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In Search of a Smoking Gun: Tortious Interference with Nondisclosure Agreements as an Obstacle to Newsgathering

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COMMENT

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I. INTRODUCTION

In early November 1995, management at CBS, on the advice of in-house counsel, prohibited the news magazine show *60 Minutes* from broadcasting an interview with Dr. Jeffrey Wigand, a former vice-president of the tobacco company Brown & Williamson.[1] The evening the interview was to have been broadcast, correspondent Mike Wallace explained on air that CBS feared liability for inducing Wigand to breach a confidentiality agreement that Wigand had signed upon departing the company. Despite *60 Minutes*'s spotless legal record over twenty-seven years of investigative reporting,[2] lawyers for CBS worried that the network might be liable for tortiously interfering with the contractual relationship between Wigand and Brown & Williamson because it had extracted from Wigand information protected by the confidentiality agreement.

Though the timidity shown by CBS seems misplaced,[3] the fact that a media institution as prominent and venerable as *60 Minutes* chose to refrain from broadcasting an important interview because of fears of liability for tortious interference means that this potential source of media liability merits some examination. Indeed, the assumption that fear of liability for activity on the boundaries of First Amendment protection would "chill" speech at the core of those values seems to be one of the driving forces that has historically led the Supreme Court to protect expression and activity that might be of dubious political value.[4] The decision by CBS seems to be the paradigmatic case for this concern: worried about potential liability for

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1. Wigand is a biochemist and endocrinologist who was Vice-President of Research and Development at Brown & Williamson until March 24, 1993. 215 N.Y. L.J. 26, 26 (1996). Wigand also spoke with officials of the Food and Drug Administration. *60 Minutes: How He Won the War* (CBS television broadcast, Dec. 8, 1996), *available in* 1996 WL 8065061 [hereinafter *60 Minutes*].

2. Bill Carter, *'60 Minutes' Explains why Show Backed off*, ORANGE COUNTY REG. (Cal.), Nov. 14, 1995, at F05.

3. According to *Newsday*, libel specialists apparently are unaware of a case in which a media defendant has been held liable for speaking to a party to a nondisclosure agreement. *The Eye Blinks at '60 Minutes': Censorship of Tobacco Expose Harms Everyone*, NEWSDAY, Nov. 14, 1995, at B03. Some have speculated that it is not a coincidence that the timidity displayed by CBS executives came at the same time that CBS shareholders were preparing to vote on a $5.4 billion takeover of the company by Westinghouse Electric Corp. *See, e.g.*, Howard Kurtz, *CBS Bows to Tobacco Clout, Cuts '60 Minutes' Segment*, BUFFALO NEWS, Nov. 10, 1995, at A13. Indeed, the president of CBS News and the company's general counsel stood to gain $1.46 and $1.19 million, respectively, through the cashing out of stock options if the deal went through. *Id.*

4. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 148 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); NAACP v. Button, 371 U.S. 415, 433 (1963).

a newsgathering technique of at least possibly questionable legality, CBS decided not to broadcast a story of unquestionable public importance that undoubtedly would have been protected speech had the source not been a party to a nondisclosure agreement.[5] If the courts were to impose liability on and significant damages against the press for speaking with parties to a nondisclosure agreement, potential wrongdoers that did not want their affairs made public would have every incentive to require their employees or agents to sign such agreements, and the press, fearing liability, may be greatly handicapped in its role of gathering and reporting information of public significance.[6]

Though implications for the press are general, for analytical purposes, this Comment will use the CBS/Wigand affair as its model. Part II briefly examines the historical grounding and elements of the cause of action known as tortious interference with contract and discusses how the interview with Dr. Wigand might be considered to have been tortious.[7] Part III analyzes the application of the tortious interference doctrine to nondisclosure agreements and newsgathering in light of existing First Amendment jurisprudence relating to libel and other causes of action. Part IV discusses the First Amendment right to petition under the *Noerr-Pennington* doctrine and as applied in *Sierra Club v. Butz*[8] to tortious interference. Part V then explores how the resulting standard might be applied to "Wigand cases."[9] Part VI concludes that the press enjoys significant protection from

5. This assertion assumes, for the purpose of this Comment, that the story Wigand told, and that CBS considered broadcasting, was substantially true, or at the very least, CBS would not have been liable under the "actual malice" standard of *New York Times*, 376 U.S. 254, and that Brown & Williamson qualifies as a public figure under *Curtis Publishing*, 388 U.S. 130. In addition, see *infra* note 58 and accompanying text.

6. The Author assumes, for the purposes of this Comment, that newsgathering is constitutionally protected activity under the First Amendment. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) (declaring that the First Amendment prohibits government from "limiting the stock of information from which members of the public may draw"); Branzburg v. Hayes, 408 U.S. 665, 681 (1972); Sandra S. Baron et al., *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027, 1053-55 (1996).

7. The primary purpose of this Comment is to suggest how First Amendment principles might be applied to cases such as that involving *60 Minutes*. For an excellent articulation of common law defenses to a tortious interference claim in this context, see Baron et al., *supra* note 6. For further discussion of common law defenses as well as some other First Amendment analysis, see William Bennett Turner, *News Media Liability for "Tortious Interference" with a Source's Nondisclosure Contract*, 14 COMM. LAW. 13 (1996); Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL RTS. J. 1069, 1101-09 (1996).

8. *Butz*, 349 F. Supp. 934 (N.D. Cal. 1972).

9. Attempts to hold the press liable for tortious interference for speaking to a party to a nondisclosure agreement will hereinafter be referred to as "Wigand cases" or "Wigand liability."

Wigand liability under existing principles deriving from libel cases and suggests that these principles support and are consistent with a proposed standard of liability for Wigand cases based on the *Noerr-Pennington* doctrine as applied in *Butz*.

II. TORTIOUS INTERFERENCE WITH CONTRACT

A. Overview

The basic formulation of the doctrine of tortious interference with contract is that a party that intentionally and improperly interferes with the performance of a contract between two other parties[10] by inducing or causing one party not to perform may be liable to the other party for its pecuniary loss resulting from the nonperformance.[11] At common law, liability was originally based on conduct by the defendant that was itself tortiously directed toward the third party or plaintiff, such as when the defendant used violence or fraud to prevent the third party from performing.[12] However, the decision in *Lumley v. Gye*[13] is commonly seen as the starting point of the development of the interference itself as a separate tort, even if the defendant's conduct would not otherwise be tortious. In *Lumley*, the defendant was a theater operator who induced a singer under contract to sing at the plaintiff's theater to break her contract with the plaintiff and sing for the defendant. The plaintiff did not allege that the defendant had employed otherwise tortious conduct in persuading the singer to breach her contract, but the court found for the plaintiff nevertheless.[14] Today, the tort is most commonly alleged in this kind of commercial context, where one competitor has induced a third party, such as a supplier or buyer, to breach a contract with a rival firm or individual.[15]

Imposing liability for interference based on conduct that is not independently tortious is arguably justified on the grounds that the plaintiff is injured by the third party's breach, regardless of the means by which the defendant induced it.[16] However, the plaintiff's right to compensation is

10. Hereinafter, the party potentially subject to liability will be referred to as the "defendant," the allegedly injured party as the "plaintiff," and the other, nonperforming party to the contract as the "third party."

11. *See* RESTATEMENT (SECOND) OF TORTS § 766 (1977).

12. *Id.* § 766 cmt. c.

13. *Lumley*, 118 Eng. Rep. 749 (1853).

14. *Id.*

15. *See, e.g.*, Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. App. 1987) (reviewing a jury award totaling $10.53 billion on Pennzoil's tortious interference claim against Texaco).

16. RESTATEMENT (SECOND) OF TORTS § 766 cmt. c (1977). Note, however, that the

not absolute. Rather, it must be balanced against the defendant's interest in freedom of action and the social interest in allowing the defendant's conduct.[17] Thus, no liability for tortious interference should be imposed in a Wigand case if the interests of the media and society in a free press are found to outweigh a corporation's interest in enforcing a nondisclosure agreement, and the media's conduct in inducing a Wigand source is not otherwise improper.[18]

The validity of the contract at issue is not dispositive. The contract must be in force at the time of the breach caused by the defendant and be applicable to the particular performance that the third party has been induced not to complete, but it is not required that the contract be legally enforceable against the third person.[19] The third party must have already breached the contract and exercised his defense before the defendant may "interfere" without risk of liability, even if the contract was not enforceable against the alleged third-party breacher in the first instance.[20] In other words, though Wigand might have had a First Amendment or other defense to an action for breach of contract brought by Brown & Williamson,[21] CBS still might have been exposed to liability for inducing him to breach his nondisclosure agreement under common law doctrine.

B. *Elements of Tortious Interference*

In order to be liable for tortious interference, the defendant must have induced the third party to breach his contract with the plaintiff. Inducement operates on the mind of the third party and can consist of mere persuasion.[22] Furthermore, the defendant must have knowledge of the existence

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plaintiff may not collect damages for the breach from both the defendant and the third party. *Id.* § 774A(2). Thus, it would seem that an action for breach of contract against the third party would be easier to maintain and sufficient to make the plaintiff whole in most cases where the third party is not judgment proof. In those cases where the third party breacher is judgment proof, tortious interference seems akin to the unjust enrichment doctrine in equity on the theory that the defendant should not be allowed to benefit from the plaintiff's loss. If unjust enrichment concerns are in fact the underlying justification for tortious interference liability where the defendant's conduct is not otherwise tortious, then such liability seems particularly inappropriate in Wigand cases.

17. *Id.* § 766 cmt. c ("The issue is whether in the given circumstances [the defendant's] interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce. In deciding this issue, the nature of his conduct is an important factor.").

18. *See* Baron et al., *supra* note 6, at 1041-51.

19. RESTATEMENT (SECOND) OF TORTS § 766 cmt. f.

20. *Id.*

21. Wigand has been sued by Brown & Williamson, and CBS is paying his expenses in the litigation. *60 Minutes*, *supra* note 1.

22. RESTATEMENT (SECOND) OF TORTS § 766 cmt. h.

of the contract and that the conduct that he encourages the third party to undertake will be in breach of the contract.[23] As noted above, the defendant may be held liable if he has knowledge of the contract, even if he believes that the contract is not legally binding.[24] Finally, though ill will and malice on the part of the defendant are not necessary elements of liability,[25] the defendant must have the intent and purpose of interfering with the contract. This means that the defendant is liable if he acts "for the primary purpose of interfering with the performance of the contract" or "knows that the interference is certain or substantially certain to occur as a result of his action."[26] However, the defendant is not liable if he is approached by the third party and accepts an offer from the third party that he knows to be inconsistent with the third party's performance of his contract with the plaintiff.[27]

Thus, in the Wigand case, if *60 Minutes* approached Wigand, knew of his nondisclosure agreement, and persuaded him to consent to an interview, then CBS met the intent and purpose prong of the tort. After all, the purpose of the nondisclosure agreement between Brown & Williamson and Wigand was to prevent disclosure of precisely the type of information that he revealed in the interview with Mike Wallace, and Wallace's purpose was clearly to obtain and broadcast that information. CBS knew that Wigand could not speak to Wallace and simultaneously perform his contract with Brown & Williamson.[28] On the other hand, if Wigand initially approached *60 Minutes* and offered to tell his story, CBS might not have been liable even if it knew of the nondisclosure agreement.[29] Nevertheless,

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23. *Id.* § 766 cmt. i.

24. *Id.*

25. *Id.* § 766 cmts. r-s.

26. *Id.* § 766 cmt. j. Note, however, that the incidental nature of the defendant's interference should be taken into account in evaluating the propriety thereof. *Id*; *see also infra* notes 30-38 and accompanying text.

27. RESTATEMENT (SECOND) OF TORTS § 766 cmt. n.

28. Technically, CBS interfered with the contract between Brown & Williamson and Wigand solely by virtue of Wallace conducting the interview with Wigand, for it was by participating in that interview and revealing information about Brown & Williamson's internal matters that Wigand breached his nondisclosure agreement. Thus, the decision not to broadcast the interview did not absolve CBS of *liability* for speaking to Wigand. However, broadcasting the interview might have substantially increased the damages that Brown & Williamson could collect, thereby significantly strengthening Brown & Williamson's incentive to sue and the threat to CBS's viability should it lose the suit. *But see infra* notes 127-133 and accompanying text on the issue of damages.

29. Indeed, one author has written:

> It is not clear that the program's involvement was the proximate cause of [Wigand's] breach. The employee had become disenchanted with his employer's business months before the interview and apparently was eager to speak to the media. It is entirely possible that the employee would have breached in any case,

this distinction is hardly satisfactory to preserve the information seeking and gathering role of the press, for in effect it would shield the press from liability only when it is the passive recipient of information.

A finding of liability on the part of the defendant is often based largely on a determination as to the propriety or impropriety of his conduct in interfering with the contract. Courts examine a variety of factors in making this determination, including the nature of the defendant's conduct and his motive, the interests of the plaintiff, the interests sought to be advanced by the defendant, the social interests in protecting the freedom of action of the defendant, the contractual interests of the plaintiff, the proximity or remoteness of the defendant's conduct to the interference, and the relations between the parties.[30]

In most Wigand cases, the plaintiff's interests in preserving the integrity of its contractual relations, the defendant's interests in interfering with those relations, and society's interest in protecting each party's interests must be weighed against each other. This should result in the media avoiding liability. This is especially true if the balance is conceived of as a contest between the interest of the press and society in preserving the role of the press in providing information to the public on matters of great public concern versus the interest of a corporation and society in concealing such information. Indeed, the invitation to find that the "conduct should be permitted without liability, despite its effect of harm to another"[31] seems expressly to allow a court to find that, as a matter of law, speaking to an individual bound by a nondisclosure agreement in the course of legitimate newsgathering is per se not improper interference. Moreover, the invitation to examine the defendant's motive seems to favor a member of the press seeking to inform the public, in contrast to a competitor of the plaintiff seeking only to acquire trade secrets or damage Brown & Williamson in order to improve its own business position.[32]

The common law of tortious interference also recognizes that some contractual interests should receive greater protection than others. The *Restatement (Second) of Torts* (*Restatement*) explicitly states:

> [T]he fact that a contract violates public policy, as, for example, a contract in unreasonable restraint of trade, or that its performance will enable the party complaining of the interference to maintain a condition that shocks the public conscience . . . may justify an inducement

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or indeed that he already had, and that '60 Minutes' was merely the conduit through which the employee chose to make the breach public.

James C. Goodale, *"60 Minutes" v. Vice Versa*, 24 N.Y. L.J. 3, 4 (1995).

30. RESTATEMENT (SECOND) OF TORTS § 767 (a)-(g).

31. *Id.* § 767 cmt. b.

32. *See id.* § 767 cmt. d; *see also* Baron et al., *supra* note 6, at 1035-37; *infra*, Part V.

of breach that, in the absence of this fact, would be improper.[33]

Thus, a court could find that performance of the nondisclosure agreement between Wigand and Brown & Williamson would enable Brown & Williamson to "maintain a condition that shocks the public conscience" because respecting Brown & Williamson's contractual rights would allow it to conceal information important to public health.[34]

In addition to recognizing that some contractual interests merit less protection than others, the *Restatement* notes that "In some cases the [defendant] may be seeking to promote not solely an interest of his own but a public interest. The [defendant] may believe that certain practices used in another's business are prejudicial to the public interest."[35] If the defendant seeks to protect the public from such practices by preventing the third party from performing a contract, the *Restatement* sets out several questions to be asked in determining the propriety of the defendant's interference. These include whether the practices are actually being used by the plaintiff, whether the defendant actually believes that the practices are prejudicial to the public interest, whether his belief is reasonable,[36] whether he is acting in good faith for the protection of the public interest,[37] whether the contractual relation involved is incident or foreign to the continuation of the practices, and whether the defendant employs wrongful means to accomplish the result.[38]

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33. *Id.* § 767 cmt. e; *see also id* § 774A.

34. *Id.* § 767 cmt. e. A court, in making such an "as applied" determination of the propriety of the nondisclosure agreement would not need to find that such agreements are per se violative of public policy, such as when they are used to prevent sources such as Wigand from speaking with a competitor. Indeed, society's interest may weigh in on the side of preventing a company from discovering the "internal affairs" of a competitor, especially if such information might include, for example, the process for artificially elevating the nicotine level in cigarettes. *See infra* note 124.

35. RESTATEMENT (SECOND) OF TORTS § 767 cmt. f; *see also* Baron et al., *supra* note 6, at 1032-35.

36. These three questions are analogous to the standard for libel liability set out by the Supreme Court in *New York Times Co. v. Sullivan*, 379 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). The question whether the practices are actually being used parallels the libel defense of truth, and the questions about the defendant's beliefs shadow the "actual malice" standard of *New York Times*. *See infra* text accompanying note 46.

37. This question is similar to the idea underlying the "sham" exception to the *Noerr-Pennington* doctrine as set out in *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972). *See infra* note 142 and accompanying text.

38. RESTATEMENT (SECOND) OF TORTS § 767 cmt. f.

C. Damages

A defendant liable to a plaintiff for interference with a contract may be liable in damages for the pecuniary loss of the benefits of the contract,[39] consequential losses for which the interference is the legal cause,[40] and emotional distress or actual harm to reputation reasonably expected to result from the interference.[41] The fact that the third party breacher is liable for his or her breach of contract does not affect the amount of damages for which the defendant-interferer may be held liable, but any damages paid by the third party will reduce the defendant's liability correspondingly.[42] Moreover, because an action for interference with contract lies in tort, damages are not based on contract rules. Thus, it is not necessary that loss incurred by the plaintiff be "within the contemplation of the parties to the contract itself at the time it was made."[43]

As discussed in greater detail in Part IV, the availability of damages for emotional distress and harm to reputation indicate that the interference with contract tort, at minimum, should be subject to the same rigorous standard of liability that the Supreme Court has applied to libel and other torts involving speech.

III. WIGAND CASES AND THE FIRST AMENDMENT

A. Libel Law

In *New York Times Co. v. Sullivan*,[44] the United States Supreme Court constitutionalized much of the law of libel in this country. An Alabama public official brought an action for libel against the *New York Times* for publishing a paid adverstisement that allegedly contained some inaccuracies about events in Birmingham. The Court held that the First Amendment, as incorporated through the Fourteenth Amendment, limits the power of the states to impose liability for allegedly libelous speech. Specifically, the Court held that speech about a public official on a matter of public concern cannot be the basis of liability for libel unless the plaintiff shows by clear and convincing evidence that the assertions made by the defendant are false and that the defendant acted with actual malice.[45] As

39. *Id.* § 774A(1)(a).
40. *Id.* § 774A(1)(b).
41. *Id.* § 774A(1)(c).
42. *Id.* § 774A(2).
43. *Id.* § 774A cmt. d.
44. *New York Times*, 379 U.S. 254 (1964).
45. *Id.* at 279-80.

used by the Court, "actual malice" does not mean common law malice—that is, ill will—but rather that the defendant spoke with knowledge of the falsity or reckless disregard for the truthfulness of its assertions.[46]

The *New York Times* case is relevant to Wigand cases in three significant ways. First, the Court applied the reasoning of *Shelley v. Kraemer*,[47] that a civil action between two private parties can be considered to be state action for the purposes of applying the Fourteenth Amendment of the Federal Constitution. In *New York Times*, the Court wrote:

> Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedom of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.[48]

The Court's holding, that the action and judgment below in *New York Times* constituted state action that restricted First Amendment freedoms, means that at the threshold, potential plaintiffs such as Brown & Williamson in Wigand cases will not be able to avoid the application of First Amendment principles to their cause of action merely because they are private actors. The absence of a "private actor" bar to First Amendment defenses does not mean, however, that the First Amendment automatically applies. It remains to be seen if, and to what extent, First Amendment principles will have force in tortious interference claims in Wigand cases.

The second manner in which the *New York Times* decision is relevant to Wigand cases is the Court's enunciation of a strong statement of policy underlying the First Amendment. The Court asserted that the purpose of the First Amendment is to "secure 'the widest possible dissemination of information from diverse and antagonistic sources,'"[49] and that the Amendment was "'fashioned to assure unfettered interchange of ideas for the bringing about of political *and social* changes desired by the people.'"[50] These statements about the importance of First Amendment free-

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46. *Id.*

47. *Shelley*, 334 U.S. 1 (1948).

48. *New York Times*, 376 U.S. at 265.

49. *Id.* at 266 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

50. *Id.* at 269 (emphasis added) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). *But see* Jews for Jesus, Inc. v. Jewish Community Relations Council of N.Y., Inc., 968 F.2d 286, 296 (2d Cir. 1992). In *Jews for Jesus*, the defendants were sued for tortious interference after they had threatened to boycott a country club that had a contract to provide accommodations to the plaintiff in order to force the club to breach its contract with the plaintiff. *Id.* at 289. The Second Circuit held that the First Amendment was not a defense to the action because New York's tortious interference law was directed at conduct and not at speech. However, the court focused on the fact that the plaintiffs had sought to coerce the club into violating state and federal antidiscrimination statutes, analogizing to cases in which the defendants had picketed in order to force an employer to discriminate in

doms culminated in the oft-quoted passage that the Court would consider the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."[51] Finally, and perhaps most importantly for Wigand cases, the Court reasoned that "[t]he protection of the public requires not merely discussion, but information."[52]

The third reason the *New York Times* decision is important for Wigand cases is the actual malice standard itself. The truth of the information supplied to *60 Minutes* would not have been in issue in an action for tortious interference. Nevertheless, as will be discussed in greater detail hereinafter, the actual malice standard has been brought to bear on claims such as intentional infliction of emotional distress that seem equally unlikely candidates for its application.

The Court extended the application of the actual malice standard to cases involving plaintiffs who are "public figures" but who are not public officials in *Curtis Publishing Co. v. Butts.*[53] In *Rosenbloom v. Metromedia, Inc.*,[54] a plurality of the Court employed *New York Times* to create a constitutional standard based on the substantive nature of the speech at issue. Justice Brennan, writing for the plurality, stated:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[55]

The plurality concluded that "[d]rawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees."[56] This "public issue" standard did not survive long, however. Just

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hiring, to prevent implementation of a school desegregation order, or to force an employer to violate a state antirestraint of trade statute. *Id.* at 296. Moreover, the court was of the opinion that the speech involved in *Jews for Jesus* was not political speech designed to secure governmental action but a series of private communications in context of a private dispute. *Id.* at 298. In contrast, most Wigand cases would not involve reporters trying to induce sources to violate any law other than state tortious interference doctrine, and seeking to uncover information on matters of public concern is closer to core First Amendment activity than the "private dispute" in *Jews for Jesus.*

51. *New York Times*, 376 U.S. at 270.
52. *Id.* at 272 (citing Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).
53. *Butts*, 388 U.S. 130 (1967).
54. *Rosenbloom*, 403 U.S. 29 (1971).
55. *Id.* at 43.
56. *Id.* at 45.

three years later in *Gertz v. Robert Welch, Inc.*,[57] the fractured Court of *Rosenbloom* coalesced into a majority that rejected that test in favor of a public/private figure distinction. This debate over whether the appropriate test should be the nature of the issue or the person discussed has only marginal relevance to most potential Wigand cases, because courts are likely to find that corporations are public figures for the purposes of *New York Times* and *Gertz* analyses.[58]

B. *New York Times in Nonlibel Contexts*

The Supreme Court has extended the application of the *New York Times* standard beyond claims of libel. In *Hustler Magazine v. Falwell*,[59] the Court considered a claim of intentional infliction of emotional distress brought by a prominent public figure who had been the subject of an ad parody that depicted him discussing having had drunken incestuous relations with his mother. Finding that the plaintiff was a public figure for First Amendment purposes[60] and relying on a jury finding below that the ad parody could not "'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated,'"[61] the Court held that public officials and figures may not recover for the tort of intentional infliction of emotional distress by reason of publication without showing that the publication contains a false statement of fact which was made with "actual malice."[62] In other words, a public plaintiff must show that the defendant made a false assertion, with knowledge that it was false, or with reckless disregard as to whether or not it was true, in order to receive damages for intentional infliction of emotional distress based on the

57. *Gertz*, 418 U.S. 323 (1974). However, the public matter standard seems to have been revived in some form. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (holding that libel plaintiff not required to meet *New York Times*'s actual malice standard in order to be awarded punitive damages when plaintiff is a private person and the speech is on a subject of private concern); *see also* Hustler Magazine v. Falwell, 485 U.S. 46, 48, 50 (1988).

58. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Johnson, 713 F.2d 262, 273 (7th Cir. 1983); Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947 (D.D.C. 1976); Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 489 (Minn. 1985) ("It is clear . . . that in its decision in *Gertz* the [Supreme Court] was deeply responsive to the need for protection of uniquely human interests not possessed by corporations."). *But see Greenmoss Builders*, 472 U.S. at 757-58 (implying that an incorporated plaintiff is properly characterized as a "private plaintiff"). Whether or not all corporations are general purpose public figures, there can be little doubt that Brown & Williamson is a public figure for the limited purpose of the debate about tobacco in this country.

59. *Hustler*, 485 U.S. at 46.

60. *Id.* at 57 (alteration in original) (quoting app. to Petition for Cert. at C1).

61. *Id.* at 49.

62. *Id.* at 56.

defendant's publication or speech.

The Court rejected the plaintiff's contention that the speech was so outrageous as to justify imposition of a lower standard of liability on the defendant.[63] The plaintiff argued that the gravamen of the tort is the intent to cause injury, and so as long as the defendant intended to cause injury which did in fact inflict serious emotional distress, the truth or falsity of the defendant's speech is of no constitutional relevance.[64] Moreover, the plaintiff's libel claim, and corresponding claim for reputational damages, had been rejected by the courts below, but the same courts had awarded plaintiff damages for emotional distress nevertheless. Citing *Garrison v. State of Louisiana*,[65] the Court reasoned that the motive or intent of the defendant is irrelevant for First Amendment purposes. Thus, although the defendant's speech was concededly false, and probably spoken with "actual malice," the Court focused on the fact that the jury below found that the parody could not reasonably have been believed as asserting the truth in reversing the lower court's finding of damages. In a later decision, the Court indicated that its holding in *Hustler* might have been based on the belief that the plaintiff had not really suffered emotional damage as a result of the parody, but had claimed intentional infliction of emotional distress in order to be awarded reputational damages—thus avoiding the *New York Times* standard of liability.[66]

The Court, however, declined to apply *New York Times* three years later in *Cohen v. Cowles Media Co.*[67] The plaintiff, Cohen, was involved in a candidate's campaign in Minnesota's 1982 gubernatorial election when he approached reporters from two major Twin Cities newspapers and offered to provide them with information regarding a candidate in the upcoming election. Cohen required the reporters to promise that his identity would not be revealed as a condition of providing the information. The reporters so promised, and Cohen gave them public court records concerning the Democratic-Farmer-Labor party's candidate for lieutenant governor. When the two newspapers published their stories, both identified Cohen as the source of the court records and indicated his connection to the Independent-Republican campaign. Cohen was fired by his employer[68] the day the stories ran.

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63. *Id.* at 53.

64. *Id.*

65. *Garrison*, 379 U.S. 64 (1964) (holding that even speakers motivated by hatred or ill will are protected by the First Amendment from liability for civil or criminal libel).

66. Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).

67. *Id.*

68. Cohen had been employed by an advertising company. Cohen v. Cowles Media Co., 457 N.W.2d 199, 202 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991).

Though the plaintiff never raised a claim of promissory estoppel himself,[69] the Minnesota Supreme Court raised the possibility of such a claim *sua sponte* at oral arguments.[70] In its opinion, the Minnesota court addressed the promissory estoppel question and noted that, in order to make out a claim of promissory estoppel, the plaintiff would have to show that injustice could be avoided only by enforcing the promise made by the reporters.[71] The court then reasoned that the right to a free press must be considered in determining the injustice of not enforcing the promise, and, using a balancing analysis, held that enforcing the promise would violate the newspapers' First Amendment rights.[72]

On review of the promissory estoppel issue,[73] the United States Supreme Court rejected the newspapers' contention that the case was controlled by a line of cases holding that "'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'"[74] Instead, the Court held that the case was controlled by an "equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[75] As examples of such generally applicable laws, the Court cited trespass,[76] the duty to respond to grand jury subpoenas,[77] copyright,[78] the National Labor Relations Act,[79] the Fair Labor Standards Act,[80] antitrust laws,[81] and nondiscrimina-

69. *Cohen*, 501 U.S. at 666-67. The plaintiff sued the publishers of both newspapers, but alleged only breach of contract and fraudulent misrepresentation. *Id.*

70. *Cohen*, 457 N.W.2d at 204 n.5.

71. *Id.* at 204.

72. *Id.* at 205.

73. The Court rejected the respondents' claim that review should be denied because the state court had decided the case on the independent state law claims of breach of contract and fraudulent misrepresentation by reasoning that the state supreme court had raised the promissory estoppel issue itself—holding that if Cohen could recover at all, it would be on promissory estoppel theory—and may have decided the case differently on that issue had it applied the correct First Amendment analysis. *Cohen*, 501 U.S. at 667-68.

74. *Id.* at 668-69 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)); *see also* Florida Star v. B.J.F., 491 U.S. 524 (1989); Landmark Comm., Inc. v. Virginia, 435 U.S. 829 (1978). It is arguable that this line of cases would not control in a Wigand case anyway because the claim of a plaintiff such as Brown & Williamson would be precisely that CBS had obtained the information "illegally."

75. *Cohen*, 501 U.S. at 669.

76. *See* Adderley v. Florida, 385 U.S. 39 (1966).

77. Branzburg v. Hayes, 408 U.S. 665, 667 (1972).

78. Zacchini v. Scripps-Howard Brdcst. Co., 433 U.S. 562, 576-79 (1977).

79. Associated Press v. NLRB, 301 U.S. 103, 130 (1937).

80. Oklahoma Press Publ'g. Co. v. Walling, 327 U.S. 186, 192-93 (1946).

tory taxes.[82]

As a doctrine generally applicable to the transactions of all the residents of Minnesota that did not single out the press, promissory estoppel qualified as a law of general applicability.[83] Though recognizing that promissory estoppel is a state law doctrine that creates obligations never explicitly assumed by the parties in a contract,[84] the Court also reasoned that the doctrine simply requires parties to adhere to legal obligations defined and imposed by the parties themselves.[85] Therefore, the Court declined to apply *New York Times* heightened standard of liability to claims of promissory estoppel. In distinguishing *Hustler*, the Court relied on the fact that Cohen had not sought damages for injury to his reputation or emotional well-being, but only for injury resulting from the loss of his job and lowered earning capacity.[86] Therefore, the Court reasoned, Cohen had not attempted to circumvent the strict requirements for establishing a libel or defamation claim as, impliedly, the plaintiff in *Hustler* had done.[87]

C. *New York Times, Hustler, Cohen, and Wigand*

The *Hustler* and *Cohen* cases provide a useful framework for analyzing Wigand cases. Both concern liability for First Amendment activity, though one case was based on tort and the other on quasi-contract principles. Tortious interference with contract claims involving newsgathering, thereby combining tort, contract, and First Amendment principles, seem to fall neatly in the intersection between these two cases.

If Wigand cases invite application of one of the analyses employed by the Court in *Hustler* or *Cohen*, it is not immediately apparent which case should be controlling. On one hand, Wigand cases involve a tort, as did *Hustler*; on the other hand, the doctrine of tortious interference is a

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81. Citizen Publ'g. Co. v. United States, 394 U.S. 131, 139 (1969); Associated Press v. United States, 326 U.S. 1, 19 (1945).

82. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581-83 (1983); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

83. Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991).

84. *Id.* at 668.

85. *Id.* at 671. The Court contrasted this with the situation in cases like *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) by noting that in those cases the State itself defined the content of publications that would trigger liability.

86. *Cohen*, 501 U.S. at 671. The Court did not address the question as to how Cohen's earning capacity could have been lowered through means other than through damage to his reputation. There was no allegation that Cohen had suffered any lasting physical or mental impairment as the result of the newspapers' breach of promise. *See also id.* at 675 n.3 (Blackmun, J., dissenting); RESTATEMENT (SECOND) OF TORTS § 906(b) cmt. c.

87. *Cohen*, 501 U.S. at 671.

"law of general applicability" just as is Minnesota's doctrine of promissory estoppel. Scrutiny of the similarities and differences between *Hustler* and *Cohen* with an eye toward Wigand cases might reveal the most helpful analysis.

First, some words about *Hustler*. The Court's reasoning is curious, for the injury alleged in an action for intentional infliction of emotional distress is fundamentally different from that claimed in a libel action. An intentional infliction plaintiff asserts that the defendant's conduct has caused the plaintiff severe emotional distress, whereas a libel plaintiff claims that his reputation has been harmed by the defendant's speech. In other words, a libel plaintiff alleges that the defendant's speech had an effect on third parties such that the plaintiff's popular esteem was lowered, thus causing him indirect injury. In contrast, an intentional infliction plaintiff claims that the defendant's conduct or speech operated on him directly, not on third persons. The truth of the defendant's speech is not an issue. Even if the plaintiff's reputation has not been damaged, as the jury finding about the unbelievability of the parody in *Hustler* would seem to have indicated, the plaintiff claims that he has sustained damage to his own emotional well-being. For the Court's analysis to make sense,[88] the Court must have discerned some correspondence between the two torts other than the nature of the injury alleged.[89]

The key similarity might be the relatively speculative nature of the damages involved in libel and intentional infliction. In *Gertz v. Robert Welch, Inc.*, the Court was concerned about the arbitrary nature of presumed and punitive damages awarded to libel plaintiffs at common law,[90] and in *New York Times* the Court also worried that newspapers may not be

88. This argument assumes that the Court did not engage in nullification of the jury's findings as suggested by Justice White in his majority opinion in *Cohen*. Justice White implied that the reason for the Court's equation of the tort of intentional infliction of emotional distress with the tort of libel rested primarily on the Court's belief that the plaintiff had alleged intentional infliction for what was really a libel claim in order to avoid the strict requirements set out in *New York Times*. *See id.* at 671.

Whatever the plaintiff's motive in alleging intentional infliction of emotional distress, the jury explicitly rejected his libel claim but at the same time found that he met the burden of proof on his intentional infliction claim (i.e. that defendant had intended to cause severe emotional distress and had in fact done so). *See Hustler*, 485 U.S. 46, 48, 50 (1988). Thus, the jury seems to have been able to distinguish between the two causes of action. Neither the lower courts nor the Supreme Court in *Hustler* ever disputed that Falwell had proven the common law elements of his intentional infliction of emotional distress claim.

89. The Court may have been influenced by the fact that Falwell alleged that publishing the parody constituted both libel and intentional infliction of emotional distress. However, the fact that the jury was able to distinguish between the two torts, as discussed *supra*, note 88, suggests that should not have been a source of confusion for the Court.

90. *Gertz*, 418 U.S. 323, 349-50 (1974).

able to survive a succession of such judgments.[91] The Court was even more concerned that "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[92] Similarly, the "state of mind" damages at issue in intentional infliction of emotional distress claims such as *Hustler*[93] are inherently speculative. Requiring a jury or judge to fix damages for injury to a plaintiff's state of mind is to ask them to assign a dollar figure to an ephemeral and unknowable loss—a task certainly no less difficult to perform than measuring an individual's loss of esteem in the community. Indeed, the Court seems to have equated the two types of damages in distinguishing *Hustler* in *Cohen*.[94]

In contrast, damage awards in promissory estoppel cases are relatively more rationally calculated. Recovery under the doctrine of promissory estoppel is based largely on the theory that the promise of the alleged breacher induced the promisee to act or forebear acting to the promisee's detriment.[95] Thus, the promisee usually is permitted to recover only reliance damages; that is, those damages incurred as a result of relying on the promise, such as expenditures made in preparation for performance or in performance.[96] The party alleging breach of promise usually must show definite losses incurred in reliance on the promise. Moreover, the remedy granted for breach of promise may be limited as justice requires.[97]

In *Cohen*, the Court distinguished *Hustler* by noting that Cohen had sought only "damages . . . for breach of a promise that caused him to lose his job and lowered his earning capacity."[98] The Court's reliance on this point of reasoning is significant in two ways. First, the fact that the Court drew this distinction between the cases suggests that the Court viewed the damages available to a plaintiff under a theory of promissory estoppel as qualitatively different from those available in an action alleging libel or intentional infliction of emotional distress. Second, it indicates that the difference in the nature of damages available was important in determining the appropriate First Amendment analysis to be applied.

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91. New York Times Co. v. Sullivan, 379 U.S. 254, 278 (1964).

92. *Id.*

93. The jury in *Hustler* awarded the plaintiff $100,000 in compensatory damages and $50,000 in punitive damages from each of the three defendants. *Hustler*, 485 U.S. at 49.

94. Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).

95. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981); CORBIN ON CONTRACTS §§ 8.1-8.13 (1996).

96. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 349; *cf.* CORBIN ON CONTRACTS § 8.8.

97. RESTATEMENT (SECOND) OF CONTRACTS § 90(1).

98. *Cohen*, 501 U.S. at 671.

On the first point, this distinction is the only one drawn explicitly by the Court between the "law of general applicability" at issue in *Hustler*—the tort of intentional infliction of emotional distress—and the promissory estoppel theory in *Cohen*. The Court must have seen a qualitative difference, but it seems that it did so based on an erroneous impression of the damages awardable on a theory of promissory estoppel. The Court seems to have believed that Cohen could have been awarded the damages he sought for loss of his job and earning capacity rather than being limited to pure reliance damages.[99] However, even if all traditional contract remedies are available to promissory estoppel plaintiffs, they likely would be subject to the usual limitations such as avoidability,[100] forseeability,[101] and reasonable certainty of amount.[102] There is a more important distinction between promissory estoppel, on one hand, and libel and intentional infliction of emotional distress on the other: under contract law, there is a near total proscription on damages for emotional disturbance[103] and punitive dam-

99. It appears as though the Minnesota courts limit recovery based on a claim of promissory estoppel to reliance damages. *See, e.g.*, Grouse v. Group Health Plan, 306 N.W.2d 114 (Minn. 1981) ("When a promise is enforced pursuant to section 90 '[t]he remedy granted for breach may be limited as justice requires.' Relief may be limited to damages measured by the promisee's reliance." (quoting RESTATEMENT OF CONTRACTS § 90 (1932))(alteration in original); *see also* Gorham v. Benson Optical, 539 N.W.2d 798 (Minn. Ct. App. 1995); Board v. Simmons Industries, No. C3-94-116, 1994 WL 454738, at *3 (Minn. Ct. App. Aug. 23, 1994).

In fact, in *Cohen* itself, the Minnesota Supreme Court indicated that Minnesota promissory estoppel doctrine tracks the *Restatement (Second) of Contracts* § 90. Cohen v. Cowles Media Co., 457 N.W.2d 199, 204 n.5 (Minn. 1990), *rev'd*, 501 U.S. 663 (1991). In addition, the United States Supreme Court seems to have overlooked or ignored the fact that the Minnesota Supreme Court had raised the promissory estoppel issue *sua sponte*. *Id.* Cohen's complaint alleged only fraudulent misrepresentation and breach of contract. Thus the damages he sought, and those that he was awarded by the jury, were not based on a theory of promissory estoppel. However, it might be argued that Cohen put his job and reputation at risk by agreeing to give the reporters the court records and thus "relied" on their promise of confidentiality. However, those losses seem to be more akin to consequential damages as opposed to pure reliance losses—as if Cohen had expended money in obtaining the information for the reporters or had foregone an exclusive lucrative offer with no guarantee of confidentiality from another newspaper. The key distinction between reliance and consequential damages appears to be the contingency of the loss. If the loss would have been incurred by the injured party regardless of the other party's performance—for example, expended capital in performance or foregone opportunities—the loss can truly be said to have been incurred in reliance. In contrast, if the loss is contingent on the breach of the other party, such as Cohen's loss of his job and earning capacity, the loss is a consequential injury. *See generally* CORBIN ON CONTRACTS §§ 998, 1011.

100. RESTATEMENT (SECOND) OF CONTRACTS § 350. It is admittedly hard to imagine, though not inconceivable, that Cohen could have avoided his losses in some manner.

101. *Id.* § 351.

102. *Id.* § 352.

103. *Id.* § 353 ("Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emo-

ages,[104] whereas emotional distress is an injury for which libel[105] and intentional infliction[106] plaintiffs may be compensated with punitive damages. Indeed, the majority in *Cohen* specifically rejected a dissenter's charge that awarding the plaintiff damages was "punitive" by noting that compensatory damages are not a form of punishment, whereas punitive damages obviously are. This suggests that the majority considered the nature of available damages to be an important factor in its analysis.[107]

If the nature of damages recoverable is a principal factor in the Court's First Amendment analysis, tortious interference with contract is much more analagous to libel and intentional infliction of emotional distress than it is to promissory estoppel. Tortious interference with contract requires, obviously, the existence of a contract, even though the action itself lies in tort. A result of this unique combination of principles is that damages recoverable by a tortious interference plaintiff encompass those traditionally associated with both contract and tort. The *Restatement (Second) of Torts* states that recoverable damages include compensation for the gains the plaintiff expected to realize from the contractual relation,[108] consequential losses,[109] harm to reputation,[110] and emotional distress.[111] If the availability of damages for emotional distress or harm to reputation is the key distinction between laws of general applicability, as

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tional disturbance was a particularly likely result.").

104. *Id.* § 355 ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."). In fact, Cohen had sought punitive damages, but only under a claim of fraudulent misrepresentation (a tort) that was rejected by the Minnesota courts. Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991).

105. RESTATEMENT (SECOND) OF TORTS §§ 622 cmt. d, 623 (1977); *see also* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 161 (1967) (public figure libel plaintiffs may be awarded punitive damages if they prove actual malice); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (holding that private libel plaintiffs need to prove actual malice in order to be awarded punitive damages where speech concerns private matter only).

106. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 49 (1988) (discussing award of punitive damages for intentional infliction of emotional distress).

107. *Cohen*, 501 U.S. at 670. Note, however, speaking on the distinction between compensatory and punitive damages, that the Court went on to say, "[T]he characterization of the payment makes no difference for First Amendment purposes when the law being applied is a general law and does not single out the press." *Id.* In light of this indication that the Court seemed to discern no dispositive difference between the two types of damages when a law of general applicability is at issue, the speculative nature of the compensatory damages available may remain as the only real difference between promissory estoppel and intentional infliction discussed by the Court.

108. RESTATEMENT (SECOND) OF TORTS § 774A(1)(a).

109. *Id.* § 774A(1)(b).

110. *Id.* § 774A(1)(c).

111. *Id.*

the Court indicated in *Cohen,*[112] then Wigand cases clearly fall under a *Hustler* analysis. Of course, neither the truth nor falsity of the information elicited by CBS from Wigand, nor CBS's knowledge or disregard thereof would be an issue under the technical elements of a tortious interference claim, but neither were such questions at issue under the intentional infliction claim in *Hustler.* This incongruity between the actual malice standard of *New York Times* and the elements of the tort alleged did not impede the Court's willingness in *Hustler* to apply *New York Times* without explaining how it should be applied to future cases where the truth of the material is not at issue.

Another difference between *Cohen* and *Hustler* is the emphasis in *Cohen* on the notion that the parties had an agreement that created and defined the legal duties they owed to each other,[113] despite the Court's acknowledgment that promissory estoppel is a doctrine that creates obligations never explicitly assumed by the parties.[114] The Court's reliance on notions of contract-like, bargained-for obligations suggests that the newspapers waived their First Amendment rights in some manner by promising confidentiality to Cohen. Though it is not clear that the requirements for waiver were met,[115] First Amendment rights can be waived explicitly.[116]

This notion of waiver is crucial, for it suggests another principal distinction between the Court's decision in *Cohen* and actions in tort such as in *Hustler* and Wigand cases. If the defendant newspapers in *Cohen* can be said to have affirmatively and voluntarily assumed legal obligations by "bargaining" with Cohen, the same cannot be said of the defendants in libel, intentional infliction, or Wigand cases. Whereas promissory estoppel is based, at least in part, on quasi-contract principles, tort doctrines such as libel, intentional infliction, and tortious interference are pre-existing duties imposed on the defendant regardless of the defendant's relationship to the plaintiff. In the Wigand case, Dr. Wigand might have voluntarily assumed legal obligations that restricted his First Amendment rights, but CBS was a

112. *Cohen,* 501 U.S. at 671. The Court never disputed the dissent's assertion that promissory estoppel and intentional infliction are equally laws of general applicability. *See id.* at 675 n.3 (Blackmun, J., dissenting). As noted *supra* text accompanying note 66, and notes 85-86, the only distinctions drawn between the two actions were the types of damages recoverable, the argument that defendants in *Cohen* had waived their First Amendment rights, and the Court's implied belief that the intentional infliction claim in *Hustler* was merely a dodge from *New York Times*'s strict requirements. *See also infra* note 129 and accompanying text.

113. *Cohen,* 501 U.S. at 671.

114. *Id.* at 668.

115. *See id.* at 677 (Souter, J., dissenting).

116. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 145 (1967) (evidence of waiver must be "clear and compelling").

party external to that agreement. As such, CBS never waived any First Amendment rights nor voluntarily assumed any legal obligations to Brown & Williamson. Rather, if liability were to be imposed on CBS for tortious interference, such liability would be grounded solely on legal duties imposed upon CBS by the state. Thus, though both promissory estoppel and tortious interference are "laws of general applicability," duties arising under a theory of promissory estoppel arguably can be said to be self-imposed whereas those arising under tortious interference doctrine clearly are not.

A third useful distinction between tortious interference and the promissory estoppel issue in *Cohen* is the effect the application of each doctrine would have on the ability of the press to gather information. As applied in *Cohen*, the promissory estoppel doctrine imposed costs on the publication of information already gathered by the press, namely, the identity of the source of court records. In contrast, liability in a Wigand case would be based on speaking to a source who is a party to a nondisclosure agreement. Liability is imposed at the point of information gathering rather than at the point of publication of conditionally acquired information. This distinction may have been what the Court meant when in *Cohen* it reasoned that the promissory estoppel doctrine imposed only "incidental" effects on the freedom of the press.[117] One might argue that upholding a "self-imposed" restriction on what the press can publish is more "incidental" than upholding a ban on the press speaking to a source and therefore possibly preventing them from gathering information altogether.

As in most torts, the issue of liability for tortious interference is distinct from that of remedies available. In the absence of constitutional restrictions, CBS might have been liable for merely speaking to Wigand. Damages available to Brown & Williamson might then have included compensation for its expected gains from its contract with Wigand, its losses incurred as a consequence of Wigand's breach, harm to Brown & Williamson's reputation, and punitive damages.[118]

As potentially crippling for the defendant as the damages available to a tortious interference plaintiff may appear to be,[119] closer scrutiny of the

117. *Cohen*, 501 U.S. at 669.

118. *See supra* notes 39-43 and accompanying text.

119. *See, e.g.*, Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. Ct. App. 1987). In *Texaco*, the jury awarded Pennzoil $7.53 billion in compensatory and $3 billion in punitive damages from Texaco for interfering with an agreement between Pennzoil and Getty Oil and other Getty entities to purchase stock in Getty Oil. *Id.* at 784. The Texas Court of Appeals found the $3 billion punitive damage award to be excessive and reduced it to $1 billion. *Id.* at 866.

damages issue in the context of a Wigand case illustrates that established First Amendment principles limit the damages a plaintiff such as Brown & Williamson might recover. First, a tortious interference plaintiff may recover for the "pecuniary loss of the benefits of the contract . . . ."[120] In the context of a nondisclosure agreement such as that signed by Wigand, it is difficult to distinguish between such "expectation" damages and consequential or reputation damages. Nondisclosure agreements typically do not confer a benefit on the employer other than security against disclosure of sensitive information. Such agreements are fundamentally a loss-prevention device, not benefit- or profit-creating instruments.[121] Thus, it would be difficult to measure what a plaintiff such as Brown & Williamson expected to gain in monetary terms when entering the contract.

Second, consequential and reputational damages in this context seem to be essentially the same thing.[122] Unless CBS were to use the material it garners from Wigand to compete directly with Brown & Williamson, or were to broadcast technical information that allows Brown & Williamson's competitors to gain market share, the greatest injuries to Brown & Williamson are most likely to stem from harm to its reputation, such as lost sales and business opportunities, lost goodwill, a decrease in the value of its securities, and an increase in the cost of obtaining capital.[123] In other words, a blow to Brown & Williamson's reputation because of Wigand's revelation—for example, that the company artificially elevated nicotine levels in its cigarettes in order to more efficiently addict its customers[124]—probably would constitute the bulk, if not all, of the consequential losses suffered by Brown & Williamson as a result of Wigand's breach. Realisti-

120. RESTATEMENT (SECOND) OF TORTS § 774A(1)(a) (1977).

121. A useful contrast might be drawn with noncompetition agreements. Typically, such competition agreements require an employee or agent not to compete with his former employer for a given period of time and within a specified geographical area either by competing directly on his own or working for a competing business. Binding a particularly knowledgeable or skillful employee to a noncompetition contract could be said to confer a competitive advantage on the employer, and breach of that contract would then defeat the employer's expected gain from that advantage.

122. *See also* Baron et al., *supra* note 6, at 1060.

123. Food Lion claimed these injuries in its recent litigation with Capital Cities/ABC. Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 823 n.3 (M.D.N.C. 1995). The court did not decide which of these might constitute reputational damages. *Id.*

124. This is merely a speculative example of the kind of damaging information sources like Wigand might reveal. However, *60 Minutes* has reported evidence that suggests that Brown & Williamson has genetically engineered, grown in Brazil, and imported to the United States a breed of tobacco plant that produces twice the nicotine of naturally grown plants. *60 Minutes*, *supra* note 1. Apparently, there is also evidence that Brown & Williamson has used a chemical process akin to the "freebasing" technique used by illegal narcotic users in order to increase the potency of the nicotine in its cigarettes, and that Philip Morris has long known that nicotine shares some of the same properties as heroin and cocaine. *Id.*

cally, because Wigand breached his agreement by speaking to *60 Minutes*, rather than Philip Morris (a competitor of Brown & Williamson), the only substantial injuries incurred by Brown & Williamson would be the result of damage to its reputation.[125]

As discussed above,[126] the availability of reputation damages seems to be a crucial touchstone of First Amendment jurisprudence. If a plaintiff may recover damage to its reputation, then the United States Supreme Court has required that the plaintiff meet the requirements of *New York Times Co. v. Sullivan* in order to establish liability. Indeed, at least one federal court has held that a plaintiff may collect damages for injury caused by a media defendant's wrongful and illegal acts in collecting information, such as fraud and trespass, but such a plaintiff may not recover reputational damages as a result of any broadcast of truthful information. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,[127] the district court wrote:

> Food Lion does not allege that any of the alleged unlawfully obtained and published information was false. Instead, Food Lion contends that ABC's alleged wrongful actions in obtaining information about Food Lion are sufficient to allow Food Lion to recover both reputational and non-reputational damages regardless of whether the information published by ABC was true or false.[128]

Addressing the issue of whether the Supreme Court's "laws of general applicability" reasoning in *Cohen* or the logic of *Hustler* was controlling, the court went on to hold:

> Where, however, a plaintiff seeks to use a generally applicable law to recover for injury to reputation or state of mind while avoiding the requirements of a defamation claim (requiring proof of falsity and actual malice), the *Cohen* holding does not appear to be applicable. To the extent that Food Lion is attempting to recover reputation damages without establishing the requirements of a defamation claim, this case more closely resembles *Hustler*.[129]

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125. This is not to say that injuries suffered by Brown & Williamson would be minimal. In fact, they could be quite substantial. Damage done to Brown & Williamson's reputation might well result in huge business losses, including lost market share, cancelled contracts with suppliers or retailers, decreased stock prices resulting in shareholder litigation, inability to hire or retain qualified employees, etc. Nevertheless, all of these losses would serve only to contribute to the measure of reputation damages. They are not injuries independent of the injury to the company's reputation. *See* RESTATEMENT (SECOND) OF TORTS § 561.

126. *See supra* note 86 and accompanying text.

127. *Food Lion*, 887 F. Supp. at 811.

128. *Id.* at 822.

129. *Id.* at 823. The court noted that Food Lion had alleged damages such as lost sales, business opportunities and goodwill, a decrease in the value of its securities, and an increase in the cost of obtaining funds, but the court did not decide which of these, if any, constituted reputational damages. *Id.* at 823 n.3. However, a jury subsequently awarded Food Lion over $5.5 million on its fraud claim. Food Lion had sought damages in excess of $52

Following this court's reasoning, it seems that, unless plaintiffs in Wigand cases can meet the *New York Times* requirements, they should be able to recover only nonreputational damages, which would be nominal in most cases.

However, the actual malice test of *New York Times* does not fit well in the context of a Wigand case for the same reason it is not easily applied to intentional infliction of emotional distress; that is, the truth or falsity of the material disclosed is not in issue. By application of the actual malice test to the intentional infliction tort, however, the court may have meant to indicate that publication or disclosure of truthful information can never be the basis of liability unless the defendant voluntarily agreed to restrictions on its First Amendment rights.[130] Indeed, the Court's imposition in *Hustler* of a requirement of a false statement of fact in intentional infliction cases brought by public figures[131] is consistent with the Court's statement years earlier in *Garrison v. State of Louisiana* that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."[132] If this statement has force in the context of a Wigand case, then damages available to a plaintiff such as Brown & Williamson should be limited to those stemming directly from Wigand's breach—his interview with Mike Wallace. Publication of any truthful information gained by Wallace from Wigand could not be the basis for damages under a tortious interference claim.

IV. THE *NOERR-PENNINGTON* DOCTRINE

As previously noted, the analogy of tortious interference cases to the reasoning of *Hustler*, both explicit and implicit, leads to the conclusion that the "law of general applicability" test of *Cohen* and its corresponding low level of scrutiny should be rejected for Wigand cases. Having rejected *Cohen*'s teaching, it remains to be seen what test should be applied. *Hustler* seems to say that the "actual malice" standard of *New York Times* must be met, but, as in *Hustler* itself, the verity of the defendant's speech would not be at issue in a Wigand case. The Court acknowledged as much in *Hustler*, and its perfunctory, if not blind, application of *New York Times* to Reverend Falwell's intentional infliction claim leaves us with little guidance both as to how *Hustler* is to be followed in the future and as to the breadth of *New York Times* requirements outside the context of libel

million. *See* Andrew B. Sims, *Food Lion and the Media's Liability for Newsgathering Torts: A Symposium Preview*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 389 (1997).

130. *See supra* notes 74 & 85.

131. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

132. *Garrison*, 379 U.S. 64, 74 (1964).

claims.

Because the most fundamental difficulty with applying *New York Times* to nonlibel claims is the absence of the truth issue, a test that does not depend on the truth or falsity of the information in controversy might be more useful than a *New York Times* test in Wigand cases. One such test might be what is commonly referred to as the *Noerr-Pennington*[133] doctrine, as enunciated in *Sierra Club v. Butz.*[134]

In *Butz*, the Sierra Club and other plaintiffs brought an action seeking injunctive and declaratory relief against a lumber company and others that would have had the effect of temporarily prohibiting logging in an area of Northern California. The lumber company counterclaimed by alleging tortious interference with an advantageous relationship.[135] It contended that the plaintiffs had "interfered" by making oral and written representations, asserting administrative appeals, and filing complaints in order to persuade the federal government that the area should be preserved. The federal district court held that this type of activity could not be the basis of liability under state law because of the First Amendment guarantee of the right to petition the government for redress of grievances.[136]

The court framed the case as a right to petition issue, but noted that the right to petition the government "is a basic freedom in a participatory government, closely related to freedom of speech and press; together these are the 'indispensable democratic freedoms' that cannot be abridged if a government is to continue to reflect the desires of the people."[137] Though the rights to a free press and to petition the government are distinct rights, they are generally subject to the same constitutional analysis.[138] The *Noerr-Pennington* line of cases relied on by the district court concerned application of federal antitrust statutes in light of the right to petition. The court reasoned that those cases together with *New York Times* "outlined the applicable principles of law"[139] controlling its decision in *Butz*. Apparently, then, the court believed that *New York Times Co. v. Sullivan* was relevant in that it stood for the principle that First Amendment rights in general are

133. United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

134. *Butz*, 349 F. Supp. 934 (N.D. Cal. 1972).

135. The basic elements of tortious interference with an advantageous relationship, at least for the purposes of this Comment, are similar to those of interference with contract. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 774B special note 2 (1977).

136. U.S. CONST. amend. I.

137. *Butz*, 349 F. Supp. at 936 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

138. Wayte v. United States, 470 U.S. 598, 610 n.11 (1985); *see also* NAACP v. Claiborne Hardware, 458 U.S. 886, 911-915 (1982).

139. *Butz*, 349 F. Supp. at 936.

to receive greater protection from common law liability, and it relied on the antitrust cases to find an appropriate test. Such an approach might also be followed in seeking out a test for liability for the tortious interference with a contract where the freedom of the press, as opposed to the right to petition, is implicated.

The *Butz* court noted that in *Noerr* the Supreme Court had disallowed application of the Sherman Act "to a conspiracy of railroads formed to foster the passage and enforcement of laws destructive of the trucking business."[140] The Supreme Court then carved out a "sham" exception which the district court adopted and applied to the tortious interference claim before it. In the *Butz* court's words: "[L]iability can be imposed for activities ostensibly consisting of petitioning the government for redress of grievances only if the petitioning is a 'sham,' and the real purpose is not to obtain governmental action, but to otherwise injure the plaintiff."[141]

V. APPLICATION OF *SIERRA CLUB V. BUTZ* TO WIGAND CASES

The extension of this *Noerr-Pennington* doctrine to nonantitrust cases has been criticized,[142] but its application to Wigand cases seems appropriate. In order to adequately protect the First Amendment interests at stake, namely freedom of the press, implicated by the threat of tortious interference claims, the courts should hold that there can be no liability for tortious interference with contract where the purpose of inducing the third party to breach his nondisclosure agreement is to gather information about a public figure on matters of public concern and not merely to harm or compete with the plaintiff. This standard of liability combines the benefits of being highly protective of First Amendment activity while obviating the need to look into the truth or falsity of the defendant's speech, which is not an issue in tortious interference claims. At the same time, the legitimate interests of plaintiffs such as Brown & Williamson in preventing valuable trade secrets from being exposed to competitors receive protection under this test.

First, this test reflects the distinction recognized by the Supreme

140. *Id.* at 937.

141. *Id.* at 939.

142. *See, e.g.*, Robert A. Zauzmer, Note, *The Misapplication of the Noerr-Pennington Doctrine in Non-Antitrust Right To Petition Cases*, 36 STAN. L. REV. 1243 (1984). The criticism is far from universal, however. *See, e.g.*, Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 159-60 (3rd Cir. 1988) (applying *Noerr-Pennington* doctrine to tortious interference claim outside of antitrust context and noting doctrine is supported by the *New York Times* line of cases); Havoco of Am., Ltd. v. Hollobow, 702 F.2d 643, 649-50 (7th Cir. 1983) (agreeing with and applying *Butz* rationale in rejecting a tortious interference claim outside of antitrust context).

Court between public and private plaintiffs.[143] Corporate plaintiffs such as Brown & Williamson will most likely be considered public figures for the purposes of this test,[144] as may some individual plaintiffs; but, purely private individuals may still be able to bind others to confidentiality agreements regarding purely private matters and expect an action for breach or tortious interference to meet a less rigorous standard of liability.[145] Such a less rigorous test for private plaintiffs seeking to keep confidential information of purely private concern would parallel the less rigorous standard that private plaintiffs are required to meet in order to be awarded punitive damages in a libel suit over private information.[146]

Second, protection is given only to those defendants seeking information regarding a matter of public concern. If *60 Minutes* had induced Wigand into revealing information of no public importance, such as the results of employee evaluations or confidential employee files, it may not receive heightened protection under this standard. Similarly, this standard would not be applied to a competitor's attempts to obtain trade secrets from employers like Wigand. Though the Supreme Court rejected reliance on this "matter of public concern" test for libel actions in *Gertz v. Robert Welch, Inc.*,[147] there have since been repeated indications that the public's interest in the information remains a factor in the courts' jurisprudence.[148]

Lastly, if the plaintiff is a public figure and the information in dispute is of public importance, the court must then look into the defendant's purpose in inducing the third party, such as Wigand, to breach his nondisclo-

143. *See, e.g.*, New York Times Co. v. Sullivan, 379 U.S. 254, 272-74 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 147-48, 155 n.19 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-46 (1974); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756-57 (1985).

144. *See, e.g.*, Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 273 (7th Cir. 1983) ("[W]e observe in passing that if the purpose of the public figure-private person dichotomy is to protect the privacy of individuals who do not seek publicity or engage in activities that place them in the public eye, there seems no reason to classify a large corporation as a private person."); Bose Corp. v. Consumers Union, 508 F. Supp. 1249 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485, 100 S. Ct. 1949 (1984); Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 483-88 (Minn. 1985); *see also supra* note 58.

145. At least one author has suggested that such persons may also have an action for invasion of privacy. Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1 (1995).

146. *See Dun & Bradstreet*, 472 U.S. at 763.

147. *Gertz*, 418 U.S. 323 (1974).

148. *See, e.g., Dun & Bradstreet*, 472 U.S. at 763; Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988); McGrane v. Reader's Digest Ass'n, Inc., 822 F. Supp. 1044, 1046 (S.D.N.Y. 1993) ("Courts are increasingly reluctant to enforce secrecy arrangements where matters of substantial concern to the public—as distinct from trade secrets or other legitimately confidential information—may be involved.").

sure agreement. If the defendant's purpose was to exercise its First Amendment right to freedom of the press or speech, rather than solely to harm or compete with the plaintiff, then no liability can be imposed. A defendant's exercise of First Amendment rights need not be broadly defined. For example, if the party that induced Wigand to breach his contract had been Philip Morris, motivated by a desire to obtain valuable trade secrets in order to capture market share from Brown & Williamson (rather than CBS motivated by a desire to inform the public on an issue of public concern (*e.g.*, public health)), Philip Morris' conduct would fall under the "sham" exception and liability might be imposed.

The defendant need not act solely to inform the public in inducing the breach to avoid the "sham" exception, but must be able to make out a legitimate, credible claim to have done so in addition to any private interest it may have had. Thus, the fact that CBS is a profit-seeking entity as well as an agent of the press would be of relatively little importance. Philip Morris might also make public the information it gains in an attempt to claim that it was acting in the public interest, as well as its own. However, given the relatively common interest of the tobacco companies in avoiding public outrage about industry practices, Philip Morris is not likely to go public with any such information even if it might gain from the tarnishing of Brown & Williamson's reputation. Even if it did, courts and juries are equipped to assess credibility and make findings of fact, and they routinely are asked to determine an actor's intent in civil and criminal cases. Only the most biased jury or court would find that CBS had no legitimate First Amendment interest but that Philip Morris did.[149]

Moreover, the court's finding would not be based on a finding of malice or ill will (as opposed to *New York Times* "actual malice").[150] In *Noerr*, the Supreme Court acknowledged that one purpose of the railroads in conspiring to seek legislation was that the legislation would be harmful to the trucking industry, but found that the railroads sincerely sought legislation and thus had a protected right to petition the government.[151] In other words, the fact that railroads were motivated by ill will toward the trucking industry in seeking the legislation did not diminish their right to seek redress from the government. As the district court said in *Butz*, "It is

149. Indeed, the *Butz* court apparently saw the "sham" exception and the *New York Times* actual malice test as requiring courts and juries to make essentially the same kind of findings. Sierra Club v. Butz, 349 F. Supp. 934, 937 (N.D. Cal. 1972).

150. The Supreme Court has rejected common law "malice" as a basis of liability for libel. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971); Garrison v. Louisiana, 379 U.S. 64, 73, 78 (1964).

151. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 139 (1961).

for the purpose of personal gain or injury to those with opposing interests that most citizens will exercise their right to petition the government."[152] Similarly, even if CBS had been motivated by strong dislike for Brown & Williamson, or even a desire to see harm come to the company after broadcast of the Wigand interview, no liability could be imposed as long as CBS had legitimately and credibly intended to inform the public on a matter of public concern.[153]

VI. CONCLUSION

First Amendment principles as applied to causes of action as libel, intentional infliction of emotional distress, and equitable or contract claims brought under a theory of promissory estoppel demonstrate that public figure plaintiffs must meet a high standard of liability in order to punish the press for the publication of information or speech relevant to issues of public concern. In the context of tortious interference with contract, a claim brought against defendants like CBS by public figure plaintiffs such as Brown & Williamson on the grounds that the defendant, in the process of gathering information on an issue of public concern, induced a third party to breach a nondisclosure agreement with the plaintiff should meet similarly stringent requirements. In *Hustler*, the Supreme Court applied the actual malice standard of *New York Times, Co. v. Sullivan* but failed to explain how that standard should be applied when the truth or falsity of the defendant's speech is not a necessary element of liability. Moreover, a plaintiff in an action for tortious interference, such as that which CBS lawyers feared, would not claim that the publication of the allegedly confidential information by the defendant was the source of the defendant's liability. Rather, the plaintiff would claim that the means by which the defendant obtained the information—by inducing an employee to breach a nondisclosure agreement—was the point at which the defendant's liability arose. Therefore, though First Amendment principles establishing that freedom of the press is to be diligently protected may be derived from Supreme Court precedent in libel and other contexts, those cases do not enunciate a test that is easily applicable to such tortious interference claims.

The primary concern is preserving the newsgathering function of the

152. *Butz*, 349 F. Supp. at 938.

153. Moreover, the fact that CBS would not directly profit from harm to Brown & Williamson, as Philip Morris likely would, should be a factor in applying the sham test. In more general terms, as long as the defendant was not motivated solely by a desire to gain an advantage in direct commercial competition or to otherwise harm the plaintiff, liability should not be imposed for tortious interference.

press while concurrently respecting the right and need of commercial plaintiffs to prevent the disclosure of sensitive information to competitors. A standard of liability drawn from the *Noerr-Pennington* line of cases and clarified in *Sierra Club v. Butz* is a better test for these purposes than is blind application of the *New York Times* actual malice standard. Such a standard would require potential plaintiffs to show that the defendant's intent in inducing sources like Wigand to breach their confidentiality agreements was to harm or compete with the plaintiff, and not to gather information about a public figure on an issue of public concern for publication. This requirement would be highly protective of legitimate First Amendment interests but is flexible enough to allow recovery for plaintiffs harmed by a competitor uninterested in contributing to the public discourse. Moreover, this test would be no more difficult for juries and courts to apply than the actual malice standard of *New York Times Co. v. Sullivan.*