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News & Types: Commercial, Competition & Trade Update

When Does Competition Become Tortious Interference?

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Practices: Litigation

It is common for parties who feel injured when the other party breaches its contract to claim damages. Of course, the most likely target is the other party to the contract. But injured parties may also have reason to look elsewhere. The other party may not be able to pay damages. There may be business reasons not to sue the other party. Or the injured party may really feel that someone else caused the damage. The "someone else" is usually a competitor. So where is the line between free and fair competition and tortious interference? A recent 7th Circuit decision had to explore these questions. (*Healix Infusion Therapy, Incorporated v. Heartland Home Infusions, Inc.*, 7th Circuit Court of Appeals, No. 12-3768, August 16, 2013)

Healix Infusion Therapy, Inc. and Heartland Home Infusions, Inc. (doing business as HHI) compete in the infusion therapy services business. Infusion therapy is the administration of substances such as pharmaceuticals intravenously or by any method other than ingestion. Healix and HHI permit medical providers to provide this service in their offices, such as offering premixed pharmaceuticals, nurses to administer the drugs, billing services and other in-office infusion therapy services. Medical practices and doctors' offices are customers for infusion therapy services.

In June 2007, Healix signed a five-year agreement with 3 Tree Infectious Disease Clinic, LLC, located in Burien, Washington. Under the agreement, Healix would provide infusion services after 3 Tree, at 3 Tree's expense, built an in-office pharmacy and hired support staff. Healix also took a security interest in some of 3 Tree's accounts receivable and filed a UCC-1 financing statement to perfect its security interest. Four months later, 3 Tree sent a letter to Healix informing Healix that it would not fulfill its part of the agreement. This placed 3 Tree in clear breach of the agreement, but Healix did not sue 3 Tree. What happened?

There were two explanations. In October 2007, 3 Tree attended an annual conference of the Infectious Disease Society Association where Chris Porter, a nurse practitioner with 3 Tree, met Landon Lackey, an employee of HHI. After this meeting and after 3 Tree sent its letter to Healix, 3 Tree signed a contract for infusion services with HHI.

The other explanation is that 3 Tree found the Healix contract too costly and would not have performed the agreement under any circumstances.

Of course, Healix liked the first explanation and sued HHI for tortious interference. In a bench trial, Healix lost. The appeal to the 7th Circuit followed.

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Under Texas law (which the court noted was the governing law), there are four elements to a tortious interference claim. First, there must be a contract. Second, the interference must be "willful and intentional." Third, the willful and intentional act must cause damage. Fourth, actual damage or loss must occur.

Healix's claim failed on the second and third element. Implicit in the requirement that the interference be "willful and intentional" is that the defendant actually knew of the agreement or, under Texas law, that a reasonable person in the defendant's position would have known about the agreement. The evidence on this was scant. Porter, the nurse practitioner with 3 Tree, said that he told Lackey, HHI's representative, of 3 Tree's agreement with Healix. But the trial court found Porter's testimony not credible due to Porter's unusual demeanor and mannerisms. There was contrary testimony that Porter never informed Lackey of the agreement.

But Healix had a fallback. Even if Porter did not inform Lackey of the agreement, Healix still had its UCC-1 financing statement, which is a public record of Healix's security interest in 3 Tree's accounts receivable and should have put HHI on notice of the agreement. Healix cited a Texas case in which a junior creditor, failing to discover a senior creditor's interest, had to turn over proceeds to the senior creditor. The Texas court declared that "[o]nce put on notice [of a security agreement via a UCC financing statement], a third party must make inquiry to discover the complete nature of the agreement between the debtor and creditor." But the appeals court did not find this persuasive.

The purpose of filing a UCC-1 financing statement is to perfect a security interest. Practitioners in Uniform Commercial Code Article 9 (the law governing secured transactions) have long debated the propriety of using a UCC-1 financing statement as a "bulletin board", not to perfect a security interest but to put on public record some other interest or fact that is not a security interest. Most would discourage this practice and the court apparently agreed. Healix was apparently trying to have its UCC-1 financing statement do double duty – first to perfect its security interest and second to use it as evidence of HHI's "knowledge" of Healix's agreement with 3 Tree. The court found the second purpose of no effect.

> "Healix takes [the statement in the Texas case quoted above] to mean that anyone who learns of a financing statement must stop and inquire about the nature of the underlying agreement. Either this, or any time two people form a contract, each must search to determine whether the other is encumbered by a competitor's security interest. Neither is accurate.
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> There are no security interests at stake in this case, no dispute about priority in assets, and no claim that HHI ever saw the financing statement, so the fact that Healix filed it is irrelevant. Article 9 of the UCC does not cover disputes about tortious interference with contracts, and HHI has not cited any decision in Texas (or another state, for that matter) extending the role of financing statements beyond resolving claims of priority."

So the court agreed with the trial court that Healix had not shown that HHI knew, or should have known, of Healix's agreement with 3 Tree based on the UCC filing. So any alleged interference by HHI could not have been intentional.

There was another basis to dispute Healix's claim of interference against HHI. Dr. Keller, the other member of 3 Tree, testified that 3 Tree "would not have performed under the contract under any circumstances . . .

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[because] Keller was profoundly uncomfortable with the financial obligations imposed by the contract [to build an in-office pharmacy and hire support staff] and he would not do what he needed to do to make the deal with Healix work." So Healix not only failed on proving HHI's knowledge of Healix's agreement with 3 Tree, Healix also failed to prove that any alleged interference by HHI actually caused any damage to Healix. "Healix's uncontroverted evidence demonstrates that [3 Tree] would have walked away from Healix no matter what HHI did. The causation inquiry ends there. [citation omitted] Healix needed to demonstrate that HHI was at fault in the breakup of the arrangement, and it cannot do so if the contract was doomed from the start."

There are a couple of lessons from the case. First, filing a UCC-1 financing statement is not enough to establish knowledge of an agreement by an alleged tortious interferer in the agreement. Second, causation in a tortious interference claim can be difficult to show, as the plaintiff must also investigate other explanations and eliminate them as causes of the breach of agreement. So, while the line between free and fair competition can be difficult to draw in an actual case, it is clear from the 7th Circuit decision that HHI did not cross the line.

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