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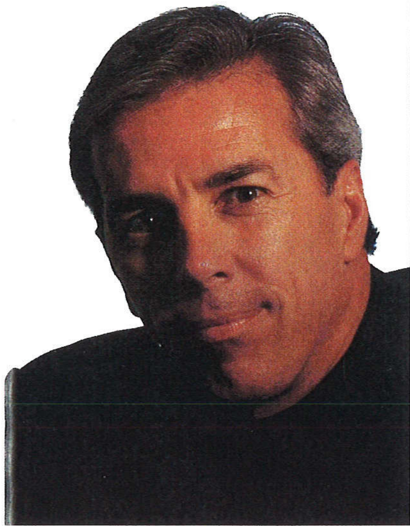

Edwin F. McPherson is a partner in the Century City law firm McPherson & Kalmansohn, where he specializes in entertainment litigation. In "Offensive Interference," he explains the role of indemnity agreements in establishing tortious interference. His article begins on page 24.

Cover photo: Tom Keller

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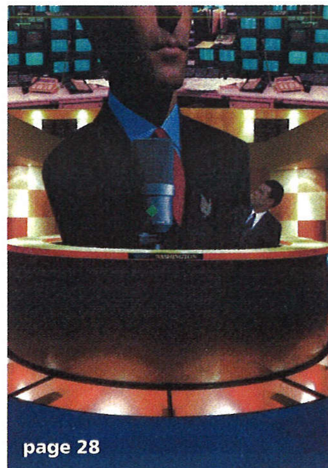

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By Edwin F. McPherson

Do indemnity agreements constitute evidence of independently wrongful behavior in interference with economic advantage claims?

Offensive Interfere

California courts have long recognized causes of action for tortious interference with contract and tortious interference with prospective economic advantage, with the former considered a subspecies of the latter.[1] In recent years, the courts have modified the elements needed to prove tortious interference, particularly in economic advantage cases. One result of these changes has been the creation of considerable misunderstanding over the role that indemnity agreements may play in proving tortious interference.

The critical distinction between the two varieties of interference is that interference with contract requires that there is (or was) an actual, binding[2] agreement between the complaining party and another party. In interference with economic advantage claims, the relationship between the parties, though likely to be profitable and thus to their economic advantage (particularly to the complaining party), has not risen to the level of an enforceable contract.[3]

In order to establish a claim for intentional[4] tortious interference with contract, the plaintiff must prove:

1) The existence of a valid and enforceable contract between the complainant and a third party.
2) Knowledge by the interfering party of the existence of that contract.
3) Intentional acts by the interfering party

Edwin F. McPherson, a partner in the Century City entertainment litigation firm McPherson & Kalmansohn, has represented both plaintiffs and defendants in numerous tortious interference cases.

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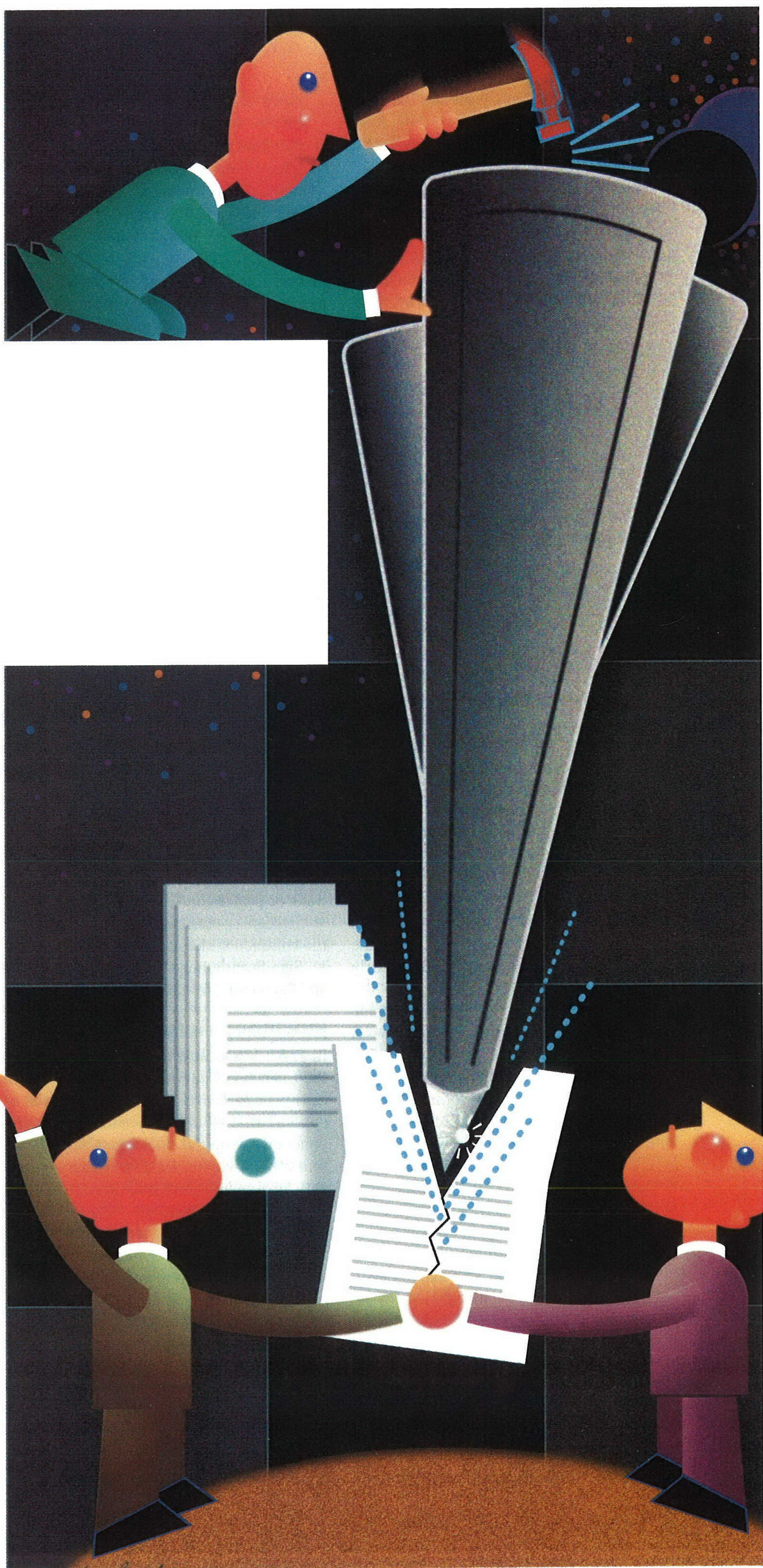


designed to induce[5] the third party to breach or disrupt its contractual relationship with the complainant.
4) Actual breach or disruption of the contractual relationship.
5) Damages proximately caused by the interfering party's acts.[6]

The elements for proving a claim for tortious interference with prospective economic advantage were, until recently, similar:
1) The existence of a prospective business relationship between the complainant and a third party containing the probability of future economic benefit to the complainant.
2) Knowledge by the interfering party of the existence of the relationship.
3) Intentional acts by the interfering party designed to cause the third party to disrupt the relationship with the complainant.
4) Actual disruption of the relationship.

5) Damages proximately caused by the interfering party's acts.[7]

In litigating tortious interference cases, one of the few significant differences between the two varieties was that in interference with contract claims the defenses of privilege[8] and competition[9] were much less likely to be sustained.[10] Some courts have upheld the defense of competition in prospective economic advantage cases if a defendant could prove that what it did served the general interest of increasing marketplace competition and, in doing so, it did not employ "wrongful" means.[11]

Until recently, however, there was very little, if any, support for the proposition that merely proving that a defendant's conduct was not independently wrongful was sufficient to sustain the defense of competition.[12] Moreover, most of the cases indicated that whether the mere absence of a wrongful act was sufficient to establish the defense was a question for the jury to decide,[13] and no authority suggested that it was anything but the defendant's burden to prove that point.

The *Della Penna* Standard

In 1995, the California Supreme Court radically altered the landscape of the defense of competition in economic advantage cases. In *Della Penna* v. *Toyota Motor Sales, U.S.A., Inc.*,[14] the court not only held that a lack of independent wrongfulness was, in and of itself, sufficient to support a claim of privileged competition, it also placed the burden of proof on the plaintiff. In so doing, the court annunciated a new requirement for tortious interference with prospective economic advantage claims: that a plaintiff "plead and prove, as part of its case in chief," that the defendant's conduct was independently wrongful.[15]

The court reasoned that, if the relationship between two parties does not rise to the level of a contract, the interest of fair competition in the marketplace plays a much more important role in determining whether or not a third party can be held liable for tortious interference. The court noted:

> The courts provide a damage remedy against third party conduct intended to disrupt an existing contract precisely because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement. Economic relationships short of contractual, however, should stand on a different legal footing as far as the potential for tort liability is reckoned....Our courts should, in short, firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant.[16]

The court laid to rest any doubt that, in a tortious interference with economic advantage case, the conduct of the third party must be more than just an act of interference; it must be "independently wrongful."[17] However, there is no such requirement in interference with contract cases. In *Quelimane Co.* v. *Stewart Title Guaranty Co.*, the California Supreme Court resolved whatever doubt was left by *Della Penna*:

> Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage [citing *Della Penna*], it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself.[18]

The *Della Penna* court refused to specify the precise nature of the wrongfulness of an act required to sustain an economic advantage cause of action, nor did it even indicate whether the wrongful act must rise to the level of a separate tort.[19] As a result, other authorities have suggested various meanings for the term "wrongful," as used in *Della Penna*:

- Independently tortious or a restraint of trade.[20]
- Violation of a statute or regulation, rule of common law, or "established standard of a trade or profession."[21]
- "[I]llegal or unfair or immoral according to the common understanding of society."[22]

Significantly, none of these cases involved an alleged interference with contract claim.

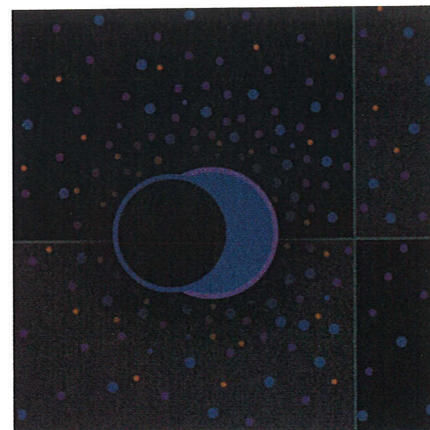
Indemnity Agreements

In *PMC, Inc.* v. *Saban Entertainment, Inc.*,[23] the California Court of Appeal attempted to clarify *Della Penna* by suggesting types of conduct that would be construed as independently wrongful. It is important to note that *PMC* involved a claim of interference with prospective economic advantage and not a case of interference with an existing contract. As the *PMC* court acknowledged, the privilege of fair competition is construed much more narrowly in an interference with contract case than in an interference with prospective economic advantage case.[24]

The *PMC* court first determined that the underlying agreement with which the defendant allegedly interfered was unenforceable[25] and therefore could not form the basis of an interference with contract cause of action, leaving only a claim of interference with prospective economic advantage.[26]

The *PMC* court then discussed *Della Penna* in detail, specifically reiterating that in a prospective economic advantage case, the actions by the defendant must be "wrongful by some legal measure other than the fact of interference itself"[27] and that "something... more than the interference itself had to be established."[28] The *PMC* court noted:

> [P]arties conducting business without a valid subsisting contract who possess only a prospective hope of a contractual relationship are obligated to accept a more aggressive exercise of the competing rights of others. Accordingly, the law affords a significantly expanded latitude for third party interference with a prospective contractual relationship than with a valid existing contract.[29]



Consistent with *Della Penna*, the *PMC* court went on to hold that, in order to be held liable for interference with economic advantage, a defendant's actions must have been:

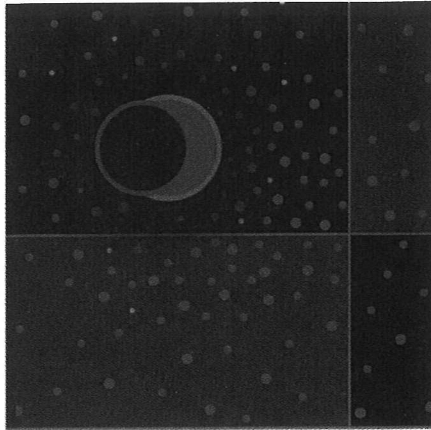
> [I]ndependently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trademark infringement. Once the plaintiff has proven an improper motive or an act by improper means, the defendant has the burden of proving it was privileged to act as a competitor.[30]

After establishing these basic principles from *Della Penna*, the *PMC* court considered an indemnity agreement that was offered by the defendant to the party with whom the plaintiff had an economic relationship. The court concluded that the indemnity agreement, in the context of an economic advantage claim, did not constitute wrongfulness as required by *Della Penna*:

> [T]he indemnity agreement requested by Saban and granted by [codefendant] Tsumura was fair play. By agreeing to indemnify Saban, Tsumura

assumed a potential obligation of Saban, thereby increasing the value of Saban's bargain....There was no fraud, intimidation, coercion or duress. We see no conduct which rises to what *Della Penna* described as actions which are "wrongful by some legal measure." Tsumura's conduct was neither unlawful nor illegitimate.[31]

Relying on *PMC,* numerous tortious interference defendants have argued that in an *interference with contract* case an indemnification agreement cannot be used as evidence of an intent to interfere. This is however, a misreading of *PMC.* The *PMC* court underscored that its discussion concerns only an economic advantage case and not an interference with contract claim. It does so by analyzing whether the indemnity agreement is independently wrongful, a requirement that does not exist in an interference with contract case.[32] In fact, the *PMC* court discussed several out-of-state cases but held that "[t]hese cases are not applicable here" because they deal "only with an interference with contract, where the competition privilege is more narrow," and not with an interference with economic advantage.[33]



In short, there is nothing in *PMC* that suggests that an indemnity agreement cannot be used as evidence of inducement in an interference with contract case, particularly when there is other evidence of inducement. The *PMC* court also expressly recognized that, even in interference with prospective economic advantage cases, "indemnity agreements, together with some other action suggesting wrongful motive or overreaching," might be sufficient to establish interference.[34]

The *PMC* holding thus is consistent with the *Restatement (Second) of Torts,* prior California case law, and case law in other jurisdictions. These authorities all suggest that an indemnity agreement may, in fact, be relevant in proving an interference with contract claim.

Comment b to Section 768 of the *Restatement (Second) of Torts* discusses whether certain means of inducement are wrongful and therefore overcome the "competition" defense:

> If [the defendant] diverts the competitor's business by exerting a superior power unrelated to their competition there is no reason to suppose that his success is either due to or will result in superior efficiency or service and thus promote the interest that is the reason for encouraging competition.[35]

An indemnity agreement would certainly fall within the ambit of "exerting a superior power unrelated to...competition."

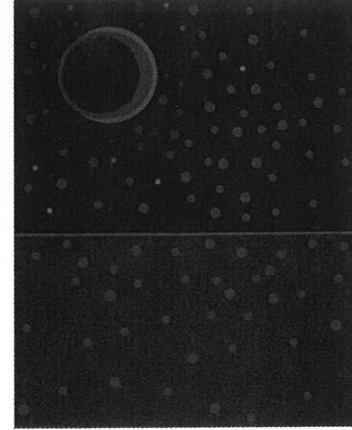
This principle was implied by the California Court of Appeal in *Charles C. Chapman Building Co.* v. *California Mart,*[36] a case decided more than two decades before *Della Penna.* In *Chapman,* the plaintiff landlord had entered into lease agreements with several tenants. California Mart apparently persuaded several tenants to move their premises by offering them inducements, which included free rent for a period of time and buyouts of their leases with the plaintiff.

The court of appeal found first that, although the relationships between many of the vendors and the plaintiff were disrupted, there were no actual breaches of the leases because all the rents were paid in full. The court then proceeded to analyze whether the defendant's agreement to pay the rent of the vendors constituted an improper inducement.

The court noted that the defendants had merely agreed to pay the rent that was due under the leases, and no more. The defendant had not agreed to pay any damages that might otherwise be sustained (and later claimed against the vendors) by the plaintiff. In fact, the court made it clear that the agreement contained "no mention of indemnity for any liability which the tenant might incur by breaching his lease" with the plaintiff. Consequently, the court expressly found that the agreement to pay rent was not tantamount to an indemnity agreement.[37]

The court further reasoned that because the agreement did not rise to the level of an indemnification agreement it could not be used as evidence of interference, sufficient to counter the defendant's assertion of the competition privilege. The obvious implication of *Chapman* was that if the agreement were an indemnification agreement, it would constitute evidence of interference.[38]

The law in other states is consistent with this notion. For instance, in *Leonard Duckworth, Inc.* v. *Michael L. Field & Co.,*[39] the Fifth Circuit, interpreting Texas law, addressed a claim of tortious interference with a real estate broker's reasonable expectancy of a commission resulting from the sale of property. The court concluded that the defendants, the purchasers of the property, engaged in surreptitious direct negotiations with the seller of the property for the purpose of depriving the plaintiffs of their sales commission. Significantly, after the plaintiffs had put the parties on notice of their expectation that they would receive commissions for the sale, the seller specifically requested that the defendants agree to indemnify it if the broker's claims were upheld, and the defendants agreed to do so.[40]



The court held that the defendants' surreptitious negotiations, combined with the indemnity agreement and a motive to prevent the plaintiffs from receiving the expected commissions, took the dealings far beyond "fair competition," were per se wrongful, and, in addition, clearly constituted tortious interference. The court reasoned:

> [The] defendants' acts cannot be considered as protected by the same privilege afforded competitors who are fairly and honestly vying for competitive advantage. These acts can only be termed sharp, overreaching, and beyond the pale of "fair play" and should not be privileged.[41]

Similarly, in *Jim-Bob, Inc.* v. *Mehling,*[42] the Michigan Court of Appeals concluded that an indemnity agreement is relevant to the issue of intent to interfere with a contract. In that case, the plaintiff was a tenant of defendant property owners, Mehling and Dawson. As the parties were negotiating a new lease, the Auto Club made an offer to purchase the property from Mehling and Dawson, but the owners rejected it. The plaintiff claimed that later, after the new lease had been finalized, the Auto Club increased its offer, including an agreement to indemnify Mehling and Dawson if the plaintiff sued them for not honoring the lease agreement. Mehling and Dawson accepted this offer, and the Auto Club then attempted to evict the plaintiff from the premises.

The plaintiff brought several claims against the defendants, including a cause of action against the Auto Club for interference with the lease agreement. The Auto Club sought to exclude evidence of the indemnity

(Continued on page 41)

Offensive Interference

(Continued from page 27)

agreement. The trial court overruled the Auto Club's objections and allowed the evidence for the purpose of showing whether there was an intent to interfere with the lease agreement. In upholding the trial court, the court of appeals stated:

> We believe that the trial court correctly determined that evidence of the indemnity agreement...was a proper subject for consideration by the jury for the limited purpose of showing whether or not defendant Auto Club had intentionally induced defendants to breach their lease with plaintiff.[43]

In *Edward Vantine Studios, Inc.* v. *Fraternal Composite Service, Inc.*,[44] the Court of Appeals of Iowa affirmed a jury's finding that the defendant had tortiously interfered with certain contracts. The plaintiff and defendant were competitors in the business of photographing composites of fraternities and sororities. The plaintiff had existing contracts with several fraternities and sororities at Iowa State University. The defendant visited many of these houses and, when told that they already had existing contracts with the plaintiff, suggested that the organizations "investigate the validity of" those contracts. The defendant subsequently signed contracts with 12 houses that were already bound to contracts with the plaintiff. In 11 of those contracts, the defendant agreed to indemnify the houses for any legal costs or fees incurred in breaking their contracts with the plaintiff.

The court found that the defendant's actions, including advising the houses to investigate the validity of their contracts and agreeing to indemnify them for claims asserted by the plaintiff, constituted "an intentional course of conduct which induced the houses not to perform their contracts with plaintiff."[45]

Indemnity Agreements in the Defense Strategy

Some tortious interference defendants have sought not only to exclude indemnity agreements from evidence but to avoid even routine discovery concerning the nature of an indemnity agreement, including the production of the agreement itself. Such positions have been taken under the guise of a joint defense privilege, claiming that all communications (including the actual negotiations concerning the indemnity agreement) are attorney-client privileged. Some defendants have attempted to bolster their position by merging the indemnity agreement with a three-way retainer agreement with a law firm, the discovery of which some judges have been loathe to order.

This position, though creative, is nevertheless entirely erroneous. First, California and many other states do not even acknowledge the existence of a "joint defense" or "common interest" privilege. As stated quite unequivocally in *Raytheon Co.* v. *Superior Court*,[46] "There is no 'joint defense privilege' as such in California."

Under California law, the determination of whether communications between parties are privileged turns upon an analysis of the communications within the context of the attorney-client privilege.[47] The general rule is that disclosure of attorney-client communications to third persons destroys whatever confidentiality otherwise exists unless "involvement of third persons to whom disclosure [is made] is reasonably *necessary* to further the purpose of the legal consultation."[48] Obviously, then, the two parties have to have the same purpose in mind for the communication.

The parties to an indemnity agreement, however, most decidedly do not have the same purpose in mind for their communications with each other, and therefore do not enjoy any communications privilege.[49] In an interference with contract case, a third party acts for what is essentially the goal of stealing (or steering) a contracting party away from another contracting party. As part of the negotiation process, either the third party offers or the contracting party demands that the third party will indemnify the contracting party in the event that the other party to the contract brings suit.

Although the first two parties will later be commonly aligned if the other party sues them both, they are on opposite sides of the bargaining table when they are negotiating the indemnity agreement. The indemnitee wants to be fully indemnified for any and all contingencies, and the indemnitor wants the indemnitee's services for as little money as possible—and therefore wants the indemnity agreement to be as narrow as possible. The parties cannot, therefore, later claim that these discussions (and their fruit—the indemnity agreement) are privileged. Even the Ninth Circuit, which does acknowledge a joint defense privilege, does not apply it so liberally.[50]

Defendants in tortious interference cases have also argued that the probative value of an indemnification agreement is outweighed by the danger of undue prejudice or confusing the issues and/or misleading the jury, and therefore should be excluded under Code of Civil Procedure Section 352. However, the only such danger generally cited by defendants is that the jury might construe the indemnity agreement as an admission of liability on the part of the indemnitee.

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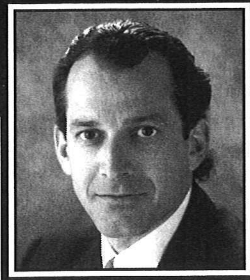

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For instance, in *Freeman* v. *City of Santa Ana*,[51] the Ninth Circuit held that evidence of an indemnity agreement should be excluded if the plaintiff is able to prove liability (of the indemnitee) through other evidence. However, the *Freeman* case was not a tortious interference case but a simple contract case. It makes a certain amount of sense to consider the exclusion of an indemnity agreement in a breach of a contract case when the only issue to be proved is whether or not the indemnitee breached the underlying agreement. It is, however, not equally logical to exclude evidence of an indemnity agreement when a plaintiff is trying to prove knowledge by the indemnitor of the existence of the underlying agreement, the intent of that party to interfere with the agreement, and the actual interference by that party.

In an environment in which competition is encouraged and rewarded, there still must be a concept of fair play. When two competitors are vying for the same customer or the same client or the same tenant, there is (and should be), as *Della Penna* suggests, a much broader range of acceptable behavior than in a situation in which a target customer (or similar party) already has an existing, binding contract with another competitor. When a valid contract exists, the competition, in theory, is over: one party has won and the other has lost.

In that case, a court and a jury must examine the totality of the circumstances that led to the breach of the contract, which certainly includes an offer or agreement to indemnify. A competitor is generally privileged to offer better services, better rates, and better products. However, when the competitor offers what is essentially complete immunity from liability for a party already under contract, its actions have clearly moved beyond acceptable competition to unfair play. This is particularly the case when—as indemnity agreements commonly provide—the indemnity lasts only as long as the indemnitee works for, or is otherwise doing business with, the indemnitor, thus creating a disincentive to leave the indemnitor. This, in and of itself, is anticompetitive and a serious restraint of trade, which (at least prior to *Della Penna*) precluded the competition defense.[52]

Neither *PMC* nor any other case suggests that an indemnitor/competitor is in any way immune from liability for tortious interference with contract—or that the indemnity agreement cannot be used as evidence of that interference, the competitor's knowledge of the existence of the contract, or its intent to interfere. On the contrary, it is quite clear that an indemnity agreement can and should be used precisely for this purpose. ■

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[1] Aalgaard v. Merchants Nat. Bank, Inc., 224 Cal. App.

3d 674, 274 Cal. Rptr. 81 (1990); Shapoff v. Scull, 222 Cal. App. 3d 1457, 1464, 272 Cal. Rptr. 480 (1990); Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 994, 135 Cal. Rptr. 720 (1977).

[2] *See* Knott v. McDonald's Corp., 147 F. 3d 1065, 1068 (9th Cir. 1998); PMC, Inc. v. Saban Entertainment, Inc., 45 Cal. App. 4th 579, 52 Cal. Rptr. 2d 877 (1996).

[3] For a detailed discussion of the two causes of action before 1995 in the context of the entertainment industry, *See* Edwin F. McPherson, *In the Line of Fire,* LOS ANGELES LAWYER, Apr. 1996, at 39; *How Talent Representatives Can Fight Client Flight,* ENTERT. L. & FIN., July 1995.

[4] Causes of action for negligent interference with economic advantage and with contract also exist and have similar pleading requirements. *See, e.g.*, National Medical Trans. Network v. Deloitte & Touche, 62 Cal. App. 4th 412, 439, 72 Cal. Rptr. 2d 730 (1998).

[5] The word "induce" is defined as "to bring on or about, to affect, cause, to influence an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on. *See also* seduce." BLACK'S LAW DICTIONARY 915 (rev. 4th ed. 1968).

[6] Quelinane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 55, 960 P. 2d 513, 77 Cal. Rptr. 2d 709 (1998), (citing Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1126, 791 P. 2d 587, 270 Cal. Rptr. 1 (1990)); *see also* National Medical Trans. Network, 62 Cal. App. 4th 412; Shapoff v. Scull, 222 Cal. App. 3d 1457, 1464-65 (1990); Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990, 994 (1977); Contemporary Investments, Inc. v. Safeco Title Ins. Co., 145 Cal. App. 3d 999, 1002, 193 Cal. Rptr. 822 (1983); Mayes v. Sturdy Northern Sales, Inc., 91 Cal. App. 3d 69, 78, 154 Cal. Rptr. 43 (1979); Buckaloo v. Johnson, 14 Cal. 3d 815, 827, 537 P. 2d 865, 122 Cal. Rptr. 745 (1975); 3 B. WITKIN, CAL. PROCEDURE, Pleading §630 at 2259 (2d ed. 1971).

[7] CrossTalk Prods., Inc. v. Jacobson, 65 Cal. App. 4th 631, 76 Cal. Rptr. 2d 615 (1998); Pacific Gas & Elect., 50 Cal. 3d 1118; Youst v. Longo, 43 Cal. 3d 64, 71 n.6, 729 P. 2d 728, 233 Cal. Rptr. 294 (1987); Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P. 2d 1158, 206 Cal. Rptr. 354 (1984); Buckaloo v. Johnson, 14 Cal. 3d at 827.

[8] In certain instances, all the elements of a tortious interference claim might be present, but the interfering party may be able to avoid liability due to some justification or privilege. The most notable such privilege is commonly referred to as the manager's privilege. "Manager" has traditionally meant an employee of a corporation (as opposed to an outside representative) who has a management function and who is acting on behalf of the corporation. However, the definition of "manager" in this context is, in fact, broader and includes outside agents and advisers of the breaching party. Aalgaard v. Merchants National Bank, Inc., 224 Cal. App. 3d, 674, 686 (1990).

As discussed in Klein v. Oakland Raiders, Ltd., 211 Cal. App. 3d 67, 259 Cal. Rptr. 149 (1989):

> A manager is said to be privileged to induce the breach of an employment contract between his employer and another employee....The privilege also extends to non-employees who serve as business advisors or agents and is applicable to advice relating to contracts generally, not just employment agreements. [Citations] A business advisor may counsel his principal to breach a contract that he reasonably believes to be harmful to his principal's best interests.

Id. at 80 (quoting Los Angeles Airways, Inc. v. Davis, 687 F. 2d 321 (9th Cir. 1982)).

Other forms of justification may include interfering with a contract, the "enforcement of which would be injurious to health, safety, or good morals" or the "inter-

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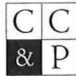

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est of labor in improving working conditions...." *See* Olivet v. Frischling, 104 Cal. App. 3d 831, 841, 164 Cal. Rptr. 87 (1980) (quoting Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 35-36, 112 P. 2d 631 (1941)).

[9] The defense of competition is really a species of the privilege defense. Traditionally, in order to prevail on this defense, a defendant had to plead and prove the following: 1) the relation with which the defendant interfered "concerns a matter involved in the competition between" the defendant and the plaintiff, 2) the defendant did not employ wrongful means in so interfering, 3) the defendant's conduct "does not create or continue an unlawful restraint of trade," and 4) the defendant's "purpose is at least in part" to advance its "interest in competing" with the plaintiff. Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners, 52 Cal. App. 4th 867, 880, 60 Cal. Rptr. 830 (1997) (citing Charles C. Chapman Bldg. Co. v. California Mart, 2 Cal. App. 3d 846 (1969)). Proof of mere "competition is not sufficient to prevail on this defense." Saunders v. Superior Court, 27 Cal. App. 4th 832, 843, 33 Cal. Rptr. 2d 438 (1994).

[10] As emphasized by the California Supreme Court in Environmental Planning and Info. Council v. Superior Court, 36 Cal. 3d 188, 194, 680 P. 2d 1080, 203 Cal. Rptr. 127 (1984), and even later in Pacific Gas & Elec., 50 Cal. 3d at 1126: "When the defendant's action does not interfere with the performance of existing contracts, the range of acceptable justification is broader...."

[11] Los Angeles Equestrian Center, Inc. v. City of Los Angeles, 17 Cal. App. 4th 432, 449, 21 Cal. Rptr. 2d 313 (1993); Pacific Express, Inc. v. United Airlines, Inc., 959 F. 2d 814, 819 (9th Cir.), *cert. den.*, 113 S. Ct. 814 (1992); Tominaga v. Shepherd, 682 F. Supp. 1489, 1497 (C.D. Cal. 1988); *see also* BAJIC 7.86 (7th ed.).

[12] *See, e.g.*, Pacific Gas & Elec. Co., 50 Cal. 3d 1118; Youst v. Longo, 43 Cal. 3d 64, 71 n.6, 729 P. 2d 728, 233 Cal. Rptr. 294 (1987); Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P. 2d 1158, 206 Cal. Rptr. 354 (1984); Buckaloo v. Johnson, 14 Cal. 3d 815, 827 (1975); Rickel v. Schwinn Bicycle Co., 144 Cal. App. 3d 648, 192 Cal. Rptr. 732 (1983); BAJIC 7.86 (7th ed.).

[13] *See, e.g.*, Lowell v. Mother's Cake & Cookie Co., 79 Cal. App. 3d 13, 20, 144 Cal. Rptr. 664, 669 (1978) ("[T]he determination of whether the defendant's conduct of interfering with...prospective economic advantage is privileged comprises a factual issue to be decided upon all the circumstances of the case."); Kentucky Cent. Life Ins. Co. v. LeDuc, 814 F. Supp. 832, 840 (N.D. Cal. 1992) (The determination as to whether an activity is privileged involves consideration of factual matters, and is "peculiarly a question for the trier of fact.").

[14] Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376 (1995).

[15] *See also* Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners, 52 Cal. App. 4th 867, 881 (1997).

[16] Della Penna, 11 Cal. 4th at 392.

[17] *See also* National Medical Trans. Network v. Deloitte & Touche, 62 Cal. App. 4th 412 (1998); Arntz Constr. Co. v. St. Paul Fire & Marine Ins. Co., 47 Cal. App. 4th 464, 476, 54 Cal. Rptr. 2d 888 (1996).

[18] Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 16, 55 (1998).

[19] Della Penna, 11 Cal. 4th at 378.

[20] *Id.* at 408-09 (Mosk, J. concurring).

[21] Arntz Constr. Co., 47 Cal. App. 4th at 477.

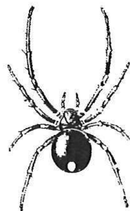
[22] Willard v. Caterpillar, Inc., 40 Cal. App. 4th 892, 48 Cal. Rptr. 2d 607 (1995).

[23] PMC, Inc. v. Saban Entertainment, Inc., 45 Cal. App. 4th 579 (1996).

[24] *Id.* at 605.

[25] *Id.* at 590.

[26] *Id.* at 594.
[27] *Id.* at 602 (quoting Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376 (1995)).
[28] *Id.* at 600; *see also* Quelinane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 55, (1998); Arntz Constr. Co. v. St. Paul Fire & Marine Ins. Co., 47 Cal. App. 4th at 477 n.2. (1996).
[29] PMC, 45 Cal. App. 4th at 601 (emphasis added).
[30] *Id.* at 603. Although Della Penna shifted the burden of proof on wrongfulness (or the lack thereof), the PMC court apparently suggests that once wrongfulness is proven by the plaintiff the burden shifts back to the defendant to prove that its conduct was privileged as competition.
[31] *Id.* at 605.
[32] Quelinane Co., 19 Cal. 4th at 55 n.4.
[33] PMC, 45 Cal. App. 4th at 605-06 n. 19.
[34] *Id.*
[35] RESTATEMENT (SECOND) OF TORTS §768, comment b, at 42.
[36] Charles C. Chapman Building Co. v. California Mart, 2 Cal. App. 3d 856, 857 (1969).
[37] *Id.* at 837. The court's reasoning here seems to be a bit circular: if all rents are paid, there is consequently no breach of the lease (which was expressly found by the court). If there is no breach of the lease, there can be no recoverable damages against which to indemnify the vendors.
[38] *Id.* As asserted in the Appellant's brief in PMC, 45 Cal. App. 4th 579: "[G]ranting safety from a lawsuit in exchange for securing the rights to property belonging to another is not and should not be encouraged by the law. It is not 'fair play' or competition, but rather 'insurance' to the breaching party by an inducing party in recognition of the wrongfulness of the inducing party's actions." Appellant's Opening Brief at 18-19.
[39] Leonard Duckworth, Inc. v. Michael L. Field & Co., 516 F. 2d 952 (5th Cir. 1975).
[40] *Id.* at 955.
[41] *Id.* at 958 (quoting 45 AM. JUR. 2D, Interference §1 (1969)).
[42] Jim-Bob, Inc. v. Mehling, 443 N.W. 2d 451 (Mich. App. 1989).
[43] *Id.* at 462.
[44] Edward Vantine Studios, Inc. v. Fraternal Composite Service, Inc., 373 N.W. 2d 512 (Iowa App. 1985).
[45] *Id* at 515. In fact, CAL. CIV. CODE §2773 suggests that such an agreement is actually unlawful. It provides: "An agreement to indemnify a person against an act thereafter to be done, is void, if the act be known by such person at the time of doing it to be unlawful."
[46] Raytheon Co. v. Superior Court, 208 Cal. App. 3d 683, 689 (1989).
[47] *Id.*
[48] Insurance Co. of N. Am. v. Superior Court (GAF Corp.), 108 Cal. App. 3d 758, 765, 166 Cal. Rptr. 880 (1980). (emphasis in original).
[49] Quite remarkably (although it would be rare for a judge not to order the production of the agreement itself), some judges have ruled that any communication between the attorney for the indemnitor and the attorney for the indemnitee is privileged and that unless the two parties discussed indemnity with each other outside the presence of one of the attorneys, all evidence other than the agreement itself (such as who asked for it, when it was asked for, etc.) will be suppressed in discovery and ultimately excluded at trial.
[50] *See* Loustalet v. Refco, Inc., 154 F.R.D. 243 (C.D. Cal. 1993); In re California Pub. Utils. Comm'n, 892 F. 2d 778 (9th Cir. 1989).
[51] Freeman v. City of Santa Ana, 68 F. 3d 1180, 1190 (9th Cir. 1995).
[52] *See, e.g.*, A-Mark Coin Co. v. General Mills, Inc., 148 Cal. App. 3d 312, 323, 195 Cal. Rptr. 859 (1983) (quoting RESTATEMENT (SECOND) OF TORTS §768).



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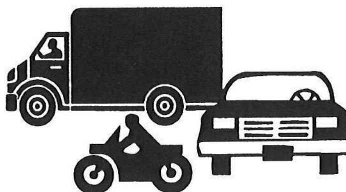

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