIFIC**

The foregoing elements are matters of fact, and do not lend themselves to pre-trial dismissal. 170 These questions of expectancy, causation, and damage invariably must be tried to the finder of fact. 171 This means that motions for summary judgment will rarely be granted.

**THE CONTRACT, EXPECTANCY OR INTEREST**

Either a contract, 172 a legally protected interest, 173 or even a

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169. The Pattern Instructions identify the following supporting cases: Harris, 197 A.2d 359; Louis Schlesinger Co. v. Rice, 72 A.2d 197, 203 (N.J. 1950) ("[A] wrongful act is any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right."); Raymond, 185 A.2d 856 ("Malicious interference is the intentional doing of a wrongful act without justification or excuse."); Sokolay v. Edline, 167 A.2d 211, 220 (N.J. Super. Ct. App. Div. 1961) (noting that to sustain the allegations that defendant maliciously interfered with plaintiff's employment there must be proof of (1) actual interference by defendant, and (2) the malicious nature of such interference).

170. See, MODEL JURY CHARGES, NEW JERSEY — CIVIL, No. 3.18(A).


172. "The . . . contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace." Hishon v. King & Spaulding, 467 U.S. 69, 74 (1984).
mere expectancy,\textsuperscript{174} will satisfy this first element. If the contract is void, as opposed to merely voidable,\textsuperscript{175} an action may be barred.\textsuperscript{176}

It is well established that interference with a prospective advantage\textsuperscript{177} — absent a written contract — may result in tort liability.\textsuperscript{178} As noted by the Court in Zippertubing Co. v. Teleflex\textsuperscript{179}:  

"[T]he cause of action . . . does not depend upon the existence of a legally enforceable relationship. 'The mere fact that a contract is unenforceable between the parties affords no justification for the act of a third person, who, for his own purposes, takes steps which prevent its performance by one of the parties to it, who, although not bound to execute it, is willing and anxious to do so.'"\textsuperscript{180}

This is an expansive concept. "An injury to a person's business by

\textsuperscript{174} See also Advanced Indus. Sec., Inc. v. William J. Burns Int'l Detective Agency, Inc., 377 F.2d 236 (5th Cir. 1967). Such a contract might even be a labor contract. However, since § 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d) (the "NLRA") (requiring unions and employers to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment") does not apply to a company's decision to relocate or terminate a portion of its operations, how can a claim for termination due to jobs terminated as a result of third party interference be preempted as against a third party tortfeasor? First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981).

More important, "[T]ortious interference against nonsignatories is not a federal claim authorized by Section 301, nor is recognition of such a claim by the courts defensible as an exercise of federal common law powers." Elizabeth Z. Ysrael, Note, Federal Common Law of Labor Contracts: Recognizing A Federal Claim of Tortious Interference, 86 COLUM. L. REV. 1051, 1066 (1986).


175. A contract may be void for illegality. E.g., Albee Homes, Inc. v. Caddie Homes, Inc., 207 A.2d 768 (Pa. 1965) (addressing illegal restraint of trade).


177. This concept of advantage is broadly construed. See Longo v. Reilly, 114 A.2d 302 (N.J. Super. Ct. App. Div. 1955) (indicating that fraudulent conduct resulted in the plaintiff's defeat in an election to an office). This was treated as wrongful interference with a business or property right.

178. Harris, 197 A.2d at 363.

179. 757 F.2d 1401 (3d Cir. 1985).

180. Id. at 1407.
procuring others not to deal with him . . . is an actionable wrong." The cause of action may be predicated upon the reasonable expectation that a contract would have been entered into but for the interference.

In a hostile takeover case, the workers' expectancy will be easy to show. The target-employer's track record, its potential, its cash flow and market conditions may be especially probative. Ironically, this is the very evidence that likely motivated the raid in the first instance.

**DEFENDANT'S KNOWLEDGE OF CONTRACT, EXPECTANCY OR INTEREST**

The worker must show some knowledge of the contract or relation by the raider. This question of fact is ordinarily quite straightforward. Most hostile bidders admit to having done some analysis of the target company in public Security and Exchange Commission filings and their public sources.

The worker need only show that the Raider had knowledge of the existence of a contract generally; there is no requirement that the worker prove knowledge of its specific terms. Indeed, a mistaken belief that the contract is void is irrelevant.

The raider's knowledge of this expectancy is usually admitted in press releases or the raider's public disclosures. In any event, this expectancy by workers is disclosed in the target's public filings which the raider relies upon.

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182. Id. at 68.
183. Id.; RESTATEMENT (SECOND) OF TORTS, § 766, cmt. i (1979).
184. THE ACQUISITIONS MANUAL, A GUIDE TO NEGOTIATING AND EVALUATING BUSINESS ACQUISITIONS 67 (Summer N. Levine, ed. 1989):

To obtain information on a Target's labor contract, contact the public affairs or research department of the relevant labor union and request a copy of the contract. Labor union addresses are listed in the Encyclopedia of Associations (Gale Research Co., Detroit, MI) and the Directory of U.S. Labor Organizations (Bureau of National Affairs, Washington, DC). The Bureau of Labor Statistics in Washington provides data on employment and wages in the nonagricultural industries.

*Id.* In other words, it is common practice to do research on the Target's labor situation.
DEFENDANT'S INTENT TO INTERFERE

A claim for tortious interference with contract requires proof that a third party intentionally interfered with a present or prospective relationship between two other parties, from which relationship the complaining party reasonably expected to receive economic benefit or advantage.\textsuperscript{187} Intent is defined by the law as that purpose or aim or state of mind with which a person acts or fails to act. Ordinarily, it is reasonable to infer that a person intends the natural and probable consequences of his act.\textsuperscript{188} An intentional tort is an act committed with the intent to cause harm to another, or committed with the belief that such injury is substantially certain to occur.\textsuperscript{189}

Prosser tells us that the legal concept of intent is much broader than the mere having of a purpose to bring about a specific result.\textsuperscript{190} Consequences desired and those substantially certain to follow are both within the concept of intent. Thus a specific intent to cause a result is not an essential element of an intentional tort where the action proceeds despite a perceived threat of harm to others which is \textit{substantially certain}, not merely likely, to occur.\textsuperscript{191} The existence of this knowledge or intent on the part of the actor may be inferred from his conduct or surrounding circumstances.\textsuperscript{192}

Intent may be proved by indirect or circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear, and may be able to give direct evidence of what a person does or fails to do, they do not likewise see and hear

\begin{footnotes}
\footnote{187. See, e.g., Harris v. Perl, 197 A.2d 359, 363 (1964); Lewis Schlesinger Co. v. Rice, 72 A.2d 197, 202-03 (N.J. 1950). It is illegal to commit "an act with the malicious intent of inflicting injury upon [a] rival's business . . . ." Van Horn v. Van Horn, 28 A. 669, 670 (N.J. 1894); see Ranier's Dairies v. Raritan Valley Farms, 117 A.2d 889, 895 (N.J. 1955); Harris, 197 A.2d 359.}
\footnote{188. This is the established definition of intent. See, e.g., Baker v. United States, 310 F.2d 924, 930 n.9 (9th Cir. 1962), cert. denied, 372 U.S. 954 (1963) (referring to a criminal case); Piedmont Cotton Mills, Inc. v. H. W. Ivey Constr. Co., 137 S.E.2d 528, 531 (Ga. Ct. App. 1964).}
\footnote{189. E.g., McGroarty v. Great American Ins. Co., 329 N.E.2d 172, 175 (N.Y. 1975) ("Certainly one may intend to run a red light but not intend that the catastrophic result of collision with another car occur. Calculated risks can result in accidents.").}
\footnote{190. W. PAGE KEETON \& ET AL., PROSSER \& KEETON ON THE LAW OF TORTS § 6, at 30 (5th ed. 1984).}
\footnote{191. See id., § 7, at 34.}
\end{footnotes}
what a person intends to do or to refrain from doing. In determining whether the defendant intentionally interfered look at the defendant’s conduct and, in the absence of evidence to the contrary, the jury may draw an inference concerning the defendant’s intent.

That inference is that the defendant intended by his conduct, or lack of conduct, those natural and probable consequences that one standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from the same act knowingly done, or knowingly omitted, by him. If the defendant’s conduct was in willful violation of a known right of the plaintiff, then the requisite intent was present.

“[I]f there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this makes the interference intentional, but the factor of motive carries little weight toward producing a determination that the interference was improper.”

If the defendant’s conduct in interfering with the plaintiff’s relationship was itself unlawful, the necessary intent is presumed, without anything more.

NEGLIGENT INTERFERENCE

It is this element of substantial certainty which distinguishes a merely negligent act from intentionally tortious conduct. Nevertheless, due care is still required. Where a defendant acts, despite his knowledge that a risk is appreciable, his conduct is negligent. Where the risk is great, his acts may be characterized as reckless or wanton, but not intentional. The actor must know or believe that harm is


194. RESTATEMENT (SECOND) OF TORTS § 767, cmt. d (1979); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979), cert. denied, 449 U.S. 890 (1980) (holding that specific intent to cause harm was not essential to establish the tort; only the intent to interfere with a known contract was required).

195. In appropriate cases where the conduct complained of may have been unlawful, counsel may rely on the traditional view that a person must be presumed to intend the consequences of his unlawful conduct. Piedmont Cotton Mills, Inc. v. H. W. Ivey Const. Co., 137 S.E.2d 528 (Ga. Ct. App. 1964); 45 AM. JUR. 2d Intereference § 4 (1969).

196. RESTATEMENT (SECOND) OF TORTS § 298, cmt. a (1979) ("The word care denotes not only the attention which is necessary to perceive change, but also the caution required to avert it once it is perceived.").

197. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 7, at 36
a substantially certain consequence of his act before an intent to cause harm will be inferred.\textsuperscript{198} There was some doubt whether mere negligence as opposed to intentional misconduct will sustain a cause of action for interference with prospective pecuniary advantage.\textsuperscript{199}

Comment (a) to § 766C highlights why liability is imposed for economic loss when a defendant is guilty of intentional wrongful conduct, and why courts have formulated a different rule where the defendant is guilty of negligence only.\textsuperscript{200} Comment (a) provides as follows:

\begin{quote}
Liability for interference with contracts and prospective contractual relations developed in the field of intentional torts. Sections 766, 766A and 766B all involve intentional torts. Thus far there has been no general recognition of any liability for a negligent interference, whether it is interference with the third person’s performance of his contract with the plaintiff (\textit{Cf.} § 766), with the plaintiff’s performance of his own contract (§ 766A) or with the plaintiff’s acquisition of prospective contractual relations. (\textit{Cf.} § 766B). The explanation usually given by the courts, when one is given at all, is that, the harm is too “remote” for negligence liability and that the defendant’s conduct is not the “proximate cause.” In most of the cases in which recovery has been denied, the defendant has had no knowledge of the contract or prospective relation and no reason to foresee any harm to the plaintiff’s interests; and the decision sometimes has been explained under the rule as to unforeseeable plaintiffs stated in § 281 . . . .\textsuperscript{201}
\end{quote}

Where the harm is foreseeable as it is in the hostile takeover arena, negligent interference should be actionable. 

\textit{People Express v. Consolidated Rail Corp.},\textsuperscript{202} affirmed the right to sue for damages caused by negligent interference with prospective economic advantage:

\begin{quote}
[A] defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical
\end{quote}

\footnotesize
\begin{flushright}
\textsuperscript{198} As a practical matter, the hostile takeover is well planned, and its implications thoroughly researched. \\
\textsuperscript{199} See e.g., \textit{Rickards v. Sun Oil Co.}, 41 A.2d 267 (N.J. Super. Ct. App. Div. 1945) (addressing the destruction of a bridge to an island, causing business loss to plaintiff). \\
\textsuperscript{200} \textit{Restatement (Second) of Torts} § 766C cmt. a (1979). \\
\textsuperscript{201} \textit{Id.} \\
\textsuperscript{202} 495 A.2d 107 (N.J. 1985).
\end{flushright}
injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct. A defendant failing to adhere to this duty of care may be found liable for such economic damages proximately caused by its breach of duty.²⁰³

In so doing, the Court expressly repudiated the fear of causal line-drawing that has prevented so many other jurisdictions from recognizing this tort.²⁰⁴

Justice Handler began People Express by reminding us that the common law routinely allows recovery of pecuniary losses in personal injury cases (recovery for loss of earning capacity) and in property damage cases (recovery for loss of use is allowed where a chattel is damaged).²⁰⁵ He then sets forth the rationale of the virtually per se Anglo-American rule which bars recovery for indirect economic losses unless defendant’s negligent misconduct also caused physical harm.²⁰⁶ Abounding authority elucidated by Justice Handler supports the per se no recovery rule.²⁰⁷

Justice Handler makes it clear that the per se nonliability rule is based primarily on a well grounded judicial fear of wide, unchecked, open-ended liability for the economic repercussions of negligence (the ripple effect).²⁰⁸ He then states that the physical harm rule supports only a limitation on, not a denial of, liability for indirect economic losses.²⁰⁹ Justice Handler’s People Express opinion fashioned a formula that limits liability but permits the allowance of meritorious claims.²¹⁰

²⁰³. People Express, 495 A.2d at 116.
²⁰⁴. Id.
²⁰⁵. Id. at 109.
²⁰⁶. See, e.g., Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) (indicating that a ship’s time charterer-lessee had no action for loss of the ship’s use while it was laid up for repairs caused by defendant’s negligence); Cattle v. Stockton Waterworks Co., 10 Q.B. 453 (1875) (denying recovery where defendant’s negligence in allowing its pipes to leak increased plaintiff’s costs under a contract with a third to construct a tunnel); Barber Lines A/S v. M/V Donau Mare, 764 F.2d 50 (1st Cir. 1985) (determining that where a ship suffered extra labor, fuel, transport, and docking costs following an oil spill caused by defendant, there could be no recovery for such indirect pecuniary losses in the absence of physical injury to plaintiffs on their property).
²⁰⁹. Id. at 111.
²¹⁰. Id.
Justice Handler began his formulation of a rule allowing recovery for indirect economic losses by carving a substantial number of exceptions to the general rule based on a "special relationship" between the negligent tortfeasor and the individual or business whose economic interests were protected. He found that a common thread ran through these numerous cases giving them an underlying unity: All of the successful plaintiffs were foreseeable with particularity, and virtually all of the foreseeable damages were both ascertainable and finite. In all these "special exception" cases the defendants knew or reasonably should have foreseen that particular plaintiffs or an identifiable class of plaintiffs were at risk, and that ascertainable economic damages would ensue from the conduct. The cases disentangled and traced by Justice Handler imposed liability upon negligent accountants and auditors, surveyors, termite inspectors, engineers, attorneys, notaries public, architects, public weighers, and telegraph companies, all involving liability for indirect economic losses, despite the absence of privity of contract between defendant professionals and their victims who were foreseeable with some particularity.

In all these cases, courts had found it fair, feasible and just to impose liability on defendants who, by virtue of their special activities, professional training or employment, had special reason to know that others, such as the intended beneficiaries of wills or purchasers of stock who were expected to rely on the company's financial statement, would be economically harmed by negligent conduct. Justice Handler makes clear that, although the particular plaintiff was not always foreseeable, the particular type of injury was. In other words, both the particular victim and the particular type of economic harm were within the class of risk that antecedently makes the defen-

211. Id. at 112.
212. Id.
213. See id.
214. Id.
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dant negligent. In this situation, as Justice Handler convincingly demonstrates, the threat of limitless liability which may justify circumscribing the scope of duty does not apply, and his rationale recognizes the allowance of a remedy.

Thus, People Express stands for the application of liability based on negligence in any case where a balancing of such factors as foreseeability, closeness of connection, and moral blame on the decision-maker warrant such a result. Several other jurisdictions currently permit recovery for negligent infliction of economic loss using traditional negligence analysis. In 1979, the California Supreme Court held that the negligent infliction of economic loss was a valid cause of action. The Supreme Court of Montana followed suit in 1982. In 1987, the Alaska Supreme Court adopted the analysis of the New Jersey Supreme Court and also held that a cause of action would be allowed. A federal district court has also imposed liability for negligent infliction of economic loss.

The Ninth Circuit permitted recovery for pure economic losses in Union Oil Co. v. Oppen. In Oppen, the defendants' offshore oil

217. Id.


219. People Express, 495 A.2d. 107. Accord, J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979). The J'Aire court would also consider the extent to which the transaction was "intended" to effect the plaintiff, but this apparently does not require any intent to harm, only a certainty that he would be affected. Other factors to be considered include certainty of harm and policy of deterring future conduct. The court did not discuss damages as such. If the only damages recoverable are for diminished value of the plaintiff's lease, the claim would not be one for interference with prospects at all, but for interference with existing property interests. If the damages are for loss of profits, as the court seemed to assume, the case is one for interference with mere prospective advantage. This California decision was followed in Hawthorne v. Kober Const. Co., Inc., 640 P.2d 467 (Mont. 1982); Keel v. Titan Const. Corp., 639 P.2d 1228 (Okla. 1981).

220. The following are traditional elements of a cause of action for negligence: duty, breach of the duty, proximate cause (including cause in fact) and actual loss. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, 164-65 (5th ed. 1984).

221. See J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979).


225. 501 F.2d 558 (9th Cir. 1974).
well leaked crude oil into the Santa Barbara Channel. Local commercial fishermen sued to recover profits caused by the defendants' negligent destruction of the Channel's supply of fish. The defendants claimed that the plaintiffs had not stated a cause of action for the lost profits. The Ninth Circuit stated that the imposition of liability should depend on reasonable foreseeability. Applying this standard, the court held that the plaintiffs were entitled to recover lost profits in this case.

**ABSENCE OF JUSTIFICATION**

(i) Introduction

There is no privilege to act unlawfully or contrary to good morals. Under the RESTATEMENT liability for interference with existing or prospective contractual relations must be "improper." The RESTATEMENT lists a number of factors to be considered in determining whether interference is "improper":

§ 767. Factors in Determining Whether Interference is Improper

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(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 the 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.

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226. Id. at 559.
227. Id. at 560.
228. Id.
229. Union Oil Co. v. Oppen, 501 F.2d 558, 569 (9th Cir. 1974).
230. Id.
233. Id.
234. By and large, a growing number of jurisdictions are approaching the issue of wheth-
With respect to subparagraph (a), the nature of the defendant’s conduct, the RESTATEMENT indicates a number of means by which the defendant will ordinarily be regarded as having improperly interfered, which include:

(i) Threats of physical violence;
(ii) Fraudulent misrepresentations;
(iii) Wrongful institution of litigation, civil or criminal; and/or
(iv) Conduct in violation of statutory provisions such as antitrust.\(^{235}\)

his approach to “conduct” has generally been followed.\(^{236}\)

Where the party has “an unlawful or improper purpose or uses unlawful or improper means,” it is actionable.\(^{237}\) The principles of tortious interference are not self-applying, and each case must be decided on its own facts.\(^{238}\) The ultimate factual inquiry must be whether the conduct was “both injurious and transgressive of generally accepted standards of common morality or of law.”\(^{239}\)

This conclusion was reached by Justice Holmes in a related
context in one of his early cases, where the majority of the Massachusetts Supreme Court approved an injunction prohibiting a union from employing any "scheme or conspiracy" whatever to bring pressure on other workmen to keep them from entering the employment.\footnote{240} Justice Holmes would have enjoined them only from using violence or threats of violence:

\footnote{240. Vegelahn v. Guntner, 167 Mass. 92 (1896).}

\footnote{241. Id. at 105-08.}
fits.\textsuperscript{242}

(ii) Proof of Wrongfulness

In the hostile takeover area, workers will generally allege some violation of the securities law,\textsuperscript{243} although other wrongs may be pled.\textsuperscript{244} This predicate will satisfy the conduct requirement. There is no further need to show malice.\textsuperscript{245} Since "[j]ustification connotes just, lawful excuse, it excludes malice . . . [which] may be inferred from the absence of just cause or excuse."\textsuperscript{246}

The raider's motive is generally to make the quick buck — "devil take the hindmost." A raider knows that the proposed "diversification by takeover" publicized to the media is a fabrication merely designed to conceal a "bust up" and is destined to fail. The business literature consistently warns against efforts at diversification through takeover.\textsuperscript{247}


\textsuperscript{244} The action may have been wrongful as an ultra vires act. E.g., Robtham v. Prudential Ins. Co., 53 A. 842 (N.J. 1903) (enjoining the corporate purchase of stock in another company where the purchase was not for purpose of making an investment but for the carrying out of an improper corporate scheme, entrenching management's power); Hill v. Nisbet, 100 Ind. 341, 349 (1885) (stating that "[w]hether the purchase of stock in one corporation by another is ultra vires or not, must depend upon the purpose for which the purchase was made"); Dittman v. Distilling Co. of Am., 54 A. 570 (N.J. Ch. 1903); Ellerman v. Chicago Junction Ry., 23 A. 287 (N.J. 1891).


\textsuperscript{246} Louis Kamm, Inc. v. Flink, 175 A. 62, 67 (N.J. 1934) (citing Wendelken v. Stone, 86 A. 376 (N.J. 1919)). See \textit{RESTATEMENT (SECOND) OF TORTS, § 766, cmt. m.} (1977). See also Henderson, \textit{Malicious Motives as a Ground of Action}, 13 JURIS. REV. 452, 461 (1901) (noting that the result of the English interference decisions between 1881 and 1901 demonstrates that "[t]he conception of legal malice . . . mean[e] little more than mere intention"). Whether or not malice for punitive damage purposes is present is a question of fact. Louis Schlesinger Co. v. Rice, 72 A.2d 197, 203 (N.J. 1950).

\textsuperscript{247} E.g., Michael E. Porter, \textit{From Competitive Advantage to Corporate Strategy}, 87 HARV. BUS. REV. 43 (1987) (reporting the track record of 33 large U.S. companies' diversification efforts over the period of 1950-1986). Stated simply, that record is "dismal." \textit{Id.} Where the company entered an unrelated line of business by acquisition prior to 1975, 74.4% of the acquisitions were subsequently divested. \textit{Id.} at 51. Where entry was by start-up, the acquisition was subsequently divested 40.9% of the time. \textit{Id.} Finally, where entry was by joint venture, the acquisition was subsequently divested 48.9% of the time. \textit{Id.} at 50. The stunningly poor reports by Porter are consistent with those reported by Ravenscraft and
The wrong tends to void any privilege of action. Various courts have found certain harmful activities to be privileged. These activities, even though they may interfere with a prospective or existing contract, cannot be legally deemed tortious activities. Every one is at liberty to earn his living in his own way provided he commits no wrong, such as violating some law or prohibition, or infringing the rights of other people. Protection of workers' and unions', indeed any citizens', right to be free of improper interference with their reasonable economic expectancies embodies an important public policy. Occasionally, however, that public policy conflicts with a counter-policy in favor of business competition. In these situations the courts may recognize a qualified privilege or immunity, but limited to situations where there is no wrongful act:

If the act complained of does not rest upon some legitimate interest [i.e., a proper end], or if there is sharp dealing or overreaching, or other conduct below the behavior of fair men similarly situated [i.e., an improper means] the ensuing loss to the plaintiff should be re-dressed.

Limited privileges such as the right to engage in competitive economic activity while recognized by the courts disintegrate where the
assertedly privileged actor employs wrongful means in the course of his activity.\textsuperscript{254}

Interference with prospective economic advantage is actionable, "unless the defendants are acting in the exercise of equal or superior right."\textsuperscript{255} This is the raider's privilege. In order to determine if what the defendant has done is actionable, i.e., not done in the exercise of equal or superior right, the ultimate inquiry is whether the conduct was "both injurious and transgressive of generally accepted standards of common morality or of law."\textsuperscript{256} We must ask, if the interference by the defendant was "sanctioned by the rules of the game."\textsuperscript{257}

...
There can be no tighter test of liability in this area than that of the common conception of what is right under the circumstances.258

According to Leslie Blau Co. v. Alfieri,259 if the alleged tort was committed out of sheer malice, the tortfeasor will be liable on that account.260 If the tortfeasor acted out of a motivation to enhance his financial position, then it is necessary for recovery that his conduct must have been transgressive of generally accepted standards of morality, i.e., a violation of standards of socially acceptable conduct.261 The law affords protection of the business entrepreneur against wrongful acts of third parties, not against fair and legitimate competition.262

(iii) Role of The Jury

The jury decides the merits of that contention. The jury serves an important function in defining notions of "wrongfulness."263 The generality of the concept is what enables law to develop in an orderly manner in light of changed circumstance consistent with fundamental principles of right.264

This jury and community morals emphasis was clearly expressed in the review of prior case law in Glass Molders, Pottery, Plastics and Allied Workers International Union v. Wickes Co.265:

258. Sustick, 137 A.2d at 60.
260. Id. at 867.
U.C.C. § 1-201(19) defines good faith merely as “honesty in fact in the conduct or transaction concerned.” U.C.C. § 1-201(19) (1977). U.C.C. § 2-103(1)(b) imposes on merchants only the higher standard of good faith of “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” U.C.C. § 2-103(1)(b) (1977).
In *Sustick v. Slatina*, 48 N.J. Super. 134, 137 A.2d 54 (App. Div. 1957) the Appellate Division noted that:

[A] degree of generality in the criteria which will suffice to spell out liability in any given case of this kind is unavoidable. The essence of the cases in this field is that in adjudging whether what the defendant has done is actionable, i.e., not done in the exercise of an equal or superior right, the ultimate inquiry is whether the conduct was "both injurious and transgressive of generally accepted standards of common morality or of law." . . . In other words, was the interference by defendant "sanctioned by the 'rules of the game.'" . . . There can be no tighter test of liability in this area than that of the common conception of what is right and just dealing under the circumstances.

48 N.J. Super. at 144, 137 A.2d 54 [citation omitted]. And in *Fitt v. Schneidewind Realty Corp.*, 81 N.J. Super. 497, 504, 196 A.2d 26 (Law Div. 1963) the court defined a "wrongful act" for the purposes of establishing liability for tortious interference as:

one which in the ordinary course of events will infringe upon the rights of another to his damage, or one which is done with the purpose of benefiting the acting party at the other's expense and is not done in the exercise of an equal or superior right. The mere doing of an act which is damaging to another and to the actor's benefit is wrongful and not within the "rules of the game."

As these passages indicate, the tort is defined in exceedingly broad terms, and the parameters of wrongful conduct may range far. We therefore think it theoretically possible for the plaintiffs in this case to assemble the elements of tortious interference without proving that Wickes violated the enumerated securities laws. Thus, the alleged transgressions of the Williams and Hart-Scott-Rodino Acts cannot be considered "necessary" elements of plaintiffs' state tort claim.\(^{266}\)

**CAUSATION**

An essential element of the proof of a cause of action in tort is

\(^{266}\) *Id.* at 179-80.
that there be some reasonable connection between an act or omission of the defendant and the damage the plaintiff has suffered.\textsuperscript{267} Since the law has generally rejected the outmoded epistemological and logical model of a single definable cause and a direct, immediate and determinate effect that suffices to prove causation, and adopted instead the substantial factor test.\textsuperscript{268} The test acknowledges the fact that in the usual course, "[a]n event without millions of causes is simply inconceivable; and the mere fact of causation, as distinguished from the nature and degree of the causal connection, can provide no clue of any kind to singling out those which are to be held legally responsible."\textsuperscript{269}

Although our law requires proof of cause to recover in tort, it does not require proof of a single cause. The substantial factor standard ascribes liability to a cause which has played a part in the production of the harm, even though the harm may have occurred absent that cause. This standard is particularly suited to the injuries here. More important, the part played by a cause in producing a harm is a question for the jury, which must determine whether that cause had such an effect in producing the harm as to lead reasonable men to regard it as a cause.\textsuperscript{270} This evaluation of substantial factors is both factual and legal,\textsuperscript{271} and is intertwined with duty, breach of duty and proximate cause.\textsuperscript{272}

Accordingly, "[c]ertainty of economic advantage need not be shown; reasonable probability of that advantage, absent interference, suffices."\textsuperscript{273} In 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 would have not interfered. The loss of prospective profits is, for example, a familiar element of damages in cases of breach of con-

\begin{itemize}
\item \textsuperscript{267} Keeton et al., supra note 79, § 41 at 263.
\item \textsuperscript{268} Restatement (Second) of Torts § 431, cmt. a (1965).
\item \textsuperscript{269} Keeton et al., supra note 79, § 41 at 266.
\item \textsuperscript{270} Restatement (Second) of Torts §§ 431, 432 (1965).
\item \textsuperscript{271} Keeton et al., supra note 79, at § 41; see Ora Fred Harris, Jr., Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation, 40 Sw. L.J. 909, 952 (1986).
\item \textsuperscript{272} David Howarth, Causation and The Law, 96 Yale L.J. 1389, 1419 (1987); Guido Calabresi, Concerning Cause and The Law of Torts: An Essay for Harry Kalven Jr., 43 U. Chi. L. Rev. 69, 72 (1975); see, Elam v. Alcolac, Inc. 765 S.W.2d 42, 176 (Mo. Ct. App. 1988).
\item \textsuperscript{273} Zippertubing Co. v. Teleflex, Inc., 757 F.2d 1401, 1409 (1985).
\end{itemize}
More important, proximate causation is a question of fact for the jury to determine whether the defendant has played a material and substantial part in causing the plaintiff's loss of the perspective economic advantage. The case law is clear that where an act by a third party is intentionally brought about the defendant's inducement or action, or where such third party conduct is even a part of the foreseeable risk which the defendant has created, the result is well within the limits of "proximate causation."

Legal cause and proximate cause are synonymous. Conduct is a legal cause of injury if it is "a substantial factor in bringing about the harm." Section 433 of the Restatement (Second) of Torts lists various criteria to determine whether conduct is a legal cause of harm.

In order for a plaintiff to collect damages for unlawful interference with economic advantage, it must be reasonably probable that, without the Raiders' alleged misconduct, some workers would have realized the economic advantage. This should not be difficult to prove, given the actual loss incurred by the plaintiff as a result of the attempted takeover.

RESULTING HARM

No one realistically denies that workers lose jobs and wages, and that unions lose dues, as a result of the series of post-takeover events triggered by the Raider. The only question is whether the raider's
involvement is too causally remote. 281

Foreseeability and causation, however, usually follow a standard track. First, the Raider puts the Target "in play," with a junk bond takeover attempt:

Once a company was put "in play" by an initial bid — even a shakily financed bid by some entrepreneurial upstart — the dynamics of the situation dictated that it would probably end up being taken over by somebody, because the directors and managers of the target, being bound to represent the interest of their stockholders, faced legal and moral difficulties if they refused without explanation an offer well above the market price of the stock. 282

Once in play, the Target often responds by opposing the takeover attempt. 283 This is generally viewed as proper. 284 The law does not allow the board to remain passive, in the face of a bad bid, or an


282. JOHN BROOKS, THE TAKEOVER GAME 20 (1987); see TAN at 92.

283. See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955, n.10 (Del. 1985) (noting that "[i]t has been suggested that a board's response to a takeover threat should be a passive one . . . [But] as the proponents of this rule of passivity readily concede, it has not been adopted either by courts or state legislatures").

284. In ruling on the legality of defensive tactics, the courts have been sympathetic to the possibility of shareholder losses resulting from coercive bids. In the early cases, the prevailing rule was that management must have some business purpose in undertaking any defensive move; in the absence of such a purpose, an active defense using corporate resources could be viewed only as an effort by management to entrench itself. See, e.g., Johnson v. Trueblood, 629 F.2d 287 (3d Cir. 1980) (stating that the plaintiff must show that the sole or primary motive of defendant managers was to retain control), cert. denied, 450 U.S. 999 (1981). An adequate business purpose includes the offered price was too low. See, e.g., Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir.), cert. denied, 454 U.S. 1092 (1981). More recently, the courts have ruled that the propriety of takeover defenses should be judged against the threat posed by the hostile bid and, recognizing the distinctive dangers of partial and two-tier offers, have held some tactics to be legal that a few years ago probably would have been viewed as unquestionably abusive. See generally Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (upholding, under the "enhanced" business judgment rule, the adoption of a poison pill).
inept bidder.\textsuperscript{285} Indeed, the courts have established an affirmative "duty of directors to evaluate proposed business combinations on their merits and oppose those detrimental to the well-being of the corporation even if that is at the expense of the short term interests of individual shareholders.\textsuperscript{286}

Not only is the fact of resistance often foreseeable, but so is the means of resistance. By now, the idea that a company best defends against a takeover by anticipating and implementing what would have been an acquirer's post-acquisition plans for the business is standard strategy, well recognized, and accepted in the literature.\textsuperscript{287}

As the raid is occurring, the reality of risk to the Target's workers is acknowledged by the Raider in the course of its suit against Target's management or in SEC filings. Raiders often acknowledge in SEC filings that it might fire workers upon gaining control of the Target. At that point, and based on prior knowledge in the field of takeovers, the resulting consequences are undoubtedly foreseeable to the Raider.\textsuperscript{288}

This foreseeability is based on both the Raider's knowledge and that of its agents. It is hardly surprising to contend that takeover professionals are aware of the consequence of tender offers on employees.\textsuperscript{289}

The Raider, or its agents, usually know that whether there is a successful takeover, or a successful defense against the takeover by the Target buying up its own stock and/or paying greenmail, directly or indirectly, the resulting operating company would end up with a

\textsuperscript{285} E.g., Treadway Cos., Inc. v. Care Corp., 638 F.2d 357, 381 (2d Cir. 1980) ("Once [the board] determined that a Care [Corp.] takeover would be detrimental to [the target] Treadway, it was . . . reasonable that the directors should move to oppose it.").


\textsuperscript{287} E.g., William E. Fruhan, \textit{Corporate Raiders: Head'em off at Value Gap}, 66 HARV. BUS. REV. 63 (July-Aug. 1988); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (indicating that the result of T. Boone Pickens' efforts to acquire Unocal in a highly leveraged acquisition was that Unocal management ended up imitating Pickens' acquisition strategy by causing the company to itself borrow substantial funds and pay them out to shareholders).

\textsuperscript{288} Cf. Unocal Corp. v. Pickens, 608 F. Supp. 1081 (D. Cal. 1985) (concluding that Pickens' Mesa Partners II "from the outset intended to put Unocal 'in play' and thereby either obtain control or 'greenmail' the corporation in exchange for dropping its bid").

\textsuperscript{289} E.g., Moran v. Household Int'l, Inc., 500 A.2d 1346, 1349 (Del. 1985) (noting that Household's attorneys explained to the directors "the possible adverse effect this type of activity could have on employees and others concerned with, and vital to, the continuing successful operation of Household even in the absence of any actual bust-up takeover attempt").
greatly increased debt burden, which in fact usually happens.\footnote{290}

The Raider or its agents, usually know that the resulting indebted operating company, with an increased debt service burden that has to be met, will have to discontinue or sell off even profitable operations under a \textit{recapitalization} plan.\footnote{291} In fact, the Target is often warned by the Raider after the raid to recapitalize or be subject to another takeover attempt. That threat, plus the legal obligation of management to put shareholder interests over those of workers, means one foreseeable thing — recapitalization.\footnote{292}

The \textit{RESTATEMENT} only limits a defendant's liability when the causal linkage between the negligence and the resulting harm is, when viewed in retrospect, “highly extraordinary: [T]he actor’s conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor’s negligent conduct, it appears highly extraordinary that it should have brought about the harm.”\footnote{293}

This section was drafted to deal with scientifically improbable “Rube Goldberg” causal sequences, situations which Prosser characterized as “the remarkable, the preposterous, the highly unlikely, in the language of the street the cock-eyed and far-fetched, even when we look at the event, as we must, after it has occurred.”\footnote{294}

Courts applying the hindsight test of Section 435(2)\footnote{295} in the manner Prosser describes, clearly indicate that the exemption from liability supplied by Section 435(2) is to be sparingly invoked.\footnote{296} Although many courts embrace the substantial factor test embodied in


292. \textit{Id.} As Professor Coffee reports, "[u]ndoubtedly, the hottest buzzwords in the executive suite over the last several years have been 'financial restructuring' and 'deconglomeration' . . . . One recent study reports that 23% of the nation’s leading 850 corporations have undergone an 'operational restructuring' since the beginning of [1985], usually selling or spinning off divisions." \textit{Id.} at 52-54, \textit{citing}, V.R. Buzzotta, \textit{A Quiet Crisis in the Workplace}, \textit{N.Y. Times}, Sept. 4, 1985, at A27, col. 2.


295. \textit{Id.}

296. Morgan v. Pennsylvania Gen. Ins. Co., 375 N.W.2d 660, 666 (Wis. 1979) (noting that the causal link between a motorist’s negligence while striking the tree, while "somewhat attenuated," presented a jury issue).}
Section 435(1), (which allows liability without foreseeability of the extent of harm and manner of occurrence), they have not considered the chain of causation in any case otherwise meeting the substantial factor test to be so attenuated as to require the application of Section 435(2).297

Prosser instructs that negligence is judged looking forward, proximate cause looking back.298 Section 435(2), consistent with this,299 explicitly calls for an objective hindsight look taken with full knowledge of all that has happened, not from the actor’s viewpoint which is limited by the knowledge the tortfeasor had at the time.300

As a simple matter of the meaning of words, there is nothing attenuated or “highly extraordinary” about the causal linkage suggested here. The company that becomes the target of a tender offer seldom remains independent.301 There was no intervening cause, no

297. With respect to Massachusetts law, e.g., Rae v. Air-Speed Inc., 435 N.E.2d 628 (Mass. 1982) (indicating that harm to the plaintiff is traceable to insurance agent’s failure to procure worker’s compensation insurance for plaintiff’s employer not extraordinary within meaning of § 435); Bernier v. Boston Edison Co., 403 N.E.2d 391 (Mass. 1980) (noting that an elderly driver accelerated instead of braking, causing another driver to swerve and hit an electric pole, which fell and hit a pedestrian. The flimsy design of the pole was held to be a substantial factor in causing injury to the pedestrian (§ 435(1); no mention was made of § 435(2)).

298. KEETON ET AL., supra note 79, at 268-69.

299. Comment c of § 435(2) of the RESTATEMENT articulates the critical issues: “whether the duty imposed on the actor was designed to protect the one harmed from the risk of harm from the hazard in question.” RESTATEMENT (SECOND) OF TORTS § 435(2) cmt. c (1977).

300. See generally Pastore v. Taiyo Gyogyo, K.K., 571 F.2d 777, 782-83 (3d Cir. 1978) (indicating that stevedore’s employee caused a fire by careless smoking; hence the subsequent injury to a fireman slipping on a ladder while putting out the fire was not highly extraordinary in hindsight); Wilson v. American Chain & Cable Co., 364 F.2d 558, 561 (3d Cir. 1966) (reversing the verdict for the defendant because trial judge failed to apply hindsight test to intervening cause: “[i]t may be that a particular defendant is unaware of the facts that led to events giving rise to the intervening act, yet the jury, viewing the matter retrospectively, could properly conclude that the act was not extraordinary.”); Hall v. Atchinson, Topeka and Sante Fe Ry., 304 F.2d 380 (5th Cir. 1974) (giving a directed verdict for railroad where the improper, negligent blockage of crossing prevented motorist from reaching hospital for emergency treatment); Kaukonen v. Aro, 298 P.2d 611 (Cal. Dist. Ct. App. 1956) (noting a nonsuit on the opening was an error where the defendant carelessly selected a travel route exposed to landslides); Pisel v. Stamford Hosp., 430 A.2d 1, 15 (Conn. 1980) (suggesting that it is not extraordinary that a delusional patient would wedge head between mattress and wall: “[u]nusual or bizarre results can become a factor on the question of proximate cause, but only when with the benefit of hindsight it appears highly extraordinary that the actor’s negligent conduct should have brought about the plaintiff’s injury”).

301. See John C. Coffee, Jr., Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer’s Role in Corporate Governance, 84 COLUM. L. REV. 1145, 1149 (1984) [hereinafter Coffee, Regulating Market Control] (noting only 20-25% of target companies remain independent following an initial tender offer); David W. Leebron, Games
Palsgrafian sequence, no cock-eyed, far-fetched, preposterous sort of occurrence with which section 435(2) deals, hence no basis for holding that the Raider's decision to put the target in play was not the "legal" or "proximate" cause of the loss of jobs: [t]he active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause."302

**TARGET'S PREEXISTING CONDITION**

A wrongful act is the legal cause of resultant harm, even though after occurring causes, such as something arising from preexisting condition,303 may have joined in producing the final result, provided the defendant's negligent conduct was a substantial factor in bringing about the total disability.304 Economic injury operating on a Target's previously impaired corporate organism renders the Raider who caused injury liable for damages for the whole resulting disability of the Target notwithstanding the fact that the impairment is greater than it would have been for the previous condition.305

**INTERVENING AND SUPERSEDING CAUSES**

Whether the Target or others had the latitude to react in various ways is a question of fact to be determined under the circumstances. It is difficult to imagine true choice, and thus any sort of a "superceding cause" as has been suggested by some Raiders. However,

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302. Wolfe v. Checker Taxi Co., 12 N.E.2d 849, 850 (Mass. 1938) (stating that the decedent, a policeman, was sitting in his squad car when defendant's speeding taxi struck a nearby pushcart forcing it into the squad car. Decedent bit his tongue as a result of the collision; the wound became infected and caused his death. Held that it need not be foreseeable that a particular person is hurt or that an injury would result in any one particular manner: "[t]he connection between the negligence and the impact, . . . was uninterrupted and direct.").

303. Where there are two distinct events separated by an appreciable period of time, the finding as to whether, or what portion of, the injuries are indivisible is properly left to the jury. Ouaglato v. Bodner, 278 A.2d 500 (N.J. Super. Ct. App. Div. 1971).


under applicable precedent, a tortfeasor is not relieved of liability by the intervening or superseding acts of a third party if those acts are reasonably foreseeable.\textsuperscript{306}

With respect to the impact of the Raider’s actions on the Target’s workers, the Raider will blame the Target’s management, and label them a superseding and intervening cause. As indicated above, if the Target’s response was a foreseeable consequence of what the Raider initiated, the Raider is responsible.

The “causation” requirement cannot be resolved as a matter of law.\textsuperscript{307} The courts invariably hold that causation is a fact question for the jury, i.e., whether the defendant has played a material and substantial part in causing the plaintiff’s loss of the prospective economic advantage.\textsuperscript{308}

At trial, the relevance of the Target’s action, might at most be on the issue of apportionment. The \textsc{Restatement}, however, makes clear that matters of apportionment of harm\textsuperscript{309} are for the jury to decide:

(1) It is the function of the court to determine
    (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing harm to the plaintiff;
    (b) whether the harm to the plaintiff is capable of apportionment among two or more causes; and
    (c) the questions of causation and apportion-

\textsuperscript{307} Latta v. Caulfield, 398 A.2d 91, 93 (N.J. 1979) (suggesting that legal cause and proximate cause are synonymous, however the ultimate holding was superseded by statute as stated in Renz v. Penn Cent. Corp., 435 A.2d 540 (N.J. 1981)).
\textsuperscript{308} See id.
\textsuperscript{309} \textsc{Restatement} (Second) of Torts § 433A Apportionment of Harm to Causes:

(1) Damages for harm are to be apportioned among two or more causes where

(a) there are distinct harms, or
(b) there is a reasonable basis for determining the contribution of each cause to be a single harm.

(2) Damages for any other harm cannot be apportioned among two or more causes.

\textit{Id.}
ment, in any case in which the jury may not reasonably differ.

(2) It is the function of the jury to determine, in any case in which it may reasonably differ on the issue,
   (a) whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff, and
   (b) the apportionment of the harm to two or more causes.\(^\text{310}\)

The burden of proof lies with the defendant who seeks to mitigate his responsibility by alleging the causal impact of another:

(1) Except as stated in subsections (2) and (3), the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff.

(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

(3) Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.\(^\text{311}\)

Without discovery on a motion to dismiss, it would be improper to suggest an absence of causation or foreseeability. For example, would the Raider have launched the takeover attempt without first determining what “defenses” the Target had in place,\(^\text{312}\) and what

\(^\text{310}\). Id. at § 434 (Functions of Court and Jury).

\(^\text{311}\). Id. at § 433B (Burden of Proof).

\(^\text{312}\). C.f., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (indicating that a board of directors has the power to adopt a “poison pill” defense in response to a hostile takeover bid).
options would the Target have had available to it? What options would the Raider have had? Of course not, that is why Raiders pay investment bankers so much money. In any event, these are issues of fact, not questions of law.

CAUSATION - BLAMING TARGET MANAGEMENT AND THE BUSINESS JUDGMENT RULE

The target of a hostile takeover generally may not, as a matter of state corporate law, favor its non-shareholder constituencies — worker, community, etc. — over its shareholders in any activity.\textsuperscript{313} The Delaware Supreme Court seems to have foreclosed such a preference for non-shareholder interests when it observed:

A board may have regard for various constituencies in discharging its responsibilities, provided that there are rationally related benefits accruing to the stockholders.\textsuperscript{314}

The contrary thesis that managers of target companies should acquiesce when confronted with a tender offer has not been adopted by courts and legislatures.\textsuperscript{315} Courts have generally gone in the opposite direction, holding that directors have not only the right but also the duty to resist tender offers that they believe to not be in the best interests of their shareholders.\textsuperscript{316} Although some decisions find particular defensive tactics to be unlawful,\textsuperscript{317} they are exceptions to the general rule permitting or even requiring defensive strategies.\textsuperscript{318}

This sense that decisions regarding the future of the corporation are best made by its managers is embodied in the business judgment

\textsuperscript{313} Revlon, 506 A.2d at 182.

\textsuperscript{314} Id.

\textsuperscript{315} Denying managers the right to resist hostile tender offer denies shareholders the opportunity to bargain effectively with the acquirer. David Haddock et al., \textit{Property Rights in Assets and Resistance To Tender Offers}, 73 VA. L. REV. 701, 721 n.49 (1987).


\textsuperscript{317} Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975); Podesta v. Calumet Indus., [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,433-34 (N.D. Ill. 1978); Condee Corp. v. Lunkenheimer Co., 230 A.2d 769 (Del. Ch. 1967).

\textsuperscript{318} Klaus v. Hi-Shear Corp., 528 F.2d 225 (9th Cir. 1975).
rule. Relying on the business judgment rule, courts typically have held that the target's management has the right, and even the duty, to oppose a tender offer it determines to be contrary to the firm's best interests. Commentators generally have applauded the results of these cases.

The reaction of shareholders to managerial resistance depends on the outcome. Few protest when resistance leads to a takeover at a higher price. When resistance thwarts the takeover attempt altogether, however, litigation usually follows. Although defeat of the takeover attempt may deprive the target's shareholders of a substantial premium, shareholders' suits against management to recover this loss are almost always unsuccessful. The great majority of public corporations have not adopted "porcupine" provisions making acquisitions more difficult, and principles of fiduciary duty restrict managers' options to do so.

FORESEEABLE ACTIONS BY TARGET

Courts have also recognized the special nature of the bust-up takeover and hinted that they may justify defensive tactics not otherwise appropriate.

319. Id.
322. See Herzel, supra note 321.
323. Numerous courts have recognized that managers' attempts to keep themselves in control breaches their fiduciary duty. See, e.g., Lerman v. Diagnostic Data, Inc., 421 A.2d 906 (Del. Ch. 1980) (holding that managers may not change proxy election rules if the changes entrench them in office); Cheff v. Mathes, 199 A.2d 548 (Del. Ch. 1964); Auerbach v. Bennett, 393 N.E.2d 994 (N.Y. 1979). Supporters of defensive action against tender offers repeatedly counsel managers not to be candid about their objectives, lest candor will lead to a finding of violation of fiduciary responsibilities. Preparation of a 'black book' of procedures to be used in the event of a takeover attempt is not desirable because it may be used to embarrass management in litigation by creating a 'credibility gap' for a management that states it has acted in good faith and carefully considered a raider's offer. E.g., LIPTON & STEINBERGER, supra note 51.
324. See Moran v. Household Int'l, Inc., 500 A.2d 1346, 1349 n.4 (Del. 1985); Revlon,
What are the management's alternatives when confronted with a hostile takeover situation? In the effort to preserve its independence while at the same time maximizing shareholder value, management typically begins by seeking a "white knight" and/or evaluating its potential for executing a defensive recapitalization [leveraged buyout, leveraged recapitalization, leveraged employee stock option (ESOP) financing, or stock repurchase program]. Price is a key consideration, as statistics show that management's ability to control the outcome of these situations depends on its ability to outbid the hostile raider. In 1987 there were 31 contested public takeovers, 52 percent of which the hostile raider won by outbidding management and/or other interested parties. In 26 percent of these transactions, a white knight outbid the hostile raider, while in only 13 percent of the transactions, management succeeded in executing a defensive recapitalization by topping the hostile raider's final price.

These statistics illustrate that once a company is put into play as a result of a hostile bid, it is virtually certain to undergo a drastic change in terms of its capital structure, strategy, and, perhaps, management, notwithstanding any antitakeover measures that the company may have adopted. While management is not always able to thwart the raider's attempted takeover bid, it can be instrumental in raising the price ultimately paid for the company's shares through the introduction of other bids, including its own defensive recapitalization.325

ALTHOUGH WORKERS NEED NOT SHOW A CAUSAL CONNECTION BETWEEN THEIR HARM AND THE RAIDERS' VIOLATION OF LAW OR GOOD MORALS, SUCH A CONNECTION USUALLY EXISTS

Unlawful delays in disclosure make a difference in the success of a takeover attempt.326 The Williams Act's disclosure requirements create a balance between bidder and target, i.e., they make a difference in the outcome of a takeover fight.327

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326. C.f., Moran v. Household Int'l, Inc., 490 A.2d 1059, 1075 (Del. Ch.), aff'd, 500 A.2d 1346 (Del. 1985) ("The time constraints and rush of events which occur when a company is 'in play' dictate quick response by the board of a target company.").
The advantage to a hostile bidder from delaying disclosure of its actual intention appears starkly from the data concerning the impact on the price of target company stock when a SEC Schedule 13D is filed. If the SEC Schedule 13D states that the purchase is only for investment, target stock earns positive abnormal returns increase to 7.74%. By down-playing (or failing to entirely disclose) its intentions, the acquirer limits the rise in the price of the target's stock, thereby minimizing the price at which additional shares can be purchased by it in the period between the SEC Schedule 13D filing and the subsequent tender offer. This lower purchase price generates larger profits later at the time of sale.

The data also shows that an even greater advantage can be secured if the acquirer does not file a SEC Schedule 13D at all. Then, so long as its buying is done carefully, the price of the target's stock may not rise at all. The practice of attempting to avoid filing a SEC Schedule 13D by having someone else purchase shares on the acquirer's behalf has come to be known as "parking."

What is interesting about parking is the standards governing its legality — Rule 13d-3's definition of "beneficial ownership" as having voting or investment power held "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise" is broad enough to pick up any parking arrangement. Thus, the rules governing disclosures in takeovers make a difference to bidders who, or which, seek what is essentially greenmail.

THE INTERFACE OF TORT AND SECURITIES LAW

The doctrine of federal preemption emanates from the Supremacy Clause of the United States Constitution:


330. Disclosure provisions of the Williams Act forced raiders "to pay substantially more for their corporate acquisitions . . . The federal and state regulations each cause [an additional] statistically significant increase in the average premiums paid to the shareholders of the target firms." Jarrell, supra note 327, at 373.
This Constitution, and the Laws of the United States which shall be
made in Pursuance thereof; and all Treaties made, or which shall be
made, under the Authority of the United States, shall be the Su-
preme Law of the Land; and the Judges of every State shall be
bound thereby, any Thing in the Constitution or Laws of any State
to the Contrary notwithstanding.\textsuperscript{331}

Federal law may preempt state common law as well as statutes and
regulations.\textsuperscript{332}

Absent an explicit indication of Congressional intent to preempt
state law, a state statute or rule of law is preempted only:

where compliance with federal and state law is a physical impossi-

bility . . . or where the state law stands as an obstacle to the ac-
complishment and execution of the full purposes and objective of
Congress.\textsuperscript{333}

here is an “over-riding presumption that ‘Congress did not intend to
displace state law.’”\textsuperscript{334} Preemption of inconsistent state law by fed-
eral law is disfavored in the absence of persuasive reasons; the bur-
den of showing that Congress’ intent to preclude the states from
providing traditional state law remedies for its citizens rests with the
defendant.\textsuperscript{335}

No “persuasive reasons” for implying preemption exist, especially
since the Williams Act contains no explicit indicia of Congressional
attempt at preemption.\textsuperscript{336} On the contrary, the securities law con-
tains an express savings clause designed to save state tort laws from
preemption.\textsuperscript{337} According to 15 U.S.C. § 78bb:

\begin{itemize}
  \item \textsuperscript{331} U.S. CONST. art. VI, cl. 2.
  \item \textsuperscript{332} Chicago & Northwestern Transp. Co. v. Kalo Erish & Tile Co., 450 U.S. 311
  \item \textsuperscript{333} CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987). See also Capital Cities
  \item \textsuperscript{334} Cipollone v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986), cert. denied,
  \item \textsuperscript{335} Stephen v. American Brands, Inc., 825 F.2d 312, 313 (11th Cir. 1987) (citing
  \item \textsuperscript{336} Thomas L. Hazen, \textit{State Anti-Takeover Legislation: The Second and Third Genera-
  \item \textsuperscript{337} For descriptions and commentary on the role of the states in regulating takeovers,
      see id.; Donald C. Langevoort, \textit{State Tender-Offer Limitation: Interest, Effects, and Political
      Competency}, 62 CORNELL L. REV. 213 (1977); Donald C. Langevoort, \textit{The Supreme Court
      and the Politics of Corporate Takeover: A Comment on CTS Corp. of America}, 101 HARV.
\end{itemize}
(a) Addition of rights and remedies: Recovery of Actual Damages; State Securities Commissions.

The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder . . . .

In *Amanda Acquisitions Corp. v. Universal Foods Corp.*, the Court recognized the impact of this anti-preemption clause in finding that a state anti-takeover law was *not* preempted by the Williams Act. Moreover, the anti-takeover statute at issue in *Amanda Acquisitions* works a greater and qualitatively more profound incursions on defendants' supposed preempted field than the cause of action articulated in a worker's tortious interference suit. The Wisconsin statute at issue in *Amanda Acquisitions* compels a hostile acquiror to wait for *three years* after buying its shares before (a) merging with the target or (b) acquiring or otherwise disposing of or encumbering the target's assets. Such a law would virtually eliminate hostile takeovers by leveraged buyout. Despite this virtual elimination of hostile tender offers, the Wisconsin statute was held *not preempted* by the Williams Act. Observing that the "best argument" for preemption is the Williams Act's supposed "neutrality" between bidder and management, the Amanda court refused to elevate an arguable absence of Congressional hostility to takeovers, into a Congressional di-

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339. 877 F.2d 496 (7th Cir. 1989).
340. Id.
341. *Id.* at 502-505.
342. *Amanda Acquisitions*, 877 F.2d at 497-98.
343. "As a practical matter, Wisconsin prohibits any offer contingent on a merger between bidder and target, a condition attached to about 90% of contemporary tender offers." *Id.* at 499.
344. *Id.* at 504-05.
rective to states not to adopt more hostile regulations:

To say that Congress wanted to be neutral between bidder and target is a conclusion reached in many of the Court’s opinions, e.g., Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977) — is not to say that it also forbade the states to favor one of these sides. Every law has a stopping point, likely one selected because of a belief that it would be unwise (for now, maybe forever) to do more. Rodriguez v. United States, 480 U.S. 522, 525-26, 107 S.Ct. 1391, 1393-94, 94 L.Ed.2d 533 (1987); Covalt v. Carey Canada Inc., 860 F.2d 1434, 1439 (7th Cir. 1988).

Nothing in the Williams Act says that the federal compromise among bidders, targets’ managers, and investors is the only permissible one. See Daniel R. Fischel, From MITE to CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading, 1987 Sup. Ct. Rev. 74, 71-74. Like the majority of the court in CTS, however, we stop short of the precipice. 481 U.S. at 78-87, 107 S.Ct. at 1643-49.345

The courts have then recognized preemption in three distinct circumstances. First, Congress may include express pre-exemption language in the statute.346 Second, a federal statute or regulation may occupy a given field in a manner which is “sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulations.”347 Congress’ intent to occupy a given field may be inferred from the pervasiveness of the federal regulatory scheme, from the dominance of the federal interest, or from the objectives of and obligations imposed by federal law.348 Finally, a state law may actually conflict with a federal statute and thus create “an obstacle to the accomplishment and execution of the...
full purposes and objectives of Congress. 349 A conflict exists only when a state law interferes with the goals of the federal statute or the regulatory methodology for accomplishment of the goals. 350

Securities laws and regulations do not purport to preempt tortious interference litigations, 351 or any other tort remedy. 352 Title 15,

351. See supra note 11; Cf., supra note 8.
352. This lack of preemptive intent is evident in the fraudulent conveyance area, which has given rise to significant developments, especially in bankruptcy relating to leveraged buyout (LBO) transactions. In United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986), cert. denied sub nom., McClellan Realty Co. v. United States, 483 U.S. 1005 (1987) (also known as Gleneagles case), the controlling shareholders of the debtor corporation solicited a purchaser for the debtor corporations' shares. Id. The purchaser/holding company acquired the debtor corporation by borrowing (through the debtor corporation) the necessary funds form a third party, securing the loan with mortgages on the debtor corporation's assets. Id. The loan proceeds went from the lender to the debtor corporation, and were subsequently turned over to the shareholders in exchange for their tendered shares. Id. Shortly after the transaction was closed, the debtor corporation found itself in bankruptcy. Id.

The Third Circuit declined an opportunity to hold the fraudulent conveyance laws inapplicable to LBO transactions, and the Court concluded that the mortgages granted to the lender by the debtor corporation were fraudulent conveyances within the Fraudulent Conveyance Act as enacted in Pennsylvania. Id. The Third Circuit took note of the fact that all of the major parties involved (lender, debtor, and purchaser) had knowledge of the intended application of the loan proceeds as a result of their participation in the LBO negotiations. Id. In addition, although the LBO involved a number of transactions (loan from lender to purchaser-formed holding company which passed through debtor corporation, debtor-corporation's grant of mortgages to lender, payment by purchaser to stockholder for debtor's corporation's stock), the Third Circuit integrated the transactions upon the finding that the debtor corporation was a mere conduit in a single integral transaction. Id. As integrated, the transaction was simple: the buyer used the debtor's assets to borrow the money to pay the shareholders. Id. The debtor received no benefit from the borrowing and, indeed, was left insolvent when the dust settled. Id.

Wieboldt Stores, Inc. v. Schottenstein, 94 B.R. 488 (N.D. Ill. 1988), was before the court on motions to dismiss certain fraudulent conveyance claims arising out of a similar structure as presented in the Gleneagles case. Id. There the court made an extensive review of law and fact before declining the actions with respect to the directors and controlling shareholders of the debtor corporation as well as the lender that provided the LBO financing. Tabor Court Realty Corp., 803 F.2d 1288. The court in Wieboldt Stores, relying on Gleneagles and other authority, stated that the point of inquiry should not be the formal structure of the transaction, but rather, the court should focus on the knowledge and intent of the parties involved in the transaction. Wieboldt Stores, 94 B.R. 488. In this case the directors, controlling shareholders and lenders all participated in the negotiations and had actual knowledge of details relating to the debtor corporation and the LBO including legal advice regarding fraudulent conveyances, which was disregarded. Id. The court concluded that this knowledge and intent would require collapsing the various transactions into one transaction with respect to the parties that participated in the transaction. Id. The court, however, declined to collapse with respect to non-controlling shareholders, and dismissed the claims against them as no knowledge or intent was alleged. Id. It was said that these shareholders
Protecting Workers From Unlawful Interference With Their Jobs

U.S.C. Section 78bb(a) expressly provides that nothing in the 1934 Act will affect state law causes of action.\(^{353}\)

Preemption has not won easy acceptance among the Justices for several reasons. First there is § 28(a) of the '34 Act, 15 U.S.C. § 78bb(a), which provides that "[n]othing in this chapter shall affect the jurisdiction of the securities commission... of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."\(^{354}\)

* * *

[W]hatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stifled by the weight of precedent." 794 F.2d at 762. The rough treatment our views received from the Court - only Justice White supported the holding on pre-emption - lifts the "weight of precedent".

There is a big difference between what Congress enacts and what it supposes will ensue. Expectations about the consequences of a law are not themselves law. To say that Congress wanted to be neutral between bidder and target - a conclusion reached in many of the Court's opinions, e.g., Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977) . . . - is not to say that it also forbade the states to favor one of these sides.\(^{355}\)

were "innocent pawn" whose only participation was the tendering of their shares in response to a tender offer. \(^{Id.}\)

353. "Persons injured in securities transactions are frequently able to choose among (and under modern alternative pleading to combine) a substantial number of private rights of action. They may be grouped into three categories — (a) actions that common law or in equity, (b) actions, express and implied, under the state blue sky laws, and (c) actions, express and implied, under the federal securities statutes." L. Loss, FUNDAMENTALS OF SECURITIES REGULATION 1007 (1983).

Similarly, Section 6 of the Clayton Act makes clear why the Sherman Act does not preempt labor law or employment contract disputes. 15 U.S.C. § 17 (1988) ("The labor of a human being is not a commodity or article of commerce."); Cordova v. Bache & Co., 321 F. Supp. 600, 605 (S.D.N.Y. 1970). The same argument might apply to securities laws unless there is some "evidence that the SEC has authorized or even condoned the alleged practices upon which this action is based." \(^{Id.}\) at 605 n.1. Obviously, such approval is impossible, since the typical case is predicted on the violation of these laws.


355. \(^{Id.}\) at 503. \(^{See id.}\) at 505 ("Although Fike v. Bruce Church, Inc., 397 U.S. 137 (1970), sometimes is understood to authorize such general-purpose balancing, a closer examination of the cases may support the conclusion that the Court has looked for discrimination rather than baleful effects."); Champion Parts, Inc. v. Oppenheimer & Co., 878 F.2d 1003, 1006 (7th Cir. 1989) (stating that a claim that was made in a tort action was preempted by the Williams Act; the Court did not delve into the merits of this contention but noted that...
The Supreme Court has stated that this provision "was plainly intended to protect rather than limit state authority."\(^{356}\)

As the *Amanda* Court points out, the Wisconsin statute would certainly make takeover attempts less likely, but it would not "alter any of the procedures governed by federal regulation."\(^{357}\) Simply making takeover attempts less attractive does not conflict with the Williams Act, because the Williams Act only regulates the procedures of a takeover, but *has not created a right either to engage in takeover activity* nor a right by shareholders to benefit from such activity:

Any bidder complying with federal law is free to acquire shares of Wisconsin firms on schedule. Delay in completing a second-stage merger (that the Wisconsin Act mandates) may make the target less attractive, and thus depress the price offered or even lead to an absence of bids; it does not, however, alter any of the procedures governed by federal regulation . . . .

*Only if the Williams Act gives investors a right to be the beneficiary of offers could Wisconsin’s law run afoul of the federal rule. No such entitlement can be mined out of the Williams Act, however. Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985), holds that the cancellation of a pending offer because of machinations between bidder and target does not deprive investors of their due under the Williams Act. The Court treated § 14(e) as disclosure law, so that investors could make informed decisions; it follows that events leading bidders to cease their quest do not conflict with the Williams Act any more than a state law leading a firm not to issue new securities could conflict with the Securities Act of 1933. See also Panter v. Marshall Field & Co., 646 F.2d 271, 283-85 (7th Cir. 1981); Lewis v. McGraw, 619 F.2d 192 (2d Cir. 1980), both holding that the evaporation of an opportunity to tender one’s shares when a defensive tactic leads the bidder to withdraw the invitation does not violate the Williams Act. Investors have no right to receive tender offers. More to the point -


\(^{357}\) *Amanda*, 877 F.2d at 504.
since Amanda sues as bidder rather than as investor seeking to sell — the Williams Act does not create a right to profit from the business of making tender offers. It is not attractive to put bids on the table for Wisconsin corporations, but because Wisconsin leaves the process alone once a bidder appears, its law may co-exist with the Williams Act. 358

Ultimately, a raider can argue little more than that the present cause of action would discourage tender offerors — just as Wisconsin’s non-preempted law would — because it might raise their cost. 359 Even assuming the truth of this assertion, it yields not a scintilla of justification for preemption. For this “deterrent effect” tampers not at all with the takeover procedures governed by federal regulation. 360 Only if Wickes asserts a purported “right” to engage in takeovers, or posits a shareholders’ “right to be the beneficiary of takeovers” can any tension whatsoever be discerned. 361 The Amanda Acquisition court observed, “the Williams Act does not create a right to profit from the business of making tender offers.” 362

More important, “a state law is preempted only if Congress not only struck its own balance but also precluded the states from striking any other.” 363 As the Court in Amanda held:

There is a big difference between what Congress enacts and what it supposes will ensure. Expectations about the consequences of a law are not themselves law. To say that Congress wanted to be neutral between bidder and target — a conclusion reached in many of the Court’s opinions, e.g., Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977) — is not to say that it also forbade the states to favor one of these sides. 364

Thus, the Supreme Court in CTS found an Indiana law regulating takeovers not preempted by the Williams Act, even though the Indiana law in CTS gravely disadvantages the bidder and significantly aides management to the point of possibly eliminating takeovers. Thus, “CTS unmistakably teaches that states have a legitimate interest

358. Id. at 504-05 (emphasis added).
359. Id. at 504.
360. Amanda, 877 F.2d at 504.
361. Id.
362. Id. at 504-05.
364. Amanda, 877 F.2d at 503.
in regulating tender offers, despite the significant influence such regulation has over the transfer of securities and the so-called market for corporate control."\textsuperscript{365} In \textit{BNS}, the court held that a state may regulate hostile takeovers as long as it does not totally eliminate them:

The plaintiff argues that a substantial alteration of the balance between management and the offeror conflicts with the Williams Act. The fair import of the cases, however, is that even statutes with substantial deterrent effects on tender offers do not circumvent Williams Act goals, so long as hostile offers which are beneficial to target shareholders have a meaningful opportunity for success.\textsuperscript{366}

Further evidence of this intent not to preempt can be seen in the Court's unwillingness to imply a federal private cause of action for violation of SEC filing laws.\textsuperscript{367}

Finally, "[t]he short answer is that Congress did not write the statute that way."\textsuperscript{368} The Supreme Court today rejects judicial rewriting of federal laws to imply rights.\textsuperscript{369} Also, there is no legislative history to support preemption. Even if such legislative history existed, it is not a substitute for plain meaning of a federal statute.\textsuperscript{370}

**DAMAGES**

The dominant image projected by current tort doctrine is that of a system committed to the ideal of individualized justice. Indeed, this commitment finds its source and strongest expression in the damage award, where the general norms of liability are tailored to the specific loss involved. To this end, painstaking concern is evinced for the particular plaintiff "as found" and for making that person


\textsuperscript{366} Id. at 469 (emphasis added).


\textsuperscript{368} United States v. Monsanto, 491 U.S. 600, 611 (1989).

\textsuperscript{369} See INS v. Cardozo-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) ("Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248-49 (1989) (rejecting attempts to narrow the federal Racketeer Influenced Corrupt Organizations Act to organized crime context where the statutory language does not support the same).

\textsuperscript{370} See Patterson v. McLean Credit Union, 491 U.S. 164, (1989); United States v. Taylor, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part) ("[I]t must be assumed that the Members of the House and Senators thought what they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said.").
"whole."  

Under the RESTATEMENT the following compensatory damages are recoverable:

(1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for

(a) the pecuniary loss of the benefits of the contract or the prospective relation;
(b) consequential losses for which the interference is a legal cause; and
(c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interferences.

(2) In any action for interference with a contract by inducing or causing a third person to break the contract with the other, the fact that the third person is liable for breach does not affect the amount of damages awardable against the actor; but any damages in fact paid by the third person will reduce the damages actually recoverable on the judgment.

Damages, in interference cases, should include lost wages and damages at least equal to the defendant's gain acquired because of the interference. After that, the computation would turn on whether the defendant acted negligently or intentionally. Under the negligence standard, damages are limited to those which are "proximate" to the injury about which complaint is made, i.e., analogous to damages in negligence actions. This may include dam-

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373. Id.
377. See ABC-Paramount Records, Inc. v. Topps Records, 374 F.2d 455, 460-62 (5th Cir.
ages for emotional distress associated with such losses. Under the intentional tort standard, recovery is allowed for unseen expenses, mental suffering and damage to reputation, in addition to punitive damages. Foreseeability and certainty, concepts that generally protect the wrongdoer, are of much less importance in the case of an intentional wrong.

EQUITABLE RELIEF

The plaintiff may have the remedy of an injunction to enjoin the defendant from interfering with an existing business relationship or expectancy. The general rules governing the propriety of equitable relief are applicable in interference with prospective advantage actions.

PUNITIVE DAMAGES

Punitive damages may also be awarded in intentional interference cases. The applicable factors are set forth under state law. Generally, this requires either a reckless indifference or an evil

1967); Gentile Bros. Corp. v. Rowena Homes, 227 N.E.2d 338, 343 (Mass. 1967); Duane Jones Co. v. Burke, 117 N.E.2d 334 (N.Y. 1967); Shell Oil Co. v. State Tire & Oil, 126 F.2d 971 (6th Cir. 1942). See also 45 AM. JUR. 2D Interference § 58 (stating the measure of damage equals the loss caused by the interference) (1969).


380. Although a plaintiff can generally only recover damages for losses that are proved with "reasonable certainty," RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981), "[d]oubts are generally resolved against the party in breach," and "[a] court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty." Id. § 352 cmt. a. See also L.L. Fuller & William R. Purdu, Jr., The Reliance Interest in Contract Damages, 46 YALE L.J. 373, 375 (1937) (stating that in cases of willful breach the uncertainty principle "seems not to be taken seriously" (footnote omitted)).

381. See Louis Kamm, Inc v. Flink, 175 A. 62, 68 (N.J. 1934); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175, 1186 (1978).

382. Id.


384. See, Cantrell v. Forest City Publishing, 419 U.S. 245 (1974) (suggesting that in defe-
intent. Given the presence of the same, however, a raider cannot be heard to complain about being held accountable for more remote causal consequences. Although greed is more evil than good, despite Mr. Boesky's contrary protestations, the calculated nature of the raider's activity combined with an awareness of the likely consequences as set forth, inter alia, in various SEC filings, are important factors to warrant the condemnation of society for the raider's volitional action. Any antecedent law violations, especially willful "parking" violations, adds further support to an award of punitive damages.

CONCLUSION

New forms of commerce — some mergers and acquisitions — when stripped to their simple essence show the inescapable violence being done to workers throughout the Nation, as well as the economy as a whole. This violence results from intentional acts and choices. In many cases, this intentional activity is coupled with criminal misconduct. The challenge is for the trial bar and organized labor to work together to vindicate the rights of these workers. As Dean Pound
wisely said, a professional acts in "[p]ursuit of [a] learned art in the spirit of a public service." 390