

12-2001

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Recommended Citation

Deepa Varadarajan, Note, *Tortious Interference and the Law of Contract: The Case for Specific Performance Revisited*, 111 Yale L.J. 735 (2001).

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Note

Tortious Interference and the Law of Contract: *The Case for Specific Performance Revisited*

Deepa Varadarajan

I. INTRODUCTION

What is the role of contract law in remedying breach? The question of the appropriate legal remedy, specific performance versus money damages, has provided adequate fodder for three decades of debate in the law and economics discourse. In the legal discipline at large, the topic has spurred centuries of debate, as illustrated by Oliver Wendell Holmes's famous line: "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass."¹ Holmes's approach to contractual remedy would evolve during the latter half of the twentieth century into the "efficient breach" theory, which advocates the remedy of expectation damages upon breach in order to encourage the promisor's breach where the resulting profits to the promisor exceed the loss to the promisee.² Although this favorite doctrine of law and economics scholars more or less describes the norm in Anglo-American contract law, in which damages are routinely available and specific performance rarely granted, it has met and continues to meet with criticism on a variety of grounds.³

1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 301 (Boston, Little Brown 1881).

2. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

3. See Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979) (arguing for routine availability of specific performance); see also Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885 (2000) (addressing the conflict between the promisee's "compensatory interest" and "secrecy interest" under the current system of contract remedy); *infra* Part II (discussing the inadequacies of the traditional damages remedy).

Alan Schwartz, in his seminal article, *The Case for Specific Performance*,⁴ argues for the routine availability of the specific-performance remedy in the event of breach. His argument centers around two main points. First, he claims that the damages remedy is often undercompensatory. Second, he refutes the claim that making specific performance routinely available will result in efficiency losses or interfere with the liberty interest of promisors.

Schwartz's arguments have the potential to shed light on another, closely related cause of action: the tort of interference with contract and business relations. Consider the following scenario: A enters into a contract with B, and a third party, C, who has knowledge of the existing contract, induces breach and receives more or less the same performance that the original promisee would have received. In such a case, the tort of interference allows the promisee to recover damages from a third-party inducer, often in addition to an award of damages from the promisor under a breach-of-contract claim. This has puzzled proponents of efficient-breach theory because it does in the three-party context what is rarely done in the two-party context under contract law: It protects the promisee's contractual right with a property rule.⁵ In fact, the inducement tort "implements even broader protection than Promisee's property-rule remedy [i.e., specific performance] against Promisor, for it consists of rights that run in favor of Promisee *against the world*."⁶ Reconciling this legal remedy with the theory of efficient breach, which encourages the Pareto superior transfer of goods to those who value them most, has proven exceedingly difficult for even its staunchest defenders. Although some legal scholars have addressed this inconsistency by questioning the very legitimacy of the tort of interference with contract, others have tried to resolve the inconsistency in a variety of ways.⁷

In Part II of this Note, I provide an overview of Schwartz's arguments in favor of the routine availability of specific performance. In Part III, I briefly address the historical development of the interference tort, focusing specifically on the inducement context. The tort's origins and evolution shed light on its close relationship with the availability and adequacy of contract remedies. In Part IV, I present the attempts of various scholars to

4. Schwartz, *supra* note 3.

5. For a discussion of the distinction between property rules and liability rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

6. Lillian R. BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877, 879 (1990).

7. See, e.g., *id.*; Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131 (1999); Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61 (1982); see also *infra* Parts IV-V (discussing attempts to reconcile contract law with the tort of interference in the inducement context).

explain what appear to be the analogous efficiency objectives of the interference tort and contract law, and offer criticisms particular to each framework. Ultimately, the only convincing arguments, as a positive matter, rest on a conception of the interference tort as filling in the gaps of contract law, where traditional remedies are inadequate. But if this is the case, then would it not be more coherent to restructure the system of remedy under contract rather than create this remedy through the back door of tort? In Part V, I suggest that the expansion of the specific-performance remedy for breach of contract, as advocated by Schwartz, provides a potential solution to the doctrinal confusion and controversy surrounding the inducement-tort remedy.

II. THE CASE FOR SPECIFIC PERFORMANCE

Contract law recognizes two methods for making a disappointed promisee whole upon breach. Either the breaching promisor must pay money damages, which would enable the promisee to purchase a substitute performance or to replace lost gains that performance would have generated, or the breaching promisor must perform under the terms of the contract. Under current law, the damages remedy is routinely available, but the specific-performance remedy is considered extraordinary, awarded on a discretionary basis by courts.⁸ The paradigmatic cases in which courts grant specific performance involve sales of “unique” goods.⁹ Moreover, courts often refuse to enforce contracts providing for remedies that differ from what courts would ordinarily give in the absence of such a clause. For example, liquidated damages clauses with damage provisions sizeable enough to guarantee performance by the promisor are generally regarded as penalties, and thus not enforced by courts.¹⁰

A. The Compensation Goal

Schwartz begins with the assertion that specific performance is the most accurate way to achieve the goal of compensation—namely, the promisee is neither under- nor over-compensated because she gets the precise performance for which she contracted.¹¹ If this is the case, however, then why is specific performance not the norm? One explanation offered by

8. RESTATEMENT (SECOND) OF CONTRACTS § 371 cmt. a (1979).

9. “Unique” here means that a court cannot obtain, at a reasonable cost, enough information about substitutes to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee. Paradigm “uniqueness” cases include land-sales contracts; long-term requirements contracts; sales of heirlooms, antiques, and certain licenses; and employment and construction contracts. Kronman, *supra* note 2, at 355-56.

10. See U.C.C. § 2-718(1) (1998).

11. Schwartz, *supra* note 3, at 274.

advocates of the current system of remedy is that damages are fully compensatory, and a specific-performance rule might give opportunities for promisees to exploit promisors without actually furthering the goal of compensation.¹² Schwartz responds by first arguing that there are cases aside from those involving unique goods in which the damage award is actually undercompensatory. Factors causing undercompensation include the difficulty of calculating incidental costs (often associated with making another deal); the emotional costs associated with breach, which are not recoverable; the inaccurate calculation of substitution damages; and the problems of predicting what would make a promisee whole. All of these factors result in courts' unwillingness to award speculative lost profits.¹³

Second, Schwartz argues that the very fact that a promisee would request specific performance reflects the inadequacy of damages because of the costs to her associated with the performance remedy.¹⁴ For instance, in the case of a construction contract, a promisee might have to expend monitoring costs to ensure the adequate performance of a reluctant breacher. In such a case, if damages were fully compensatory, then the promisee would have strong incentives to opt for damages rather than to seek a specific-performance award. In addition, promisees, and not the courts, are in the best position to decide whether they will be adequately compensated by damages and to assess the difficulties of compelling performance.¹⁵

B. *Efficiency Concerns*

Another explanation for the absence of specific performance as a routinely available remedy is that the transaction costs associated with its expansion would exceed the costs of undercompensation under the current system. Two primary arguments support this explanation. One concerns pre-breach negotiations, and the other concerns post-breach negotiations.

1. *Pre-Breach Negotiations*

Anthony Kronman argues that the existing regime of contract remedy, in which damages are the norm and specific performance the exception, makes "economic sense"¹⁶ because it is consistent with the parties' intentions. Often called an "intention-justification theory," this argument

12. *Id.*; see also Posner, *supra* note 2, at 146 (discussing the potential for exploitation of the promisor under a specific-performance rule).

13. Schwartz, *supra* note 3, at 276.

14. *Id.* at 277.

15. *Id.*

16. Kronman, *supra* note 2, at 355.

suggests that the uniqueness test “draws the line between specific performance and money damages in the way that most contracting parties would draw it were they free to make their own rules concerning remedies for breach and had they deliberated about the matter at the time of contracting.”¹⁷ The effect of making specific performance routinely available would be that the parties would negotiate contract provisions restricting its use, thus incurring additional pre-breach negotiation costs.¹⁸

Schwartz argues, however, that in a large number of cases, Kronman’s characterization of parties’ intentions is in fact untrue. For example, a promisor of unique goods often cares more about preserving her right to breach than Kronman allows in his analysis, because she has good reason to believe that even if later offers may be random and few, they are likely to be much higher than earlier ones.¹⁹ Moreover, in the “undeveloped” unique goods market, exogenous shocks—or sudden increases in demand—have the most pronounced effect on price because supply is often inelastic.²⁰ Thus, Schwartz contends that a single characteristic like uniqueness is hardly determinative of parties’ preferences.

2. *Post-Breach Negotiations*

The second efficiency argument against making specific performance routinely available concerns the costs of post-breach negotiations.²¹ Suppose B_1 contracts with S to buy a lawnmower for \$100 and, before delivery, the demand for lawnmowers increases. Then, B_2 , a buyer averse to shopping around, offers the seller \$150, while the new market equilibrium price for the lawnmower is \$125. If B_1 has a specific-performance option, she is likely to demand it to force S to share some of his profit from breach. Since this post-breach negotiation between B_1 and S does not generate additional social wealth but only redistributes it, the negotiation costs incurred represent a deadweight efficiency loss that could be avoided by a

17. *Id.* at 365.

18. For instance, in a unique-goods context—such as the market for antiques—the intention-justification argument suggests that because a well-developed market does not exist and transactions are spotty, the promisor is likely to believe that he will not receive a better offer in the time between the formation of the contract and performance. Because he estimates his likelihood of breach to be low, he would be indifferent to a specific-performance provision in the contract. The promisee, on the other hand, would probably prefer to have such a provision in the contract because she fears the risk of undercompensation. Therefore, they would likely negotiate for a specific-performance provision. This reasoning is reversed in a non-unique goods scenario in which the easy availability of substitutes would make the promisee indifferent and the promisor prefer a damages remedy to protect his right to breach. Thus, the current system of remedies saves pre-breach negotiation costs. *Id.*

19. Schwartz, *supra* note 3, at 281.

20. *Id.* at 281-83.

21. *Id.* at 284-85.

damages remedy. This *ex post* efficiency argument is the cornerstone of the efficient-breach theory.²²

Schwartz contends, however, that this argument is based on the often false assumption that the first buyer has access to the market at a significantly lower cost than the seller.²³ If both have similar access to the market, as he suggests is often the case, then routine availability of specific performance would not give rise to costly post-breach negotiations. Using the lawnmower example, *S* would sell *B*, the lawnmower for \$100, and then he would buy another lawnmower on the market for \$125 to sell to *B*₂ for \$150.

C. *Liberty Interests*

Schwartz also rejects the argument that routine availability of specific performance will compromise the liberty interests of promisors.²⁴ First, if the promisor sells roughly fungible goods or unique goods, then a decree of specific performance does not violate the promisor's liberty because "the goods are assets to the promisor much like cash."²⁵ Likewise, services offered by large corporations assume an impersonal, cash-like quality, so that neither the liberty interests of the corporation nor those of its employees are burdened by a specific-performance remedy.²⁶ Schwartz asserts that liberty interests are affected only in the case of "an individual promisor who performs personal services."²⁷ Current law does not grant specific performance in such a case.²⁸ But aside from this particular context, Schwartz sees no credible liberty argument against the routine availability of specific performance.

Schwartz's main arguments concerning the compensation, efficiency, and liberty concerns of contract remedy support the expansion of the specific-performance remedy.²⁹ More recently, legal scholars have made

22. See Posner, *supra* note 2, at 133.

23. Schwartz, *supra* note 3, at 286.

24. See *id.* at 297.

25. *Id.*

26. *Id.*

27. *Id.*

28. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 8, § 367; see also *Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1852) (enjoining the promisor's performance for a third-party inducer rather than compelling specific performance because the breach involved a personal-services contract).

29. Although this Note focuses on Schwartz's arguments for the routine availability of specific performance, numerous scholars have provided additional moral and economic arguments criticizing the current scheme of contract remedy that favors efficient breach. See, e.g., Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 2 (1989) (favoring a "simple entitlement approach, which provides that a party is generally bound to perform his contractual promises unless he obtains a release from the promisee," over efficient-breach theory); Ian R. MacNeil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 968 (1982)

arguments that further question certain assumptions underlying the preference for expectation damages in modern contract law.³⁰ In the following Parts, I develop an additional argument in support of reexamining the current system of contract remedy that favors expectation damages in the event of breach: Increasing the availability of the specific-performance remedy would allow for a reduction in the scope of the interference tort, thus creating greater doctrinal coherence between contract and tort law in the inducement context.

III. THE TORT OF INTERFERENCE: A TROUBLESOME BUT TELLING HISTORY

The interference tort comes in two varieties: interference with contract and interference with prospective business relations. The former describes a situation in which a valid contract exists between two parties. The latter has no such requirement—prospective contractual relations are sufficient for such an action.³¹ A *prima facie* case for either action requires that the plaintiff prove the following: (1) A valid contract or business relationship existed between the plaintiff and the breaching party; (2) the defendant

(questioning the efficient-breach theory's "bias in favor of individual, uncooperative behavior as opposed to behavior requiring the cooperation of the parties").

30. Ben-Shahar and Bernstein address the conflict between a promisee's interest in being made whole—"compensatory interest"—and desire to keep certain information private—"secrecy interest"—under a regime of expectation damages:

When a breach occurs and expectation damages are sought, the expectation measure will often include lost profit. Lost profit is typically calculated on the basis of business information related to the promisee's operations This and other information revealed during the discovery process may be information that the promisee would prefer to keep private. First, revealing the information might damage her bargaining position in future contract negotiations with this or another transactor and might lead to her having to pay a higher price in future transactions. The promisee's weakened bargaining position arises . . . because [the promisor] will learn the true value of performance to the promisee. Knowing the value of performance to the promisee should enable the promisor to extract a greater share of the bargaining surplus in subsequent transactions.

Ben-Shahar & Bernstein, *supra* note 3, at 1886.

Craswell addresses the distorting effect that noncompensatory remedies have on the level of precaution against breach taken by parties to a contract. Although he does not take an explicit position on either side of the debate concerning the optimal system of contract remedy, he discusses one of the glaring oversights in the *ex post* transaction cost-centered debate: "[C]ontract remedies can affect many other decisions as well [T]hey also affect the parties' incentives to take precautions to prevent breaches before they happen In short, it should no longer be said that the efficiency of any contract remedy depends solely on *ex post* negotiation costs." Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 670 (1988).

31. States vary in their recognition of the tort of interference with prospective relations and in their recognition of the tort of interference with contracts when the contract is terminable-at-will. New York and California are often seen as polar ends of the spectrum with respect to this action, from the most restrictive to the most lenient, respectively. See John Danforth, Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1500-08 (1981).

knew of such a contract or relationship between the parties; (3) the defendant disrupted this relationship; and (4) the defendant's acts did in fact harm the plaintiff.³² Proof of malice or ill will on the part of the defendant is not required. In addition, although a defendant can raise the affirmative defense of fair competition in cases of terminable-at-will contracts and prospective relations,³³ this defense is usually unavailable in the case of a valid contract.

Although the tort of interference applies to various situations involving the disruption of a contractual relation, I focus solely on the inducement context. I take up the following situation: The inducer has knowledge of an existing contract or business relation, offers the promisor better terms, and receives more or less the same performance that the promisee would have received under the original contract. The emergence and historical treatment of the tort of interference in the inducement context highlights its close relationship to the availability and adequacy of contract remedies.

A. *Early Common-Law Actions*

The earliest interference claims can be traced to early Roman law, where the head of a household could bring an action against any person who caused harm to members of his household.³⁴ Centuries later, in early English common law, the interference action would take the form of landlord-tenant and master-servant actions. These common-law actions are worth investigating because they share an important characteristic: They emerged because the promisee had no legal recourse in contract against the promisor. The landlord-tenant rule can be traced in the English Year Books to the reign of Henry VII, when courts recognized a landlord's action against a third party who induced his tenants to leave.³⁵ Tenancy agreements were then at-will agreements, meaning either party could legally terminate the relationship at any time. Thus, while the law provided no remedy for the promisee against the promisor, it provided a remedy against the third-party inducer. I suggest that this observation should be taken a step further: *Because* the promisee had no legal recourse via contract against the promisor, the interference action emerged in this landlord-tenant context.

Similarly, a second interference rule regarding the relationship between masters and servants emerged in this period. In response to the virtual

32. RESTATEMENT (SECOND) OF TORTS, §§ 766, 766A, 766B (1979).

33. *Id.* § 768(1).

34. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 979-80 (5th ed. 1984).

35. Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487, 495 (1986).

decimation of the labor supply caused by the Black Death in the mid-fourteenth century, Parliament passed the Statute of Labourers in 1349. This ordinance, enacted amidst intense competition for servants in a diminished labor pool, enabled a master to sue a third party who enticed his servants to leave. Again, these master-servant relationships were terminable-at-will employment situations, and thus the master had no legal recourse against the servant. In the absence of a remedy against promisors, Parliament's reaction was to create a remedy—the enticement-of-servants action—against third-party inducers.³⁶

In neither case did courts view the property protection afforded in the three-party inducement context as conceptually problematic, despite the absence of even liability protection in the two-party breach context. The distinction was natural because it was grounded in status relations. The feudal tenant or the master's servant was seen in quasi-property terms. But, on the other hand, neither the tenant nor the servant, as autonomous individuals with terminable-at-will contracts, could be compelled by courts to perform. Thus, two strains of justification seem to underlie the emergence of these actions. First, if every wrong must have a remedy at law, then the promisee should have some recourse. But where was the wrong? Herein lies the second justification. The wrong was not only the process of inducement but also the result: the loss of a scarce, not easily replaceable, unique good.³⁷

B. *Nineteenth-Century Roots*

The roots of the modern interference action are generally traced to three nineteenth-century decisions, which firmly established in English law the

36. Danforth addresses the social and political underpinnings of the master-servant action in this period:

Since the master-servant relationship was the primary structural unit of the feudal economy and social hierarchy, deterring the enticement of servants had social implications that transcended protecting the narrow interests of individual masters. In the fourteenth century the enticement action provided a much needed reinforcement for the underlying foundation of the English political economy.

Danforth, *supra* note 31, at 1509.

37. Dobbs discusses the underlying "wrongness" of interference:

To find a wrong in interference we shall have to add some factor besides the act of interfering by persuasion or honest representation. This has proved to be a very difficult thing to do.

Though not everyone will readily accept the point, it may be important to recognize that the "wrongness" of interference is a result of our legal rule against it—not the other way around. It is of course so that law is sometimes made in response to moral feelings of society, and so it should be. But it seems the case at other times that law is the source of moral attitudes. If persuasion is bad in this case, it seems to be so only because we have first made a legal rule against it.

Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 344 (1980).

tort of interference with contract and, subsequently, with prospective business relations—*Lumley v. Gye*,³⁸ *Bowen v. Hall*,³⁹ and *Temperton v. Russell*.⁴⁰ In 1853, Lumley, a theater owner, brought an action in tort against Gye, a rival theater owner, for inducing Joanna Wagner, a famous opera singer, to breach her performance contract with Lumley. Lumley argued for an extension of the common-law enticement-of-servants action to include disruption of relationships other than those between masters and servants. The majority found in Lumley's favor, stressing the nature of the relationship between Lumley and Wagner—the exclusivity of the contract and the requirement of personal service—and its similarity in character to the relationships protected by the master-servant actions.⁴¹ In its painstaking attempts to analogize the two relations, the majority seemed to restrict application of the new tort remedy to certain cases depending on the character of the relationship disrupted, rather than to grant to all private commercial relationships generalized tort protection from third-party interference. But *Lumley* differed drastically from its fourteenth-century predecessors: A tort remedy was granted when (1) an explicit contract existed between status equals, and (2) a legal remedy was available in contract law against the promisor.⁴²

Judge Coleridge, the lone dissenter in *Lumley*, criticized this extension of the enticement-of-servants doctrine to the realm of enforceable employment contracts. It was one thing to allow for such a remedy in the context of a status relation, familial or proprietary, but to extend the action further would mean usurping the territory of contract law. He wrote that “in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties.”⁴³

The *Lumley* court's attempt to restrict the interference tort to disruptions of “master-servant-like” relations would prove unsuccessful soon thereafter. Plaintiff Lumley had not only argued for an extension of the enticement-of-servants action, but he had also claimed that the defendant had intentionally harmed him by using his contract (and implicitly, the employment relationship it represented) as a “tool” to rob him of his contractual benefit.⁴⁴ Adopted by the court and later termed

38. 118 Eng. Rep. 749 (Q.B. 1853).

39. 6 Q.B.D. 333 (C.A. 1881).

40. 1 Q.B. 715 (C.A. 1893).

41. *Lumley*, 118 Eng. Rep. at 754. Judge Crompton wrote: “I think that, where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule.” *Id.*

42. *See Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1852) (addressing the issue of equitable remedies). The court granted an injunction preventing Wagner from performing elsewhere after breaching her contract with Lumley.

43. *Lumley*, 118 Eng. Rep. at 760 (Coleridge, J., dissenting).

44. *Id.* at 751 (argument of Cowling for the plaintiff).

Lumley's "larger doctrine,"⁴⁵ this was an attempt to prove causation by overcoming the tricky matter of the promisor's intervening willingness to breach. The contract itself would be regarded as the causal link, the means by which the malicious third party directly harmed the promisee.⁴⁶

In *Bowen*, an action brought by one brick manufacturer against a competitor for inducing a skilled brickmaker to breach his employment contract, the court abandoned the previously dominant, relation-centered argument in favor of *Lumley*'s "larger doctrine."⁴⁷ By focusing on this aspect of the *Lumley* decision, the *Bowen* court bypassed the question of promisee-promisor relation altogether and established a general right of tort protection against third-party inducers of contract breach when the defendant's motive was malice or ill will (a motive not required explicitly by the *Lumley* court). The requirement of "malice" by courts, however, was short-lived. The term proved so flexible that it was replaced by a mere knowledge requirement—liability would be imposed on a defendant who knowingly induced contract breach.⁴⁸

The early common-law interference actions, involving either landlords and tenants or masters and servants, did not require an enforceable contract; their legitimacy came from the status of the relationship disrupted. Furthermore, the tort action was not a supplement to an action for breach of contract; rather, it was the very absence of a contract remedy that precipitated the interference tort's emergence. The extension of these early interference actions to contractual relations at large in the nineteenth century occurred under the auspices of the *Lumley* doctrine. *Lumley*'s "contract as tool" interpretation, unlike its early common-law predecessors, necessitated the existence of an enforceable contract between two parties. This requirement was abandoned, however, in the next stage of elaboration of the interference action. Twelve years after the *Bowen* decision, the court in *Temperton* would again redefine liability for tortious interference.

Temperton was a master mason and builder who worked in defiance of the regulations set by an early union, the Bricklayer's Society. To compel his adherence, officials of the Society induced one of his customers to

45. *Bowen v. Hall*, 6 Q.B.D. 333, 340 (C.A. 1881) (Brett, L.J.).

46. *Lumley v. Gye* was the third in a series of cases brought by theater owners against rival theater owners for inducing a singer's breach of contract, but the first in which the court accepted an argument of causation. The two earlier opinions, occurring a half century earlier, refused to grant the action because the interferers' actions were deemed too remote. *Ashley v. Harrison*, 170 Eng. Rep. 276 (K.B. 1793); *Taylor v. Neri*, 170 Eng. Rep. 393 (C.P. 1795). For further discussion, see Dowling, *supra* note 35, at 499-500. Although Gye cited these cases as "direct authorities against the maintenance of [*Lumley*'s] action," Judge Wightman dismissed both after cursory discussion, finding that they did not sufficiently resemble the case before the court. *Lumley*, 118 Eng. Rep. at 759 (Wightman, J.).

47. *Bowen*, 6 Q.B.D. at 340 (Brett, L.J.).

48. *Dobbs*, *supra* note 37, at 342. Something akin to the "malice" requirement, however, persists in cases of interference with business relations, as I discuss *infra* Section V.B.

breach a contract for the purchase of building materials. They also induced prospective customers not to purchase materials from him. The majority found for Temperton in regard to the breach of both his existing contract and his prospective contracts, and made no distinction between his contracts for goods and his contracts for services.⁴⁹

Although the *Temperton* case does not conform to the inducement scenario on which this Note focuses because the inducers of the breach did not wish to procure the contract performance for themselves, it had important ramifications for future inducement cases that do fit the scenario considered here. The *Temperton* decision had two major effects. First, it further strengthened the applicability of this tort to non-master-servant-like contracts, a step consistent with the earlier *Bowen* ruling. Second, it recognized tort liability for the disruption of unformalized prospective relations, which was wholly inconsistent with the *Lumley* doctrine.

The transition from common-law application of the interference doctrine in two particular status-based contexts—landlord-tenant and master-servant actions—to the modern tort in the nineteenth century was arguably a product of misapplied judicial logic, but it can also be seen as quite the opposite. The appearance and reappearance of the interference doctrine share a common thread: the lack of a sufficient contract remedy or, at least, the perceived lack of one. Perhaps the interference tort's current strength within a fairly rigid system of contract remedy can be attributed to the same perception.⁵⁰

IV. AN OVERVIEW OF ATTEMPTS TO RECONCILE THE TORT OF INTERFERENCE AND CONTRACT LAW

In this Part, I consider two main attempts to reconcile the body of contract law with the tort of interference in the inducement context: "tort-based" and "contract-based" explanations. The former seeks to demonstrate that the legitimacy of the inducement tort derives from its serving tort-like objectives, in which case its current expansion⁵¹ is inexplicable. The latter explanation claims that the tort derives its

49. *Temperton v. Russell*, 1 Q.B. 715, 727-30 (C.A. 1893) (Lord Esher, M.R.).

50. Danforth discusses the reasons why one state rejects the inducement tort: "Tort liability . . . has now been accepted in all but one state [Louisiana] and extends far beyond the old enticement-of-servant action." Danforth, *supra* note 31, at 1499-1500. Danforth continues:

Louisiana still refuses to recognize independent tort liability for interference with contract As a general rule, Louisiana courts have viewed the interfering will of the breaching party as the proximate cause of the contract breach and found the connection between the interferer's inducement and the plaintiff's injury to be too remote.

Id. at 1499 n.60 (citations omitted).

51. *Id.* at 1499-1500.

legitimacy from contract-like objectives—namely, to fill in the gaps of contract remedy.

A. *Tort Application for Tort Objectives*

Harvey Perlman offers a “tort-based” explanation for the emergence of the interference tort and suggests that its current expansion deviates from its original purposes. He begins with the observation that under the tort of interference with economic relations, courts often “view economic relationships as comparable to property rights.”⁵² He regards this treatment as incompatible with the treatment of the economic relationship in the two-party scenario, where excepting the specific-performance remedy, the promisor’s performance is not the property of the promisee until the performance has occurred. If expectancy damages in the two-party situation are viewed as compensatory, so that the promisee is indifferent between receiving performance or the value of performance, this should also remain true in the three-party inducement context.⁵³ Rather than accepting a property characterization in the three-party scenario, Perlman suggests using an “unlawful means test,” which would limit interference-tort liability to situations in which the defendant’s acts in causing breach are “independently wrongful.”⁵⁴

The basis of Perlman’s analysis is a characterization of the development of the interference tort as a product of courts’ unwillingness to grant recovery for economic loss under the rubric of traditional intentional torts such as fraud.⁵⁵ Third-party recovery for intentional torts such as fraud, which resulted from words rather than physical acts, was severely restricted. Generally, only those whom the defendant intended to deceive could recover. Expansion of this tort to include third parties’ contractually

52. Perlman, *supra* note 7, at 66.

53. *Id.* at 93.

54. *Id.* at 62.

55. Because “[t]he laws of physics do not provide the same restraints for economic loss” as for physical injury, tort claims for purely economic loss pose the threat of unlimited liability:

In cases of physical injury to persons or property, the task of defining liability limits is eased, but not eliminated, by the operation of the laws of physics. Friction and gravity dictate that physical objects eventually come to rest. The amount of physical damage that can be inflicted by a speeding automobile or a thrown fist has a self-defining limit.

Even in chain reaction cases, intervening forces . . . offer a natural limit to liability.

Id. at 72-73. Common-law courts found it difficult to formulate restraints on liability, and as a result, third parties’ claims of economic loss resulting from physical torts were not recoverable. A third party’s economic loss was seen as too indirect, and only the victim of the physical injury could recover.

Perlman contrasts this restriction with courts’ willingness to allow recovery in a similar context when the plaintiff and the victim were family members or master and servant. Because these status relations were a “self-limiting” feature of the tort, courts were willing to permit recovery for pure economic loss. *Id.* at 73.

based losses would have proven too difficult,⁵⁶ and without a tort of interference, a wasteful course of litigation would likely have ensued. For instance, if *A* contracted with *B* for employment, and a third party *C*, fraudulently posing as *A*, wrote to *B* saying his services were no longer wanted, then under the intentional tort of fraud, only *B* would have a cause of action against *C*. *A* could, however, bring a breach of contract action against *B*, who in turn could claim indemnity from *C*. Given this convoluted outcome, Perlman finds it unsurprising that courts would have had an incentive to create a separate cause of action—the tort of interference.

Perlman suggests, however, that this separate cause of action poses the same potential for unrestrained liability and necessitates appropriate limits. Requiring the plaintiff to show the defendant's *intent* to interfere with the plaintiff's contract is one way of doing this; it limits plaintiffs to contract-holders and not just to any third party who might have been harmed by the disruption of the contract.⁵⁷ But he insists that the intent requirement should supplement, not replace, the requirement of an independently tortious act on the part of the defendant.

Perlman finds the current state of the interference doctrine, in which liability hinges on the defendant's intent alone, insupportable and wholly inconsistent with "the application of tort principles to reach tort objectives."⁵⁸ In the absence of an unlawful act that independently merits tort liability, the interference rule should "promote—or at least not interfere with"—the objectives of contract law to minimize transaction costs and encourage breach where efficiency gains result.⁵⁹ As for the expansion of the tort to prospective relations, "[t]o the extent society is better off when parties seek more advantageous relationships, avoidance of inefficient relationships is as desirable as breach of inefficient contracts."⁶⁰

Perlman's analysis faces difficulties, however. The "unlawful means test" does not account for the large body of cases of the *Lumley v. Gye* variety, in which liability was found in the absence of independently tortious acts. As Benjamin Fine writes:

56. Expansion of the traditional tort of fraud to "indirect" injuries fails to distinguish between the plaintiff's loss and those suffered by other persons dependent on the contract performance. *Id.* at 75-77. Thus, in *Lumley v. Gye*, if Wagner had failed to perform due to fraud on the part of Gye, Lumley's economic loss could not be distinguished from those of others—concession stand owners, taxi drivers, and other indirect beneficiaries.

57. *Id.* at 77 ("[I]f a plaintiff suffering economic loss is required to show that Gye knew of his contract or expectancy and purposely disrupted it, the number of successful plaintiffs and the extent of liability are considerably smaller."). Requiring the plaintiff to show the defendant's intent to interfere eliminates possible claims from other persons dependent on the contract performance, such as the concession stand owners and taxi drivers mentioned above.

58. *Id.* at 78.

59. *Id.* at 79.

60. *Id.* at 90.

Where the courts uniformly agree both as to certain paradigms of liability and as to the underlying structure of analysis and policy justifying the imposition of that liability, it does not suffice for a normative theory simply to state that “there is no reason why the legal results should not be altered to conform to the theory.”⁶¹

Moreover, the premise of Perlman’s normative theory, namely, that the tort of interference arose as a means of applying “tort principles to reach tort objectives,” is itself questionable. If the doctrine had emerged solely as a way of protecting the unsuspecting promisee whose contract was breached on account of a third party’s fraudulently luring her promisor away, then Perlman’s inability to explain its expansion would be perfectly justified. But although courts might be more likely to grant recovery to interference plaintiffs when the defendant has committed independently tortious acts, neither the emergence nor the evolution of the tort can be traced to this objective alone. Most tellingly, the paradigmatic cases of the nineteenth century failed to conform to this supposedly determinative scenario. Instead, the historical development of the interference tort seems to suggest an alternative explanation: the application of tort principles to supplement the compensatory objectives of contract law.

B. *Tort Application for Contract Objectives*

The second group of reconciliation attempts treats contract performance as a property right in the three-party inducement scenario under the interference tort, but offers economic justifications for this treatment. Fred McChesney adopts this view in addressing the ex post effects of the interference tort in the inducement context, specifically, the lowered transaction costs that arise when inducers negotiate directly with promisees.⁶² Lillian BeVier makes a similar economic argument for property protection of contract performance in the inducement context, but she stresses its ex ante rather than ex post effects.⁶³ She identifies two contractual settings—“returns-to-information” and “relational” cases—in which the interference tort creates ex ante incentives for the promisee to make contract-specific investments that contract remedies alone do not protect.

61. Benjamin L. Fine, Note, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1125-26 (1983) (quoting Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 431 (1975)).

62. McChesney, *supra* note 7.

63. BeVier, *supra* note 6.

1. *McChesney*

McChesney provides a first-best argument for the inducement tort, one that pertains to a system in which contract remedies are fully compensatory. He argues that although the rule of “breach now, pay later” may be optimal in the two-party model due to lowered transaction costs, this is not the case in a third-party inducement situation.⁶⁴ Without an interference rule, the *Lumley* scenario would go as follows: Wagner has no incentive to breach unless Gye offers her more than Lumley’s offer plus the cost of damages to Lumley in the event of a breach. A determination of this sum will involve a negotiation between Gye and Wagner before the breach occurs. McChesney, however, criticizes the assumption of efficient-breach theorists that promisors will “automatically and voluntarily” compensate promisees upon breach and do so to the promisees’ satisfaction.⁶⁵ The unlikelihood of such an outcome suggests the need for a post-breach negotiation to determine damages between Wagner and Lumley.

McChesney asserts that under a rule of tortious interference, this double bilateral negotiation will be replaced by a single transaction: direct negotiation between Gye and Lumley, the inducer and the promisee, thus rendering unnecessary subsequent post-breach negotiation.⁶⁶ The interference tort deters those would-be inducers who neglect to negotiate directly with the promisee. Direct negotiation with the promisee results in lower transaction costs than would arise in a world without the tort of interference.⁶⁷ Hence, McChesney argues that absent “any empirical evidence to the contrary, tortious interference, not ‘efficient’ breach, would seem the superior rule in the inducement context.”⁶⁸ McChesney is not concerned with distributional effects—that the outcome is superior because the promisee rather than a breaching promisor receives the surplus value—but with the Pareto superiority of the outcome. The interference tort minimizes the deadweight losses that result from increased transaction costs. Therefore, seemingly contradictory property-rule protection is optimal in the inducement scenario because of its desirable allocative effects.

McChesney’s characterization, however, is problematic for two reasons. First, he suggests that his is normatively a “first-best” argument for the inducement tort,⁶⁹ which means that allowance of the tort is optimal even if the system of contract remedy is fully compensatory.⁷⁰ But he

64. McChesney, *supra* note 7, at 149.

65. *Id.* at 150.

66. *Id.* at 151.

67. *Id.*

68. *Id.* at 152.

69. *Id.* at 131.

70. *Id.* at 143.

begins his argument by criticizing the important efficient-breach assumption of “automatic and voluntary” compensation upon breach and suggesting that a costly negotiation to ascertain damages will likely occur upon breach. If this is the case, however, then what legitimizes the current system of contract remedy that favors damages over specific performance in the first place? The idea of “breach now, pay later” rests upon the assumption that costly negotiations to determine damages will not take place, or alternatively stated, that the transaction costs associated with the damages remedy will be comparatively less than those associated with specific performance. McChesney claims that his arguments apply to a first-best world, but he then assumes that transaction costs of significant magnitude exist. Thus, his analysis does not seem to rest in a first-best world after all—the defect is still in the system of contract remedy.

Second, McChesney’s argument falls victim to the problem of assignment. Although he acknowledges that not all rights to a promisor’s performance are assignable, particularly in the case of personal service contracts,⁷¹ he advocates a bright-line rule of interference that forces inducers to negotiate with promisees.⁷² He suggests that in the absence of a bright-line rule, an inducer might opportunistically claim that she induced breach without prior negotiation with the promisee because she thought the contract would be deemed legally unassignable. This, he continues, would lead to the same increase in transaction costs that the tort of interference seeks to avoid. To permit a “defense that assignability was uncertain would encourage Inducers to take now and pay later, then resort to courts to avoid liability for failing to negotiate.”⁷³ In other words, it would lead to negotiation plus litigation costs.

McChesney’s assertion that forced inducer-promisee negotiation yields lower transaction costs seems mistaken when assignability is unclear, such as in the case of personal service contracts. Instead, the ex ante negotiation plus ex post litigation costs lamented by McChesney would simply be replaced by two ex ante negotiations. In the absence of an assignability clause in the original contract, a promisee will need to secure the promisor’s agreement. Thus, an inducer-promisee negotiation between Gye and Lumley, for example, would likely be followed by a promisor-promisee negotiation, with Lumley purchasing the right to assign from Wagner.

71. *Id.* at 156-57.

72. *Id.* at 157-58.

73. *Id.* at 158.

2. *BeVier*

BeVier, like McChesney, begins her analysis by questioning the assumptions underlying the “efficient breach” hypothesis in the two-party model. The damage remedy is optimal in contractual settings where market substitutes for performance exist and promisees have a comparative advantage at finding substitute goods.⁷⁴ In such cases, contract damages make promisees indifferent between performance and breach, and goods go to the users who value them most. When market substitutes are available, the inducement tort deters efficient behavior by taxing the flow of goods to their most valued users. But, says BeVier, many contractual settings do not possess these requisite conditions, and when they do not, “inducement liability promotes value-enhancing behavior rather than retards it.”⁷⁵ Such nonconforming settings usually involve significant contract-specific investment by the promisee, which contract remedies alone do not protect.

The first contractual situation in which the inducement tort promotes efficiency is the “returns-to-information” case. BeVier identifies such cases as involving promisees’ investment in information specific to the particular contract at issue—for example, a contract to purchase controlling shares of a corporation.⁷⁶ Because the returns to this contract-specific information require performance of that particular contract, no adequate substitutes exist for performance. In such cases, the appropriate contract remedy is specific performance, because it is more “reliably compensatory.”⁷⁷

Given that specific performance meets compensatory objectives, BeVier further asserts that inducer liability is preferable to specific performance because it encourages value-enhancing transactions at a lower cost than contract remedies.⁷⁸ Because the inducement tort allows for recovery of damages not contemplated by parties at the time of contracting—consequential damages, emotional distress, or harm to reputation—the promisee is more assured of adequate compensation.⁷⁹ This translates into incentives for informational investment on the part of promisees and incentives to spend less on precautions against breach.

Moreover, BeVier questions the presumption that the third party is indeed the higher-valuing user, a presumption maintained by Perlman to justify leaving to the inducer the decision of with whom to negotiate—promisee or promisor.⁸⁰ It is equally likely, she asserts, that the inducer

74. BeVier, *supra* note 6, at 898.

75. *Id.*

76. *Id.* at 899.

77. *Id.* at 916.

78. *Id.*

79. *Id.* at 916-17.

80. *Id.* at 918.

would choose to negotiate with the promisor in return-to-information cases not because she is the higher-valuing user, but because she prefers to free-ride on the promisee's informational investment.⁸¹ The tort of interference, by forcing inducers to negotiate with promisees, would eliminate such opportunistic behavior by inducers. Property protection in the inducement context, BeVier argues, thus produces two socially beneficial results: It creates investment incentives, and it weeds out opportunistic free-riders from the genuinely higher-valuing users.

Furthermore, BeVier argues that the inducement tort is beneficial in the case of "relational" contracts, which "'encompass most generic agency relationships, including distributorships, franchises, joint ventures, and employment contracts.'"⁸² Like the returns-to-information cases, they often involve investments in contract-specific information, which render the damage remedy undercompensatory. Unlike the returns-to-information cases, however, they involve relationships over time rather than discrete obligations and transactions, and the difficulty of defining performance precludes the awarding of specific performance as a contract remedy.⁸³ Property-right protection under the inducement tort in these cases encourages investment by ensuring adequate compensation in the event of breach. And, once again, by forcing inducer-promisee negotiation, the interference tort deters free-riding.

BeVier's analysis seems more faithful to both the historical development and modern application of the inducement tort than Perlman's or McChesney's. At the very least, her analysis presents a story in which the legitimacy of the inducement tort is derived from deficiencies in contract remedy. She does not, however, make a particularly convincing case that the promisee merits a supercompensatory remedy in tort when specific performance is available in contract law in cases of returns-to-information. It seems redundant to protect the promisee with a property rule in tort when one is already available in contract. Her analysis of the relational cases, however, proves useful in applying Schwartz's specific-performance argument to clarify the inducement-tort puzzle.

81. *Id.* at 918-19. A case involving the purchase of controlling shares of a corporation, such as the notorious *Texaco, Inc. v. Pennzoil Co.* case, illustrates this point. The promisee initially invests in finding and making a private deal, one that soon gains public and media attention. An inducer firm, upon learning of the deal, chooses to make another secret offer directly to the promisor, thereby profiting from the promisee's original informational investment. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986).

82. BeVier, *supra* note 6, at 908 (quoting Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981)).

83. *Id.* at 909-10.

V. A COMPLEMENTARY WIDENING AND NARROWING OF SCOPE

Taking together this analysis of the doctrinal conflict between the inducement tort and modern contract law and Schwartz's argument for routine availability of specific performance upon breach leads to two possible conclusions. First, since "[t]he principal function of the concept of tortious interference is to provide a back-up remedy against breaches of contract"⁸⁴ in the three-party inducement context by affording property-rule protection, the existence of this tort demonstrates the larger failure of current contract law to meet its compensatory objective. Thus, it serves as another argument in favor of expanding specific performance in the two-party context because the existing system of contract remedy fails to meet its compensatory objective. The problem with this first conclusion, however, is that it leaves open the possibility of inefficient redundancy and overcompensation for the promisee. For instance, if *A* contracts with *B*, and *C* induces *B* to breach, *A* can compel specific performance from *B* and also seek further damages from *C* for inducement of breach.

Alternatively, since the purpose of the tort is to fulfill the compensatory objective of contract remedy, it makes more doctrinal sense to expand property-rule protection in contract remedy and limit the inducement-tort remedy to only those situations where specific performance is not possible. The one clear exception Schwartz makes to the routine availability of the specific-performance remedy is an individual personal-service contract, where the liberty interests of the promisor would be compromised. It seems more than coincidental that the paradigmatic case of tortious interference with contract—*Lumley v. Gye*—involved that very scenario.

Although this is the only exception Schwartz allows, BeVier's analysis suggests that the ongoing and hard-to-define nature of the performance obligation in relational cases renders awarding specific performance impossible in these settings. Since relational cases closely resemble personal-service contracts, the tort of interference might apply in those contexts as well. The problem, however, with introducing any element of vagueness into a rule is the subsequent administrative costs involved in deciding which cases fit the relevant criteria. An analysis of the costs of making such a determination on a case-by-case basis relative to the costs of failing to meet the compensatory objective in those cases would likely be necessary.

My suggested thesis, a widening of property-rule protection in contract remedy accompanied by a complementary narrowing of the inducement-tort remedy to only those situations where specific performance is not possible,

84. *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 947 (7th Cir. 1986) (Posner, J.).

introduces two questions, one of a normative nature and the other a practical concern. First, why not narrow the scope of the interference tort to personal-service contracts (or, administrative costs permitting, relational contracts) without altering the existing system of contract remedy, since this would seem to address concerns of doctrinal tension without altering the efficient-breach framework of contract law? Second, since an expansion of the specific-performance remedy would create increased doctrinal clarity only if it led to a corresponding narrowing of the application of the inducement-tort remedy, would expansion of the specific-performance remedy in fact lead to narrower application of the interference tort in the inducement context?

A. *The Case Against "Narrowing" Alone: Normative Considerations*

Dan Dobbs similarly suggests restricting liability for tortious interference to cases involving "unique-performance contracts."⁸⁵ He writes:

The line of demarcation between market-oriented contracts on the one hand and unique-performance contracts on the other may not be the line that is finally drawn; but it offers a base from which courts could analyze cases, draw distinctions and give reasons without embracing a rule of universal liability.⁸⁶

However, his analysis stems from an efficient-breach framework, and he seeks to leave the current system of contract remedy undisturbed.⁸⁷ Thus, he proposes solely a "narrowing" without the accompanying "widening" of scope in contract remedy that I posit in this Note. The difference in points of analytic departure might help account for the differing conclusions. If one's initial premise is that the current system of contract remedy is undercompensatory and no more efficient than one in which specific performance is routinely available,⁸⁸ a premise that I adopt in this Note with the use of Schwartz's arguments as a jumping-off point, then the widening of property-rule protection in contract remedy seems the best way to address two closely linked problems: the inadequacy of contract remedy and its current doctrinal conflict with the inducement tort.

Furthermore, if the tort originated as a response to gaps in contract remedy and expanded beyond use in cases of unique-performance contracts because of a perceived insufficiency of contract remedy, as argued earlier in

85. Dobbs, *supra* note 37, at 375-76.

86. *Id.* at 376.

87. *Id.* at 360-61.

88. See Schwartz, *supra* note 3, at 271.

this Note, then to narrow the scope of the tort without correspondingly widening the scope of property-rule protection in the law of contract is a solution that does not really address the root of the problem. Dobbs thus offers a temporary solution at best. An application of Carol Rose's "crystals and mud" analogy to the efficient-breach/interference-tort context helps illuminate this point.⁸⁹ Rose describes the phenomenon in property law of hard-edged rules that create "perfectly clear, open and shut, demarcations of entitlements" ("crystals") being replaced by "fuzzy, ambiguous rules of decision" ("mud").⁹⁰ These periodic swings between crystalline and muddy legal rules occur because of endogenous factors created by the legal rules themselves. She illustrates this back-and-forth pattern of legal decision in various property law contexts, from the common law of mortgages to recording systems of land ownership.⁹¹ In all of these cases,

the trouble . . . is that an attractively simple legal device draws in too many users, or too complex a set of uses. And that, of course, is where the simple rule becomes a booby trap. It is this booby trap aspect of what seems to be clear, simple rules—the scenario of disproportionate loss by some party—that seems to drive us to muddy up crystal rules with the exceptions and the post hoc discretionary judgments.⁹²

This characterization can be analogized to the efficient-breach/interference-tort context discussed here. If one accepts the premise that the system of contract remedy imposes more or less a bright-line rule of damages (with certain exceptions in extraordinary cases), then it is possible to see how the inability of the system to deal with increasingly complex uses in a fully compensatory way would lead to "muddiness." The form of muddiness in this case, however, was not the restructuring of the system of contract remedy itself, but rather a restructuring of tort law with the introduction and expansion of the interference tort in the inducement context. An analysis of the case law governing the inducement tort reveals the tendency of courts to review the adequacy of the contract remedy available to the plaintiff when formulating judgments.⁹³ The expansion of the interference tort in the twentieth century could thus be seen as a reflection of the perceived insufficiency—the undercompensatory nature—of contract remedy in a large number of cases. As such, any lasting solution to the doctrinal rift between contract and tort law in this area would

89. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

90. *Id.* at 578.

91. *Id.* at 583-90.

92. *Id.* at 597.

93. See, e.g., *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 947 (7th Cir. 1986).

necessitate a restructuring of contract law. Thus, the complementary widening and narrowing that I have suggested here is preferable as a normative framework to Dobbs's suggestion of narrowing alone.

B. *A Likely Complementariness: Practical Considerations*

An analysis of the existing case law indicates that an expansion of the specific-performance remedy would likely lead to a narrower application of the inducement-tort remedy. This is evidenced by the fact that courts in several jurisdictions already refuse to grant promisees awards for tortious interference with contract when the contract remedy is fully compensatory, for example, in cases where a liquidated damages clause is specified and enforced in the original contract. In *Memorial Gardens, Inc. v. Olympian Sales & Management Consultants, Inc.*, a case in which the plaintiff alleged tortious interference with funeral contracts, the Colorado Supreme Court cited the rule that "if there is a liquidated damages clause and the liquidated amount is paid and accepted, it constitutes the total amount of damages allowable."⁹⁴ The court based the rule on commentary in section 774A of the *Restatement (Second) of Torts* regarding the measure of damages in an action for intentional interference with contract:

[S]ince the damages recoverable for breach of the contract are common to the actions against [the party breaching the contract and the party inducing the breach], any payments made by the one who breaks the contract or partial satisfaction of the judgment against him must be credited in favor of the defendant who has caused the breach.⁹⁵

From such a rule it seems to follow that in cases where a court awards specific performance against the promisor for breach, the promisee would have no claim against the inducer for tortious interference with contract.

Other jurisdictions similarly apply the rule elaborated by the Colorado Supreme Court. For instance, in *McEnroe v. Morgan*,⁹⁶ an Idaho court of appeals reversed a district court award of compensatory and punitive damages against the appellant for interference with a land-sales contract. The court reasoned that because the vendors had already been allowed to

94. 690 P.2d 207, 212 (Colo. 1984); see, e.g., *Larson v. Am. Nat'l Bank of Denver*, 484 P.2d 1230, 1232 (Colo. 1971) (holding that the plaintiff was not entitled to recover attorney's fees from the defendant after the payment and acceptance of a liquidated damages award); *Marvin v. Pueblo Dairymen's Coop.*, 284 P.2d 238, 241 (Colo. 1955) (holding that under the terms of a cooperative marketing agreement, a cooperative marketing association for agricultural products had no further remedy against a breaching milk producer beyond the stipulated liquidated damages).

95. RESTATEMENT (SECOND) OF TORTS, *supra* note 32, § 774A cmt. e.

96. 678 P.2d 595 (Idaho Ct. App. 1984).

retain as liquidated damages the equity in a home conveyed to them by the purchasers as a down payment, their recovery was complete. Similarly, in *Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.*, a district court made the following observation in dismissing a clinic's claim of tortious interference with contract against a hospital for hiring physicians away from the clinic:

[A]ny recovery plaintiffs could obtain under their tortious interference with contract claims is limited to the liquidated damages specified in the employment contracts. Given the uncontroverted evidence that the defendants have paid, or are committed to paying these sums as they become due, the action for tortious interference is without merit.⁹⁷

These cases serve as further evidence that a widening in the scope of contract remedy would likely result in a complementary narrowing in the scope of the interference tort.

Expansion of the specific-performance remedy might solve the doctrinal tension between contract law and tort law regarding interference with a valid contract. But where does this leave the tort of interference with business relations? Most jurisdictions presently recognize an affirmative defense of competition in claims of interference with terminable-at-will contracts or prospective contracts, "provided it is fair competition, consistent with antitrust law and other principles."⁹⁸ Usually, liability is found only in cases where the defendant has behaved maliciously against the promisee, or, in other words, with a "lack of genuine commercial intent."⁹⁹ Thus, an analysis similar to Perlman's "unlawful means test" that is utilized by most courts in the context of business relations prevents a clash of the interference tort with the efficiency objectives of contract law. It is worth noting, however, that certain jurisdictions have increasingly expanded this tort to include *negligent* interference with prospective business relations, in which liability is "based on the foreseeability of the plaintiff's injury and the absence of due care on the part of the defendant."¹⁰⁰ The removal of the intent requirement, while currently the

97. 45 F. Supp. 2d 1164, 1203-04 (D. Kan. 1999); *see also* *Curtis 1000, Inc. v. Pierce*, 905 F. Supp. 898 (D. Kan. 1995) (limiting the employer's tortious interference remedy against a former sales representative to what was specified under the terms of their employment contract).

98. *Frandsen*, 802 F.2d at 947; *see also id.* at 948 ("In cases where no breach of contract results from the interference, the tort is really a branch of the law of unfair competition, and it is necessary for liability that the alleged tortfeasor have gone beyond the accepted norms of fair competition."); RESTATEMENT (SECOND) OF TORTS, *supra* note 32, § 768.

99. *Fine*, *supra* note 61, at 1136.

100. *Danforth*, *supra* note 31, at 1508. *Danforth* adds that:

California courts have based tortious interference liability not only on unformalized relationships, but also on relationships that had been unformed and merely foreseeable at the time of the defendant's act. To show that his prospective interest was sufficient to

exception rather than the rule in cases of prospective business relations, similarly poses the threat of doctrinal conflict between the interference tort and the efficiency objectives of contract remedy.

The practical benefits of increased doctrinal clarity in this area would be manifest. First, the restricted application of tortious interference liability that would result from a complementary widening in scope of the specific-performance remedy would inject a degree of predictability into this increasingly chaotic branch of law. Inconsistent damage awards and varying post hoc discretionary judgments would be replaced by a more or less uniform standard for liability. Liability for tortious interference in the inducement context would be restricted to cases in which specific performance is not a possible contract remedy—those involving personal-service contracts, or, more broadly, relational contracts. Thus, all parties to a potential suit would know what to expect during the course of litigation, and the adjudicating ability of courts would not be unduly stretched.¹⁰¹ Furthermore, doctrinal clarity in this area would result in reduced administrative costs. Courts would no longer be overburdened by unmeritorious tortious interference claims, in which the moving party has already been justly compensated under a breach of contract claim. The elimination of redundant litigation and the streamlining of judicial decisionmaking to a simple, one-pronged analysis of whether the claim involves the induced breach of a personal-service or relational contract would significantly lower administrative costs.

VI. CONCLUSION

I have suggested an argument to add to the existing litany of arguments¹⁰² in favor of expanding the specific-performance remedy in cases of contract breach. Routine availability of specific performance would lead to increased doctrinal clarity in the area of tortious interference with

enjoy tort protection, a plaintiff claiming interference with prospective advantage need only show "the probability of future economic benefit."

Id. (quoting *Buckaloo v. Johnson*, 537 P.2d 865, 872 (Cal. 1975)). For similar applications of this rule, see, for example, *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979); *Institute of Veterinary Pathology, Inc. v. California Health Laboratories*, 172 Cal. Rptr. 74 (Ct. App. 1981); and *Gold v. Los Angeles Democratic League*, 122 Cal. Rptr. 732 (Ct. App. 1975).

101. Judge Higginbotham has stressed the need for clear rules and guiding principles for adjudication:

[The case-by-case] approach fails to recognize limits upon the adjudicating ability of courts. We do not mean just the ability to supply a judgment; prerequisite to this adjudicatory function are preexisting rules, whether the creature of courts or legislatures. Courts can decide cases without preexisting normative guidance but the result becomes less judicial and more the product of a managerial, legislative or negotiated function.

Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1028 (5th Cir. 1985).

102. See *supra* notes 29-30 and accompanying text.

contract and business relations. In the inducement context, scholars have often viewed this tort as a thorn in the side of contract remedy, which privileges the efficient movement of goods to higher-valuing users. An examination of the tort's historical evolution as well as its current treatment in legal scholarship suggests that it exists to fill the gaps of contract law, where traditional remedies are inadequate. This being the case, a redefinition of contract remedy seems more coherent than the creation of a new remedy through the back door of tort law.

An expansion of the specific-performance remedy in contract law would likely lead to a corresponding narrowing in the application of the tort remedy. This is evidenced by the fact that many courts already refuse to grant an interference-tort remedy when the contract remedy is fully compensatory, for instance, in cases where liquidated damages are specified and paid to the promisee upon breach. Thus, the tort of interference with contract would be limited to those cases in which specific performance is not a possible remedy—personal-service contracts, or, perhaps more broadly, relational contracts. The tort of interference with business relations, however, could continue to be governed by a malice or unlawful means standard, since such a standard does not interfere with the objectives of contract law. Not only would doctrinal clarity result from these changes, thereby reducing unnecessary confusion, expense, and redundant litigation, but cases of interference in this century would be more in line with the paradigmatic case that initiated the interference tort's rebirth in Anglo-American law—*Lumley v. Gye*.