BUSINESS TORTS

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BUSINESS TORTS

Introduction.

It has been said that as far as legal generations go, not until "yesterday" did torts achieve recognition as a distinct branch of law. W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 1 (5th ed. 1984). Nevertheless, even though tort law is now recognized as a proper subject, providing a general definition or description of what is a tort, is difficult, if not impossible. For example, tort is from the Latin word torquSee Black's Law Dictionary, p. 1335 (5th ed. 1979). Oklahoma statutorily provides that "every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon his right." 76 O.S. 1991, § 1. It is easier to describe the purpose of tort law which is simply to protect the health, property, economic rights and civil rights of citizens, not only by compensating those whose rights are invaded, but also by punishing and deterring misconduct. This goal is the very basis of the "fault" principle in tort law. See Cooter, Economic Analysis of Punitive Damages, 56 So.Cal. L.Rev. 79, 137 (1982); Morris, Punitive Damages in Tort Cases 46 Harv.L.Rev. 1173, 1177 (1931).

It becomes even more difficult to characterize what are now frequently called "business torts." That phrase has been utilized to describe the various number of torts arising in commercial or business contexts. Nevertheless, even though the term "business tort" is a relatively new term, it

has its roots in the common law. For example, the old common law tort of fraud and/or deceit is alive and well in business communities throughout the United States.

Numerous books and treatises have been dedicated to the subject of business torts. Thus, this chapter can only scratch the surface of the subject. It will discuss some of the more common "torts" which arise in the business or commercial context, as well as some of the common issues which arise in connection with each tort. The practitioner is cautioned that each particular tort discussed undoubtedly has many other issues, case law, etc. which cannot be addressed in a single chapter. Further, the law on this area is continually evolving, and the particular torts discussed below typically overlap in the fields of unfair competition, antitrust, and other similar statutory and common law causes of action which should be analyzed before pursuing any claim in a business tort context.

Interference with Economic Relationships.

Introduction.

Two Typical Interference Torts.

Interference with economic relationships can take many forms. The most typical "interference" torts are tortious interference with contractual and business relationships and interference with prospective business advantage. In Oklahoma, "one has the right to carry on and prosecute a lawful business in which he is engaged without unlawful molestation or unjustified interference from any person, and any malicious interference with such business is an unlawful act and an actionable wrong." Crystal Gas Co. v. Oklahoma Natural Gas Co., 529 P.2d 987, 989 (Okl. 1974). The Oklahoma courts have deemed such interference actionable ever since the early case of Schonwald v. Ragains, 32 Okl. 223, 122 P. 203 (1912) in which the court said,

> It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction is one of the most valuable of all rights. Indeed, in the commercial world, the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a right in the ordinary forms of property [quoting from Nashville, Chattanooga & St. Louis Ry. Co. v. McConnell, 82 F. 65 (Cir. M.D. Tenn. 1897).] See also Neff v. Willmott, Roberts & Looney, 170 Okl. 460, 41 P.2d 86 (1935).

The types of economic relationships that the law might protect and the various types of harm that it might sanction are far too numerous to list. Set forth below is a general discussion of the torts of interference with existing contractual or business relationships and interference with prospective advantage. Such torts are often joined with some other common law or statutory causes of action or may be asserted as a stand-alone cause of action for a particular wrong involved where no other remedy seems appropriate. A dispute in a business context may also present causes of action under the common law of lender or employer liability, breach of fiduciary duty, trade secrets, trademark infringement, or such statutory remedies under the antitrust laws, the Lanham Act, RICO, etc. It is critical, therefore, that the practitioner evaluate

all possible legal theories presented by the facts so that the most effective legal theories and the broadest remedies are pursued for the client.

Policy Basis for Interference Torts.

Interference torts have a solid foundation in the common law and public policy. For example, states have a vital interest in protecting the system of private property and consensual commercial exchange. The tort is premised on the fact that business in a state must be free, open and fair to all. A critical basis for this protection is the role of protecting the sanctity of the market system's structure of consensual exchange and protection and preventing parties from achieving by misconduct what they cannot achieve by market transactions. See Werner, Z. Hirsch, Law and Economics: An Introductory Analysis, p. 200 (1988). Intentional interference with business relations is among those types of business torts Oklahoma has deemed to run counter to the basic premise of the free enterprise system. See, e.g., Crystal Gas Co., supra; see also MGW, Inc. v. Fredericks Dev. Corp., 6 Cal.Rptr.2d 888, 898 (Cal. App. 1992). Thus, states are free to conclude that "an efficient legal system would try to eradicate property violations, not seek to optimize them." See, e.g., David V. Haddock, Fred S. McChesney and Menahem Speigle, An Ordinary Economic Rationale for Extraordinary Legal Sanctions, 78 Cal.L.Rev. 1, 29 (1990).

The primary difference between the two torts relates to the degree of protection given by the law to the particular relationship involved. In theory, some additional protection is afforded a bona fide contractual relationship as opposed to a prospective economic advantage, but as a practical matter, it is often difficult to quantify the difference. The comments to the Restatement (Second) of Torts state the following:

> When the interference is with a contract, an interference is more likely to be treated as improper than in the case of interference with prospective dealings, particularly in the case of competition....

Restatement (Second) of Torts § 766 cmt. b (1977).

Prosser and Keeton have concluded that a contractual relationship ought to be entitled to more stringent protection than a prospective advantage. W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 130 (5th ed. 1984) (hereinafter "Prosser and Keeton"). Nevertheless, in most states the degree of protection is the same for both torts. For example, many cases follow the Restatement (Second) of Torts § 767 factors which are identical for both torts.

Interference with Existing Contractual and Business Relationships.

Introduction.

Interference with contractual and/or business relationships is a hybrid tort. It includes inducing breach of contract, which itself is one of three closely related torts: "[inducing] breach of contract, [inducing] termination of contractual relations, or rendering performance impossible."

George A. Fuller Co. v. Chicago College of Osteopathic Medicine, 719 F.2d 1326, 1331 (7 Cir. 1983). There are two varieties of these torts. The first occurs where the tortfeasor interferes with performance of the plaintiff's contract partner. Restatement (Second) of Torts § 766. The second is where the interference of a contract occurs by preventing the plaintiff's own performance of the contract or by making the plaintiff's performance more expensive or burdensome. Restatement (Second) of Torts § 766A. No Oklahoma court has ruled on the validity of such a claim. However, the Tenth Circuit in John A. Henry & Co. v. T.G.& Y. Stores Co., 941 F.2d 1068 (10 Cir. 1991) held that a claim under Section 766A is viable in Oklahoma. Other jurisdictions have rejected claims under Section 766A. See, e.g., Price v. Sorrell, 784 P.2d 614 (Wyo. 1989).

Interference can thus occur, by causing a breach of contract by a third party, causing termination of contractual relationships by a third party rendering performance by the third party impossible, or where a defendant causes a plaintiff to breach, terminate or be unable to perform his own contract.

Elements.

In order to prevail on a claim for tortious interference with contractual relations, a party must show:

(1)That it had a business or contractual right that was interfered with;

(2)That defendant knew or under the circumstances should have known of the contract or relationship;

(3)That the interference was malicious, wrongful or intentional;

(4)That the interference was neither justified, privileged nor excusable (in other words, improper); and

(5)That damage was proximately sustained as a result of the complained interference.

See, e.g., Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649 (Okl. 1990); Mac Adjustment, Inc. v. Property Loss Research Bureau, 595 P.2d 427, 428 (Okl. 1979). See also Oklahoma Uniform Jury Instruction (2d) Instruction No. 24.1.

Other states have defined the elements to include (1) that a plaintiff had a valid contract; (2) that the defendant knew or should have known of the contract; (3) that the defendant intentionally acted to induce the breach of contract; (4) that the defendant acted improperly; (5) that defendant's conduct caused the breach of contract; and (6) that the conduct caused the plaintiff

damages.

As in any tort, absence of evidence to support one or more of the elements of a tortious interference claim entitles a defendant to judgment as a matter of law. Because this tort is continuously evolving, there is much inconsistency within and among jurisdictions. See H. Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 Univ. of Chicago L.Rev. 61 (1982) (hereinafter "Perlman"). Courts disagree on such fundamental matters as the type of contract to be protected, the kind of interference that will be actionable, and the type of defenses that can be asserted. Id.; Prosser and Keeton § 129. The most significant difference between the many courts considering this tort involves the plaintiff's burden of proof. See Perlman at 65. The traditional view requires a plaintiff to prove that the defendant intentionally interfered with the contract. The defendant then has the burden of proving any justification or privilege. An increasing number of courts, including Oklahoma, however, have applied the test set forth in the Restatement (Second) of Torts § 766 (1977). See Continental Trend Resources, Inc. v. OXY USA, Inc., 810 F.Supp. 1520 (W.D. Okl. 1992). This test requires the plaintiff to prove that the defendant intentionally and improperly interfered with the contract. Thus, even if the Comments to the Restatement (Second) of Torts § 766 acknowledge the split of authority and do not purport to determine conclusively the burden of proof issue, the addition of the "improper" element in the section has led many states to now require the plaintiff to prove, as an element of the tort, that defendant's conduct was based upon either an improper motive or improper means.

As noted in the introduction, the theory underlying the broad tort of interference balances a party's freedom to enter into business relationships with the sometimes competing interests of other parties co-existing in the marketplace. Thus, most courts, including Oklahoma, impose liability for inducing breach of contract where a party, who is a stranger to a contract, induces its breach or acts in a manner other than in the legitimate exercise of its own rights. This cause of action extends not only to conduct that results in an actual breach of the contract, but also to conduct that results in substantial interference with the performance or the diminution of value in the contract. See, e.g., John A. Henry & Co., supra; Continental Trend Resources, Inc. v. OXY USA, Inc., supra; Arkansas v. Texas, 346 U.S. 368 (1953). The basic theory is that the right to perform a contract and to reap the performance resulting therefrom and also the right to performance by the other party are property rights entitled to protection. See authorities cited in introduction; Annotation 26 A.L.R.2d 1227, 1240-41 (1952); 8 Proof of Facts 2d 267, 275 (1976); 45 Am.Jur.2d Interference §§ 1, 39 (1969).

Requirement of a Contract or Business Relationship.

To establish the tort of intentional interference of existing contractual or business relationships requires that the plaintiff first establish proof of a valid contractual or business relationship. See, e.g., Constant v. Hallmark Cards, Inc., 568 N.Y.S.2d 441 (N.Y.A.D. 1991) (dismissing a tortious interference claim for lack of an enforceable contract). Thus, a party may not recover for inducing breach of an illegal contract such as illegal gambling and sporting events or illegal covenants in restraint of trade.

Nevertheless, it is not required that the contract's relationship be definite or even enforceable. See, e.g., 26 A.L.R.3d 1296, 1297-98 (1981). For example, even though there is conflicting

authority with respect to contracts terminable at will [see, e.g., Stanley v. Kelley, 422 N.E.2d 663 (Ind. Ct. App. 1981)], most courts have held that such contracts are valid and subsisting and third parties are not free to tortiously interfere with them. Bochnowski, supra; Annotation 5 A.L.R.4th 9 (1981); Prosser and Keeton at 995-96; Childress v. Abeles, 84 S.E.2d 176 (N.C. 1954). Additionally, even though a contract may be unenforceable or voidable by one party, it does not prevent the assertion of a tort action against an interloper who interferes with the performance of the contract. Prosser and Keeton § 129; Restatement (Second) of Torts § 766 cmts. f and g; Sterner v. Marathon Oil Co., 767 S.W.2d 686 (Tex. 1989) (stating that [the Texas Supreme Court] has held that the unenforceability of a contract is no defense to an action for tortious interference with its performance and that third persons are not free to tortiously interfere with the performance of a contract). Compare Carmen v. Hebert, 601 P.2d 646 (Colo. Ct. App. 1979) (finding liability even though lack of mutuality) with Wedgewood Carpet Mills, Inc. v. Color-Set, Inc., 254 S.E.2d 421 (Ga. Ct. App. 1979) (finding no liability where there was indefiniteness and lack of mutuality).

It is also critical to recognize that the existence of the relationship is often intertwined with causation and damage issues. Frequently the evidence on the two points overlaps.

Knowledge and Intent.

This type of tort is universally recognized to be an intentional tort. There is, therefore, generally no recovery for "negligent interference with prospective advantage or negligently inducing breach of contract." See, e.g., Restatement (Second) of Torts § 766C (stating that one is not liable for such negligent conduct).

Generally, to find for a plaintiff, a jury must also find that defendant knew of the existence of the contract or business relationship between the plaintiff and a third party. Constructive knowledge is generally sufficient if, from the facts and circumstances of which he had knowledge, a defendant should have known of the existence of the contractual or business relationship which was interfered with. Moreover, even if a party is mistaken as to the legal significance of the facts or believes there is no contract, liability can still arise where a party knows of facts that give rise to the plaintiff's contractual rights with another. 45 Am.Jur.2d Interference § 11 (1969); Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. Ct. App. 1987). In addition to knowledge, a plaintiff must also prove intent, i.e., that the actions by the defendant were intended to interfere with the contractual or business relationship.

It is important to distinguish the element of intent from the concept of malice or ill will. Some courts have used language that would require ill will, malice or even conduct that would be independently tortious absent the interference itself. See, e.g., Precise v. City of Rossville, 403 S.E.2d 47, 49 (Ga. 1991) (holding "[w]here one who maliciously and wrongfully and with intent to injure another person's business prevents others from dealing with him and his business is therefore injured, the person is thus injured as a cause of action against the person thus causing the injury and for loss of damages sustained"). Nevertheless, most courts, including Oklahoma, permit a plaintiff to recover without proving that the defendant harbored actual malice or ill will toward the plaintiff. Any interference with one's lawful business under Oklahoma law is an actionable wrong. Niemeyer v. U.S. Fidelity & Guaranty Co., 789 P.2d 1318 (Okl. 1990).

Thus, even though the term malice is utilized, it is utilized in the sense as "legal malice," i.e., the

intentional doing of a harmful act without justification or excuse as opposed to proving malice in the popular sense of hatred, ill will or spite.

Improper Conduct.

The original Restatement did not require a plaintiff to prove that the defendant's conduct was improper. Rather it placed the burden on the defendant to show that its conduct was justified, privileged or excused. Now, however, the Restatement (Second) of Torts requires the plaintiff to affirmatively prove that a defendant's conduct was improper, i.e., not justified, privileged or excused. See, e.g., Continental Trend Resources, Inc., supra. As one court noted, practically speaking, improper conduct and justification are opposite sides of the same coin:

> The Restatement utilizes the term "improper" to describe actionable conduct by a defendant. Non-justification is synonymous with "improper" if a defendant's interference is unjustified under the circumstances of the case, it is improper. The converse is also true.

See Gross v. Lowder Realty Better Homes & Gardens, 494 So.2d 590, 597 n.3 (Ala. 1986). Compare Sakowitz, Inc. v. Steck, 669 S.W.2d 105 (Tex. 1984) (burden to show improper motive on the plaintiff) with Potthoff v. Jefferson Lines, Inc., 363 N.W.2d 771 (Minn. Ct. App. 1985) (privilege is an affirmative defense to be borne by the defendant).

Although Oklahoma probably requires that the plaintiff bear the burden of proof, it is important to note that the courts in many jurisdictions still define the tort without requiring proof of malicious, inherently tortious or other improper conduct. Other courts have required that the plaintiff prove that the defendant's conduct was either tortious in itself or improper as required by Section 766B of the Restatement (Second) of Torts. Legal commentators, such as Prosser and Keeton, applaud the Restatement (Second) of Torts's element of improper conduct based on the belief that the burden of proof on the fundamental liability theory should rest with the plaintiff, as with most tort theories. See, e.g., Prosser and Keeton at 983-84. The factors most courts consider are the nature of an actor's conduct, the actor's motive, the interest of those with whom the actor's conduct interferes, the interest sought to be advanced by the actor; the social interest in protecting the freedom of action and the contractual interest of the actor; the proximity or remoteness of the actor's conduct to the interference and the relationship between the parties. See Restatement (Second) of Torts § 767. See also Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127-28 (6 Cir. 1981), cert. denied, 456 U.S. 991 (1982); Gross v. Lowder Realty Better Homes & Gardens, supra.

Affirmative Defenses.

There have been several defenses recognized both in Oklahoma and across the country to the tort of intentional interference. These diverse defenses include competition, assertion of a financial interest by the defendant, responsibility for the welfare of another, truthful information or advice, absolute right for refusal to deal, etc. See, e.g., Restatement (Second) of Torts §§ 768 773. Nevertheless, courts often tread a fine line in deciding between important competing social interests. In some cases, the underlying motives or interests of the defendant seem perfectly justifiable, yet the particular means chosen to accomplish them seem excessive. For example,

business competition may be a proper motive, but the use of extortion, bribery or slander would constitute clearly inappropriate means.

Some of the more frequent defenses, both affirmative and otherwise, are discussed below; however, the practitioner should recognize that there are others.

Refusal to Deal.

Under Oklahoma law, the existence of an absolute right cannot constitute tortious interference. See, e.g., Ellison, 751 P.2d at 1106. Oklahoma law recognizes that, absent an independent duty to deal, a party is privileged to refuse to do business with anyone. See, e.g., Paddington Corp. v. Major Brands, Inc., 359 F.Supp. 1244, 1245 (W.D. Okl. 1973) ("Absent any purpose to create or maintain monopoly, corporation ... may deal with whomever it wants."); Nissen v. Andres, 178 Okl. 469, 63 P.2d 47, 49 (1936); Furst v. Lucas, 177 Okl. 513, 61 P.2d 214, 217 (1936). This rule is consistent with the weight of authority from other jurisdictions holding that absent a duty imposed by contract or statute, a tortious interference claim cannot be maintained on the basis of a mere refusal to deal. In Fulton v. Hecht, 580 F.2d 1243, 1250 (5 Cir. 1978), cert. denied, 440 U.S. 981 (1979) (citations omitted) a tortious interference claim was rejected because:

> [A]n individual can refuse to enter into a contract or to maintain a business relationship terminable at will for any reason sufficient to himself. Even if defendants did intentionally inflict economic harm on the plaintiff, such behavior is tolerated by the law because of the state's interest in protecting the individual freedom to enter, or refrain from entering, into contractual relationships.

See generally Restatement (Second) of Torts § 762 cmt. c (1939) ("The privilege [to refuse to deal] exists regardless of the actor's motive for refusing to enter business relations with the other and even though the sole motive is a desire to harm the other"). See, however, Continental Trend Resources, Inc. v. OXY USA, Inc., supra. Thus, in the absence of a statutory or contractual duty to deal, a refusal to deal, without more, cannot constitute tortious interference. See, e.g., Kresbsbach v. Henley, 725 P.2d 852 (Okl. 1986) (plaintiff's allegations that a medical practice group's refusal to refer patients did not constitute an unlawful restraint of trade; therefore, unlawful interference claim was defeated because a group's refusal to deal with the plaintiff was not unlawful under the antitrust laws and, therefore, could not constitute tortious interference). Cf. Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 885 F.2d 683 (10 Cir. 1989), cert. denied, 498 U.S. 972 (1990) (conduct in the absence of regulatory intervention which would have been found to constitute a breach of the duty to perform a contract in good faith can be actionable as tortious interference if it were shown that the actions were done for an improper motive).

Truthful Information.

Providing truthful information cannot constitute tortious interference. The Restatement (Second) of Torts § 722 provides:

> One who intentionally causes a third person not to perform a contract or not to

> enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation by giving the third party ... truthful information.

See also George A. Fuller Co. v. Chicago College of Osteopathic Medicine, 719 F.2d 1326, 1333 (7 Cir. 1983); Continental Trend Resources, Inc., supra.

Financial Interest of Defendant.

A defendant acting to protect his or her own legitimate financial interests is generally permitted to assert such conduct as a defense. For example, a person acting in good faith to protect its own contractual rights cannot be guilty of tortious interference with prospective contractual relations. The Restatement (Second) of Torts also recognizes a privilege if the alleged interference consists of an assertion of good faith of legally protected rights or interests. Oklahoma, while not specifically addressing the privilege of Section 773, appears to apply similar principles. See, e.g., National Life & Accident Ins. Co. v. Wallace, 162 Okl. 174, 21 P.2d 492 (1933); Holland v. Perrault Bros., Inc., 311 P.2d 795, 801 (Okl. 1957).

Competition.

Competition is often used as a justification for interference. See Overbeck v. Quaker Life Ins. Co., 757 P.2d 846, 848 (Okl. Ct. App. 1984) quoting Schonwald ("Legitimate competition, by fair means, is always lawful...."); Restatement (Second) of Torts § 768 (1979) (distinguishing between the torts of existing and prospective economic relations).

Responsibility for the Welfare of Another.

The Restatement (Second) of Torts § 770 recognizes a defense of responsibility for the welfare of another if an actor who is charged with the welfare of another does not use wrongful means and acts only to protect the welfare of a third person. However, the circumstances contemplated in a defense are not frequently litigated in the context of business litigation. The Restatement (Second) of Torts suggests that the welfare may be physical, moral or economic. Traditional relationships that seem to be ripe for application of this defense include attorney/client, doctor/patient, parent-guardian/child, employer/employee, agent-principal-trustee/beneficiary, etc.

Remedies.

Generally speaking, all damages reasonably flowing from or caused by interference are generally recoverable. For inducing a breach of contract or interfering with the business relationship, a defendant can be held liable for all damages which flow from such interference, irrespective of whether a breach of contract was established, and the defendant can also be liable for punitive damages. See Continental Trend Resources, Inc., supra ($30 million punitive damages); Allison v. American Airlines, 112 F.Supp. 37 (N.D. Okl. 1953). See, e.g., Restatement (Second) of Torts § 774A(2); American Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp., 798 S.W.2d 274 (Tex. 1990). The general theory, as defined by the Restatement (Second) of Torts, expressly allows recovery for emotional distress, harm to reputation, other consequential losses and punitive damages for interference claims. Restatement (Second) of Torts § 774A. Of course, a

plaintiff must establish the defendant's wrongful acts were a proximate cause of the plaintiff's damages. Crystal Gas Co., 529 P.2d at 989; Del State Bank, 548 P.2d at 1028.

Intentional Interference with Prospective Economic Relationships.

As noted, the Oklahoma Supreme Court has not yet ruled whether or not Oklahoma recognizes the tort of tortious interference with prospective advantage. Nevertheless, such a tort has been applied in Oklahoma courts. See Overbeck, supra; Continental Trend Resources, Inc., supra; John A. Henry & Co., supra; Restatement (Second) of Torts § 766B.

The elements of the two torts, i.e., existing contractual and business relationships vis-á-vis prospective advantage, are substantively similar with the distinction that a party must prove a valid business relationship or expectancy with the reasonable probability of future economic benefit, as opposed to an existing contractual relationship. See, e.g., Restatement (Second) of Torts § 766B. It is important for a plaintiff to show that there is a bona fide and reasonable expectancy of a continuing and prosperous relationship and not just the hope or the potential for one. The plaintiff in a prospective advantage case must demonstrate the expected benefit with some reasonable degree of specificity, although not to a certainty. More than mere hope or optimism is required. The law mandates that a reasonable probability of an economic benefit from a valid prospective relationship occur. Disputes about the true existence of a future expectancy and causation of harm are often more hotly contested in cases involving interference with prospective advantage than in contractual interference cases. See, e.g., Burke v. Hawkeye Nat'l Life Ins. Co., 474 N.W.2d 110 (Iowa 1991) (holding that in a claim of intentional interference with a prospective business advantage, plaintiff must prove that a defendant intended to financially injure or destroy the plaintiff. In cases of interfering with existing contracts, the Iowa court did not require such proof.).

Generally speaking, the other elements and defenses, although not identical, are similar.

Strategy.

As noted earlier, when a practitioner is faced with a potential interference case, it is also critical to consider pleading other substantive theories of recovery, such as RICO, trade secrets, employment torts, etc. From the plaintiff's perspective, although malice in the form of ill will is not required in Oklahoma, it is usually helpful as a practical matter in that it may be required in order to persuade a jury that it should be allowed to recover. Of course, showing of ill will by a defendant may also allow the plaintiff to collect punitive damages. See, e.g., Continental Trend Resources, Inc., supra; Rogers v. Nall, 583 So.2d 271 (Ala. 1991). Tortious interference cases turn on fact findings concerning intent, knowledge, causation and malice. Thus, themes and theories to convince the jury that the defendant harbored malice is very helpful from a plaintiff's perspective because liability then may be found, even where the interference might otherwise be justified if the motive and particular means used are enough to convince the jury that the conduct was "improper." An effective ulterior motive case can be very rewarding. See Continental Trend Resources, Inc., supra.

Causation or actual harm is also critical and can be difficult, particularly on a prospective advantage claim. Thus, it is important from a plaintiff's perspective to plan ahead and try to head

off all causation defenses a defendant might employ. Key witnesses can normally be found from third parties concerning a defendant's conduct on the causation issues.

From a defendant's perspective, counsel should take advantage of the burden of proof required on the plaintiff to show a negative, i.e., the absence of justification, privilege or excuse. Early depositions from a plaintiff's key witnesses before they fully recognize the nuances of these and other "defenses" can be helpful. Early use of interrogatories and admissions can also head off a potential disastrous outcome. Because third party witnesses are often key in interference cases, both plaintiff and defense counsel should be careful to play the dynamics of the situation. Timing is also critical on discovery from such witnesses. Further, causation should be emphasized by the defense, and use of economic and market trends, scientific development, etc. should be utilized to show that the plaintiff's claimed damages were not caused by any interference by the defendant. Early motions for summary judgment can also be effectively utilized by the defense. Defendants will often assert that they had an absolute right to do what they did in the name of competition or financial interests. Thus, ulterior motive, malice, etc. become important ingredients in an interference trial from both the plaintiff's and defendant's perspective.

Finally, business interference cases sometimes involve a dangerous mixture of large figures and high emotions. Jury studies have indicated that a party's right to contract and operate a business is one of the most important rights as viewed by juries. Competition in business and the free market system of our nation are concepts that can trigger strong emotional undercurrents and are perfect topics for inflammatory jury appeals.

It is important for both sides to recognize the ulterior motive element, i.e., if it can be demonstrated by internal memos and communications, it might be wise for a defendant to consider an early settlement. Nevertheless, if there are strong factual circumstances where a defendant can properly explain its conduct, such explanation should be done at an early stage so that an embarrassed or unprepared witness does not appear at trial or on a videotaped deposition.

Fraud or Misrepresentation.

Elements.

Fraud, deceit and misrepresentation claims in Oklahoma are a hybrid of common law and statutory law. Compare 15 O.S. § 58 with 76 O.S. § 3. Both statutes are construed consistently. Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust v. Octagon Properties, Ltd., 740 F.Supp. 1553 (W.D. Okl. 1989). Fraud can be both actual and constructive. Faulkenberry v. Kansas City Southern Ry. Co., 602 P.2d 203 (Okl. 1979) (where there is a trustee or fiduciary relationship, constructive fraud can occur which is identical to ordinary fraud except that it does not require any deception); 15 O.S. 1991, § 59.

The elements of actual fraud in Oklahoma are (1) material false representations of fact (or omission); (2) made with knowledge of their falsity or recklessly made without knowledge of their truth and as a positive assertion; (3) with the intention that they be acted upon by another; (4) justifiable reliance thereon by another party; (5) resulting injury.

The Oklahoma courts have held that fraud is a generic term which embraces all multifarious means which human ingenuity can devise and which are resorted by one individual to gain

advantage over another by false suggestions or by suppression of truth. See, e.g., Spartan Petroleum Corp. v. Curt Brown Drilling Co., 446 P.2d 808 (Okl. 1968); Hildebrand v. Harrison, 361 P.2d 498 (Okl. 1961). It includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated. Id.

Misrepresentation and Materiality.

Generally, a fraud claim cannot be predicated on a promise to do a thing in the future. Citation Co. Realtors, Inc. v. Lyon, 610 P.2d 788 (Okl. 1980). Further, a false representation must be a statement of existing fact and not a mere expression of opinion. Hall v. Edge, 782 P.2d 122 (Okl. 1989); Roberts v. Wells Fargo AG Credit Corp., 990 F.2d 1169 (10 Cir. 1993) (under Oklahoma law, borrowers could not recover against lender for alleged fraud in breaking its promise to renew line of credit note for a five-year period coinciding with term loan, absent any evidence that lender's promise to perform was accompanied by intent not to do so). The gist of fraudulent misrepresentation or omission is the producing of a false impression in another's mind and the means of accomplishment are immaterial if the result is actually accomplished. See Nesbitt v. Home Fed. Sav. & Loan Assoc., 440 P.2d 738 (Okl. 1968); Clovis v. Clovis, 460 P.2d 878 (Okl. 1969). A promise to act or not to act by itself is an insufficient inducement to constitute fraud. See Southwestern Bell Media, Inc. v. Eden, 848 P.2d 584 (Okl. Ct. App. 1993). Moreover, misrepresentations must be as to fact and not as to matters of law. See generally Nesbitt v. Home Fed. Savings & Loan Ass'n, supra; First Nat'l Bank & Trust Co. of Muskogee v. Muskogee Discount House of Muskogee, 382 P.2d 137 (Okl. 1963). Nevertheless, under some circumstances, a fraud claim can be based on a statement of opinion if the opinion is not actually held or a promise to do something in the future if the promised act is accompanied with a present intention not to perform and intent to deceive. See infra at p. 32.

The requirement that a representation must be of existing fact and not a mere expression of opinion often comes up in "puffing" cases. As the Hall court explained, "[f]or example, a seller's opinion which is nothing more than 'puffing' will not give rise to an action based on misrepresentation" [citing with approval Presidio Enterprises, Inc. v. Warner Bros. Distrib. Corp., 784 F.2d 674 (5 Cir. 1986)]. 782 P.2d at 126. In Hall, the court adopted the Restatement (Second) of Torts for this proposition and defined puffing as "praising, extolling, or commending in inflated or extravagant terms and is usually from interested motives." 782 P.2d at 126 n.2 [citing 12 The Oxford English Dictionary, 796 (2d ed. 1989)]. The exaggerated phrase "is considered to be offered and understood as an expression of the seller's opinion only, which is to be discounted as such by the buyer, and on which no reasonable man would rely." See Prosser and Keeton § 109 at 757.

One useful case on this point is American Computer Trust Leasing v. Jack Farrell Implement Co., 763 F.Supp. 1473 (D. Minn. 1991), aff'd and remanded, 967 F.2d 1208 (8 Cir.), cert. denied, Boerboom Interin., Inc. v. American Computer Trust Leasing, 121 L.Ed.2d 338 (1992). In American Computer, the defendant sought to impose fraud liability on a counterclaim defendant based on the following representations:

> "ADP is a proven leader in data processing."

> "This Harvester/Case/ADP relationship will give us (Harvester/Case) leadership."
>
> "The Harvester/Case/ADP relationship will ensure support."
>
> "No other system compares to ADP."
>
> "ADP is capable of dramatically increasing the efficiency and profitability within our dealership."

763 F.Supp. at 1487.

In reviewing these allegations, the trial court found that "[n]one of the alleged misrepresentations is actionable because each statement is either true, constitutes ordinary sales talk or puffing, or is a representation of future acts.... Because Boerboom and Ferrell proffered no evidence of any actionable statements, summary judgment is granted in favor of ADP on the defendants' fraudulent misrepresentation counterclaims." 763 F.Supp. at 1487.

Similarly, in Presidio Enterprises, supra (cited with approval by the Oklahoma Supreme Court in Hall), the United States Court of Appeals for the Fifth Circuit rejected allegations of puffing as constituting actionable fraudulent misrepresentations. In Presidio, the allegations centered upon the unsuccessful movie, "The Swarm," which was highly touted to Presidio in a number of pre-releases. Presidio ended up "blind bidding" to have the exclusive showings of "The Swarm" in Austin, Texas.

In rejecting Presidio's claim, the Fifth Circuit observed the time-honored rule that expressions of opinion are not actionable. "This is a wise and sound principle that is deeply embedded in the common law." 784 F.2d at 679. Thus, because actions for fraud or misrepresentation must be based on objective statements of fact and not expressions of personal opinions, statements such as "'The Swarm' would be 'the greatest adventure-survival movie of all time,'" and "your blockbuster for the summer of '78," and that "this will be the most 'want-to-see' movie of the year," while disputable, were not statements of fact for two reasons: (1) they turn on vague, essentially indefinable terms; and (2) they are predictions. Id.

Similarly, the Restatement (Second) of Torts §§ 539 and 542 adopted by the Oklahoma Supreme Court in Hall, specifically rejects puffing and opinion as a basis for actionable fraud. The Restatement comment elaborates:

> The habit of vendors to exaggerate the advantages of the bargain that they are offering to make is a well recognized fact. An intending purchaser may not be justified in relying upon his vendor's statement of the value, quality or other advantages of a thing that he is intending to sell as carrying with it any assurance that the thing is such as to justify a reasonable man in praising it so highly.

Section 539 Comment on Subsection (2).

Similarly, the Restatement amplifies its discussion of Opinion of Adverse Party in Section 542 with the following qualifying comment:

> [T]he purchaser of an ordinary commodity is not justified in relying upon the vendor's opinion of its quality or worth. For example, one who is purchasing a horse from a dealer is not justified in relying upon the dealer's opinion, although the latter has a greater experience in judging the effects of the factors which determine its value.
>
> e. This is true particularly of loose general statements made by sellers in commending their wares, which are commonly known as "puffing," or "sales talk." It is common knowledge and may always be assumed that any seller will express a favorable opinion concerning what he has to sell; and when he praises it in general terms, without specific content or reference to facts, buyers are expected to and do understand that they are not entitled to rely literally upon the words. "Such statements, like the claims of campaign managers before election, are rather designed to ally the suspicion which would attend their absence than to be understood as having any relation to objective truth." ... (Citations omitted.)
>
> Thus, no action lies against a dealer who describes the automobile he is selling as a "dandy," a "bearcat," a "good little car," and a "sweet job," or as "the pride of our line," or "the best in the American market."

Section 542 cmts. d-e.

Even in puffing cases, nevertheless, one must be careful to distinguish between fact and opinion. See Greene v. Humphrey, 274 P.2d 535 (Okl. 1954) (representations that seller in barber shop had a one year lease on premises and that buyer could obtain a "like lease" constituted "representations of fact" on which buyer was entitled to rely without investigating the truth thereof and not mere "expression of opinion"); Finefrock v. Carney, 263 P.2d 744 (Okl. 1953) (representation concerning quality of property bought unseen may be basis of fraud inducing contract of sale); Lenn v. Miller, 403 P.2d 458 (Okl. 1965) (same).

Further, fraud may be perpetrated by making a promise to perform future acts if there is no present intention to perform. See Wagstaff v. Protective Apparel Corp. of America, Inc., 760 F.2d 1074 (10 Cir. 1985); Tice v. Tice, 672 P.2d 1168 (Okl. 1983). Compare with Citation Co. Realtors, Inc. v. Lyon, 610 P.2d 788 (Okl. 1980) (wide distinction between non-performance of a promise and a promise made mala fide, only the later being actionable in fraud). State ex rel. Southwestern Bell Tel. Co. v. Brown, supra. The Oklahoma Supreme Court has held that actions

by a promisor toward the fulfillment of a promise will preclude a finding of fraud against the promisor. See Furr v. Thomas, 817 P.2d 1268 (Okl. 1991).

A false representation can be verbal, written, or an active concealment of true facts. The generally applied rule is that there is no qualitative difference between a misrepresentation of fact and an action that conceals the fact that prevents the other party from discovering it. Comment a to Section 550 of the Restatement (Second) of Torts states that:

> A defendant is subject to liability for fraudulent misrepresentation if he paints over and so conceals a defect in a chattel or a building that he is endeavoring to sell to the plaintiff and thus induces the plaintiff to buy it in ignorance of its defective character. So also is he subject to liability if he reads the contract to the plaintiff and omits a portion of it or if he so stacks aluminum sheets that he is selling as to conceal defective sheets in the middle of the pile.

Restatement (Second) of Torts § 550 cmt. a.

Thus, under some circumstances, if there is a positive duty on the part of one of the parties to the contract to speak and he remains silent, failure to speak constitutes fraud. See Hubbard v. Bryson, 474 P.2d 407 (Okl. 1970); Uptegraft v. Dome Petroleum Corp., 764 P.2d 1350 (Okl. 1988) (one conveying false impression by disclosure of some facts and concealment of others is guilty of fraud even though a statement is true as far as it goes, since concealment is, in effect, a false representation that what is disclosed is the whole truth; party may keep absolute silence and violate no rule of equity, if he volunteers to speak and to convey information which may influence the conduct of the party, he is then bound to disclose the whole truth); Lundgaard v. Baxter, 849 P.2d 421 (Okl. Ct. App. 1992). See also Silk v. Phillips Petroleum Co., 760 P.2d 174 (Okl. 1988) (if there is a positive duty on one of the parties to the contract to speak and he remains silent to detriment of other party, fraud occurs); Testerman v. First Family Life Ins. Co., 808 P.2d 703 (Okl. Ct. App. 1990). Thus, the concealment of material facts which one is bound under certain circumstances to disclose may constitute fraud. See also Varn v. Maloney, 516 P.2d 1328 (Okl. 1973).

A duty to disclose can be imposed by statute, by a fiduciary or confidential relationship, or by knowledge that the party's representation has been misunderstood by another. See Restatement (Second) of Torts § 551 (1977); Everman Nat'l Bank v. United States, 756 F.2d 865, 869 (Fed. Cir. 1985); Laventhall v. General Dynamics Corp., 704 F.2d 407, 411 (8 Cir.), cert. denied, 464 U.S. 846 (1983).

Knowledge and Intent.

It is well settled that a person must knowingly make false representations with the intent that they be relied upon. See, e.g., Doerr v. Henry, 806 P.2d 669 (Okl. Ct. App. 1990) (vendors of real property committed constructive fraud upon purchasers by contracting to sell land as represented on certain plans with knowledge that the boundary lines in an earlier survey upon which latter survey plat was made were not known); Citizens Bank & Trust Co. of Vivian, La. v.

Tomlin, 852 P.2d 803 (Okl. Ct. App. 1993); Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793 (10 Cir. 1993).

Generally, intent is proved based on the circumstances surrounding the actionable statements. Further, a statement recklessly made can rise to the level of intent. See Varn v. Maloney, supra; Tice v. Tice, supra.

A more difficult situation occurs where the misrepresentation is made by a person in a position to know the truth or falsity of the statement but who, in fact, does not know, i.e., an agent of a corporation who states a fact that they believe is true but other officials of the corporation know to be false. See, e.g., Leisure Am. Resorts, Inc. v. Knutilla, 547 So.2d 424 (Ala. 1989). Thus, where an agent of the corporation makes a promise and the president of the corporation knows at the time of the promise that it cannot or will not be fulfilled, the corporation may be liable for deceit even though the agent is not. Id. In most states the principal is charged with the knowledge of all employees concerning matters within the line and scope of their employment. See, e.g., Dime Box Petroleum Corp. v. Louisiana Land & Exploration Co., 717 F.Supp. 717 (D. Colo. 1989), aff'd, 938 F.2d 1144 (1991); Satellite Financial Planning Corp. v. First Nat'l Bank, 633 F.Supp. 386, on reconsideration, 643 F.Supp. 449 (D. Del. 1986); Etshokin v. Texasgulf, Inc., 612 F.Supp. 1212 (N.D. Ill. 1984). Where an agent misrepresents the extent of his or her knowledge or access to facts, even though he or she believes the statement that is based upon this supposed knowledge is true, the agent also may be liable for deceit. See, e.g., Lee v. Brodbeck, 243 N.W.2d 331, 334 (Neb. 1976).

As noted, a promise to do something in the future is generally not actionable. However, if one makes a promise with the intent not to perform, such statement can be actionable. An action by a promisor towards fulfillment of the promise nevertheless will preclude a finding of fraud against the promisor. See p. 32, supra.

Of course, scienter also continues to be recognized as a prerequisite to certain statutory fraud claims such as Section 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934, actions brought pursuant to state and consumer fraud and deceptive trade practice statutes; and actions based upon the Racketeer Influenced and Corrupt Organizations Act ("RICO") which are based on securities, mail and wire fraud. Further, various circuit courts of appeals have held that recklessness also satisfies the scienter requirement made in connection with the sale of securities under and creates 10b-5 liability.

Additionally, Oklahoma has also recognized negligent misrepresentation. This is consistent with other jurisdictions. In most jurisdictions recognizing actions for negligent misrepresentation, the ordinary negligence concepts of duty and foreseeability have been limited so that a cause of action may only be maintained by those to whom information is supplied as a part of a maker's business and profession to those with whom the maker has some direct relationship or to those whom the maker of the statement should reasonably expect would rely on the information supplied.

Oklahoma will also allow claims to go forward on constructive fraud without intent if the requisite type of relationship is established. See, e.g., Doerr v. Henry, supra; Buford White Lumber Co. Profit Sharing & Sav. Plan & Trust v. Octagon Properties, Ltd., 740 F.Supp. 1553 (W.D. Okl. 1989).

Reliance.

A party must rely on the misrepresentation. Therefore, a party cannot recover for misrepresentation unless he or she actually acts on the misrepresentation and is damaged thereby. There are two prongs to this in litigating fraud cases. For example, one may suffer damage in connection with the transaction in which there has been misrepresentation, but if the party did not act in reliance on the misrepresentation, then under traditional proximate cause principles, he or she cannot recover. On the other hand, if the recipient of the misrepresentation has acted or refrained from acting in reliance on the misrepresentation but has not suffered damages as a result, the recipient cannot recover for damage caused by some other remote cause.

Oklahoma has been somewhat inconsistent concerning whether or not the reliance must be justifiable. Compare Silver v. Slusher, 770 P.2d 878 (Okl. 1988), cert. denied, 493 U.S. 817 (1989) with Mulkey v. Morris, 313 P.2d 494 (Okl. 1957) (no justifiable reliance). This concept is closely connected to the concept of immateriality with respect to reliance upon statements of opinions, predictions or promises by persons whose interests are equal or whose knowledge, experience or access to facts is no greater than the recipients. Bruschi v. Brown, 876 F.2d 1526 (11 Cir. 1989). Reliance also is not reasonable where the recipient has notice or knowledge that the representation is untrue prior to acting upon it, or where integration provisions in contracts make reliance unreasonable. See, e.g., Southwestern Bell Media, Inc. v. Eden, 848 P.2d 584 (Okl. Ct. App. 1993); One-O-One Enterprises, Inc. v. Caruso, 848 F.2d 1283 (D.C. Cir. 1988); Jackvony v. RIHT Financial Corp., 873 F.2d 411 (1 Cir. 1989).

In Southwestern Bell, supra, the contract between the parties provided "[n]either the advertiser nor the publisher shall be bound by any agreement or understanding not expressed by these Terms and Conditions, and verbal agreements shall be without any force or effect whatever." 848 P.2d at 585. Nevertheless, Eden contended that sales representatives of Southwestern Bell made oral promises that were not reflected within the writing. The Oklahoma Court of Appeals held that the terms of the contract itself disallowed the enforcement of any oral promises and further, that Oklahoma by statute barred the enforcement of such promises. See 15 O.S. 1991, § 137. Further, the court held that a promise to act or not to act is an insufficient inducement to constitute fraud. 848 P.2d at 585; see also Citation Co. Realtors Inc. v. Lyon, 610 P.2d 788 (Okl. 1980).

In One-O-One Enterprises v. Caruso, 668 F.Supp. 693 (D.D.C. 1987), aff'd, 848 F.2d 1283 (D.C. Cir. 1988), the plaintiffs contended that defendants made certain misrepresentations in connection with the purchase and sale of securities. The district court dismissed the complaint for failure to state a claim upon which relief can be granted, holding that the final integration clause in the agreement barred the fraud claim as a matter of law.

The integration clause of the final agreement provided that that agreement "supersede[d] any and all previous understandings and agreements." 668 F.Supp. at 698. Thus, the district court held that any reliance by plaintiffs on prior representations were unreasonable and not actionable. The district court observed:

> After eights months of vigorous negotiations, the parties reached a final

> agreement that was lengthy, detailed and comprehensive. During these eight months, many offers, promises and representations were made.... To avoid a misunderstanding and to make clear that the only understanding between the parties was that expressed in the Agreement, the parties agreed that the Agreement "supersede[d] any and all previous understandings and agreements".... Even if Sullivan and Caruso had previously agreed not to divest their interest in Tenly, the Agreement explicitly superseded the previous representations. Therefore, when the representations were superseded by the Agreement there was no representation upon which plaintiffs could [reasonably] base a fraud claim.

District Court Opinion, 668 F.Supp. at 698 (emphasis in original).

The appellate court agreed. In so holding, the court observed that if plaintiffs could use a defendant's prior representation or nondisclosure to defeat the clear words and purposes of a broad integration clause, "contracts would not be worth the paper on which they are written." 848 F.2d at 1287 citing Tonn v. Philco Corp., 241 A.2d 442, 445 (D.C. App. 1968). On matters of large significance to the parties' bargain, silence in a final agreement containing an integration clause -- in the face of prior explicit representations -- must be deemed an abandonment or excision of those early representations. See, e.g., Kardios Systems Corp. v. Perkin-Elmer Corp., 645 F.Supp. 506, 509-10 (D. Md. 1986) (removal of "best efforts" provision from final agreement constituted affirmative excision of this term).

The One-O-One court further held that plaintiffs cannot overcome a written instrument by invoking the fraud in the inducement exception to the parol evidence rule. To stretch this exception to permit a fraud claim in the face of a broad integration clause "would severely undermine the policy of the parol evidence rule, which is grounded in the inherent reliability of a writing as opposed to the memories of contracting parties." 848 F.2d at 1287 citing Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 630 (4 Cir.), cert. denied, 434 U.S. 923 (1977). Thus, the court concluded that a party with the capacity and opportunity to read a contract it has executed cannot later claim fraud in the inducement where the contract specifically bars all prior representations and assurances. See also Jackvony v. RIHT Financial Corp., 873 F.2d 411, 415-16 (1 Cir. 1989) (broad integration clause which supersedes prior agreements and understanding and provides that no person has been authorized to give any information or make any representation not contained in the prospectus and proxy, bars fraud claim as a matter of law); Management Assistance, Inc. v. Computer Dimensions, Inc., 546 F.Supp. 666, 671-72 (N.D. Ga. 1982), aff'd sub nom., Computer Dimensions, Inc. v. Basic Four, 747 F.2d 708 (11 Cir. 1984) (because agreement explicitly superseded representations upon which plaintiffs predicated their fraud claim, party with capacity and opportunity to read a written contract cannot later claim fraud in the inducement).

Damages.

The final element of a fraud claim is damage on the part of the recipient of the misrepresentation. It is axiomatic that a recipient who relies on a misrepresentation but is not damaged has no cause of action. It is well settled that the issue of damages in a tort action is left to the jury's judgment

after hearing all the evidence. See Rainbow Travel Service v. Hilton Hotels Corp., 896 F.2d 1233 (10 Cir. 1990). In Oklahoma, a plaintiff is entitled to recover "the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not." 23 O.S. 1991, § 61. See also Mitchell v. Ford Motor Credit Co., 688 P.2d 42 (Okl. 1984) (plaintiff is entitled to recover for all detriment caused by a loss whether it could be anticipated or not); King v. City of Guymon, 523 P.2d 1154 (Okl. Ct. App. 1974) (profit, interest, etc. are recoverable under 23 O.S. § 61); 23 O.S. 1991, § 4 ("[d]etriment is a loss or harm..."); 23 O.S. 1991, § 7 (interest recoverable in cases involving fraud). The jury in Oklahoma should be instructed on the measure of damages in a fraud or deceit case as follows:

> One who willfully deceives another, with intent to induce [him/her] to alter his position to [his/her] injury or risk, is liable for any injury which [he/she] thereby suffers.

See OUJI 2d, Instruction No. 18.12; 76 O.S. 1991, § 2; 23 O.S. 1991, § 61. See also Sade v. Northern Natural Gas Co., 483 F.2d 230, 236 (10 Cir. 1973).

Where one alters his position in reliance on the representation or omission of another, the plaintiff is entitled to recover all damages as a result of such fraud. 76 O.S. 1991, § 2; 23 O.S. 1991, § 61. See LeFlore v. Reflections of Tulsa, Inc., 708 P.2d 1068, 1076 (Okl. 1985). Thus, in some instances, Oklahoma has adopted the "benefit of the bargain" rule which expands the measure of damages that the plaintiff can receive as a "natural and probable result" of the fraudulent inducement. See 708 P.2d at 1076-77. Benefit of the bargain damages are sometimes referred to as "expectation damages." Dan B. Dobbs, Remedies § 9.2 pp. 594-607. The benefit of the bargain rule, together with other forms of damages, is invoked to expand the law of damages to ensure that a plaintiff recovers all that it is entitled to as a result of another's fraud. Dobbs, supra. LeFlore v. Reflections of Tulsa, Inc., supra.

For example, in LeFlore, because the defendant represented an all expense paid trip would be given to the winner of a beauty contest, the court permitted the plaintiff to recover the damages of the all expense paid trip, even though she did not lose anything by virtue of entering the contest. In other words, the plaintiff was entitled to recover her expectation (the trip) as a result of being fraudulently induced to alter her position, i.e., entering the contest.

Because one is entitled to receive compensation for any injury they suffer as a result of the fraud, see 76 O.S. 1991, § 2, the law permits a plaintiff to recover other types of damages in addition to the benefit of the bargain, such as lost profits, lost opportunity, interest, and consequential and incidental damages.

Affirmative Defenses.

There are a number of affirmative defenses available to a defendant in an action for misrepresentation or fraud. The absence of justifiable reliance is not an affirmative defense. Rather, the burden of proving justifiable reliance, except in limited cases, remains with the plaintiff. An exception to this general rule is found in some securities cases involving non-disclosure in which reliance is presumed and may be rebutted by the defendant. Abell v. Potomac Ins. Co., 858 F.2d 1104 (5 Cir. 1988), vacated on other grounds, 492 U.S. 914 (1989);

DuPont v. Brady, 828 F.2d 75, 78 (2 Cir. 1987). Affirmative defenses include the statute of limitations, waiver and estoppel, statute of frauds, ratification and the like. See Steiger v. Commerce Acceptance of Oklahoma City, Inc., 455 P.2d 81 (Okl. 1969).

Special Considerations.

There are a number of special considerations involved in fraud cases. For example, in Oklahoma, fraud is never presumed and must be shown by clear and convincing evidence. See, e.g., Tice v. Tice, 672 P.2d 1168 (Okl. 1983). Furthermore, there are special pleading requirements of a fraud claim, not found with other business torts. See 12 O.S. § 2009b; Rule 9(b) of the Federal Rules of Civil Procedure; Gay v. Akin, 766 P.2d 985 (Okl. 1988). This stringency is because the in terrorem effect of the fraud bazooka is potent in that a fraud defendant faces the unsavory label of fraudfeasor, placing a reputation for honesty and fair dealing at stake. Thus, courts have strictly applied Fed.R.Civ.P. 9(b) by requiring plaintiffs to plead fraud with particularity.

Rule 9(b) and 12 O.S. 1991, § 2009(b) require that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This specificity requires that the circumstances constituting fraud to include matters such as the time, place and contents of the false representations or omissions, as well as the identity of the persons making the representations and what was obtained or given up thereby. See, e.g., Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362 (10 Cir. 1989); Midwest Grinding Co. v. Spitz, 976 F.2d 1016 (7 Cir. 1992); In re GlenFed. Inc. Sec. Lit., 11 F.3d 843 (9 Cir. 1993). A plaintiff must identify what statements were made, whether they were made in documents, orally, or what omissions were made; the time and place of each statement and the person responsible for making the same; the context of the statements, the manner in which they misled the plaintiff and what the defendants obtained as a consequence of the fraud.

The particularity requirement serves several purposes. First, it protects defendants from unwarranted charges of fraud, especially those whose livelihood may depend on their reputation and goodwill of their business in the community. O'Brien v. National Property Analysts Partners, 936 F.2d 674, 676 (2 Cir. 1991) (a purpose of Rule 9(b) is to protect a defendant's reputation from "improvident charges of wrongdoing"); United States ex rel. Joseph v. Cannon, 642 F.2d 1373, 1385 (D.C. Cir. 1981), cert. denied, 455 U.S. 999 (1982) (Rule 9(b) "safeguards potential defendants from frivolous accusations of moral turpitude"); Semegen v. Weidner, 780 F.2d 727, 731 (9 Cir. 1985) (Rule 9(b) protects defendants "especially professionals whose reputations in their fields of expertise are most sensitive to slander - from the harm that comes from being charged with the commission of fraudulent acts"). Rule 9(b) also serves the salutary purpose of minimizing strike suits which are brought not to redress real wrongs, but to take advantage of their nuisance or in terrorem value. O'Brien, supra; Joseph, supra; Simcox v. San Juan Shipyard, Inc., 754 F.2d 430 (1 Cir. 1985) (the purpose of Rule 9(b) is to protect defendants from unfair surprise and eliminate strike suits); Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677 (7 Cir. 1992), aff'd, 7 F.2d 93 (7 Cir. 1993) (allegations of fraud do serious damage to good will of business firm or professional person, and thus people should be discouraged from tossing such accusations into complaints in order to induce settlement or for other ulterior purposes).

The specificity required by Rule 9(b) also provides some assurance that the fraud claim has been investigated and the pleader reasonably believes a wrong has occurred. Semegen v. Weidner,

780 F.2d at 731 ("The requirements of Rule 9(b) are designed to prohibit a plaintiff from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis."); Tuchman v. DSC Communications Corp., 14 F.3d 1061 (5 Cir. 1994) (Rule 9(b) protects defendants from harm to their reputation and good will, reduces the number of strike suits, and prevents plaintiffs from filing baseless claims and then attempting to discover unknown wrongs). Finally, Rule 9(b) serves to place defendants on notice and to enable them to prepare meaningful defenses to charges of fraud. New England Data Services, Inc. v. Becher, 829 F.2d 286, 288 (1 Cir. 1987).

Thus, although intent may be pled generally, Rule 9(b) requires more than a simple conclusory allegation that a defendant had fraudulent intent; rather, to plead intent adequately, a plaintiff must set forth specific facts that support an inference of fraud, such as facts that show a defendant's motive -- or where defendant's motive is not apparent, a plaintiff must identify circumstances that indicate conscious behavior on the part of defendant. See Tuchman v. DSC Communications Corp., 14 F.3d at 1068; Matter of Haber Oil Co, 12 F.3d 426 (5 Cir. 1994); Greenstone v. Cambex Corp., 975 F.2d 22 (1 Cir. 1992) (must set forth specific facts that make it reasonable to believe defendant knew that a statement was materially false or misleading). Moreover, if motive is not apparent, the strength of the circumstantial allegations of fact to show a defendant knew his statements were materially false or misleading must be correspondingly greater. Id. See also Browne v. Robb, 583 A.2d 949, 955-56 (Del. Super. Ct. 1990), cert. denied, 499 U.S. 952 (1991) (common law fraud claim not pled with particularity where allegations consisted of attorney's representation that he "was an experienced and competent criminal defense attorney" and would provide legal representation "that would be skillful and diligent manner [sic]" -- such statements were mere expressions of opinion and were, at best, the attorney's subjective judgment as to the value and quality of his own legal abilities).

Strategy.

The first thing for the practitioner to recognize is that there are special types of issues in fraud claims such as securities fraud, civil RICO and deceptive trade practice cases. For example, the elements on duty to disclose material facts, reliance, vicarious liability, loss causation requirements and other statutory requirements shift from the typical fraud claim. A full discussion of those types of considerations is beyond the scope of this paper.

Further, both defendants' and plaintiffs' counsel need to recognize that credibility is the sine qua non of a fraud case. The credibility of lawyers and witnesses is probably more important to a litigant's success in a fraud action than in any other type of litigation. The ultimate issue almost always turns out to be the jury's assessment of the honesty of both the defendant and the plaintiff.

Thus, a careful practitioner will view both his own case and the adverse party's case with a critical eye. Judging credibility is so important in a fraud case that it is often wise to discard or eliminate other weaker claims or defenses as they affect the credibility of the fraud case. Moreover, both plaintiffs and defendants should focus on the strength of their particular elements. For instance, if a defendant insists that he or she did not make the misrepresentation in question but is a poor witness and the plaintiff's evidence that the defendant did make the misrepresentation is very strong, defendant's counsel may be well advised to focus on an issue where the proof is stronger such as scienter and/or reliance.

Moreover, in fraud cases, it is important for both sides to commit the adverse party to their story as soon as possible. Memory, record retention policy and the dynamics of developing facts often make helpful information very difficult to discover if adverse parties are allowed to develop his or her version of facts and legal theories after hearing what other parties and witnesses say.

It is important for a plaintiff's cause to know when a plaintiff discovered facts that reasonably should have put him or her on notice of fraud to avoid the statute of limitations period. See 12 O.S. § 95. Further, it is critical to investigate the claim prior to the commencement of the lawsuit to be able to allege as many facts as possible to satisfy the particularity requirements of 12 O.S. § 2009(b). It can also be useful to file initial discovery with the complaint to obtain useful information before theories of the case are developed.

Banking Torts/Lender Liability.

Financial institutions have become particularly suspect to multi-million dollar verdicts in recent times. For example, in the seminal case State Nat'l Bank of El Paso v. Farah Mfg. Co., Inc., 678 S.W.2d 661 (Tex. Ct. App. 1984), an $18,000,000 verdict was affirmed and thereafter lender liability cases continued to be filed in many jurisdictions with many cases resulting in large awards. Lender liability and banking torts can be filed under various theories. For example, a lender may incur liability if it controls its borrower in an unwarranted way. These doctrines are known as the instrumentality doctrine or equitable subordination. Further, banks like any other business can be found to have committed the torts of fraud, negligent misrepresentation, breach of fiduciary, bad faith, RICO, etc. Borrowers and third parties, including creditors and suppliers of borrowers, have invoked such theories. This section by necessity can only give a very general, broad overview of some banking torts theories, as well as a brief discussion of recent Oklahoma cases.

Control Theories.

As noted, a lender may incur liability under a number of different legal theories if it engages in unwarranted intrusions into the affairs of its borrowers or where it manages the borrower's affairs. For example, where a borrower becomes a "mere instrumentality" of the lender, a lender can become responsible for the debts of a corporation where the control is pervasive.

Courts have generally identified three separate factors required for such lender liability, i.e., (1) the lender actually controls the borrower's affairs, (2) the lender uses its control to commit fraud or to bring about an unjust result, and (3) the lender proximately causes harm to the borrower through misuse or control. See, e.g., Krivo Indus. Supply Co. v. National Distillers & Chem Corp., 483 F.2d 1098, 1105, 1110 (5 Cir. 1973), modified at 490 F.2d 916 (5 Cir. 1974). Clearly, a lender may monitor a borrower's business or participate to some extent in its affairs to protect its loan. Nevertheless, a lender may not dominate or assume management control of the borrower. Courts have found liability where (1) a lender required a borrower to consistently sell its product to the lender at a loss or below market price, see, e.g., Henderson v. Rounds & Porter Lumber Co., 99 F.Supp. 376 (W.D. Ark. 1951); (2) it required the borrower to turn over the proceeds from sales to the lender with the lender paying bills from third parties, see, e.g., A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W.2d 285 (Minn. 1981); In re Ky. Wagon Mfg. Co., 71 F.2d 802 (6 Cir.), cert. denied, 293 U.S. 612 (1934); (3) it required the borrower to implement

strict and oppressive credit sales or inventory policies for its products, see, e.g., Credit Managers Assoc. v. Superior Ct., 51 Cal.App.3d 352 (Cal. Ct. App. 1975); (4) it precluded the borrower from encumbering other assets, paying dividends, purchasing stock, etc. without the lender's prior consent, see, e.g., A. Gay Jenson Farms Co., supra. Other theories are discussed below.

Bankruptcy courts will sometimes utilize the doctrine of equitable subordination to subordinate a claim of a creditor who engaged in inequitable conduct to the claims of other creditors. This is a far greater threat to lenders than the instrumentality theory. The elements generally include (1) inequitable conduct; (2) injury to other creditors or an unfair advantage to the wrongdoer; and (3) imposition of liability that is not inconsistent with the Bankruptcy Act. Other courts have held that inequitable conduct is not always a prerequisite for equitable subordination. Moreover, the Fifth and Seventh Circuits have held that lenders are entitled to fully enforce their rights as written in loan agreements regardless of lender's motive and regardless of how severe the impact on the debtor's finances may be. Clark Pipe & Supply Co., 893 F.2d at 693; Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351 (7 Cir. 1990).

Other Tort Theories.

Claims premised on common law fraud theories are often filed against lenders. See Section C, supra, for discussion of fraud. For example, fraud has been found against lenders when they have made false threats to declare a default or call a loan, State Nat'l Bank of El Paso v. Farah Mfg. Co., Inc., 678 S.W.2d 661 (Tex. Civ. App. 1984), or false promises to consider future advances or not call outstanding loans if additional security is given or management changes are made. See, e.g., Sanchez-Corea v. Bank of Am., 38 Cal.3d 892, 701 P.2d 826, 215 Cal.Rptr. 679 (1985); Stirling v. Chemical Bank, 382 F.Supp. 1146 (S.D.N.Y. 1974), aff'd, 516 F.2d 1396 (2 Cir. 1975). Fraud has also been found where borrowers in reliance upon false or incomplete representations by the lenders have been induced to start a business prematurely, Delahanty v. First Pa. Bank, N.A., 464 A.2d 1243 (Pa. Super. Ct. 1983), or invest in financially troubled enterprises controlled by or owing substantial sums to the lenders. See, e.g., Security Pac. Nat'l Bank v. Williams, 262 Cal.Rptr. 260 (Cal. Ct. App. 1989) (decertified for publication); Barnett Bank v. Hooper, 498 So.2d 923 (Fla. 1986); Richfield Bank & Trust Co. v. Sjogren, 244 N.W.2d 648 (Minn. 1976). Securities fraud cases are also often prevalent in banking relationships. Grubb v. FDIC, 868 F.2d 1151 (10 Cir. 1989) (involving misrepresentations made concerning the loan portfolio in the sale of stock of bank). A bank can also be held liable for aiding and abetting a fraudulent scheme. FDIC v. First Interstate Bank of Des Moines, N.A., 885 F.2d 423 (8 Cir. 1989) ($6 million verdict entered against bank for aiding and abetting a fraudulent scheme of its customer); Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793 (3 Cir.), cert. denied, 439 U.S. 930, 58 L.Ed.2d 323 (1978); Adam v. Mount Pleasant Bank & Trust, 387 N.W.2d 771 (Iowa 1986) (bank's continual covering of overdrafts in violation of legal lending limit intentionally gave customer false appearance of solvency such as to uphold verdict against bank in favor of those who dealt with customer); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First Nat'l Bank of Little Rock, 774 F.2d 909 (8 Cir. 1985) (bank liable for participation in check-kiting scheme); Whitney v. City Bank, N.A., 782 F.2d 1106 (2 Cir. 1986) (bank held liable for actual and punitive damages for aiding a breach of fiduciary duty). Finally, several recent cases have also applied fraud, estoppel, contract, unjust enrichment, equitable lien and fiduciary duties theories where other creditors supplied the contractors involved.

Negligent Misrepresentation.

There are also cases that hold a bank liable for negligent misrepresentation, typically where the bank provided erroneous credit information on borrowers to third parties. For example, some courts have found such a duty arising out of providing credit information based upon the assistance such information provides to the bank's borrower enabling the bank to profit from its customer's "economic longevity." Berkline Corp. v. Bank of Miss., 453 So.2d 699 (Miss. 1984). At the other extreme, courts have imposed a duty of care only when the defendant is in the business of supplying information to guide another's business and do not consider a lender to meet this qualification, while other courts hold that a duty of care is owed only where the information relates to a product of the speaker. See, e.g., Weiss-Lawrence, Inc. v. James Talcott, Inc., 399 F.Supp. 84 (D.N.H. 1975).

Breach of Fiduciary Duty.

The general rule is that a borrower/lender relationship is an arm's length relationship which creates no fiduciary duty. Several courts have created exceptions to this rule and have permitted breach of fiduciary duty claims to go forward. As set forth below, Oklahoma courts generally hold that there is no fiduciary relationship between a borrower and a lender.

Bad Faith.

Section 1-203 of the Uniform Commercial Code (the "UCC") provides that every contract falling within the UCC "imposes the obligation of good faith in its performance or enforcement." Courts are divided on whether or to what extent these UCC requirements or comparable common law principles apply in a lender/borrower context other than in a contract type of action. Restatement (Second) of Torts § 205. Most courts hold that the duty of good faith cannot override specific provisions in loan documents authorizing a lender to take action. Nevertheless, other courts have found that a duty of good faith applies generally to lender/borrower relationships or at least applies where the loan documents which qualify a right to repayment are ambiguous or confer an option on the lender to accelerate. A recent Tenth Circuit case found that a bank breached an implied covenant of good faith and fair dealing where the borrower brought a breach of contract action against the bank for seizing oil runs under mortgage assignment provision without reasonable notice or a good faith basis causing the borrower to lose his oil and gas interests. In that case the Tenth Circuit held that the bank breached its implied covenant of good faith and fair dealing by invoking the assignment and found that a $6 million damages award was not so excessive as to shock the judicial conscience. Duffield v. First Interstate Bank of Denver, N.A., 13 F.3d 1403 (10 Cir. 1993), reh'g denied.

Oklahoma Cases.

The Oklahoma courts appear to be conservative in lender liability cases. In First Nat. Bank & Trust Co. v. Kissee, 859 P.2d 502, 508 (Okl. 1993), a guarantor asserted that the bank used economic duress against him in obtaining the guaranty. The court noted that "the doctrine of economic duress/business compulsion should turn on the more conservative approach whether the wrongful act is sufficiently coercive to cause a reasonable prudent person with no reasonable alternative to succumb to the perpetrator's pressure." 859 P.2d at 508. See also Centric Corp. v.

Morrison-Knudsen Co., 731 P.2d 411, 416-19 (Okl. 1986). The presence of an unlawful or wrongful act is a prerequisite to a finding of economic duress even in the lender context. Moreover, the court rejected the guarantor's argument that the bank by misrepresentation and outright deceit engaged in a course of conduct solely to improve its position with respect to the unsecured debts owed by one brother and, in so doing, breached its implied duty of good faith and fair dealing toward the guarantor. The court held that a breach of implied covenant of good faith and fair dealing in a commercial context may not give rise to an action in tort.

In so holding, it observed:

> We strongly agree with the guarantor's primary contention that banks have an obligation to exercise good faith and fair dealing with its customers. Common law imposes this implied covenant upon all contracting parties, that neither, because of the purpose of the contract, will act to injure the party's reasonable expectations nor impair the rights or interests of the other to receive the benefits flowing from their contractual relationship.

859 P.2d at 509.

Nevertheless, without "gross recklessness or wanton negligence on behalf of a party" to a commercial context, a breach of implied covenant of good faith and fair dealing merely results in a breach of contract. Id. In other words, the court found that there is no special relationship between a borrower or lender to create liability in tort for breach of implied covenant of good faith and fair dealing. "[T]o impose tort liability on a bank for every breach of contract would only serve to chill commercial transactions. This is not to say that under every fact situation arising from a breach of contract that recovery may never be allowed." Id. See also Downing v. First Bank, 756 P.2d 1227 (Okl. 1988); Kitada Banking Decisions: Emerging Theories of Bank Liability-The Breach of Covenant of Good Faith and Fair Dealing 103 Bankers Law Journal 80 (1986); Symons The Banker-Customer Relation 100 Bankers Law Journal 220 (1983).

Finally, the court rejected the bank's argument that a special or fiduciary relationship existed between the bank and the guarantor, holding that Oklahoma recognizes the common law rule that the relationship between a bank and its customer is not fiduciary in nature but that of creditor/debtor, citing State Guaranty Bank v. Doerfler, 99 Okl. 258, 226 P. 1054 (1923); Brown v. Eastman Nat'l Bank, 291 P.2d 828 (Okl. 1955); Ingram v. Liberty Nat'l Bank & Trust Co., 533 P.2d 975 (Okl. 1975). The court held out a slim reed of hope for borrower's attorneys by recognizing that the existence of a fiduciary relationship depends upon the factual situation, including the relationship of the parties involved to each other and the nature of the disputed transaction (859 P.2d at 510-11), and thus under unique circumstances a fiduciary relationship in the borrower/lender context may be imposed.

In First Security Bank v. Taylor, 964 F.2d 1053 (10 Cir. 1992), the bank brought an action to collect on a loan and the borrowers counterclaimed alleging breach of the lending agreement. The United States District Court for the Western District of Oklahoma entered judgment on a jury verdict for the borrowers and cross-appeals were taken. The Taylor court relied on Rodgers

v. Tecumseh Bank, 756 P.2d 1223 (Okl. 1988) noting that the Oklahoma Supreme Court specifically held that it would not extend the implied duty of good faith and fair dealing to contracts in commercial loans. However, it did so in the discussion of a tortious breach of contract, and it may be that such a holding is limited to tortious breach of contracts. Nevertheless, the Taylor court did affirm a breach of an oral contract by the bank to loan additional monies outside the guaranteed loan and for the bank's negligent servicing of the loan. The jury had returned a verdict finding that the bank had breached its agreement to loan monies outside the guaranteed loan, preventing the borrowers from performing and thus the bank could not recover on its loan. It should be noted that the court affirmed the oral agreement verdict for the reasons that the lender's attorney failed to properly preserve the issue of oral agreement and statute of fraud argument for appeal as opposed to substantive grounds.

In Estate of Bras v. First Bank & Trust Co., 821 P.2d 387 (Okl. Ct. App. 1991), the court held that the law will not permit a bank officer or director to escape personal liability for his corporation's intentional malfeasance by preserving a state of ignorance through gross or willful neglect of duties. In that case the borrower had brought a suit against the bank and certain officers for damages arising from alleged conspiracy between the bank officers to defraud the borrower in the procurement of the loan. In Buck's Sporting Goods, Inc. v. First Nat'l Bank & Trust Co., 868 P.2d 693 (Okl. 1994), the court found that fact questions as to circumstances surrounding an alleged bank's telephonic approval of a loan under credit agreement precluded summary judgment on borrower's breach of commercial contract claim. The court rejected all tort claims.

In Security First Nat'l Bank v. Knowles, 871 P.2d 446 (Okl. Ct. App. 1994), a bank sued to recover on a note executed in its favor and the debtor counterclaimed for the bank's alleged tortious interference with its rights under a cattle maintenance agreement in wrongfully taking possession of the cattle and causing the cattle owner to terminate its contractual relationship. The Court of Appeals held that the debtor, by expressly disclaiming "any right, title or interest" in cattle, waived any claim he had for tortious interference with his rights under the cattle maintenance agreement.

Miscellaneous Recent Decisions.

Other recent decisions of note include Hanson v. American Nat'l Bank & Trust Co., 865 S.W.2d 302 (Ky. 1993), which re-affirmed a $5.7 million punitive damage award after the decision in TXO Prod. Corp. v. Alliance Resources Corp., 125 L.Ed.2d 366 (1993). In that case, Hansen had borrowed money from American National Bank & Trust Company since the 1970's. In 1985, the bank was acquired by First Kentucky National Corporation which set up a task force to review customer accounts and reclassify any substandard accounts. Customers, like Hansen, were not informed when their accounts were being reviewed and reclassified as substandard, nor was Hansen informed that an internal memo had been prepared recommending that his debts be restructured and the line of credit restricted and that a plan be put in place to do so. Hansen refused their plan. Nevertheless, the loan was restructured. Closing documents contained almost a hundred pages and when Hansen began to read the documents, the bank's representative objected because of the length of time it would take Hansen to read all of the documents. Hansen was assured that the documents contained the terms to which Hansen agreed. Based on those assurances, which turned out to be false, Hansen signed the documents.

On appeal, the court found that the promises such as "financing 20% of future projects," "15 year repayment term if restructured debt was paid as agreed," and a $125,000 line of credit were promises which were sufficient to support a claim for fraud. Additionally, the court rejected the bank's argument that Hansen's claims were precluded by his failure to read the contract. The court further rejected arguments by the bank that Hansen's alleged payment agreement of 15 years was unenforceable under the Kentucky statute of frauds, observing that the statute of frauds does not embrace assurances or representations that are deceitfully or fraudulently made.

In Osage Corp. v. Simon, 613 N.E.2d 770 (Ill. App. Ct. 1993), the court held that allegations that the lender obtained the mortgage by threatening prosecution for bank fraud was sufficient to state a defense of duress and to preclude summary judgment for the lender. Similarly, in Thomas v. N.A. Chase Manhattan Bank, 1 F.3d 320 (5 Cir. 1993), the United States Court of Appeals for the Fifth Circuit reversed a summary judgment in favor of Chase Manhattan in an action for fraud and breach of fiduciary duty arising from Chase's referral of an investment partner for the plaintiff. The court held that issues of material fact existed as to whether the plaintiff had reasonably relied on representations by the bank concerning the investment partner's prior relationship with the bank and other banks.

In Wells Fargo Realty Advisors Funding, Inc. v. Violi, Inc., 872 P.2d 1359 (Colo. Ct. App. 1994), the Colorado Court of Appeals affirmed a $13 million judgment against the lender for breach of covenant of good faith and fair dealing, where the lender refused to release its borrowers in return for deeds in lieu of foreclosure to certain properties that had equal value to the debt. The Court of Appeals affirmed the trial court's holding that the lender breached the covenant of good faith and fair dealing, but reversed the judgment for breach of fiduciary duty and negligence.

In Phoenix Leasing, Inc. v. Sure Broadcasting, Inc., 843 F.Supp. 1379 (D. Nev. 1994), a borrower's attempts to avoid a contractual waiver of the right to trial by jury in federal court failed. The court held that federal law applies and that while the right to a jury trial is a constitutionally protected right, it may be waived in the contract. This case contrasts with the case of Patterson v. ITT Consumer Financial Corp., 18 Cal.Rptr.2d 563 (Cal. Ct. App. 1993), cert. denied, 127 L.Ed.2d 563 (1994) which held arbitration provisions in form loan agreements are unconscionable and unenforceable.

In In re Quality Processing, Inc., 9 F.3d 1360 (8 Cir. 1993), the court held that a tortious interference claim of bean traders who prepaid for beans which were not delivered was not barred by the seller's failure to identify specific beans to the trader's conduct. Finally, the Permanent Editorial Board for the Uniform Commercial Code has proposed an Official Comment to UCC § 1-203 concerning good faith and fair dealing which does not support an independent cause of action for failure to perform or enforce in good faith. Rather, the Board argues that the section should mean that a failure to perform or enforce in good faith a specific duty or obligation of the contract constitutes a breach of that contract only. See also Walker v. First State Bank, 849 S.W.2d 337 (Tenn. Ct. App. 1992); NationsBank of Virginia, N.A. v. Mahoney, 22 UCC Rep.Serv.2d 633 (Va. Cir. Ct. 1993).

Trade Secrets.

Trade secret litigation can be exciting, emotional and very difficult. Victims of trade secret theft are often outraged and betrayed. Targets of such litigation feel unfairly threatened. Such litigation causes legitimate concerns about the target's livelihood, while often the product or information at issue is at the core of the victim's business. Thus, it has been said that trade secret litigation is usually won or lost during the first thirty days of litigation as both parties scramble for facts, procedural advantage, and the moral high ground in hearings to determine if a preliminary injunction will issue.

Like many business torts, a trade secret claim is seldom pursued only on a misappropriation theory. Usually this theory is advanced along with interference of contract and prospective business advantage, breach of fiduciary duty, RICO, third party beneficiary theories and conversion. This section does not analyze the other theories. Rather, this section focuses solely on a broad overview of the tort of misappropriation of a trade secret.

Elements.

In Oklahoma, to prevail on a claim for misappropriation of a trade secret, a plaintiff must prove by a preponderance of the evidence: (1) the existence of a trade secret; (2) misappropriation of the secret by the defendants; and (3) use of the secret by the defendants to the detriment of the plaintiff. See, e.g., Micro Consulting, Inc. v. Zubeldia, 813 F.Supp. 1514, 1534 (W.D. Okl. 1990), aff'd, 959 F.2d 245 (10 Cir. 1992); Amoco Production Co. v. Lindley, 609 P.2d 733 (Okl. 1980); Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc., 584 F.2d 946, 951 (10 Cir. 1978). See generally 78 O.S. §§ 85-94, commonly referred to as the Oklahoma Uniform Trade Secrets Act.

The common law tort of misappropriation of trade secrets is similar: generally, it must be demonstrated that (1) the aggrieved party possessed the trade secret, and (2) the defendant is using the trade secret in breach of an agreement, confidence or duty or as a result of discovery by improper means. See, e.g., Restatement (Second) of Torts § 757; E.I. dupont deNemours & Co. v. Christopher, 431 F.2d 1012 (5 Cir. 1970), cert. denied, 400 U.S. 1024 (1971); Videotronics, Inc. v. Bend Electronics, 564 F.Supp. 1471, 1475 (D. Nev. 1983). Milgrim observes that the common law cause of action for misappropriation of trade secrets is supplemented by statutory law in most jurisdictions, including at least eleven states which, like Oklahoma, have adopted the Uniform Trade Secrets Act. See, e.g., 3 R. Milgrim, Milgrim on Trade Secrets App. B (1991) (38 states have some type of statutory law on trade secrets; 25 states have statutes supporting substantive property rights and trade secrets) (hereinafter referred to as "Milgrim"). Several courts have expressly adopted common law principles in interpreting the provisions of the Uniform Trade Secret Act as the Act is based on common law. See, e.g., Sheets v. Yamaha Motors Corp., U.S.A., 657 F.Supp. 319, 326 27 (E.D. La. 1987), aff'd in part; Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 898 (Minn. 1983); Wisconsin Elec. Power Co. v. Public Serv. Comm'n., 329 N.W.2d 178, 180-81 (Wis. 1983).

As noted, trade secret claims are often accompanied with averments of conspiracy or breach of restrictive covenants. In Oklahoma, however, a claim that someone has breached a restrictive covenant using confidential information is subject to statutory limitation. See 15 O.S. § 217 providing that every contract by which one is restrained from exercising a lawful profession, trade or business of any kind, other than Sections 218 and 219, is to that extent void.

Nevertheless, restrictive covenants are enforceable if supported by adequate consideration and are reasonable in scope and duration. Restrictive covenants are useful in trade secret litigation because it helps prove the existence of trade secret by showing the plaintiff treated the information as secret and took reasonable precautions to safeguard it.

Conspiracy claims are also sometimes brought against the misappropriator and his or her new employer who stands to benefit from the use of the misappropriated information. See Restatement (Second) of Torts § 757 cmt. c (1939); § 758.

Existence of a Trade Secret.

The term "trade secret" as defined in the Oklahoma Trade Secrets Act means:

> Information including a formula, pattern, compilation, program, device, method, technique or process that:
>
> a.derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can use economic value from its ... use, and
>
> b.is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

78 O.S. § 86(4); Micro Consulting, Inc. v. Zubeldia, 813 F.Supp. at 1534.

The Restatement defines trade secrets as follows:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

See also Annotation, "What is 'trade secret' so as to render actionable under state law its use or disclosure by former employee," 59 A.L.R.4th 641 (1988); Annotation, "What is a computer 'trade secret' under state law," 53 A.L.R.4th 1046 (1987).

It has been said that trade secrets must relate to the continuing operation of a business and usually do not relate to a discrete business event. For example, in some cases the terms of a secret bid, the salaries of certain employees, the contemplation or making of certain investments, or the date of introducing new product or model may not constitute new trade secrets. Rivendell Forest Products, Ltd. v. Georgia-Pacific Corp., Case No. 93-1110 (10 Cir. June 30, 1994) (trade

secret can include integrated computer system with some elements in public d omain).

For example, in Central Plastics Co. v. Goodson, 537 P.2d 330 (Okl. 1975), an action was filed for unfair competition alleging misappropriation and wrongful use of trade secrets based on a customer list. The Oklahoma Supreme Court held that a list containing names and addresses of customers and suppliers was not a trade secret which equity would protect on defendant's departure from his employment with plaintiff where the list, initially obtained by the plaintiff from defendant's father, contained information which was available anywhere, and the defendant's father had as much right to convey the list to the defendant as he had initially to the plaintiff. The court found that an employee's knowledge of his employer's customers acquired by him as an ordinary employee and not by virtue of any particular trust or confidence is not a trade secret. In the absence of an express prohibitory agreement, the employee may, on a change of employment, solicit such customers whether he proceeds from written list or memorized information.

On the other hand, the Central Plastics court held that a brochure which the corporate defendant had taken and changed with consent and agreement of the manufacturer constitutes prima facie evidence of an intent to injure competitors and, as such, amounted to deceptive trade practice in violation of 78 O.S. §§ 53a-2(2,5) and 54a. Similarly, in Black, Sivalls & Bryson, Inc. v. Keystone Steel Fabrication, Inc., supra, the court observed that matters which have been discovered through examination of a patented device designed to uniformly heat certain industrial fluids and which also had been revealed in information which had been published or otherwise disseminated did not qualify as a trade secret in action for unfair competition. Nevertheless, the court observed that questions with regard to the identity of application of an outside heat transfer coefficient employed to calculate proper tube wall thickness and with respect to pricing information were questions for a jury. Further, the fact that a plaintiff had published a paper which contained a number of experimental outside heat transfer coefficients, one of which was close to the coefficient employed by the plaintiff in its patented device, did not, as a matter of law, preclude it from constituting a trade secret. Finally, the court observed that confidential data regarding operating and pricing policies can constitute a trade secret and thus, notwithstanding the difficulty of distinguishing between normally acquired skills and trade secret information, where there is circumstantial evidence from which a jury could reasonably infer trade secret use, there are sufficient facts to permit a case to go to a jury in an action for unfair competition.

The courts have applied the following factors in determining the existence of a trade secret:

> (1)The extent to which the information is known outside the business;
>
> (2)The extent to which the information is known by employees and others involved in the business;
>
> (3)The extent of measures taken by the employer to guard the secrecy of the information;

> (4)The value of information to the employer and to his competitors;
>
> (5)The amount of effort or money expended by the employer in developing the information;
>
> (6)The ease or difficulty with which the information could be properly acquired or duplicated by others.

See Restatement (Second) of Torts § 757 cmt. b.

The Restatement offers the following observation:

> Substantially a trade secret is known only in the particular business in which it is used.... Others may know of it independently, as for example, when they have discovered the process or formula by independent invention or keeping it secret. Nevertheless, a substantial element of secrecy must exist so that except by the use of improper means it would be difficult to acquire the information.

Id. Thus, although sometimes absolute secrecy is required, the common rule is that the secret must be substantially "secret."

The second and third factors identified by the Restatement address the issue of what precautions a company has taken to protect the secrecy of the information. See, e.g., Ecologix, Inc. v. Fansteel, Inc., 676 F.Supp. 1374, 1382 (N.D. Ill. 1988). Reasonable precautions are required, and it is generally not sufficient to rely on normal privacy or subjective intent to keep the information secret.

In CVD, Inc. v. Raytheon Co., 769 F.2d 842, 853 (1 Cir. 1985), cert. denied, 475 U.S. 1016 (1986), the court found it significant that despite the company's written policy that engineering drawings may be stamped with a restrictive legend warning of the document's confidential nature, none of the drawings at issue were stamped. See also Electronic Data Systems Corp. v. Kinder, 497 F.2d 222, 223 (5 Cir. 1974).

The Restatement's fourth factor deals with the value of the information to the employer and the competitors. The Restatement (Second) of Torts provides that for an idea to have value, it must provide "an opportunity [for the owner] to obtain an advantage over competitors who do not know or use it." See also Black, Sivalls & Bryson, Inc., supra (information on operating and pricing policies can qualify as trade secrets because "the ability to predict a competitor's bid with reasonable accuracy would give a distinct advantage to the possessor of that information"). Further, even though a trade secret may not be currently in use, it still can under certain circumstances, constitute a "trade secret." See, e.g., A.O. Smith Corp. v. Petroleum Iron Works Co., 73 F.2d 531 (6 Cir. 1934), reh'g denied and opinion modified, 74 F.2d 934 (6 Cir. 1935).

The Restatement's fifth factor simply focuses on the amount of money or effort expended by the employer in determining the information. Finally, courts focus on whether or not the information can be properly acquired or duplicated by others with ease or difficulty.

In Telex Corp. v. International Business Machines Corp., 510 F.2d 894 (10 Cir. 1975), the court held that luring employees with special knowledge can be a misappropriation of a trade secret. Further, the court held that federal patent law does not entirely preempt state trade secret law where they conflict. In Micro Consulting, supra, the court held that trade secret law clearly applies to computer software and trade secret protection attaches to a broad range of subject matter including computer programs and accompanying documentation, as well as the ideas and the expression of those ideas contained therein.

Misappropriation.

The next element in Oklahoma is misappropriation which is defined as:

> Use of a trade secret of another without express or implied consent by a person who ... at the time of the ... use, knew or had reason to know that his knowledge of the trade secret was ... acquired under circumstances giving rise to a duty to maintain its secrecy or to limit its use....

78 O.S. § 86(2)(B)(2)(b). This element requires the proof of some acquisition by a person who is privileged to the information by reason of some special relationship and unauthorized use of the same. See Micro Consulting, Inc. v. Zubeldia, 813 F.Supp. at 1535.

In Amoco Production Co. v. Lindley, 609 P.2d 733 (Okl. 1980), the Oklahoma Supreme Court, in determining whether a trade secret existed, sufficient to give rise to a duty not to disclose or adopt to one's own use stated:

> That in trade secret litigation, courts are looking at the equities of the given set of circumstances out of which the claimed trade secret arises. The courts are then balancing those equities between the right of the company to use its employees and resources to its utmost advantage against the right of the highly developed mind and skill of the employee. Factors to be considered are how many of the innovative elements in the newly developed process are available; how closely tied is the development of the intrinsic knowledge of the innovator. In other words, is it possible to sort the process from the inner workings of a man's knowledge; ... other considerations are time and money and company facilities used in its production and employer's own knowledge thereof.

In Micro Consulting, supra, the court balanced the resources made available for the development of the product against the equally sensitive factor of defendants to ensure that they are not restrained from using their knowledge, skill and experience to gain the likelihood. 813 F.Supp. at 1535. One's former employee cannot be restricted from using his knowledge, skill and experience in competition with his former employer. 1 Milgrim § 5.02[3]. The Oklahoma Supreme Court is in accord with the majority view and has expressly recognized that "an

employee has the right to engage in a competitive business for himself and to compete for business customers of his former employer provided that such competition is fairly and legally conducted. See Central Plastics Co. v. Goodson, 537 P.2d 330, 334 (Okl. 1975).

Other states focus on the fiduciary or confidential relationship which arises as a result of employment relationships; independent contractors' relationships; licenses; debtors; or other parties in close relationships.

Defenses.

Common defenses include such arguments that the defendant developed the idea independently [see Droeger v. Welsh Sporting Goods Corp., 541 F.2d 790, 792-93 (9 Cir. 1976) ("the ownership of a trade secret does not give the owner a monopoly in its use, but merely a proprietary right which equity protects against usurpation by unfair means"); Hoeltke v. C.M. Kemp Mfg. Co., 80 F.2d 912, 928 (4 Cir. 1935), cert. denied, 298 U.S. 673 (1936); Affiliated Hosp. Prods., Inc. v. Baldwin, 373 N.E.2d 1000, 1006 (Ill. App. Ct. 1978)] or that the trade secret is abandoned because it was disclosed by its owner or otherwise became publicly available after a misappropriation has occurred.

With respect to abandonment, the courts are split as to whether the subsequent disclosure of a trade secret releases one who formally misappropriated the trade secret. Compare Shellmar Products Co. v. Allen-Qualley Co., 87 F.2d 104 (7 Cir. 1936), cert. denied, 301 U.S. 695 (1937) with Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150, 155-56 (2 Cir. 1949). Section 2A of the Uniform Trade Secrets Act, adopted by Oklahoma offers a compromise and provides that after a trade secret is disclosed, an injunction may be continued "for additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from misappropriation." 78 O.S. § 87.

Remedies.

Actual or threatened misappropriation may be enjoined. 78 O.S. § 87. Upon application to the court, the injunction shall be terminated when the trade secret has ceased to exist but the injunction, as noted above, can be continued for an additional reasonable period of time in order to eliminate the commercial advantage that otherwise would have been derived from misappropriation. Id. Further, under certain exceptional circumstances, the injunction may condition future use upon payment of a reasonable royalty for longer than the need of time for which the use could have been prohibited. These exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable. 78 O.S. § 87(B). Finally, under appropriate circumstances, affirmative action of a protected trade secret may be compelled by court order.

The Act provides that unless there is a material and prejudicial change of position prior to acquiring knowledge or reason to know of the misappropriation which would render a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. These damages can include both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other method, damages caused by misappropriation

may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. 78 O.S. § 88(A). If the misappropriation is found to be willful and malicious, a court may award exemplary damages in an amount not exceeding twice any award made pursuant to the provisions of Section 88(A). Reasonable attorney's fees can be awarded if a claim of misappropriation or a motion to terminate an injunction is made in bad faith or willful or malicious misappropriation exists. See, e.g., 78 O.S. § 89.

With the exception of certain remedies, the adoption of the Uniform Trade Secrets Act by Oklahoma displaces conflicting tort, restitutionary and other law of the state providing similar remedies for misappropriation of trade secrets. 78 O.S. § 92(A). It does not affect, however, contractual remedies whether or not based upon misappropriation of trade secrets, civil remedies that are not based upon misappropriation of a trade secret, or criminal remedies whether or not based upon misappropriation of a trade secret. 78 O.S. § 92.

To obtain an injunction, plaintiff must show more than a mere possibility of harm. Instead, it must show that a trade secret exists and an unauthorized person has access to it, that there is a threat of imminent disclosure or use of the secret, that a plaintiff will suffer irreparable injury, and that no adequate legal remedy exists and that the plaintiff has a probability of success on the merits. Other courts require plaintiffs to show that the equities tip in favor of the plaintiff or that public policy will be furthered.

Legal remedies can include lost profits. They may also include start-up expenses resulting from developing a business [see University Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 539 (5 Cir. 1974)], overhead expenses [3 C. Knapp, Commercial Damages ¶ 52.07[1] (1991); Grand Trunk W.R.R. v. H.W. Nelson Co., 116 F.2d 823, 839-40 (6 Cir. 1941)], costs of remedial action [Dozor Agency, Inc. v. Rosenberg, 218 A.2d 583, 585-86 (Pa. 1966)], and reduction in the value of business [DeVries v. Starr, 393 F.2d 9, 20-21 (10 Cir. 1968)]. Further, plaintiffs can frequently show damages by measuring the defendant's gross profits resulting from the misappropriation.

Breach of Fiduciary Duties.

As set forth in previous sections, the existence of a fiduciary or special relationship is important in several contexts. For example, the existence of a fiduciary relationship may give rise to a constructive fraud claim even though there was no intent to deceive. See Section C, supra. The existence of a fiduciary relationship can also be an important factor in a misappropriation of trade secret case. See Section E, supra. This chapter will discuss breach of fiduciary duty as a stand alone cause of action.

At the outset it is axiomatic that in any litigation involving allegations of breach of fiduciary duty to determine (1) did a fiduciary relationship exist at the time of the alleged misconduct; (2) if so, what was the scope of the relationship; and (3) was there a breach of the duties that arose within the scope of the relationship.

Fiduciary relationships can exist as a result of statutes such as partner and partnership; legal proceedings such as administrator and heir and in contractual relationships such as principal/agent, attorney/client, etc. There is no generally accepted definition of what constitutes a fiduciary relationship. Under Oklahoma law, a confidential or fiduciary relationship arises only

where there is kinship between the parties or there is such a professional, business or social relationship that could reasonably lead an ordinary prudent person in the management of his business affairs to repose such a degree of confidence in the other which, in effect, results in substitution of the will of the defendant for that of the plaintiff in material matters involved in the transaction. See, e.g., Mahan v. Dunkleman, 205 Okl. 54, 234 P.2d 366 (1951).

Elements.

Like other business torts discussed in this paper, traditional tort principles apply to a breach of fiduciary duty cause of action, i.e., duty, breach, causation and damage. Some of the factors which courts have applied in determining whether or not a confidential or fiduciary relationship exists include (1) whether a peculiar confidence is placed by one individual in another; (2) whether a person exercises influence over another; (3) whether there is a condition of superiority of one of the parties over the other; (4) whether a party is subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability or ignorance; (5) whether things of value or other property of the subservient person are possessed or managed by the alleged dominant party; (6) whether there is a surrender of independence by the subservient party to the dominant party; (7) whether there is an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (8) whether there has been total trust and confidence placed in one over the other. See generally Rajala v. Allied Corp., 919 F.2d 610, 615 (10 Cir. 1990), cert. denied, 500 U.S. 905 (1991); Ritchie Enterprises v. Honeywell Bull, Inc., 730 F.Supp. 1041 (D. Kan. 1990); Denison State Bank v. Madeira, 640 P.2d 1235 (Kan. 1982); C? Delivery, Inc. v. Emery Air Freight Corp., 647 F.Supp. 867, 875 (E.D. Mo. 1986); Restatement (Second) of Torts § 874 cmt. a.

It has been said that a confidential or fiduciary relationship is never presumed and the burden of proof is on the party asserting it. Rajala, 919 F.2d at 615; Rader v. Boyd, 252 F.2d 585 (10 Cir. 1957). A person seeking to foist a fiduciary duty on another must establish the existence of a fiduciary duty by clear and convincing evidence. Id. Under some circumstances, the existence of whether or not a fiduciary relationship exists is appropriate for the court to decide as a matter of law. See generally Citizens State Bank v. FDIC, 639 F.Supp. 758 (W.D. Okl. 1986) (banks involved in arm's length transaction do not stand in a fiduciary relationship to each other). "A buyer/seller relationship does not create a fiduciary duty because the parties are dealing at arm's length and seeking for themselves the best advantage." Ritchie Enterprises, 730 F.Supp. at 1053. Parties may assuredly deal at arm's length for their mutual benefit without raising a confidential or fiduciary relationship between them. Rader v. Boyd, 252 F.2d at 587; Rajala, supra; Ritchie Enterprises, supra; National Westminster Bank, U.S.A. v. Ross, 130 B.R. 656 (S.D.N.Y. 1991), aff'd, 962 F.2d 1 (2 Cir. 1992). "[O]ne may not abandon all caution and responsibility for his own protection and unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary." Denison State Bank, 640 P.2d at 1243-44. Courts should be unwilling to radically alter the given scheme of commercial dealings by the possible imposition of fiduciary relationships upon sellers in ordinary commercial transactions. See Ritchie Enterprises v. Honeywell Bull, 730 F.Supp. at 1054. Even where seller has superior knowledge of a product, it does not necessarily justify imposition of fiduciary relationship in the absence of some conscious assumption of fiduciary duties. Ritchie Enterprises, 730 F.Supp. at 1054.

In a situation where negotiated contracts occur between two sophisticated parties and the contract governs the responsibilities and obligations of the party, generally no fiduciary duty exists as a matter of law. See cases cited above; Oreman Sales, Inc. v. Matsushita Elec. Corp., 768 F.Supp. 1174 (E.D. La. 1991) (no fiduciary relationship between buyer-distributor and seller manufacturer where relationship is merely contractual); Strey v. Hunt Int'l Resources Corp., 749 F.2d 1437 (10 Cir. 1984), cert. denied, 479 U.S. 870 (1986) (sales contract does not create fiduciary duty); W.K.T. Distrib. Co. v. Sharp Elec. Corp., 746 F.2d 1333 (8 Cir. 1984) (parties who enter into arm's length negotiations are not in a fiduciary relationship); Franklin Supply Co. v. Tolman, 454 F.2d 1059 (9 Cir. 1971) (accounting firm employed by parties to contract for sale of stock determined book value and sale price did not have a duty to act as fiduciary). See generally Restatement (Second) of Torts § 874 (1977).

Common law fiduciary duties include the duty of care, duty of loyalty, duty to account, duty of confidentiality, duty of full disclosure, duty to act fairly and duty of good faith and fidelity. Corporate officers, directors and controlling shareholders owe some sort of duty, one that ought to be enforced by the court, to the corporation and through the corporation to the sh areholders. Fiduciary duties of officers and directors are generally divided into categories of care and loyalty. L. Soloman, et al., Corporations: Law on Policy 591 (2d 1988). Many states have adopted the Model Business Corporation Act § 8.30 which defines corporate duties of care. See, e.g., 18 O.S. § 1001 et seq. Section 8.42 of the Act imposes substantially a duty of care on corporate officers possessing discretionary authority. Nevertheless, under the business judgment rule, they are not responsible for mere bad business judgment. See Aronson v. Lewis, 473 A.2d 805 (Del. Super. Ct. 1984) (directors afforded presumption that, in making business decisions, they exercised independent judgment, informed themselves as to the merits of the action, acted in good faith and honestly believed that the action taken was in the corporation's best interests). Duty of loyalty is also addressed in the Business Corporation Act § 8.31. Duty of loyalty issues arise in a variety of transactions, each which must be addressed on their facts. See AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111-14 (Del. Ch. 1986); Veasey, Duty of Loyalty: The Criticality of Counsel's Role 45 Bus. Law. 2065-66 (1990).

Other circumstances where a fiduciary relationship is commonly at issue include partnership fiduciary duties, duties of trustees, agency duties, fiduciary duties of estate representatives, fiduciary duties of stock brokers and investment advisers, fiduciary duties of real estate agents and brokers, fiduciary duties under ERISA, and fiduciary duties of lenders.

Breach.

The ways a fiduciary can breach his or her duty is limited only by the imagination. Common breaches include neglect, imprudence, want of skill, misappropriation, usurpation of business or corporate opportunity, aiding and abetting or acting in concert with other, i.e., conspiracy, rendering inappropriate advice, fraudulent inducement, failure to act in another's best interest, misrepresentations, misuse of confidential information, breach of confidentiality, misuse of superior knowledge, failure to disclose, misuse of superior influential position, self dealing, etc.

Corporate directors may be held liable for the fiduciary duty of nonfeasance. Often directors are challenged with corporate malfeasance. Nevertheless, corporate directors are generally clothed

by law with presumption that their conduct is based on a "bona fide regard for the interest of the corporation whose affairs of the stockholders are committed to their charge." This presumption is what is known as the business judgment rule. The business judgment rule comes up in many different contexts. Breach of fiduciary duty also occurs in conflict of interest situations involving corporate directors and officers.

Likewise, breach of fiduciary duties can occur in partnership transactions which, by their very nature, necessitates that all partners deal fairly with one another.

Trustees are burdened with fiduciary obligations pursuant to the very nature of a trust relationship. Thus, breaches of fiduciary duty often occur in a trustee situation. Fiduciary liability can arise from agency status, improper administration of estates, in a stockbroker context, in a real estate broker context, and in the context of an ERISA plan. It should be noted that in the ERISA context that the seminal case of Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) and its progeny, preempt many fiduciary duty, and other common law, causes of action.

Affirmative Defenses.

The affirmative defenses for breach of fiduciary duty include the statute of limitations, estoppel, ratification, waiver, laches, standing, failure to plead fraud with particularity, business judgment rule, approval, lack of fiduciary relationship, failure to exercise due diligence and preemption.

Most cases in a breach of fiduciary duty situation center around whether or not a fiduciary relationship exists, and if so, its scope. For example, in many commercial transactions, lender liability context, etc., there is normally no fiduciary relationship absent special circumstances. Therefore, in those cases, a plaintiff must rely on special circumstances to establish the relationship and the scope of that relationship. See also MidAmerica Federal Sav. & Loan Assoc. v. Shearson /American Express, Inc., 886 F.2d 1249, 1257 (10 Cir. 1989) (observing that Oklahoma courts have found a fiduciary relationship exists whenever trust and confidence are placed by one person in the integrity and fidelity of another); Windon Third Oil & Gas Drilling Partnership v. FDIC, 805 F.2d 342 (10 Cir. 1986), cert. denied, 480 U.S. 947 (1987) (accountant found not to have fiduciary duty towards investors); Quinlan v. Koch Oil Company, No. 92-5219 (10 Cir. June 1, 1994) (oil purchaser owes royalty owner a fiduciary duty under Oklahoma law because of their contractual agreement; also plaintiff can choose a contract or tort recovery); Devery Implement Co. v. J.I. Case Co., 944 F.2d 724 (10 Cir. 1991) (Oklahoma courts recognize fiduciary relationship arising out of a manufacturer/dealer contract if the transaction involved fact or circumstances indicative of imposition of personal confidence).

Professional Malpractice.

There have been multiple volumes written on the separate subjects of lawyer malpractice, accountant malpractice and other types of professional malpractice. It would be impossible to fairly or adequately attempt to summarize the state of the law in these areas in a subsection of a chapter in a one hour overview of business torts. These claims can involve statutory and common law claims, and involve such issues as privity, necessity of expert witnesses, contract liability, malicious prosecution, tortious interference, defamation, fraud, the applicable relationship, causation, damages, breach of ethical violations, liability under the securities laws,

etc. For use of the practitioner, listed below are some cases dealing with some of the above issues for use when the practitioner is faced with a professional malpractice case:

FDIC v. Regier Carr & Monroe, 996 F.2d 222 (10 Cir. 1993);

Wynn v. Estate of Holmes, 815 P.2d 1231 (Okl. Ct. App. 1991) (statute of limitations does not begin until damage occurs; accountants assuring plaintiff that he would avoid consequences of malpractice kept the statute of limitations from beginning);

Funnell v. Jones, 737 P.2d 105 (Okl. 1985), cert. denied, 484 U.S. 853 (1987) (malpractice of a lawyer is in the nature of a tort claim even if the relationship is contractual);

FDIC v. Ferguson, 982 F.2d 404 (10 Cir. 1991) (contributory negligence principles apply in attorney malpractice; elements include the existence of attorney/client relationship, breach of attorney's duty, facts constituting negligence, proximate causation, cause in fact);

Haney v. State, 850 P.2d 1087 (Okl. 1993) (no attorney/client relationship between the district attorney's office and an AFDC recipient);

Boehler v. Shumake, 853 P.2d 240 (Okl. Ct. App. 1993) (two year statute of limitations for legal negligence);

Thomas v. Cleary, 768 P.2d 1090 (Alaska 1989) (no recovery for accountant's malpractice where the IRS never imposed liability);

Shaffer v. Jones, 650 P.2d 918 (Okl. Ct. App. 1982) (proximate causation is required, not every breach of duty leads to liability);

Birchfield v. Harrod, 640 P.2d 1003 (Okl. Ct. App. 1982);

Allred v. Rabon, 572 P.2d 979 (Okl. 1977) (elements of attorney malpractice action);

Wabaunsee v. Harris, 610 P.2d 782 (Okl. 1980) (judgmental liability rule adopted);

Applegate v. Dobrovir, Oakes & Gebhardt, 628 F.Supp. 378 (D.D.C. 1985), aff'd, 809 F.2d 930 (D.C. Cir. 1987), cert. denied, 481 U.S. 1049 (1987) (action may be maintained

against partnership; expert witness required);

Vanguard Production, Inc. v. Martin, 894 F.2d 375 (10 Cir. 1990) (liability to nonclients exists even where general negligence rules foreseeability are satisfied);

Bradford Securities Processing Services, Inc. v. Plaza Bank & Trust, 653 P.2d 188 (Okl. 1982) (bond counsel subject to malpractice suit where he knew his legal work would be relied upon by others);

Buford White Lumber Co. Profit Sharing & Savings Plan & Trust v. Octagon Properties, Ltd., 740 F.Supp. 1553 (W.D. Okl. 1989);

Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (N.J. Super. Ct. App. Div. 1976), cert. denied, 72 N.J. 459, 371 A.2d 63 (1976) (seller's attorney agreed to assure execution and delivery of security agreement for the benefit of all sides to the transaction; attorney held liable to buyer for (1) failing to fulfill the assumed duty and (2) failing to advise the buyers of this omission);

Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., 106 N.M. 757, 750 P.2d 118 (1988) (adverse party cannot justifiably rely on opposing counsel to protect him from harm);

Rayne State Bank & Trust Co. v. National Union Fire Ins. Co., 483 So.2d 987 (La. 1986) (mortgagor's attorney owes no duty to mortgagee);

Page v. Frazier, 388 Mass. 55, 445 N.E.2d 148 (1983) (mortgagee's attorney owes no duty to mortgagor-purchaser);

Heliotis v. Schuman, 181 Cal.App.3d 646, 226 Cal.Rptr. 509 (Ct. App. 1986) (seller's lawyer owes no duty to buyer to disclose that client-seller's property was sliding into the Pacific Ocean). But cf. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1978) (seller's lawyer liable to buyer for negligence where lawyer volunteered to perform a task that would benefit both sides);

Ackerman v. Schwartz, 733 F.Supp. 1231, 1241 (N.D. Ind. 1986) ("[A]n attorney owes no duty to nonprivies whose identities are unknown at the time of the allegedly negligent misrepresentation, even if future reliance by such persons is reasonably foreseeable."); Vereins-UND Westbank, AG v. Carter, 691 F.Supp. 704 (S.D.N.Y. 1988) (lawyer liable to parties whose participation in the transaction was specifically contemplated);

Norman v. Brown, Todd & Heyburn, 693 F.Supp. 1259 (D. Mass. 1988) (an attorney may be liable to a third party whose reliance on a tax opinion was reasonably foreseeable);

First Fla. Bank, N.A. v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990) (accountant who negligently prepared audit for client liable to bank that lent money to client in reliance on the audit where the accountant delivered the audit statement to the bank and negotiated the bank loan; even the restrictive privity-equivalent test would find a duty under these facts). In dictum the court stated that the auditor need not acquire knowledge of its intended use from the client. But see Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co., 715 S.W.2d 408 (Tex. Ct. App. 1986) (auditor must acquire knowledge of its intended use from the client); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969) (liability to reliant third party who is "actually known" by the accountant);

Touche Ross & Co. v. Commercial Union Ins. Co., 514 So.2d 315 (Miss. 1987);

International Mortgage Co. v. John P. Butler Accountancy Corp., 177 Cal.App.3d 806, 223 Cal. Rptr. 218 (Ct. App. 1986) (accountant's public watchdog function argues in favor of a broad duty);

H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 356, 461 A.2d 138, 155 (1983) ("Having inserted the audit in that economic stream, the defendants should be responsible for their careless misrepresentation to parties who justifiably relied upon their expert opinions.");

Citizens State Bank v. Timm, Schmidt & Co., S.C., 113 Wis.2d 376, 335 N.W.2d 361, 365 (1983);

Hale v. Groce, 304 Or. 281, 744 P.2d 1289 (1987) (attorney liable for negligently failing to include in his client's will a specific gift to plaintiff);

Lucas v. Hamm, 56 Cal.2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), cert. denied, 368 U.S. 987 (1962);

Ferraris v. Levy, 223 Cal.App.2d 408, 36 Cal. Rptr. 30 (Ct. App. 1963) (fact that attorney acted on behalf of client does not defeat malicious-prosecution claim). Ohio courts are split on this point. Compare W.D.G., Inc. v. Mut. Mfg. & Supply Co., 5 Ohio St.3d 397 (Ct. App. 1976) (absolute immunity rule) with Board of Ed. of Miami Trace Local School Dist. v. Marting, 185 N.E.2d 597 (Ohio Com. Pl. 1962) ("the dictates of common honesty" require that attorneys be liable for malicious prosection where they know their

clients are acting with malice);

Prewitt v. Sexton, 777 S.W.2d 891 (Ky. 1989);

Lessard v. Jersey Shore State Bank, 702 F.Supp. 96 (M.D. Pa. 1988) (only a prior party may bring a malicious prosecution claim; the party's daughter lacks standing);

Bird v. Rothman, 128 Ariz. 599, 627 P.2d 1097 (Ct. App. 1981) (court rejected plaintiff's proffer of expert testimony (by the attorney-defendant) on issue of probable cause; probable cause always presents a question of law for the court);

Glasgow v. Fox, 757 P.2d 836 (Okl. 1988) (voluntary dismissal without prejudice not "successful termination sufficient to satisfy that element under Oklahoma law");

Demopolis v. People's Nat'l Bank of Wash., 59 Wash. App. 105, 796 P.2d 426 (Ct. App. 1990) (attorney-defendant; false statement that plaintiff was a perjurer not pertinent to trial in which plaintiff's credibility was at issue);

Halperin v. Salvin, 117 A.D.2d 544, 499 N.Y.S.2d 55 (App. Div. 1986) (the common law privilege afforded to words spoken and written in the course of judicial proceedings is "limited to statements which are pertinent to the subject matter of the lawsuit, made in good faith and without malice");

Thorton v. Rhoden, 245 Cal.Ct.App.2d 80, 53 Cal.Rptr. 706, 719 (Ct. App. 1966). See also Restatement (Second) of Torts § 586 cmt. a: The privilege stated in this section is based upon a public policy of securing to lawyers as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore, the privilege is absolute;

Restatement (Second) of Torts § 586 cmt. e. See also cmt. a: "The publication of defamatory matter by an attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conferences and other communications preliminary to the proceedings.";

Ange v. State, 98 Fla. 538, 123 So. 916 (1929) (the privilege applies to statements that are "necessarily preliminary" to judicial proceedings);

Lanchile Airlines v. Connecticut Gen. Life Ins. Co. of N. Am., 731 F.Supp 477 (S.D. Fla. 1990) (privilege not applied to attorney's prelitigation comment that his client's opponent

was a cheat; statement lacked a direct bearing on whether litigation would commence);

Drummond v. Stahl, 127 Ariz. 122, 618 P.2d 616, 620 (1980), cert. denied, 450 U.S. 967 (1981):

> In our opinion, public policy and legal precedent compel us to adopt a position that there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney. We must weigh the possible harm to attorneys in the filing of malicious complaint against the need to encourage the reporting of unethical conduct. In weighing these conflicting interests, it is our opinion that public policy demands the free reporting of unethical conduct if we are to continue to enjoy the privilege of a self-regulating profession.

For notable exceptions, see Sassower v. Himwich, 236 N.Y.S.2d 491 (Sup. Ct. 1962), aff'd, 19 A.D.2d 946, 245 N.Y.S.2d 971 (1963); Lee v. W.E. Fuetterer Battery & Supplies Co., 323 Mo. 1204, 23 S.W.2d 45 (1929) (absolute privilege does not apply to state bar proceedings);

Sussman v. Damian, 355 So.2d 809, 812 (Fla. Dist. Ct. App. 1977) (attorney's defamatory attack on opposing counsel's integrity, made in the courthouse elevator after heated motion argument held unrelated to cause at hand and, therefore, not absolutely privileged);

Moores v. Greenberg, 834 F.2d 1105 (1 Cir. 1987);

Moorehead v. Miller, 102 F.R.D. 834 (D.V.I. 1984);

Duncan v. Lord, 409 F. Supp. 687 (E.D. Pa. 1976);

Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989);

Franke v. Zimmerman, 526 S.W.2d 257 (Tex. Ct. App. 1975);

Daugherty v. Runner, 581 S.W.2d 12 (Ky. Ct. App. 1978);

Sprague v. Moore, 136 Mich. 426, 99 N.W. 377 (1904);

Walker v. Goodman, 21 Ala. 647 (1852);

Cf. Thayer v. Hicks, 243 Mont. 138, 793 P.2d 784 (1990) (accountants);

M & S Bldg. Supplies, Inc. v. Keiler, 738 F.2d 467 (D.C. Cir. 1984) (labor law);

Horne v. Peckham, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (Ct. App. 1979) (General practitioner owed duty to refer client to tax specialist. Failing to do so, the general practitioner is held to the standard of a specialist);

Compare Citizens, 113 Wis. 2d at 376, 335 N.W.2d at 361 (noncompliance with GAAS and GAAP constitutes negligence per se) with Thayer, 243 Mont. at 138, 793 P.2d at 784 (noncompliance is relevant but inconclusive evidence of breach of duty);

Geiserman v. MacDonald, 893 F.2d 787 (5th Cir. 1990). But cf. Day v. Rosenthal, 170 Cal. App. 3d 1125, 1146-48, 217 Cal. Rptr. 89 (Ct. App. 1985), cert. denied, 475 U.S. 1048 (1986) (expert testimony not needed where attorney/investor promoter guilty of clear fiduciary breach amounting to disciplinary-rule violations);

Kaufman v. Stephen Cahen, P.A., 507 So.2d 1152 (Fla. Dist. Ct. App. 1987) (attorney not required to anticipate that state Supreme Court would reverse appellate decision on which attorney relied in advising client that wrongful death statute did not apply to client's case);

Thompson v. Niles, 434 So.2d 36 (Fla. Dist. Ct. App. 1983).

Practice Tips: The most frequent "time errors" result from the failure to

1.Note a known deadline on a calendar;

2.React to the calendar's deadline notice;

3.

Know of a deadline in the first place. An effective docketing system can eliminate the first two problems. The lawyer also should give the ascertainment of all applicable time limits high priority at the outset of every case. Early brainstorming to find all available legal theories will reduce the risk of losing a choice claim or defense to a tolled statute of limitations;

Brennan v. Reed, Smith, Shaw & McClay, 304 Pa. Super. 399, 450 A.2d 740 (Super. Ct. 1982) (failure to advise issuers of potential need to register limited partnership);

Mageary v. Hoyt, 91 Ariz. 41, 369 P.2d 662 (1962) (allowing client to sign a contract when attorney knew the client did not understand it). But cf. Lamb v. Barbour, 188 N.J. Super. 6, 455 A.2d 1122 (Super. Ct. App. Div., 1982), cert. denied, 93 N.J. 297, 460 A.2d 693 (1983) (no duty to advise client that she lacked the business experience to run her recently purchased business);

Blackhawk Bldg. Servs. Ltd. v. Law Firm of Arpelmeier, Fisch, Power, Warner & Engberg, 428 N.W.2d 288 (Iowa 1988) (covenant not to compete);

Collins v. Wanner, 382 P.2d 105 (Okl. 1963) (vigorous dispute between experts over the conclusion's reasonableness strengthens argument that attorney's judgment fits within reasonableness realm).