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Negligent Interference with Contract - An Argument Against Categorical Rejection: Applying a Duty/Risk Analysis to Negligent Drug Testing

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Negligent Interference with Contract—An Argument Against Categorical Rejection: Applying a Duty/Risk Analysis to Negligent Drug Testing

Negligent conduct is as anti-social as wilfully injurious conduct. The interest of the community in the freedom of action of the individual tolerates the one no more than the other.[1]

I. INTRODUCTION

Louisiana law regarding interference with contract is convoluted, to say the least. Until 1989, Louisiana was the only state not to allow recovery for intentional interference with contract.[2] But then in *9 to 5 Fashions, Inc. v. Spurney*,[3] the Louisiana Supreme Court recognized a very narrow action for intentional interference, the exact parameters of which are still unclear. Some courts have interpreted the supreme court jurisprudence[4] to preclude an action for negligent, as opposed to intentional, interference.[5] However, other courts have sustained such actions in some scenarios, such as in the context of negligent drug testing.[6] The purpose of this comment is to examine the Louisiana jurisprudence on interference with contract in general, to explore the policy reasons behind the reluctance of courts to impose liability for so-called "negligent interference," and ultimately, to recommend that these negligence claims not be categorically rejected where the application of a duty/risk analysis could adequately protect legitimate policy concerns, specifically in the context of negligent drug testing.

II. TORTIOUS INTERFERENCE WITH CONTRACT

A. *Generally*

Intentional interference with contract "draws a line beyond which no member of the community may go in intentionally intermeddling with the business affairs

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1. Note, *Tortious Interference with Contractual Relations*, 31 Harv. L. Rev. 1017, 1021 (1918).
2. 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 232 (La. 1989) (citations omitted).
3. 538 So. 2d 228 (La. 1989).
4. PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058 (La. 1984); 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989); Great Southwest Fire Ins., Co. v. CNA Ins. Co., 557 So. 2d 966 (La. 1990).
5. *See, e.g.*, Inka's S'Coolwear, Inc. v. School Time, L.L.C., 725 So. 2d 496 (La. App. 1st Cir. 1998) (The *9 to 5 Fashions* court "specifically repudiated recovery based upon negligent interference with contract."); Crockett v. Cardona, 713 So. 2d 802, 806 (La. App. 4th Cir. 1998) ("Louisiana does not allow and never has allowed recovery for the negligent interference with contractual relations"); Larsen v. Renard, 576 So. 2d 1188, 1190 (La. App. 3d Cir. 1991) ("Liability for negligent interference with contractual relations resulting in economic loss is not recognized in Louisiana.").
6. *See, e.g.*, Lewis v. Aluminum Co. of America, 588 So. 2d 167 (La. App. 4th Cir. 1991); Elliott v. Laboratory Specialists, Inc., 588 So. 2d 175 (La. App. 5th Cir. 1991); Nehrenz v. Dunn, 593 So. 2d 915 (La. App. 4th Cir. 1992).

of others."[7] The right to recovery "is determined by balancing the interest of the defendant in doing his otherwise lawful act and of the plaintiff in being free from interference."[8] Justification, or a privilege to interfere, is found when the social import of the defendant's interest in interfering outweighs the interest of the plaintiff.[9] In distinguishing between permissible behavior and interference, consideration is given to "the varying ethical standards of the community, and especially the standards of business ethics."[10] While liability for tortious interference has been criticized as contradicting "the foundation of the competitive economic order in the United States,"[11] the privilege of competition precludes the imposition of liability when the interference is among competitors to advance the interferer's economic self interests.[12] Indeed, an injury which results from lawful competition is *damnum absque injuria.*[13] However, no such justification exists if the interferer is motivated by spite, malice, or some other improper motive.[14] It is only the latter brand of interference that is actionable.

Liability for interference with contract developed in the field of intentional torts, and there has been no general recognition of any liability for negligent interference.[15] Intentional interference claims are defined from the aspect of duty.

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7. 45 Am. Jur. 2d *Interference* § 1 (1964); Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., 325 F.2d 2 (3d Cir. 1963); *see also* Ellis v. City of Valdez, 686 P.2d 700 (Alaska 1984).

8. Jeffrey A. Schaefer, *Tortious Interference with Real Estate Broker's Business Relationship with Seller*, 41 Am. Jur. Proof of Facts 2d 393, §10 (1985).

9. Charles E. Carpenter, *Interference with Contract Relations*, 41 Harv. L. Rev. 728, 745 (1928).

10. 45 Am. Jur. 2d *Interference* § 1 (1964) (internal citations omitted).

11. Gina M. Grothe, *Interference with Contract in the Competitive Marketplace*, 15 Wm. Mitchell L. Rev. 453, 458 (1989).

12. *See* Carpenter, *supra* note 9, at 755-59.

13. Deon v. Kirby Lumber Co., 162 La. 671, 679, 111 So. 55, 58 (1926) (loss without legal injury).

14. Ran Corp. v. Hudesman, 823 P.2d 646 (Alaska 1991); Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 S.W.2d 832 (Mo. Ct. App. 1993). The Restatement (Second) of Torts § 767 provides:

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

15. Restatement (Second) of Torts § 766C, cmt. (a) (1977). *See also* Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Electric Corp., 26 A.D.2d 9 (N.Y. App. Div. 1966); Frank Horton & Co., Inc. v. Diggs, 544 S.W.2d 313 (Mo. Ct. App. 1976); Local Joint Executive Board of Las Vegas v. Stern, 651 P.2d 637 (Nev. 1982); Aikens v. Baltimore and Ohio Railroad Co., 501 A.2d 277 (Pa. Super. Ct. 1985); Snow v. West, 440 P.2d 864 (Or. 1968); Peterson v. Zerr, 477 N.W.2d 230 (N.D. 1991); Alvord and Swift v. Steward M. Muller Constr. Co., 385 N.E.2d 1238 (N.Y. 1978).

The crucial inquiry is whether there is a duty not to *intentionally* interfere with another's contractual relations by conduct that is otherwise lawful. It is not the underlying conduct itself which is tortious, but rather engaging in the conduct for the *purpose* of interfering with another's contractual relations. "But for" the intentional interference, the conduct would not be tortious. On the other hand, in a negligent interference claim, the *conduct itself* is tortious because, by definition, it is negligent. Therefore, what is often labeled as "*negligent* interference with contract" is not really "interference with contract" at all, but rather an ordinary negligence claim containing interference with contractual relations as one element of the damages. The question is not whether there is a duty "not" to *negligently* interfere with another's contractual relations. Indeed, no one asks whether a negligent driver owes a duty "not" to damage another car or "not" to physically injure another motorist. There is already an independent duty "not" to be *negligent*. Therefore the inquiry becomes whether the resulting damage is within the scope of the risk associated with being negligent.

One cannot evaluate whether liability should be imposed for negligent interference with contract without considering the relationship between the underlying negligent conduct and the resulting contractual interference. For example, it is settled law that a plaintiff may recover lost "earnings or profits from [his] business, occupation or profession" as an element of damages in a personal injury action.[16] While this could be called a negligent interference claim in that the tortfeasor *negligently* interfered with the injured person's employment or occupation, the courts instead analyze such claims from the aspect of damages. The question is whether the damages are within the scope of the risk associated with a breach of the duty owed. Where a person is physically injured in an automobile accident, the courts have found that the lost wages suffered by the injured person are within the scope of the risk associated with driving negligently.[17]

On the other hand, courts are reluctant to allow recovery for pecuniary loss unaccompanied by physical injury. One example would be the driver who loses a multimillion dollar deal because someone else's negligence caused an automobile accident that blocked off the entire interstate, making it impossible for the driver to make his meeting in time to close the deal. The driver then seeks recovery from the negligent motorist for his lost profits. Such indirect claims are almost universally rejected, as they do not fall within the scope of the risk of driving negligently. The result is that while a motorist who is physically injured by the negligent motorist may recover for his lost wages or profits,[18] the other drivers who are not physically injured cannot. The rationale underlying this distinction is that while physical damage inflicted by a tortfeasor has a self-defining limit (i.e., one negligent motorist can only physically harm a limited and easily ascertainable number of other persons), economic relations are so intertwined that disruption of

16. Laville v. Hartford Accident & Indem. Co., 178 So. 2d 464, 468 (La. App. 1st Cir. 1965) (internal citation omitted).

17. *See id.*

18. *See id.*

one may have far-reaching consequences.[19] Claims for purely economic loss thus present "the potential for liability of enormous scope, with no easily marked intermediate points and no ready recourse to traditional liability-limiting devices such as intervening cause."[20] However, the difficulty of determining where to draw the line in limiting liability for non-physical damages has not prevented the recognition of other causes of action, such as negligent infliction of emotional distress[21] and negligent misrepresentation.[22] Likewise, it should not preclude the recovery of interference damages absent physical injury in some contexts. Unfortunately, some courts are looking to the supreme court's decisions on intentional interference and categorically rejecting any claim which they perceive to be one for "negligent interference."

B. The Louisiana Supreme Court Decisions

The Louisiana Supreme Court first considered whether to recognize a cause of action for inducing a breach of contract or interfering with contractual relations in *Kline v. Eubanks.*[23] In *Kline*, the plaintiff sued the defendant for inducing a plantation laborer to leave his job in violation of his employment contract with the plaintiff. The court found no cause of action under Louisiana Civil Code article 2315,[24] noting that when the article was adopted the present system of labor was unknown. The *Kline* court found no necessity for the new remedy.[25] Although the court rejected a cause of action for inducing breach, it noted that in any event, the defendant's actions were not the proximate cause of the plaintiff's damages since the laborer who deserted his employment was a free agent.[26]

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19. David W. Robertson, *Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of Intentional Interference with Contractual Relations*, 46 La. L. Rev. 737, 741 (1986).

20. *Id.*

21. Moresi v. State of Louisiana, 567 So. 2d 1081 (La. 1990) (recognizing a cause of action for negligent infliction of emotional distress, but requiring the "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious").

22. Barrie v. V.P. Exterminators, 625 So. 2d 1007 (La. 1993) (recognizing a cause of action for negligent misrepresentation utilizing a duty/risk analysis).

23. 109 La. 241, 33 So. 211 (1902); *see also* Cust v. Item Co., 200 La. 515, 8 So. 2d 361 (La. 1942).

24. La. Civ. Code art. 2315 provides in part: "Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it."

25. Kline v. Eubanks, 109 La. 241, 247, 33 So. 211, 213 (1902). However, this delict was recognized by Louisiana's civilian sibling, France. The Cour de Cassation first declared that facilitation of an employee's breach of contract was a tortious act in 1908. Vernon V. Palmer, *Historical Origins of the Civilian Action Against Interference with Contract Rights in France: Louisiana Perspective on a Road Not Taken*, 6 & 7 Tul. Civ. L.F. 131, 138 (1991). In France, employment contract cases were "the leading edge of the jurisprudential development" of delictual actions for tortious interference. *Id.* at 146.

26. *Kline*, 109 La. at 245, 33 So. at 213.

Eighty-seven years after *Kline*, Louisiana recognized a limited action for intentional interference with contract in *9 to 5 Fashions, Inc. v. Spurney*. However, a "crack in the resistance"[27] of the courts to interference claims had appeared five years earlier as the result of two other decisions, *PPG Industries, Inc. v. Bean Dredging*[28] and *Sanborn v. Oceanic Contractors, Inc.*[29]

1. The Early Jurisprudence—PPG Industries *and* Sanborn

In *PPG Industries, Inc. v. Bean Dredging*,[30] the defendant's dredging operations caused damage to Texaco's natural gas pipeline.[31] As a result, Texaco was unable to fulfill its contract to supply natural gas to the plaintiff, who consequently had to obtain fuel from another source at an increased cost. Plaintiff filed suit to recover the increased cost of obtaining natural gas.[32] The defendant filed an exception of no cause of action, contending that Louisiana has never recognized the right of recovery for negligent interference with contractual relations.[33]

The Louisiana Supreme Court characterized the case as bringing "into focus the broad question of recovery of an indirect economic loss incurred by a party who had a contractual relationship with the owner of property negligently damaged by a tortfeasor."[34] The court noted that in previous cases concerning this issue, Louisiana courts had categorically denied recovery without analyzing the problem.[35] Rather than following this mechanical approach, the *PPG* court applied a full duty/risk analysis before reaching its conclusion.

In analyzing the prior jurisprudence,[36] the *PPG* court asserted that the possibility of multiple actions and an unforeseeable extension of liability may have influenced the previous courts in denying such claims "as a matter of public policy."[37] Recognizing that imposing liability on the tortfeasor could create liability "in an indeterminate amount for an indeterminate time to an indeterminate class,"[38] the court asserted that a policy decision is necessary to limit the recovery of damages: "Policy considerations determine the reach of the rule, and there must be an ease of association between the rule of conduct, the risk of injury, and the

27. Bruce V. Schewe, *Developments in the Law, 1989-90, Obligations*, 51 La. L. Rev. 361, 368 (1990).
28. 447 So. 2d 1058 (La. 1984).
29. 448 So. 2d 91 (La. 1984).
30. 447 So. 2d 1058 (La. 1984).
31. *Id.* at 1060.
32. *Id.*
33. *Id.*
34. *Id.* at 1059.
35. *Id.*
36. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134 (1927); Forcum-James Co., Inc. v. Duke Transp. Co., 231 La. 953, 93 So. 2d 228 (1957).
37. *PPG Industries*, 447 So. 2d at 1061-62 (citations omitted).
38. *Id.* (quoting Ultramares Corp. v. Touche, 174 N.E. 441, 444 (1931)).

loss sought to be recovered."[39] Here, the court concluded that although the case fell literally within the expansive terms of Article 2315, the plaintiff could not recover because his damages did not fall within the scope of the risk.[40]

The significance of the supreme court's decision was not the outcome of the decision, but rather the analysis utilized by the court in reaching its decision. Although the economic loss suffered by the plaintiff was the indirect result of actual property damage, the defendant characterized the claim as one for negligent interference. Instead of categorically rejecting the plaintiff's demands as a "negligent interference with contract" action, the court applied a duty/risk analysis. Since *PPG*, the lower courts have consistently found no cause of action for damage to contractual relations that resulted from a negligent act towards a third party, which consequently damaged the plaintiff.[41] These results are justified not because the damages sustained were from negligent interference, but rather because the harm to the plaintiff was too far removed to be within the scope of the risk contemplated by the duty the defendant owed to the third party. There was no ease of association between the duty owed and the harm incurred. As such, a duty/risk analysis limits the liability, eliminating the unforeseeable extension of liability that had prompted the earlier blanket prohibition against allowing any recovery for indirect economic losses.

In the same year of the *PPG* decision, the Supreme Court once again considered a claim for intentional interference with contract similar to the one rejected earlier in *Kline*.[42] In *Sanborn v. Oceanic Contractors, Inc.*,[43] the defendant was the former employer of the plaintiff. The plaintiff had worked for the defendant under a work visa in the Middle East. Eight months after the employment relationship ended, plaintiff desired to work for a new employer and requested that the defendant release him from the previous work visa so that a new one could be issued. The defendant refused, and the plaintiff was unable to fulfill his employment agreement with his new employer. The plaintiff then sued for tortious interference. The Louisiana Supreme Court found that the plaintiff had not alleged that the defendant owed him a duty or that any duty was breached. However, under the immigration laws of the host country, an employer was required to notify the administration within 48 hours of the termination of an employee working under a work visa. The *Sanborn* court found that this legal duty,

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39. *PPG Industries*, 447 So. 2d at 1061-62 (quoting Hill v. Lundin & Assoc., Inc., 260 La. 542, 256 So. 2d 620 (1972)).

40. *PPG Industries*, 447 So. 2d at 1060.

41. *See* Community Coffee Co., Inc. v. Tri-Parish Constr. & Materials, Inc., 490 So. 2d 1109 (La. App. 1st Cir. 1986) (no cause of action where defendant snagged and tore down electric power lines and the resulting power outage caused damaged to plaintiff); Professional Answering Serv., Inc. v. Central La. Elec. Co., 521 So. 2d 549 (La. App. 1st Cir. 1988) (no cause of action where defendant negligently felled trees on power line and resulting power surge caused damage to plaintiff); Babin v. Texaco Inc., 449 So. 2d 718 (La. App. 3d Cir. 1984) (loss of employment to mine workers was not within the scope of protection intended by duty of oil drilling company not to damage salt mine); *see also* Illinois Cent. Gulf R.R. v. Texaco, Inc., 467 So. 2d 1141 (La. App. 5th Cir. 1985).

42. *See supra* text accompanying notes 23-26.

43. 448 So. 2d 91 (La. 1984).

coupled with Louisiana's strong public policy against non-compete clauses in employment contracts, might indeed support the finding of a duty owed to the plaintiff.[44] The court reversed the trial court's dismissal and remanded to allow plaintiff to amend his petition.

What is especially significant about the *Sanborn* decision is the suggestion by the Louisiana Supreme Court that a claim for tortious interference with contract might be actionable. The court intimated in a footnote that although the issue was not presented in the *Sanborn* case,

> were plaintiff to allege and prove defendant intentionally and willfully interfered with plaintiff's contract with [his new employer], that such intentional interference was the proximate cause of the failure of the contract, and that defendant's actions were motivated by malice, or at least not by a significant interest of its own, he might well be entitled to relief.[45]

However, the court noted that an opinion on the subject at that time would be advisory at best.[46] This "obvious invitation"[47] was soon accepted, as the issue was squarely presented in *9 to 5 Fashions, Inc. v. Spurney.*

2. *Intentional Interference*—9 to 5 Fashions, Inc. v. Spurney

In *9 to 5 Fashions Inc., v. Spurney,*[48] the Louisiana Supreme Court removed the absolute bar for actions based on tortious interference with contract, recognizing the action in a very limited way. The plaintiff, 9 to 5 Fashions, was a uniform supplier who had a contract with the Louisiana World Exposition, Inc. (LWE). The defendant, Spurney, was the chief executive officer of LWE. 9 to 5 Fashions alleged that Spurney had intentionally and negligently interfered with the performance of the contract between 9 to 5 Fashions and LWE, causing performance of the contract to be more burdensome and costly.[49]

The *9 to 5 Fashions* court criticized the *Kline* court's limitation of Article 2315 to problems known at the time of the Code's drafting, observing that the "basic concept of a civil code is that of a statement of general principles of law capable

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44. *Id.* at 94.
45. *Id.* at 95 n.5
46. *Id.*
47. Frank L. Maraist & Thomas C. Galligan, Louisiana Tort Law § 20-3 (1996).
48. 538 So. 2d 228 (La. 1989).
49. Spurney had initially recommended another firm for the uniform contract, and 9 to 5 Fashions sued for restraint of trade. Spurney induced 9 to 5 Fashions to dismiss the suit by agreeing to recommend them for the contract. 9 to 5 Fashions alleged that after the contract was awarded, Spurney delayed in appointing an LWE employee to coordinate the design and supply of the uniforms, and that the employee who was eventually assigned had no experience with uniform supply coordination. 9 to 5 Fashions alleged that Spurney's delay resulted in their ordering too much material, effecting a loss of profits on the contract. The trial court found that Spurney was carrying out a "personal vendetta" against 9 to 5 Fashions.

of governing the affairs of present and *future* generations."[50] The *9 to 5 Fashions* court referred to the bar of such actions as "anachronistically unjust when compared with this court's application of the delictual principles to other issues and circumstances."[51] Nonetheless, the court expressed its intention not "to adopt whole and undigested the fully expanded common law doctrine of interference with contract."[52] The court also cautioned that "[s]ome aspects of this tort have been subjected to serious criticisms, leaving open a good many questions about the basis of liability and defense, the types of contract or relationship to be protected, and the kinds of interference that will be actionable."[53] The court recognized "only a corporate officer's duty to refrain from intentional and unjustified interference with the contractual relation between his employer and a third person."[54]

The action recognized in *9 to 5 Fashions* is rather anomalous. The typical interference action involves three parties, two parties contractually bound and a third party who interferes with that contract. However, in *9 to 5 Fashions* the action is essentially only between two parties contractually bound. Since a corporation can only act through its agents, the action is one of a corporation breaching its own contract through actions of its representative, the corporate officer. When a contract is breached, the non-breaching party will have a remedy in contract for the breach, and a cause of action in tort should therefore be unnecessary. It was the insolvency of the corporation which prompted the plaintiff to seek to impose personal liability upon the officer, who would be covered by the corporation's officer liability insurance policy. The peculiar facts of the case have created confusion as to what exactly constitutes actionable interference in Louisiana, as "the circuit courts have continually split (even within a circuit itself) over whether *9 to 5 Fashions* should be expanded."[55] While the *9 to 5 Fashions* court may not have intended its newly recognized cause of action to be so limited, many lower courts have refused to expand the cause of action beyond the narrow facts of that case.[56]

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50. *9 to 5 Fashions*, 538 So. 2d at 233 (emphasis added).

51. *Id.* at 234. *See* PPG Indus. Inc. v. Bean Dredging, 447 So. 2d 1058 (La. 1984) (abrogating the rule that flatly prohibited recovery for intangible economic loss produced by negligent conduct); *see* also, Sanborn v. Oceanic Contractors, Inc., 448 So. 2d 91 (La. 1984) (suggesting that intentional tortious interference with contract rights may be actionable).

52. *9 to 5 Fashions*, 538 So. 2d at 234.

53. *Id.* (citations omitted).

54. *Id.* The *9 to 5 Fashions* court delineated the elements of an intentional interference with contract action:

> (1) the existence of a contract or a legally protected interest between the plaintiff and the corporation; (2) the corporate officer's knowledge of the contract; (3) the officer's intentional inducement or causation of the corporation to breach the contract or his intentional rendition of its performance impossible or more burdensome; (4) absence of justification on the part of the officer; (5) causation of damages to the plaintiff by the breach of contract or difficulty of its performance brought about by the officer.

Id.

55. Calliope Coaches, Inc. v. Vannier, 1998 WL 315437, at *2 (E.D. La. 1998).

56. *See* Tallo v. Stroh Brewery Co., 544 So. 2d 452 (La. App. 4th Cir. 1989), *writ denied*, 547 So. 2d 355 (La. 1989); Accredited Sur. and Cas. Co. v. McElveen, 631 So. 2d 563 (La. App. 3d Cir.

Many courts have interpreted *9 to 5 Fashions* as precluding an action for negligent interference.[57] The *9 to 5 Fashions* court did note that interference with contract had its modern inception in malice and had remained almost entirely an intentional tort, and that "in general, liability has not been extended to the various forms of negligence by which performance of a contract may be prevented or rendered more burdensome."[58] In addition, due to the fiduciary duties owed by a corporate officer to the corporation and its shareholders, he should enjoy immunity from personal liability for negligent interference with the corporation's contracts with third persons. The officer's primary duty is to the corporation, and if he is threatened with the prospect of personal liability for negligent interference, he may not put the corporation's interests above the third party's interests. The *9 to 5 Fashions* court reasoned that a corporate officer's "fidelity and freedom of action aimed toward corporate benefit should not be curtailed by undue fear of personal liability."[59]

Arguably, the policy reasons for rejecting an action for negligent interference within a fiduciary relationship are not applicable to other forms of negligent interference. *9 to 5 Fashions* should not be interpreted as an absolute bar to a negligent interference claim. The *9 to 5 Fashions* court criticized the "anachronistically unjust" bar of *Kline*,[60] and approvingly referred to *PPG Industries, Inc. v. Bean Dredging*,[61] in which the Louisiana Supreme Court replaced the rule prohibiting recovery for intangible economic loss with a duty/risk analysis. While expressing its intent to proceed with caution, the *9 to 5 Fashions* court did not expressly preclude an action for negligent interference in the appropriate case. Although the court correctly noted that interference claims are almost always intentional torts, the reluctance to find a duty not to negligently interfere should not be interpreted to disallow recovery of interference damages where an independent duty exists, which is exactly what some courts are doing by categorically rejecting such claims.

3. *Negligent Interference*—Great Southwest Fire Insurance Co. v. CNA Insurance Co.

When squarely presented with a negligent interference claim, the Louisiana Supreme Court declined to impose liability. In *Great Southwest Fire Insurance Co. v. CNA Insurance Co.*,[62] an excess liability insurance carrier sued the primary insurer, seeking to recover sums it had to pay due to the alleged bad faith failure of the primary insurer to defend properly and settle a lawsuit against their common

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1994), *writ denied*, 637 So. 2d 483 (La. 1994); Yoes v. Shell Oil Co., 657 So. 2d 241 (La. App. 5th Cir. 1995); Lynn v. Berg Mechanical, Inc., 582 So. 2d 902 (La. App. 2d Cir. 1991).

57. *See* cases cited *supra* note 5.

58. 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228, 232 (La. 1989).

59. *Id.* at 232.

60. *Id.* at 234.

61. 447 So. 2d 1058 (La. 1984).

62. 557 So. 2d 966 (La. 1990).

insured.[63] The *Great Southwest* court found that the primary insurer owed no duty to the excess insurer, reasoning that to find such a duty would, in effect, be to recognize something very similar to an action for negligent interference with contract.[64] The court referred to its recent recognition in *9 to 5 Fashions* "of a narrowly drawn action for *intentional* interference" and the *9 to 5 Fashions* court's intention to "proceed with caution in expanding that cause of action."[65] The *Great Southwest* court reiterated that "except for a very few cases to the contrary, there is little authority for negligent interference with contract in general."[66]

In concluding that the primary insurer did not owe a duty to the excess insurer, the *Great Southwest* court considered both the likelihood that any duty recognized would evolve to include a duty to avoid negligent interference, and the difficulty of reserving such a negligent interference action to only excess insurers. However, the vast majority of factors cited by the court were related to the unique realm of insurance.[67] Just as the fiduciary obligations owed by a corporate officer in *9 to 5 Fashions* required that negligent interference actions not be allowed in that context, the fiduciary obligations owed by an insurer to the insured and the highly regulated nature of insurance protection in general compelled a similar limitation in *Great Southwest*. The refusal to recognize a negligent interference action in these circumstances should not be applied universally to all actions which do not involve the same concerns.

It is significant that the Louisiana Supreme Court in *Great Southwest* did not categorically reject the negligent interference claim, but instead utilized a duty/risk analysis. Since the plaintiff alleged bad faith on the part of the defendant, it could be argued that the action was one for intentional interference. However, the *Great Southwest* court never considered whether the elements of intentional interference under *9 to 5 Fashions* were met. Since the court based its decision on the existence *vel non* of a duty owed, it would seem to follow that interference actions should not be categorically rejected if the facts are outside the scope of *9 to 5 Fashions* or if the claim is essentially one for negligent interference.

Claims that could be categorized as negligent interference should not be categorically rejected. The previous Louisiana Supreme Court decisions rejecting negligent interference were justified for various reasons. In *PPG*, the plaintiff's harm was too remote to be within the scope of the risk. In *9 to 5 Fashions*, the fiduciary obligations owed to the defendant's corporation precluded the finding of a duty. In *Great Southwest*, the competing obligations of a primary insurer and an excess insurer precipitated the same result. In none of these cases did the

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63. *Id.* at 966.

64. *Id.* at 969.

65. *Id.*

66. *Id.* at 970 (citations omitted).

67. Specifically, "the substantial although indirect protection that is already provided insurers legislatively by subrogation, the injustice and inefficiency that may be produced by encouraging insurers with independent rights to intervene in litigious matters in competition with their insureds, and the effect upon insurance administration and rates of requiring primary insurers' attorneys to serve three masters." *Great Southwest*, 557 So. 2d at 971.

Louisiana Supreme Court categorically reject the action as one for "negligent interference." The term itself is superfluous and misleading, since there is really no such thing as a negligent interference action. An interference is either intentional or it is negligent. If negligent, it is subsumed into the broader realm of negligence actions. Courts should abandon the "rock-strewn path of 'negligent interference with contract' for more familiar tort terrain."[68] In a negligence action, a duty/risk analysis is fully competent to impose liability where warranted and yet not extend liability beyond the scope of any duty owed. Such an analysis would impose liability where there exists an ease of association between an actor's negligent conduct and damage to a third party's contractual relations where none of the policy reasons asserted for denying a so-called "negligent interference" action are implicated. An action for negligent drug testing is the prime example.

III. NEGLIGENT DRUG TESTING

Perhaps the most persuasive argument for allowing recovery for at least some forms of negligent interference is in the area of negligent employment testing. Many employers require some form of testing, including drug screens, polygraph examinations, and merit-based tests, as a condition of employment. The most pervasive testing is for illegal drugs. In several cases, employees have been terminated because of an allegedly false positive result which was due to the negligence of the testing laboratory. Some Louisiana courts have categorically rejected such claims as "negligent interference with contract" actions. Others have allowed recovery by application of a duty/risk analysis. The Louisiana Supreme Court has not yet been confronted with the issue.

A. *The Louisiana Jurisprudence*

The first Louisiana court to consider whether a drug testing laboratory is liable for negligence which culminates in the termination of the testee was the first circuit in *Herbert v. Placid Refining Co.*[69] The employer refinery contracted with a drug testing laboratory to collect and test urine samples from all of its employees, including Herbert. The lab reported to the refinery that Herbert's urine sample disclosed the presence of THC, the active ingredient in marijuana. Herbert and nine other employees whose urine tested positive were terminated.[70] Herbert sued the lab for negligence, alleging that the lab had a duty "to analyze his body fluids in a manner that utilized State [sic] of the art technology and was fair and accurate," and that the lab "failed to prevent melanin interference with their THC analysis because of inadequate laboratory methodology."[71]

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68. Green Mountain Power Corp., v. General Electric Corp., 496 F. Supp. 169, 175 (D. Vt. 1980).

69. 564 So. 2d 371 (La. App. 1st Cir. 1990).

70. *Id.* at 372.

71. *Id.*

The first circuit affirmed a summary judgment dismissing plaintiff's suit. The *Herbert* court discussed *Johnson v. Delchamps,*[72] and adopted its rationale as its own.[73] In analyzing Herbert's claim against the lab, the court stated that in order for him to prevail, he "must show some noncontractual (tort) duty flowing from [the lab] to himself."[74] Herbert "asserted that [the lab] *owed him a duty* to properly analyze his body fluids," and the lab's breach of that duty caused him to be summarily terminated by the refinery.[75] However, the court rejected his claims and found that the lab had a contractual duty to the refinery, not Herbert, to properly analyze his urine.[76] The court found that the lab owed him "no duty to protect against this risk. Louisiana law does not recognize a cause of action for *negligent interference with contract rights.*"[77]

The fourth circuit has reached a different conclusion. In *Lewis v. Aluminum Co. of America,*[78] the facts were almost identical to those in *Hebert,* except that the plaintiff was an independent contractor who was offered the opportunity to gain employment status and was instructed to undergo drug testing. He tested positive, and as a consequence was not made a regular employee and had his independent contractor status terminated. Although he obtained an independent test showing he was drug-free, his employer refused to reconsider its position. Lewis sued the drug testing labs alleging negligence.[79] He further alleged that the false report "affected his ability to find other employment and damaged his general reputation in the community."[80]

The *Lewis* court correctly noted that in a negligence action, a duty/risk analysis is utilized to determine if the defendant's conduct constitutes fault in that it amounts to a breach of a legal duty to protect against a particular risk.[81] While recognizing that liability had "not been extended to various forms of negligent interference with contract," the court found that the plaintiff had stated a cause of action in general negligence, alleging "the breach of the duty to perform the drug tests in a competent and non-negligent manner."[82] The court found an ease of association between the rule of law contained in Articles 2315 and 2316 and the risk of injury sustained by the plaintiff.[83]

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72. 897 F.2d 808 (5th Cir. 1990) (no cause of action against employer for termination of at-will employee on the basis of a negligently administered polygraph examination).

73. *Herbert,* 564 So. 2d at 373.

74. *Id.*

75. *Id.* at 374 (citations omitted).

76. *Id.* (citations omitted).

77. *Id.* (citing Great Southwest Fire Ins. Co., 557 So. 2d 966 (La. 1990); 9 to 5 Fashions, Inc. v. Spurney, 538 So. 2d 228 (La. 1989); PPG Industries, Inc. v. Bean Dredging, 447 So. 2d 1058 (La. 1984); Professional Answering Serv., Inc. v. Central La. Elec. Co., Inc., 521 So. 2d 549 (La. App. 1st Cir. 1988)).

78. 588 So. 2d 167 (La. App. 4th Cir. 1991).

79. *Id.* at 169.

80. *Id.*

81. *Id.* at 170-71.

82. *Id.* at 170.

83. *Id.*

The court found that the "precept that liability does not extend to negligent interference with contract rights" was not applicable here.[84] The employee was not an unknown third party. To the contrary, when the lab analyzed plaintiff's sample, it was aware that negligent testing on its part could produce a false positive result which could damage both the employee's "reputation and his employment opportunities."[85] The court found that the damages were directly foreseeable and the chance of harm was not remote. Therefore, extending the lab's liability to encompass plaintiff's harm did not create an undue burden upon the lab's freedom of action: "Instead, it should foster a greater sense of responsibility within it to perform its drug testing services in a skillful and competent manner."[86]

The *Lewis* court found that the plaintiff had stated a cause of action in negligence, regardless of the contract between the lab and plaintiff's employer and the plaintiff's status as an at-will employee.[87] Although employment is terminable at will, the court found that "the employment is a subsisting relationship, of value to the employee, until it is terminated. Thus, while the possibility of employment termination at any time affects the amount of damages sustained by the employee, it should not affect the employee's right of recovery."[88] Likewise, in *Nehrenz v. Dunn*,[89] the fourth circuit found that a terminated employee had stated a cause of action in general negligence based on a breach of the testing lab's duty to perform drug tests in a competent and non-negligent manner and that the plaintiff's alleged injuries were within the scope of that duty.[90]

The fifth circuit found a non-contractual obligation between the testee and the lab in *Elliott v. Laboratory Specialists, Inc.*,[91] adding that to suggest that the lab owed the employee no duty to analyze his body fluid in a scientifically reasonable manner was "an abuse of fundamental fairness and justice."[92] At trial, the employee's experts testified that the testing procedures used by the lab were improper and the chain of custody protocol was inadequate.[93] In upholding the jury's award of $25,000, the court found that the lab "should be held responsible for its conduct. The risk of harm in our society to an individual because of a false-positive drug test is so significant that any individual wrongfully accused of drug usage by his employer is within the scope of protection under the law."[94] The *Elliott* court found that testing laboratories owe a duty of care to tested employees, despite their contractual relationship with the employer: "Privity of contract should

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 170-71.
88. *Id.* at 171 n.4 (citations omitted).
89. 593 So. 2d 915 (La. App. 4th Cir. 1992).
90. *Id.* at 917.
91. 588 So. 2d 175 (La. App. 5th Cir. 1991).
92. *Id.* at 176.
93. *Id.*
94. *Id.*

never excuse a duty imposed by law on the conduct of individuals towards another in a reasonable society."[95]

Although the second circuit has not been presented with the issue of negligent drug testing, language in another case suggests that the court might follow the first circuit's rejection of such a claim. In *Carter v. Smith*,[96] the issue was whether a motorist who was not physically injured during an automobile accident could recover damages for her loss of employment which resulted from the accident.[97] While ultimately concluding that the defendant's "negligent breach of duty to drive safely does not encompass the risk of a subsequent termination of contract between the plaintiff and a third party,"[98] the court noted that the true nature of the case was one for interference with contract. The court read *Great Southwest* as holding that negligent interference with a contract is not a cause of action.[99] It found *Herbert v. Placid Refining Co.*[100] to be analogous, and noted that the analytical method utilized in *Herbert* was more persuasive than the opposite conclusion drawn by the fourth circuit.[101] However, the *Smith* court did concede that an "argument can be made that loss of job is a reasonably foreseeable consequence of, and easily associated with, a false positive drug test, negligently obtained," an ease of association which was "simply not the case here."[102]

Whether or not an employee has a cause of action against a drug testing lab for negligent testing is unsettled in most jurisdictions. Ironically, while Louisiana was the last jurisdiction to allow intentional interference claims, it is leading the way in allowing negligence actions in this context. The fourth and fifth circuit cases allowing recovery are often cited by other jurisdictions that allow recovery.[103] The first circuit has denied recovery. The second and third circuits, along with the Louisiana Supreme Court, have yet to decide the issue. When these courts are confronted with the issue of negligent testing, the proper approach would be to conduct a duty/risk analysis and allow recovery.

B. A Duty/Risk Approach to Negligent Drug Testing Claims

A claim should not be categorically rejected as one for negligent interference with contract. In a true interference action, it is the conduct of interfering with the contractual relation which is proscribed. The question is whether there is a duty

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95. *Id.*

96. 607 So. 2d 6 (La. App. 2d Cir. 1992).

97. The plaintiff was a driver and caretaker for a handicapped patient, who was riding in the car with the plaintiff when an accident occurred. The accident frightened the patient to such an extent that she refused to ride in the car with the plaintiff. As a result, the patient's mother terminated the plaintiff.

98. *Carter*, 607 So. 2d at 6.

99. *Id.* at 7.

100. 564 So. 2d 371 (La. App. 1st Cir. 1990).

101. *Carter*, 607 So. 2d at 8.

102. *Id.*

103. *See, e.g.*, Stinson v. Physicians Immediate Care, Ltd., 646 N.E.2d 930 (Ill. App. 1995) (drug-testing laboratory owes a duty of reasonable care to persons whose specimens it tests for employers or prospective employers).

to protect another's contractual relations, or at least not to do an act which interferes in such relations. Where conduct is itself negligent or tortious, the question should not be whether there is a duty not to negatively impact another's contractual relations, but rather whether the interference as a consequence of independently negligent conduct is within the scope of the risk. If a duty exists, and the interference is within the scope of the risk, then the imposition of liability should not be precluded simply because it might be categorized as "negligent interference with contract." Therefore, the proper resolution is to determine whether a duty is owed, and if so, the corresponding scope of the risk of a breach thereof.

1. Laboratories Owe a Duty to Perform Drug Tests in a Non-negligent Manner

In the negligent drug testing cases, the question is whether a drug testing laboratory owes a duty to the testee. The *Herbert* court found no such duty existed, and that the lab owed the plaintiff "no duty to protect against this risk."[104] The *Lewis*, *Elliott*, and *Nehrenz* courts concluded that the labs did owe a duty. The duty owed was not to protect the employee's employment, but rather to perform the tests "in a competent and non-negligent manner."[105] The existence of such a duty should be found: "Under general negligence principles a provider of services must (1) possess the skill normally possessed by persons who provide such services for a fee, (2) use reasonable care in performing the service, and (3) exercise his or her best judgment."[106]

The Louisiana Supreme Court recognized such a duty in *Barrie v. V. P. Exterminators*.[107] In *Barrie*, a homeowner enlisted the services of a termite inspector to inspect the home for termites. The report was to be used to facilitate the sale of the house. The inspector negligently and erroneously reported that the house was free from termites, and the result was a pecuniary loss to the purchaser. The purchaser, who was not a party to the contract between the vendor and the inspector, sued the inspector for negligent misrepresentation.

The theme in negligent misrepresentation cases "is that one is liable for negligent disclosure if he has superior knowledge and knows the other party is relying upon him for such knowledge."[108] According to the comments to § 552 of the Restatement (Second) of Torts, the duty of care owed by commercial information providers is to observe a relative standard, defined in terms of the intended use of the information weighed against the magnitude and probability of loss which would result from incorrect information.[109] In *Barrie*, the Louisiana

104. Herbert v. Placid Refining Co., 564 So. 2d 371, 374 (La. App. 1st Cir. 1990).
105. Lewis v. Aluminum Co. of Am., 588 So. 2d 167, 170 (La. App. 4th Cir. 1991).
106. Maraist & Galligan, *supra* note 47, § 21-1, at 451.
107. 625 So. 2d 1007 (La. 1993).
108. Maraist & Galligan, *supra* note 47, § 5-7(h), at 122.
109. Restatement (Second) of Torts § 552 cmt. (a) (1977).

Supreme Court found this section of the Restatement to be compatible with the duties encompassed by Articles 2315 and 2316 of the Civil Code.

Since the defendant in *Barrie* had knowledge of the prospective use of the information, had a pecuniary interest in supplying the information, and held himself out as a specialist, the court concluded that a duty to use reasonable care and competence in obtaining the information and communicating it to the prospective buyers of the dwelling existed as a matter of law.[110] A similar duty should be imposed upon a drug testing laboratory who supplies information for pecuniary gain.

Although decided before *Barrie*, a similar result was reached by the fifth circuit in *Colbert v. B.F. Carvin Construction Co.*[111] In *Colbert*, a general contractor and an architect both had contracts with the school board for certain construction work. The contractor sued the architect for negligent preparation of plans and specifications, failure to give additional instructions during the progress of the work, and for withholding recommendation for payment until the contractor did additional uncompensated for work, thereby causing a loss of profits on the contractor's contract with the school board. Although the court concluded that there was as yet no remedy in Louisiana for negligent interference with contract, the court recognized a tort based upon a negligent professional undertaking by an architect causing foreseeable economic harm to the plaintiff's interests.[112]

While the *Colbert* court discussed several Louisiana cases allowing similar actions,[113] it quoted a California case for the rationale that liability should be imposed because the supervising architect has a significant amount of control over the contractor.[114] The court found that it was this control, "tantamount to a power of economic life or death over the contractor," that justifies the imposition of a duty to perform his functions without negligence as they affect the contractor.[115] The *Colbert* court also discussed a Minnesota decision[116] which concluded that an engineer owes a duty to the subcontractor even in the absence of contractual privity, noting that the prevailing rule in most jurisdictions recognizes the liability

110. *Barrie*, 625 So. 2d at 1018.

111. 600 So. 2d 719 (La. App. 5 Cir. 1992), *writ denied*, 604 So. 2d 1309 (La. 1992).

112. *Colbert*, 600 So. 2d at 719.

113. R & R Enter. v. Rivers & Gulf Marine Survey, 476 So. 2d 12 (La. App. 5th Cir. 1985); Impressive Builders v. Ready Mix, Inc., 535 So. 2d 1344 (La. App. 5th Cir. 1988); Alley v. Courtney, 448 So. 2d 858 (La. App. 2d Cir. 1984), *writ denied*, 450 So. 2d 360 (La. 1984); Farrell Constr. v. Jefferson Parish, 693 F. Supp. 490 (E.D. La. 1988), *rev'd on other grounds*, 896 F.2d 136 (5th Cir. 1990); Standard Roofing Co. v. Elliot Const., 535 So. 2d 870 (La. App. 1st Cir. 1988), *writ denied*, 537 So. 2d 1166 (La. 1989); S.K. Whitty & Co. v. L.L. Lambert, 576 So. 2d 599 (La. App. 4th Cir. 1991), *writ denied*, 580 So. 2d 928 (La. 1991); Gurtler, Herbert & Co. v. Weyland Mach. Shop, 405 So. 2d 660 (La. App. 4th Cir. 1981), *writ denied*, 410 So. 2d 1130 (La. 1982).

114. *Colbert*, 600 So. 2d at 724 (citing United States v. Rogers & Rogers, 161 F. Supp. 132, 136 (S.D. Calif. 1958)).

115. *Colbert*, 600 So. 2d at 724.

116. Waldor Pump v. Orr-Schelen-Mayeron & Assoc., 386 N.W.2d 375 (Minn. Ct. App. 1986).

of professional service providers who are negligent in the provision of services.[117] The Minnesota court found the engineering firm "liable in negligence to those who foreseeably relied on its professional services."[118]

The *Colbert* court also discussed *Westerhold v. Carroll,*[119] a Supreme Court of Missouri decision adopting a balancing test to be applied on a case by case basis to determine whether in a specific case the defendant will be held liable to a third person not in privity. The factors to be balanced included "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, and the policy of preventing future harm."[120] Noting that this was not a case where the architect was being exposed to unlimited liability to an unlimited number of persons, the *Colbert* court adopted the *Westerhold* balancing test and concluded that the petition stated a cause of action.[121]

The foreseeability of the harm resulting from an erroneous test is one evident aspect of the duty equation.[122] The employer usually has no expertise in drug testing, and it is foreseeable that the employer will rely on the results and recommendations of the testing laboratory. It is also foreseeable that the employer will take "severe action in response to the misleading reports."[123] It is even foreseeable who the potential plaintiffs will be, since the laboratory knows precisely who is being tested for precisely which employers. As such, a duty should be found based upon the foreseeability of the harm that will result as a direct result of any negligent testing that produces a false positive.

A legal duty to perform drug testing in a non-negligent manner could also be found based on Louisiana Revised Statutes 49:1005, which imposes minimum guidelines to be followed by drug testing laboratories in many circumstances.[124]

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117. *Colbert,* 600 So. 2d at 724 (citing Waldor Pump v. Orr-Schelen-Mayeron & Assoc., 386 N.W.2d 375, 376-77 (Minn. Ct. App. 1986)).

118. *Colbert,* 600 So. 2d at 724.

119. 419 S.W.2d 73 (Mo. 1967).

120. *Colbert,* 600 So. 2d at 724 (citing Westerhold v. Carroll, 419 S.W.2d 73, 81 (Mo. 1967)).

121. *Colbert,* 600 so. 2d at 725.

122. Maraist & Galligan, *supra* note 47, § 5-1, at 101.

123. David W. Lockard, Comment, *Protecting Medical Laboratories From Tort Liability for Drug Testing—The Amorphous Concept of Duty,* 17 J. Legal Med. 427, 453 (1996).

124. La. R.S. 49:1005 (Supp. 2000) provides:

> A. Beginning June 1, 1991, all drug testing, except as provided for in R.S. 49:1008, of individuals in residence in the state and all drug testing of samples collected in the state, including territorial waters and any other location to which the laws of Louisiana are applicable, shall be performed in NIDA-certified or CAP-FUDT-certified laboratories, if both of the following apply:
>
> (1) If, as a result of such testing, mandatory or discretionary consequences will be rendered to the individual.
>
> (2) Drug testing is performed for any or all of the following classes of drugs: marijuana, opioids, cocaine, amphetamines, and phencyclidine.
>
> B. Drug testing as provided in this Subsection shall be performed in compliance with the NIDA guidelines except as provided in this Chapter or pursuant to statutory or regulatory

While the statute mandates that drug testing only be conducted in certified laboratories that maintain certain procedures, it does not contain any provisions concerning violations. Imposing liability on non-conforming laboratories would serve as an enforcement mechanism for the statute. The determination of whether a private remedy is implicit in a federal statute was considered in *Cort v. Ash*.[125] In *Cort*, the United States Supreme Court considered several factors, including whether the plaintiff was one of the class for whose benefit the statute was enacted and whether there was any indication of legislative intent, explicit or implicit, to create or deny such a remedy.[126] Here, while the statute is a state statute, the same analysis should apply. The statutory regulation of drug testing procedures in instances where an employee will suffer consequences based on the results of the test benefits the employee who is tested more than any other party. It is the employee who primarily suffers the harm of a false positive. Therefore a legal duty owed to the employee should be found based on the statute.[127]

2. *The Duty Owed by the Laboratories Extends to the Persons Who Are Tested*

The next determination is whether this duty extends "to protect the plaintiff against the particular risk that occurred, in the particular manner in which it occurred. Put differently, does *this* defendant have a duty to protect *this* plaintiff against *this* risk that occurred in *this* manner."[128] In the negligent drug testing cases, the plaintiff is typically an at-will employee.[129] Employment-at-will precludes an employee terminated due to a negligently administered polygraph or drug examination from recovering from the employer.[130] The rejection of a cause of

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authority under R.S. 23:1081 et seq. and R.S. 23:1601 et seq. The cut off limits for drug testing shall be in accordance with NIDA guidelines with the exception of initial testing for marijuana. The initial cut off level for marijuana shall be no less than fifty nanograms/ML and no more than one hundred nanograms/ML as specified by the employer or the testing entity. The Department of Health and Hospitals shall have the responsibility to adopt the NIDA guidelines for purposes of governing drug-testing programs for specimens collected in accordance with this Chapter. The Department of Health and Hospitals shall have the responsibility for adoption of any subsequent revisions of the NIDA guidelines as of the initial effective date of this Chapter.

125. 422 U.S. 66, 95 S. Ct. 2080 (1975).

126. *Id.* at 78, 95 S. Ct. at 2088.

127. *See* Ambroz v. Cornhusker Square Ltd., 416 N.W.2d 510 (Neb. 1987) (finding an employee who was terminated for refusing to take a polygraph examination in violation of a state statute had stated a cause of action against his former employer); *see also* Strahl v. Miller, 151 N.W. 952 (Neb. 1915).

128. Maraist & Galligan, *supra* note 47, § 5-1, at 101.

129. *See* La. Civ. Code art. 2747; Johnson v. Delchamps, Inc., 897 F.2d 808, 810 (5th Cir. 1990), *writ denied*; Ballaron v. Equitable Shipyards, Inc., 521 So. 2d 481 (La. App. 4th Cir. 1988); Chauvin v. Tandy Corp., 984 F.2d 695 (5th Cir. 1993); Overman v. Fluor Constr. Inc., 797 F.2d 217 (5th Cir. 1986); Varnado v. Roadway Express, 557 So. 2d 413 (La. App. 4th Cir. 1990).

130. *See* Johnson v. Delchamps, Inc., 897 F.2d 808 (5th Cir. 1990) (no cause of action against an employer for termination as the result of allegedly negligent administration of a polygraph examination

action against the employer is justified, as the employer usually relies in good faith upon the results of the testing laboratory.[131] Without a remedy against the employer, terminated employees have asserted claims in negligence against testing laboratories, with varying degrees of results. Some courts have relied on employment-at-will to preclude recovery for "otherwise applicable tort claims against employers *or third parties*."[132] However, the fourth and fifth circuit cases allowing recovery did not preclude recovery due to the employee's status as an at-will employee.[133]

The traditional policy concerns which precluded courts such as *PPG* from extending the scope of the defendant's duty to encompass that plaintiff's harm are simply not present in the drug testing context. Here, the terminated employee is not a person whose contractual interests were incidentally harmed. To impose liability, something more is needed to render the defendant liable.[134] There must be some negligence "*toward* the plaintiff's contract interest, for otherwise the defendant has been guilty of no breach of duty *to the plaintiff*."[135] Negligent drug testing is certainly negligence directed at the employee's interest in employment. There is an ease of association between the negligent testing and the employee's subsequent termination. It is unreasonably risky to conduct employment related drug screens in a negligent manner precisely because the person tested will be terminated (or at least reprimanded in some fashion) if the test is positive. There is no limitless extension of liability since the lab know exactly whom it tests. The lab should be liable for any harm it inflicts upon those persons by virtue of a negligently conducted test.

3. *Public Policy Supports the Imposition of Liability Upon Negligent Drug Testing Laboratories*

Imposing a duty to perform non-negligently on drug testing laboratories is supported by policy concerns. The enactment of Louisiana Revised Statutes 49:1005[136] expresses the public policy of Louisiana in maintaining minimum standards in testing procedures. The imposition of liability is necessary to enforce

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administered by a fellow employee). The fifth circuit found that while the employee maintained that the negligent administration of the test was an independent tort, what she really complained of was the discharge itself. *Johnson*, 897 F.2d at 810. The court found that employment-at-will controlled the disposition of the case and affirmed the summary judgment for the employer. *Id.* at 811.

131. Karen Manfield, *Imposing Liability on Drug Testing Laboratories for "False Positives": Getting Around Privity*, 64 U. Chi. L. Rev. 287, 295 (1997).

132. John Devlin, *Reconsidering the Louisiana Doctrine of Employment at Will: On the Misinterpretation of Article 2747 and the Civilian Case for Requiring "Good Faith" in Termination of Employment*, 69 Tul. L. Rev. 1513, 1549 (1995) (emphasis added).

133. *See supra* text accompanying notes 87-95; *see also* Merrick v. Thomas, 522 N.W.2d 402 (Neb. 1994) (at-will-employee stated a cause of action in negligence against the Sheriff's Merit Commission and against the County itself for negligent scoring of a merit test).

134. Carpenter, *supra* note 9, at 739.

135. *Id.* (emphasis added).

136. *See supra* text accompanying note 124.

that legislative expression. The employee who is adversely affected has no cause of action against the employer.[137] While the employer may have an action for breach of contract against the lab, there is little incentive for an employer to pursue such a remedy. Employers are not likely to demand higher quality services since they are more concerned with decreasing costs and increasing efficiency through cheaper providers of testing services.[138] They have little incentive to champion the interests of an employee who purports to be the victim of a false positive.

The laboratories are the best risk avoiders. They have exclusive control over the testing procedure, as they calibrate the equipment for various influences, set the benchmark for normal and abnormal ranges, and establish their own quality control procedures.[139] Through their control of the scientific process used, the labs have significant control over the number of false positives.[140] Imposing liability for negligent procedures creates an incentive for the lab to consider the costs of false positives when deciding what procedures to use and how much money to spend on precautionary measures.[141] The laboratories have a pecuniary interest in the services they provide, and therefore the cost of providing reasonable care should be incorporated into the cost of their services, not imposed on the innocent employee, "who assumes all the risk and is in the weakest position to bargain or directly benefit from the transaction. The failure to find protection in this situation is fundamentally unfair."[142]

4. A Duty/Risk Analysis Is Competent to Limit This Liability

The *Great Southwest* court explored the policy reasons behind the reluctance to recognize an action for negligent interference, rooted in part on what has been called the "pragmatic objection": While physical damage can generally be limited, economic harm often creates a chain reaction, and "may produce an unending sequence of financial effects."[143] The *Great Southwest* court noted that with few exceptions, courts have generally "refused to cross the bright line that has traditionally marked negligence claims for economic harm as off limits which would require them to substitute a case-by-case adjudication on the issue of proximate cause."[144]

However, the Louisiana Supreme Court did in fact cross that bright line in *Barrie v. V.P. Exterminators, Inc.*[145] When negligent misrepresentation causes only pecuniary loss, "the courts have found it necessary to adopt a more restricted rule of liability, because of the extent to which misinformation may be, and may be

137. *See supra* text accompanying notes 129-131.
138. Manfield, *supra* note 131, at 293.
139. Lockard, *supra* note 123, at 453.
140. Manfield, *supra* note 131, at 292.
141. *Id.*
142. Lockard, *supra* note 123, at 453.
143. Great Southwest Fire Ins. Co. v. CNA Ins. Co., 557 So. 2d 966, 970 (La. 1990).
144. *Id.*
145. 625 So. 2d 1007 (La. 1993).

expected to be, circulated, and the magnitude of the losses which may follow from reliance upon it."[146] In *Barrie*, the court recognized that the adoption of a set theory of liability was not necessary, but rather "the case by case application of the duty/risk analysis, presently employed by our courts" provides adequate protection, "because the initial inquiry is whether, as a matter of law, a duty is owed to this particular plaintiff to protect him from this particular harm."[147] It is this individualized application of the duty/risk approach that should be utilized in "negligent interference" cases.

IV. CONCLUSION

The decision whether to allow recovery for pecuniary loss resulting from non-physical injury should be governed by application of the duty/risk analysis. The solution cannot be found in adherence to bright line rules, as "[n]either a blanket denial nor an unlimited approval of recovery is appropriate."[148] There is no need for the term "negligent interference with contract." The nomenclature should not be used to categorically reject claims, but neither should it be invoked as an independent basis for tort liability. The cases dealing with negligent drug testing are but one example of a form of negligent interference which should be actionable, not as a negligent interference action in and of itself, but rather as a negligence action through the application of a duty/risk analysis. As the Supreme Court of New Jersey noted: "In the end, the challenge is to fashion a rule that limits liability but permits adjudication of meritorious claims."[149]

The application of the duty/risk analysis ensures that liability is imposed where public policy imposes a duty, while at the same time limiting liability to the intended scope of that duty. Professor Robertson recognized the importance of such an individualized approach:

> Is a big, bright-line prohibitory rule, treating intangible economic losses differently from other injuries, better tort policy than an approach requiring the courts to confront the scope of liability issue for each type of plaintiff and each item of claimed damages? [Professor] Leon Green would not have found much difficulty with the question: "[R]ules of law tend to become less and less dependable, and more and more fluid as society becomes more complex and people more intelligent. The formula can not be invented which relieves the judges and juries from the painful necessity of using their good sense in deciding cases. Intelligence and formulas soon part company. Rules will carry those who must pass judgment only so far, figuratively speaking, into the neighborhood of the problem to be passed upon, and then the judges must get off and walk."[150]

146. Restatement (Second) of Torts § 552 cmt. (a) (1977).
147. Barrie v. V.P. Exterminators, 625 So. 2d 1007, 1016 (La. 1993).
148. Maraist & Galligan, *supra* note 47, § 5-9, at 132.
149. People Express Airlines, Inc. v. Consolidated. Rail Corp., 495 A.2d 107, 111 (N.J. 1985).
150. Robertson, *supra* note 19, at 745-46 (citations omitted).

This was the walk the Louisiana Supreme Court took in *PPG* and *Barrie*. And it is this walk that should be continued as courts are faced with the issue of intangible economic loss caused by a defendant's negligence, whether or not the loss includes damage to a contractual relation.

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