Business Law Section of the Florida Bar
Business Litigation Committee

WHITE PAPER CONCERNING CODIFICATION OF TORTIOUS INTERFERENCE CLAIMS HB 313 and SB 1312

JANUARY 27, 2022

I. INTRODUCTION

The Business Law Section of The Florida Bar (the "Section") is an organization within The Florida Bar comprised of lawyers, judges, and professors of law who deal with issues of "business law" (including, without limitation, the substantive areas of corporations, limited liability companies and other alternative entities, securities, bankruptcy, banking, commercial finance, franchise, antitrust, intellectual property and computer law; and involving both business transactions and business disputes).

The mission of the Section includes providing a forum for the discussion and exchange of ideas leading to the improvement of business laws, proposing and commenting on existing and proposed business law legislation and regulations, and enhancing the administration of justice.

Through the efforts of its nearly 5,000 members, the Section strives to enable companies conducting or considering conducting business in Florida to better forecast outcomes, evaluate risk, and allocate resources by assisting in drafting, updating, and commenting on business-related statutes and rules.

The Section has a long history of working with the Legislature to draft and revise statutes critical to the business community of Florida including the Limited Liability Company statutes, the Business Corporation statutes, the Arbitration Code, and the Uniform Commercial Real Estate Receivership Act, to name a few. This work has helped to build a foundation for predictable outcomes and the administration of justice for both businesses and the courts. Each Section position and legislative effort serves to increase predictability in the law and to attract business to Florida.

II. THE SECTION OPPOSES CODIFICATION OF TORTIOUS INTERFERENCE CLAIMS IN HB 313 AND SB 1312

During its Winter Meeting on January 27, 2022, the Executive Council of the Section voted to oppose HB 313 and SB 1312 which purport to create a statutory cause of action for tortious interference with a contract or business relationship.

In opposing the proposed legislation, the Section expressed concerns about the need for, and purposes of, codification of a well-established common law cause of action. To the extent the proposed legislation is intended to codify the tortious interference case law, it does not do so, but instead, broadens the scope of the claim and adds a remedy for treble damages not currently

available, as well as a provision for prevailing plaintiff's attorneys' fees. The Section believes that the remedy of treble damages has the potential of causing the most simple of breach of contract cases to be expanded to include a statutory claim for tortious inference, creating unnecessary litigation. In addition, the Section is concerned that the proposed legislation will disincentivize otherwise healthy and legal business relationships.

1. Tortious Interference Claims in the Common Law[1]

Tortious interference is a common law tort. In Florida, the elements of tortious interference with a contract or business relationship[2] are: (1) the existence of a business relationship between the plaintiff and a third person, not necessarily evidenced by an enforceable contract, under which the plaintiff has legal rights; (2) the defendant's knowledge of the relationship; (3) an intentional and unjustified interference with the relationship by the defendant which induces or otherwise causes the third person not to perform; and (4) damages to the plaintiff resulting from the third person's failure to perform. *Seminole Tribe of Fla. v. Times Pub. Co., Inc.*, 780 So. 2d 310, 315 (Fla. 4th DCA 2001). An essential element of tortious interference is that the "interference be both direct and intentional." *Rosa v. Fla. Coast Bank*, 484 So. 2d 57, 58 (Fla. 4th DCA 1986) (citing *Ethyl Corp. v. Balter*, 386 So. 2d 1220 (Fla. 3d DCA 1980) *cert. denied* 452 U.S. 955, 101 S.Ct. 3099, 69 L.Ed.2d 965 (1981)) (additional citation omitted). Florida does not recognize a cause of action "for interference which is only negligently or consequentially effected." *Balter*, 386 So. 2d at 1224 (citing 4 Restatement (Second) of Torts § 766 C (1979)).

Consistent with Florida's long-standing public policy of promoting competition, "so long as improper means are not employed, activities taken to safeguard or promote one's own financial, and contractual interests are entirely non-actionable." *Id.* at 1225. Indeed, it is irrelevant under existing Florida case law "whether the person who takes authorized steps to protect his own interests does so while also harboring some personal malice or ill-will towards the plaintiff."[3] *Id.* A cause of action for tortious interference does not lie where a plaintiff is seeks redress for injuries caused by actions taken "in the lawful protection of [the defendant's] legitimate interests." *Id.* at 1226.

Damages allowed for tortious interference claims are generally not punitive in nature, but rather "are a natural, proximate, probable or direct consequence of the act, but do not include

[1] This is a summary and is not intended to be a complete statement of the current common law concerning tortious interference claims.

[2] "Tortious interference with a contract and tortious interference with a business relationship are basically the same cause of action. The only material difference appears to be that in one there is a contract and in the other there is only a business relationship." *St. Johns River Water Mgmt. Dist. v. Fernberg Geological Servs., Inc.*, 784 So. 2d 500, 505 (Fla. 5th DCA 2001) (quoting *Smith v. Ocean State Bank*, 335 So. 2d 641 (Fla. 1st DCA 1976)).

[3] In the first Florida decision to recognize the tort of tortious interference, the Florida Supreme Court held that "[w]here one does an act which is legal in itself, and violates no right of another person, it is true that the fact that the act is done from malice, or other bad motive towards another, does not give the latter a right of action against the former." *Chipley v. Atkinson*, 23 Fla. 206, 213, 1 So. 934, 938 (Fla. 1887).

remote consequences." *Taylor Imported Motors, Inc. v. Smiley*, 143 So. 2d 66 (Fla. 2d DCA 1962) (citations omitted). "In both contract and tort actions, lost profits are recoverable only if their loss is proved with a reasonable degree of certainty" and are not merely speculative in nature. *Douglass Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc.*, 459 So. 2d 335 (Fla. 4th DCA 1984) (citing Fla. Jur.2d Damages § 76; *Lucas Truck Service Co. v. Hargrove*, 443 So. 2d 260 (Fla. 1st DCA 1983). Punitive damages may be awarded on a tortious interference claim "only if trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." Section 768.72(2), Florida Statutes. The existing law does not provide for an award of attorneys' fees to any party on a tortious interference claim. *Trytek v. Gale Indus., Inc.*, 3 So. 3d 1194, 1198 (Fla. 2009) ("It is well-settled that attorneys' fees can derive only from either a statutory basis or an agreement between the parties.").

2. Claims for Tortious Interference are Well-Developed in the Case Law

HB 313 AND SB 1312 are unnecessary because wrongful interference with contractual and business relationships are already prohibited by Florida's well-developed body of tortious interference case law. *See, e.g., Ethan Allen v. Georgetown Manor*, 647 So. 2d 812 (Fla. 1994); *Ferguson Transportation, Inc. v. North American Van Lines, Inc.*, 687 So.2d 821 (Fla. 1996). *See also Int'l Sales & Serv., Inc. v. Austral Insulated Prod., Inc.*, 262 F.3d 1152, 1154 (11th Cir. 2001). Throughout the decades that tortious interference has been recognized under the common law, Florida's courts have defined the contours of the claim so that commercial actors can properly evaluate whether their activities may expose them to liability and act accordingly. As further discussed below, the Section believes that HB 313 AND SB 1312 would inject uncertainty into commercial relations and have other adverse consequences for businesses and individuals alike, with no apparent justification.

3. Proposed Legislation does not Codify Existing Case Law

HB 313 and SB 1312 do not merely codify existing case law. Florida courts have defined the types of business relationships and opportunities that are protected under tortious interference case law. *See, e.g., Ethan Allen*, 647 So. 2d at 815 (holding that relationships with **past** customers are not protected). HB 313 and SB 1312's broad and imprecise language could outlaw customary business activities that are not currently prohibited by tortious interference case law. In addition, HB 313 and SB 1312 would not protect other types of business relationships that are currently protected under existing law.

For example, HB 313 and SB 1312 could lead to claims for "disruption," which is not a recognized concept under existing case law and which has no precise definition. It is easy to see how innocuous situations that are currently dealt with through contract law turning into "disruption" claims. By way of example, as written, a third party responsible for a delivery delay could face a "disruption" claim under HB 313 and SB 1312. The proposed legislation also uses a definition of "business relationship" from an Elder Abuse statute that limits "business relationships" to the sale of goods or services, thereby excluding sales of property and the myriad forms of business relationships that do not involve goods or services. HB 313 and SB 1312 would alter the common law in a way that does not have a logical relationship to its apparent goals.

Further, an essential element of an action tortious interference of a business relationship is that the "interference be both **direct and intentional**." *Rosa*, 484 So. 2d at 58 (emphasis added). The proposed legislation ostensibly provides a statutory cause of action for "caus[ing] the breach or violation of, or the refusal or failure to perform, a lawful contract…" with no express requirement that such conduct be direct and intentional. Together with the availability of statutory treble damages and one-sided attorneys' fees for what could be merely negligent conduct, the proposed language would be a significant departure from current tortious interference law and policy in Florida.

4. Proposed Legislation Does Not Address Legal Defenses

HB 313 and SB 1312 do not address any potential defenses to the proposed statutory cause of action, which will undoubtedly lead to litigation and risk a court ruling that the common law tortious interference defenses have been superseded. *Donner v. Arkwright-Boston Mfrs. Mut. Ins. Co.*, 358 So. 2d 21, 25 (Fla. 1978) (common law defenses superseded by statute).

5. Proposed Legislation is Anti-Competitive

HB 313 and SB 1312 will have a profound chilling effect on business competition, innovation, and the ability of smaller business to compete against those with established contracts by creating significant risk for any person or firm engaged in commercial relations. In the context of job creation and hiring, workers will have their bargaining power decreased given the substantial risk to potential employers under the statutory scheme.

Under current law, only well-established business relationships and expectancies are protected, allowing competition without fear of suit. In addition, damages are generally based on the contractual loss suffered, thereby compensating a party for a breached contract, but not placing them in a better position than they bargained for through contract.

In addition, under HB 313 and SB 1312, even "persuading" an individual or company to end their contract with another could lead to a crippling lawsuit because of their treble damages and one-sided attorneys' fee provisions (discussed below). For instance, suppose that start-up Company A seeks to convince a potential client to end their contract with Company B by offering the potential client better rates and services. As drafted, Company A could face treble damages and attorney's fees, resulting in a massive windfall to Company B, in circumstances that are currently considered fair competition. HB 313 and SB 1312 would invariably alter the balance of power between parties to a contract, creating significant risk for any party who wishes to get out of a contract and engage with another individual or firm and giving the other party significant leverage that was not bargained for in the contract.

Finally, HB 313 and SB 1312, as written, will very likely lead to lawsuits against any person involved in any way whatsoever when someone breaches a contract. Thus, lawyers, accountants, consultants, and other professionals could face personal liability for merely advising on the benefits and risks of breaching a contract. Certain industries, such as the recruiting industry, could cease to function altogether when dealing with employees who are not at-will.

6. Treble Damages and Attorneys' Fees are Punitive and Could Apply to Negligent Conduct

HB 313 and SB 1312's treble damages provision is foreign to Florida law, which only provides for such awards as a civil remedy for criminal behavior. Under existing Florida law, the only allowing for an award of treble damages in the business context are civil theft (Fla. Stat. § 772.11) and writing a worthless check (Fla. Stat. § 68.065). Both claims involve behavior that is otherwise criminalized. The civil theft statute requires proof of criminal intent, and it is already a crime to write a worthless check in Florida. Both statutes have 30-day "safe harbor" provisions. Thus, the statutes are narrow, involve behavior that is criminal in nature, and provide a clear opportunity for the defendant to right a wrong prior to facing suit.

On the other hand, HB 313 and SB 1312 would impose the same penalty reserved for theft on someone who merely "disrupts" a business relationship—an action which has never been characterized as criminal or even wrongful in many circumstances. Most concerning, as discussed above, is that such draconian remedies ostensibly apply even to negligent conduct.

The treble damages and one-sided attorneys' fee provisions incentivize frivolous lawsuits, with little downside risk for the plaintiff. Section 57.105(7) of the Florida Statutes, which makes contractual attorneys' fee provisions reciprocal, does not do the same for statutes which by their own terms only allow attorneys' fees to one side. *See, e.g. Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985) (discussing section 57.105 and other Florida statutes awarding attorneys' fees). With no ability to recover their attorneys' fees for successfully defending against a meritless tortious interference claim, Defendants will have no incentive to defend and will be forced to settle quickly to avoid undue exposure. This aspect of HB 313 and SB 1312 could create a cottage industry of "strike suits" used to penalize commercial relations which are otherwise legal.

7. Proposed Legislation Does Not Exempt Parties to a Contract or Business Relationship

Tortious interference law generally protects against unlawful third-party interference. HB 313 and SB 1312 do not explicitly exempt the actual *parties* to a contract or business relationship, which could allow for an award of treble damages against a party for a contractual breach. Such an outcome is contrary to basic contract common law principles and runs afoul of the independent tort doctrine which generally restricts the remedies available to parties to a contract to those specifically negotiated for in the contract and disallows companion tort claims unless the parties demonstrate that the tort is independent of any breach of contract claim. *See Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos., Inc.*, 110 So. 3d 399, 409 (Fla. 2013) (Pariente, J., concurring). *See also Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494-95 (Fla. 3d DCA 1994) ("Where damages sought in tort are the same as those for breach of contract a plaintiff may not circumvent the contractual relationship by bringing an action in tort.") (citations omitted); *Island Travel & Tours, Co. v. MYR Indep., Inc.*, 300 So. 3d 1236, 1240 (Fla. 3d DCA 2020) (barring tort claims as a matter of law because they were "ultimately based on the same underlying conduct giving rise to its contract claim.").

8. Proposed Legislation Could Lead to Unintended Consequences and May Impact Constitutional Rights

HB 313 and SB 1312's language could outlaw a myriad of activities that its drafters have not anticipated. By way of example, it is not clear whether "any person" broadly references parties to the contract or business relationship, as set forth above, and/or the parties' lawyers or non-legal professionals. HB 313 and SB 1312 seek to regulate other behaviors, as discussed above, which are not generally wrongful under Florida law. For instance, if a husband convinces his wife to end her five-year employment agreement so that the couple can move cities, the husband could be liable under HB 313 and SB 1312 as drafted. The proposed legislation could create undesirable outcomes, with the threat of suits pervading basic commercial (and even personal) relations. HB 313 and SB 1312 may also present constitutional issues given its broad prohibition of certain types of speech.

III. CONCLUSION

In sum, the proposed legislation would likely disrupt well-settled and predictable law, create uncertainty in commercial relations, disincentivize otherwise healthy and legal business relationships, and lead to a significant increase in frivolous litigation—all of which are contrary to the goal of bringing business to Florida. For these and the reasons set forth above, the Business Law Section opposes HB 313 and SB 1312.