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## When Athletes Breach: Tortious Interference with the Contractual Relation of Season Ticket Holders

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# WHEN ATHLETES BREACH: TORTIOUS INTERFERENCE WITH THE CONTRACTUAL RELATION OF SEASON TICKET HOLDERS

## I. INTRODUCTION

*“It is usually said that tort liability may be imposed upon a defendant who intentionally and improperly interferes with the plaintiff’s rights under a contract with another person if the interference . . . makes the contract rights . . . less valuable.”*<sup>1</sup>

As the cost of attending an athletic event increases, so too does fan frustration with team owners and their highly compensated athletes. Many fans have looked to the courts to provide a legal salve for their frustrations.<sup>2</sup> Season-ticket holders of the National Hockey League’s Ottawa Senators recently sued the team’s star player, Alexei Yashin, for tortious interference with contractual relations.<sup>3</sup> The season ticket holders argued that their season ticket contract with the Senators included, by its implied terms, Yashin’s agreement to perform for the team and its fans, and Yashin’s refusal to play interfered with their contract.<sup>4</sup> Although the court rejected the plaintiff’s claim, the case raises an interesting question:

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<sup>1</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 129 at 978 (5th ed. 1984).

<sup>2</sup> See generally *Charpentier v. Los Angeles Rams Football Co.*, 75 Cal. App. 4th 301 (1999)(holding no breach of contract with season ticket holder when team relocated to new city); *Skalbania v. Simmons*, 443 N.E.2d 352 (Ind. Ct. App. 1982)(finding class status for season ticket holders where team failed to complete season); *Strauss v. Long Island Sports Inc.*, 401 N.Y.S.2d 233 (N.Y. App. Div. 1978)(involving suit by fans against pro basketball team for trading star player).

<sup>3</sup> See *Potechin v. Yashin*, [2000] 186 D.L.R.4th 757. Defendant Yashin, the star player and captain of the Senators Hockey Club, refused to play out the final year of his four-year, \$20 million contract with the Senators unless the team renegotiated the contract. *Id.* at 758. Plaintiff Potechin, a Senators season ticket holder, brought a \$27.5 million class action suit against Yashin arguing that Yashin caused the team to breach its season ticket contract with Potechin and all other similarly situated fans by failing to perform under the contract. *Id.*

<sup>4</sup> See *id.* Potechin argued that the Senators heavily marketed Yashin with the intent of inducing fans to purchase season-tickets. *Id.* at 761. Potechin further argued that implied terms within his season ticket contract represented that “barring uncontrolled events” – i.e. injury or trade - Yashin would play for the team. *Id.*

Do fans *ever* have legal remedy when athletes breach their contracts with their employers?<sup>5</sup>

This Note will examine the propriety of bringing a tort action for interference with contractual relations against a breaching athlete and the viability of this action in such circumstances. Throughout this Note, the masculine pronoun will be used when referring to the player, the season ticket holder, and the stranger to their contract. The first section of this Note will examine the history of the interference tort and the tort's purpose. Section II will examine the elements necessary to establish a *prima facie* case for the interference tort. Finally, this Note will conclude with an analysis of the season ticket holders' plight and why, when objectively applying the law to such circumstances, the season ticket holders should prevail on their claim.

## II. HISTORICAL DEVELOPMENT

Where Party A and Party B have entered into a contract, the tort of intentional interference with contractual relations recognizes the right of Party A to bring a cause of action against a party not in privity to the contract (stranger), who induces Party B to breach the contract.<sup>6</sup> The tort was originally limited in scope and recovery to special economic relationships that were created without the stabilizing influence of a contractual agreement.<sup>7</sup> The lack of a contractual agreement created one unstable economic relationship after another, as either party was free to sever the relationship at the behest of a stranger.<sup>8</sup> The modern day tort of interference with contractual relations grew out of the enticement-of-servant action, which was created to address this instability.<sup>9</sup>

The enticement-of-servant action stabilized the labor supply by giving masters the right to sue persons who enticed away their servants.<sup>10</sup>

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<sup>5</sup> See *Yashin*, 186 D.L.R.4th at 768 (dismissing action against defendant for lack of evidence in support of intent to benefit). The *Yashin* court found that the club's marketing efforts involving *Yashin* did not create an implied term that the club would "take all reasonable steps within its control to ensure that Mr. *Yashin* would be part of its roster in the 1999-2000 season." *Id.* at 767.

<sup>6</sup> See KEETON ET AL., *supra* note 1.

<sup>7</sup> See Donald. C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487, 495-96 (1986)(discussing origins of interference tort). Dowling discusses the tort's evolution from laws protecting the Landlord/Tenant and Master/Servant relationships. *Id.*

<sup>8</sup> See *id.*

<sup>9</sup> See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 976-77 (explaining origins of interference with contract tort).

<sup>10</sup> See *id.* The Black Death in England had so diminished the labor force that competition for servants resulted in persons enticing them away from their masters. *Id.* at 976. The response was the Ordinance of Labourers, which provided masters with a cause of action against those engaged in these practices. *Id.* at 977.

This action was viewed as more necessary to restore the social and economic order of the time rather than to protect the rights of individuals.<sup>11</sup> In *Lumley v. Gye*,<sup>12</sup> the English court extended the enticement of servants action to situations in which a stranger procures an employee's breach of an employment contract.<sup>13</sup> *Lumley* signaled a shift from a societal interest in maintaining the social order to an interest in maintaining economic order through the integrity of contractual relations.<sup>14</sup>

A lack of confidence in the integrity of contractual relationships can weaken the market economy because many economic decisions are reliant upon the performance of contracts.<sup>15</sup> The interference tort assures parties contemplating these economic decisions that their newly created property rights will remain free from intermeddling strangers.<sup>16</sup> A stranger who, notwithstanding this contract, chooses to interfere should pay for any damages he causes the aggrieved party.<sup>17</sup>

Traditional contract remedies may be unavailing to an aggrieved promisee.<sup>18</sup> Although a promisee may have an action against a promisor for the promisor's breach, such a remedy may not have the deterrent effect intended.<sup>19</sup> For example, a promisor may invoke the doctrine of efficient breach where it may pose an economically sound alternative to performance.<sup>20</sup> Additionally, the doctrine of impossibility excuses the

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<sup>11</sup> See John Danforth, Note, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1509 (1981) (arguing deterrence of enticement of servants had social implications beyond individual interests).

<sup>12</sup> 118 Eng. Rep. 749 (Q.B. 1853).

<sup>13</sup> See *id.* at 755 (Erle, J.) (stating principles of enticement of servant and present case same); *id.* at 758 (Wightman, J.) (extending enticement of servants to procurement of breach of personal services contracts). In *Lumley*, the plaintiff had an exclusive contract with one Johanna Wagner to sing at the plaintiff's theatre. *Id.* at 750. The defendant, owner of a rival theatre enticed Wagner to breach her contract with the plaintiff and sing at the defendant's theatre instead. *Id.*

<sup>14</sup> See Danforth, *supra* note 11, at 1511 (noting shift of concern to stabilizing economy through integrity of contractual relations).

<sup>15</sup> See Danforth, *supra* note 11 (recognizing effect of contractual stability on market economy). Danforth notes that many economic decisions in a market economy are dependent on the reliability of contracts. *Id.*

<sup>16</sup> See Dowling, *supra* note 7, at 505 (recognizing act of contracting creates intangible piece of property). Dowling notes the *Lumley* Court's recognition that a contract's promised performance is "worthy of protection as physical property." *Id.*

<sup>17</sup> See Dowling, *supra* note 7, at 505 (recognizing those not party to contract must either respect contract or pay damages).

<sup>18</sup> Compare Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 76-77 (1982) (outlining instance where contract remedies may fail), with Dowling, *supra* note 7, at 510 (noting purpose of contracting to assure recovery in event of non-performance).

<sup>19</sup> See Danforth, *supra* note 11, at 1511 (noting that contract remedies do not deter breach).

<sup>20</sup> See Clark A. Remington, *Intentional Interference with Contract and the Doctrine*

promisor's performance where occurrences that the contracting parties did not initially contemplate make performance impossible.<sup>21</sup> The interference tort considers breaching parties who are willing but unable to perform because performance has been frustrated by a stranger's actions.<sup>22</sup> Where the breaching party has an excuse recognized in contract law, tort law affords this alternative cause of action in the form of the interference tort.<sup>23</sup>

### III. PRIMA FACIE CASE

To properly articulate the propriety of a season ticket holder bringing a tort action for interference with contractual relations, an examination of the elements of the tort is necessary. Because states differ as to the exact requirement to establish a prima facie case for the tort, this Note will focus primarily on Massachusetts law.<sup>24</sup> Tortious interference with contractual relations is elucidated in the Restatement (Second) of Torts § 766.<sup>25</sup>

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*of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 647-48(1999)(discussing instances where breach more efficient than performance). Oliver Wendell Holmes recognized that contracts give the parties the choice to perform or pay damages. *Id.* at 647. Remington notes that contract remedies actually encourage breaches by allowing a party to pay damages that do not outweigh the costs of performance. *Id.*

<sup>21</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 261 (Main Vol. 1979). This section identifies the doctrine of impossibility as:

Where, after a contract is made, a party's performance is made impracticable without his fault by occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

*Id.*

<sup>22</sup> See *Developments in the Law -- Competitive Tort: Interference with Contractual Relations*, *supra* note 22 (observing frustration of contract occurs where third party interferes with otherwise willing promisor); see also RESTATEMENT (SECOND) OF TORTS § 766, cmt. k (1977)(stating interference exists where performance frustrated by depriving promisor means of performance).

<sup>23</sup> See Perlman, *supra* note 18, at 76 (discussing advantages of interference tort).

<sup>24</sup> See Danforth, *supra* note 11, at 1500-1505 (recognizing states differ on basis of tortious interference claim).

<sup>25</sup> See RESTATEMENT (SECOND) OF TORTS §766 (Main Vol. 1977). The section reads:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

*Id.*

Massachusetts adopted the Restatement's view on tortious interference with contractual relations and announced the elements of a prima facie tort in recent case law.<sup>26</sup> To recover for interference with contractual relations in Massachusetts, a plaintiff must prove: the plaintiff had an existing contract with a third party, the defendant knew of the contract, the defendant intentionally interfered for an improper purpose or by improper means, and the interference caused harm to the plaintiff.<sup>27</sup>

### A. *Existence of a Contract*

The existence of a contract with a third person is the first element that the plaintiff must prove.<sup>28</sup> Courts will look at the express and implied terms of the contract to determine whether the plaintiff has an enforceable right.<sup>29</sup> Courts will look at the team's season ticket marketing practices to determine if those marketing practices implied that an athlete would perform.<sup>30</sup>

To bring an action based on an advertising's representations, the plaintiff must show that he knew of the advertising and that he relied on the representations in that advertising when he purchased the ticket.<sup>31</sup> In *Strauss v. Long Island Sports, Inc.*<sup>32</sup>, in response to an investigation into consumer fraud claims, the Attorney General of New York and the New Jersey Nets reached an agreement to compensate fans who purchased tickets based on the team's advertising.<sup>33</sup> The team agreed to a rebate for ticket holders' who purchased tickets "solely on the basis that Julius Erving would play for the Nets."<sup>34</sup>

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<sup>26</sup> See *Shafir v. Steele*, 727 N.E.2d 1140, 1143 (Mass. 2000) (recognizing Section 766, Restatement (Second) Torts, as Massachusetts law).

<sup>27</sup> See *Swanset Dev. Corp. v. Taunton*, 668 N.E.2d 333, 338 (Mass. 1996) (listing prima facie elements for intentional interference with contractual relations).

<sup>28</sup> See *American Private Line Servs., Inc. v. Eastern Microwave, Inc.*, 980 F.2d 33, 36 (1st Cir. 1992) (finding no claim where failure to prove existence of contract); *United Truck Leasing Corp. v. Geltman*, 551 N.E.2d 20, 21 (Mass. 1990); See generally Jeffrey C. Melick, *Tortious Interference with Business Relations*, MASSACHUSETTS TORT LAW MANUAL ch. 13 (1999) (outlining prima facie elements).

<sup>29</sup> See Melick, *supra* note 28, § 13.2.1(a) (recognizing contract formation through oral or written, express or implied terms).

<sup>30</sup> See *Strauss*, 401 N.Y.S.2d at 234.

<sup>31</sup> See *id.* at 235. The *Strauss* Court stated, "[i]t is elementary that in any action based upon representations in advertising...the plaintiff must prove knowledge of, and reliance upon, the representation alleged." *Id.*; See also *Yashin*, 186 D.L.R.4th at 767 (finding plaintiff's failure to show advertising intended to induce purchase fatal to claim).

<sup>32</sup> 401 N.Y.S.2d 233 (N.Y. App. Div. 1978).

<sup>33</sup> See *Strauss*, 401 N.Y.S.2d at 234. The team had promoted its star player, Julius Erving ("Dr. J."), during its season ticket marketing campaign. *Id.* The advertisements invited fans to come and see Dr. J play at Nets games. *Id.*

<sup>34</sup> See *id.* at 234 (outlining terms of 10 percent rebate to ticket holders). The agreement required the ticket holders to sign an affidavit stating that (a) the tickets were

The *Strauss* court, however, questioned the extent it could presume that the fans relied on the defendant's advertising.<sup>35</sup> The problem the *Strauss* court found with the plaintiff's claim was that the plaintiff was unable to prove reliance beyond a naked presumption.<sup>36</sup> The court reasoned that the plaintiffs' circumstances did not warrant a presumption they saw and/or relied on the team's advertising.<sup>37</sup> Massachusetts recognizes the power of advertising by constructing express warranties where advertising statements are the basis of a consumer's bargain.<sup>38</sup>

### B. Defendant's Knowledge

The second element necessary to sustain a claim is the stranger's knowledge of the contract.<sup>39</sup> The requirement of knowledge is necessary to limit the broad range of potential plaintiffs in this tort.<sup>40</sup> Without requiring the defendant's knowledge of an existing contract, the number of persons claiming to be harmed by the defendant's actions could become endless.<sup>41</sup> Persons who were never in contemplation of the parties but who were affected by efficient breaches would find themselves in a position to bring an action.<sup>42</sup>

If a stranger does not have knowledge of the contract, then he cannot intentionally interfere with contract.<sup>43</sup> Intent requires that the result

purchased in reliance on Julius Erving playing for the team; (b) the tickets were purchased for personal use only; and (c) the Nets would be released from any other claims. *Id.*

<sup>35</sup> See *id.* at 238. "In this age of 'team-jumping ballplayers' and 'renegotiated' athletic contracts, the risk that Dr. J might not be playing for the Nets might 'fairly be regarded as within the risks that (a purchaser) assumed under the contract.'" *Id.*

<sup>36</sup> See *id.* at 236 (citing cases in which presumption reliable). "[B]y no stretch of the imagination may one comfortably presume that a majority of season ticket holders purchased in reliance on the Nets' newspaper advertising." *Id.*

<sup>37</sup> See *Strauss*, 401 N.Y.S.2d at 236. The court found the fact that fans purchased tickets over several months was not enough to create a presumption that those fans relied on the seven days of newspaper advertising promoting Dr. J. *Id.*

<sup>38</sup> See *Stuto v. Corning Glass Works*, CIV. A. No. 88-1150-WF, 1990 WL 105615, at \*5 (D. Mass. July 23, 1990) (recognizing creation express warranties through statements in advertising). The *Stuto* court recognized that many courts and the U.C.C. find that if a buyer relies on the statements in advertising as a basis of the bargain, then the advertisement will have created an express warranty. *Id.*

<sup>39</sup> See *Swanet Dev. Corp. v. Taunton*, 668 N.E.2d 333, 338 (Mass. 1996); See also *Melick*, *supra* note 28 (citing *Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 821 (1st Cir. 1948)).

<sup>40</sup> See *Perlman*, *supra* note 18, at 76-77 (noting intent requirement sets plaintiff's injuries apart from more remote injuries resulting from defendant's actions). The number of potential plaintiffs becomes smaller when the plaintiff is required to show that the third party knew of the contract. *Id.*

<sup>41</sup> See *Perlman*, *supra* note 18, at 76-77.

<sup>42</sup> See *id.*

<sup>43</sup> See *KEETON ET AL.*, *supra* note 1, at 994 (stating intentional interference presupposes knowledge of plaintiff's interest); see also *RESTATEMENT (SECOND) OF TORTS*,

was substantially certain to occur and that the actor either desired the result or knew the result would occur.<sup>44</sup> The defendant, therefore, need only know that the contract exists and that he is interfering with its performance; he need not be aware of the legal consequences inured to the contract.<sup>45</sup> In Massachusetts, knowledge is imputed to the defendant if the circumstances indicate that he should have known of the existence of the contract.<sup>46</sup>

### C. Use of Improper Motive or Means

The American Law Institute adopted the requirement of improper purpose or means as a measure to limit the number of colorable complaints.<sup>47</sup> When the tort was first pronounced in *Lumley*, the judges stressed the malicious intent of the wrongdoer as an element of the action.<sup>48</sup> Malice, however, is not the touchstone of the tort.<sup>49</sup>

Like most modern courts, Massachusetts eschewed the malice requirement in establishing a prima facie case of intentional interference.<sup>50</sup> Instead, Massachusetts requires that the intentional interference be improper in motive or means.<sup>51</sup> Massachusetts explained that the standard for improper motive or means includes those that are wrongful by "statute or other regulations or a recognized rule of common law or perhaps an established standard of trade or profession."<sup>52</sup> Furthermore, Massachusetts recognizes those acts outlined as improper in the Restatement (Second) of Torts section 767.<sup>53</sup>

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§ 766 cmt. i (1977) (stating stranger's knowledge necessary for liability).

<sup>44</sup> See RESTATEMENT (SECOND) OF TORTS § 8A (1979).

<sup>45</sup> Cf. RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (1977). "It is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty . . ."

*Id.* <sup>46</sup> See Mellick, *supra* note 28 (citing *Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 821 (1st Cir. 1948)).

<sup>47</sup> See Perlman, *supra* note 18, at 71.

<sup>48</sup> See generally *Lumley*, 118 Eng. Rep. 749 (finding defendant acted maliciously); see also KEETON ET AL., *supra* note 1, at 977 (noting emphasis upon malice of defendant in *Lumley*).

<sup>49</sup> See RESTATEMENT (SECOND) OF TORTS § 766 cmt. s (1977) (finding malice only one type of interference and not requisite); see also KEETON ET AL., *supra* note 1, at 979 (observing "malice" as requisite for improper motive dropped from cases).

<sup>50</sup> See *United Truck Leasing*, 551 N.E.2d at 22 (observing malice not element of tortious interference with contractual relations in Massachusetts).

<sup>51</sup> See *id.* at 23 (accepting improper motive or means as element of tortious interference with contractual relations). In *United Truck Leasing*, the court held that there was no interference with contractual relations where the defendant's motive included, *inter alia*, benefiting himself financially rather than hurting the plaintiff. *Id.* at 24.

<sup>52</sup> See *United Truck Leasing*, 551 N.E.2d at 23.

<sup>53</sup> See *id.* at 24 (recognizing section 767 as helpful in determining impropriety of interference). Section 767 reads:

The nature of the actor's conduct is one of the factors to consider when considering the propriety of the interference.<sup>54</sup> There is no legitimate privilege to interfere where the purpose of the interference is to exert economic pressure on another.<sup>55</sup> The Restatement Massachusetts considers, *inter alia*, economic pressure as an improper means of interference with a contract.<sup>56</sup> Considering the circumstances in which the pressure is exerted, the actor's objective, and the reasonableness of the pressure as a means to achieving that objective, will aid the court in determining the propriety of economic pressure.<sup>57</sup>

#### IV. ANALYSIS

##### *A. Why the Tort Applies to the Season-Ticket Holder*

The season-ticket holder's right to bring an action in tort against a breaching athlete is created when the ticket holder enters into a contract

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interest of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

RESTATEMENT (SECOND) OF TORTS § 767 (1979).

<sup>54</sup> See RESTATEMENT (SECOND) OF TORTS § 767 (1979).

<sup>55</sup> See Keeton ET AL., *supra* note 1, at 1001 (finding less privilege where objective to pressure plaintiff into complying with defendant's collateral matter). Prosser gives examples of this type of pressure as including, *inter alia*, forcing compromise to a claim or extorting money. *Id.*

<sup>56</sup> See *Hanna Paper Recycling v. ZBR Pub., Inc.*, No. 870891, 1994 WL 879724 at \*3 (Mass. Super. Feb. 3, 1994) (considering Section 767's definition of economic pressure in evaluating propriety of actor's conduct).

<sup>57</sup> See *id.* at \*3 (*quoting* the Restatement (Second) of Torts, section 767 cmt. c (1979)). section 767 states, in pertinent part:

In light of the circumstances in which it is exerted, the object sought to be accomplished by the actor, the degree of coercion involved, the extent of the harm that it threatens, the effect upon the neutral parties drawn into the situation . . . and the general reasonableness of and appropriateness of this pressure as a means of accomplishing the actor's objective.

Restatement (Second) of Torts § 767 cmt. c (1979).

with a professional sports franchise to purchase season tickets.<sup>58</sup> The agreement between the ticket holder and the team creates an intangible property interest in the product the team is purporting to field.<sup>59</sup> An athlete's refusal to perform under the terms of his or her existing contract interferes with the quality and value of the product by diminishing the team's overall attractiveness and, arguably, on-field performance, particularly when that athlete is one of the team's elite.<sup>60</sup> If the terms of the season ticket contract include a promise to deliver the performance of a particular athlete, then that athlete's decision not to perform will frustrate the team's ability to deliver the product as promised and, therefore, cause a breach.<sup>61</sup> By frustrating the team's ability to deliver the product, the athlete has interfered with the contract between the team and the ticket holder.<sup>62</sup>

The ticket holder may attempt to recover damages from the team for breach of contract.<sup>63</sup> The team, however, has breached through no fault of its own because the breach was actually caused by the athlete's refusal to perform under the terms of his or her valid and existing contract.<sup>64</sup> Under the doctrine of impossibility, the team will be excused from providing the season-ticket holder with the promised product.<sup>65</sup> The ticket holder, therefore, has no actionable contract claim against the team.<sup>66</sup> The ticket holder is left in a position where the property right created by his contract with the team has been damaged through the improper acts of the athlete, yet he has no cause of action under contract law.<sup>67</sup>

The tort of interference with contractual relations provides the season ticket holder with a remedy where he would otherwise have none.<sup>68</sup>

<sup>58</sup> See *supra* note 17 and accompanying text (observing right of aggrieved party to seek damages against strangers not respecting contract).

<sup>59</sup> See *supra* note 16 and accompanying text (discussing property right created by contractual agreements).

<sup>60</sup> See PAUL D. STAUDOHAR, *PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS* 33 (Cornell University Press 1996) (noting correlation between winning teams and highly paid athletes). Staudohar notes the positive relationship between highly paid athletes and their superior performance and the positive relationship between high-salaried and winning teams. *Id.*

<sup>61</sup> See *supra* note 22 and accompanying text (discussing frustration of contract performance).

<sup>62</sup> See *supra* note 22 (identifying frustration as type of interference).

<sup>63</sup> See *supra* note 18 and accompanying text (recognizing rights against breaching parties for damages caused by breach).

<sup>64</sup> See *supra* note 21 and accompanying text (finding breaching parties unaccountable where performance frustrated by unforeseeable events).

<sup>65</sup> See *supra* note 21 and accompanying text (explaining doctrine of impossibility).

<sup>66</sup> See *supra* note 18 and accompanying text (discussing instances where contract remedies fail).

<sup>67</sup> See *id.*

<sup>68</sup> See *supra* notes 18 and 22 and accompanying text (explaining purpose of interference tort intended to reconcile failure of contract remedies).

In a situation such as this, the tort's value is evident because it affords the ticket holder a right of action against the athlete.<sup>69</sup> Instead of being left with a diminished property value and no cause of action, the ticket holder is now in a position to recover against the athlete if he can establish a prima facie case of intentional interference.<sup>70</sup>

*B. The Burden of the Season Ticket Holder: Establishing a Prima Facie Case*

1. Existing Contract

Perhaps the most difficult element for the season ticket holder to prove is that the player's appearance was a term of the contract with the team because the ticket holder must adduce evidence that the player's appearance on the team was part of the basis of the bargain.<sup>71</sup> The ticket holder must demonstrate that he knew of the advertising and relied on its representations when making his decision to purchase the tickets.<sup>72</sup> Although the *Strauss* court rejected the particular season ticket holder's claims of reliance on advertising in that case, it did not deny the possibility that advertising does create implied terms of a contract.<sup>73</sup>

A closer look at the motivations behind advertising in professional sports reveals team strategies of promoting star players as a means of inducing fans to purchase season tickets.<sup>74</sup> The economics of sports dictate the necessity of generating revenue through, among other things, fan attendance at sporting events.<sup>75</sup> A direct correlation is seen between the quality of the and fan attendance.<sup>76</sup> It is incumbent upon teams, therefore, to gather a collection of the best players possible in order to sustain fan interest and excitement.<sup>77</sup> Without the fan support at the gates, the sports

<sup>69</sup> See *supra* note 18 and accompanying text.

<sup>70</sup> See *supra* note 27 and accompanying text (identifying elements of interference tort).

<sup>71</sup> See *id.*

<sup>72</sup> See *supra* note 21.

<sup>73</sup> See *supra* notes 36-37 and accompanying text (stating reasons why ticket holders' claim failed in this particular case).

<sup>74</sup> See *supra* notes 33 and accompanying text (demonstrating instances where teams promote their star player).

<sup>75</sup> See PAUL D. STAUDOHAR & JAMES A. MANGAN, *THE BUSINESS OF PROFESSIONAL SPORTS* 6 (Paul D. Staudohar & James A. Mangan eds., University of Illinois Press 1991) (discussing ticket sales as main source of revenue).

<sup>76</sup> See ROGER G. NOLL, *THE BUSINESS OF PROFESSIONAL SPORTS* 31 (Paul D. Staudohar & James A. Mangan eds., University of Illinois Press 1991) (stating financial success of team depends on quality of team).

<sup>77</sup> See generally NOLL, *supra* note 76 (discussing importance of gate receipts and signing of marquee players to increase those receipts).

franchise will remain economically viable.<sup>78</sup> Furthermore, athletes are benefiting themselves by performing in front of paying fans and creating interest in the team.<sup>79</sup>

The season ticket holder's case is strengthened if he can create a presumption that his purchase was based on the advertising campaign.<sup>80</sup> To do this, he will need to show that he had knowledge of the advertising when he purchased the tickets.<sup>81</sup> A court is more likely to find the plaintiff had knowledge of the advertising if he can show that the campaign ran over an extended period of time in a highly visible manner.<sup>82</sup> This increases the likelihood that he saw the advertising and that it was a basis of the bargain.<sup>83</sup>

## 2. Knowledge

To show that the athlete intentionally interfered with the plaintiff's contract, the athlete must have had knowledge of the existence of the season ticket contract.<sup>84</sup> This prima facie element should not be difficult for any season ticket holder to prove.<sup>85</sup> The ticket holder must simply show that, based on the circumstances, the athlete should have known that the team enters into season ticket contracts with fans and that the team promotes the athlete as a reason to come and see the team perform.<sup>86</sup> The athlete need not be aware that the failure to perform will have legal consequences with respect to the season ticket holder.<sup>87</sup> It is axiomatic that if the fan sees and relies on advertising representations then it is likely that the athlete also knows of both the existence of those advertisements and that they promote him as a part of the team.

Concerns that this tort may be overreaching are unwarranted in these circumstances.<sup>88</sup> The tort limits the scope of recovery to the season

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<sup>78</sup> See *supra* note 76.

<sup>79</sup> See NOLL, *supra* note 76, at 39. "By agreeing to restrictions on the competition for players, goes the argument, players are advancing their own interests by improving fan interest in the game and preserving well-paid jobs for all." *Id.*

<sup>80</sup> See *supra* note 37 and accompanying text.

<sup>81</sup> See *supra* note 34 and accompanying text.

<sup>82</sup> Cf. *supra* note 37 and accompanying text (rejecting claims where advertising lasted only seven days).

<sup>83</sup> See *supra* note 38 and accompanying text (discussing reliance on advertising as basis of bargain).

<sup>84</sup> See *supra* notes 39 and 43 and accompanying text.

<sup>85</sup> See *Developments in the Law -- Competitive Tort: Interference with Contractual Relations*, *supra* note 22, at 960 (finding knowledge requirement poses few legal problems).

<sup>86</sup> See *supra* note 46 and accompanying text (imputing knowledge on defendant where circumstances indicate defendant should have known of contract).

<sup>87</sup> See *supra* note 45 and accompanying text (finding appreciation of legal significance not requirement of interference tort).

<sup>88</sup> See *supra* note 40 and accompanying text (discussing potentially large number of

ticket holder by requiring that the athlete know that a contract between the season ticket holder and team exists.<sup>89</sup> Those not in a comparable position of the season ticket holder will be unable to recover because the athlete will not have knowledge of their contract.<sup>90</sup> The number of potential plaintiffs, therefore, is limited.<sup>91</sup>

### 3. Improper Means or Motive

A court also must find the athlete's objective and means in which he hoped to achieve that objective were improper.<sup>92</sup> The athlete need not intend to harm the season ticket holder to have an improper means.<sup>93</sup> But where an athlete refuses to perform until his contract is renegotiated, he is improperly using economic pressure to achieve his objective.<sup>94</sup>

By refusing to perform, the athlete is, in essence, forcing the team into a compromise that requires them to pay the athlete more money or risk a season that does not live up to expectations.<sup>95</sup> When seasons do not live up to expectations, fans become disenchanted and often stop attending games, directly affecting the team's revenue.<sup>96</sup> Such an action, therefore, is an improper means of interference.

## V. CONCLUSION

This discussion is not intended to be exhaustive on the issue of tort actions for interference with contractual relations. Rather, it is a cursory look at how one might proceed with such a claim and why it is proper to do so in the event of an athlete's breach. Having established the prima facie case of the interference tort, the season ticket holder may very well have a cause of action against a breaching athlete. Moreover, the season ticket holder deserves this cause of action because he has lost property value due to the intentional acts of another. The tort of intentional interference with contractual relations not only provides a useful remedy for sports fans who

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plaintiffs without knowledge requirement).

<sup>89</sup> See *supra* note 40 and accompanying text (discussing knowledge requirement's limiting effect on number of potential plaintiffs).

<sup>90</sup> See *id.*

<sup>91</sup> Cf. *supra* note 18 and accompanying text.

<sup>92</sup> See *supra* note 57 and accompanying text.

<sup>93</sup> See *supra* note 50 and accompanying text (observing maliciousness not necessary to establish improper means).

<sup>94</sup> See *supra* note 55 and accompanying text (stating economic pressure to force compromise type of improper means).

<sup>95</sup> See *supra* note 76 and accompanying text.

<sup>96</sup> See *supra* note 75 - 76 and accompanying text (recognizing correlation between noncompetitive teams and low attendance rates); see also *supra* note 74 and accompanying text (discussing ticket sales as main revenue source).

feel wronged, it acts to deter contractual breaches by professional athletes who would otherwise refuse to perform their valid contracts, thus stabilizing the economic landscape of the sporting industry.

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