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# Blended Liability for a Blended Tort: The Interaction Between At-Will Employees, Non-Compete Covenants and Tortious Interference Claims

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## **Blended Liability for a Blended Tort: The Interaction Between At-Will Employees, Non-Compete Covenants and Tortious Interference Claims**

*“Competition is not a tort.”<sup>1</sup>*

### INTRODUCTION

Eddie is a mid-level product salesman for Fox Exports. Fox hired Eddie as an at-will employee and bound him to a non-compete covenant that restricts Eddie’s ability to work for any of Fox’s competitors within a specified geographic region for two years after the termination of their employment relationship. After working for Fox for roughly two years, Eddie meets a manager for Newport Exports, one of Fox’s competitors, at a local golf outing. After conversing for a while, Newport’s manager believed Eddie would fit in well with his company and offered Eddie a job. After Eddie accepted the offer, Fox sues Newport for tortious interference.

This Note proposes an analytical framework for resolving such disputes and argues that a narrow standard of liability is appropriate. A change is needed as the current regime chills employers from offering jobs to former employees of competitors, promotes social inefficiency by permitting employers to restrict their employee’s future employment opportunities while offering only at-will employment and erects a large barrier to the employee’s most gainful job market. Based on the interplay of the employment-at-will doctrine, noncompetition agreements and tortious interference claims, this Note refutes the Restatement (Second) of Torts<sup>2</sup> approach and instead recommends a theory of liability that incorporates aspects of both tortious interference with contract and tortious interference with prospective contractual relations claims. Such a liability framework not only safeguards fair competition and embraces employee mobility, but also affords employers adequate protection for their legitimate business interests.

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<sup>1</sup> *Speakers of Sport, Inv. v. Proserv, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999) (Posner, J.).

<sup>2</sup> Unless otherwise indicated this Note utilizes the term “Restatement” to refer to the provisions of the Restatement (Second) of Torts.

## I. THE EMPLOYMENT-AT-WILL DOCTRINE

American jurisprudence typically construes employment for an unstated term as a relationship that may be terminated at the will of either the employer or the employee.<sup>3</sup> The employment-at-will doctrine<sup>4</sup> stands for the proposition that an employee can be terminated at any time for any reason, good reason or bad reason.<sup>5</sup> Though the harshest impacts of the doctrine have been softened throughout the years,<sup>6</sup> most workers in the United States who were told “You’re Fired!” had no legal recourse under traditional employment law.<sup>7</sup> The vast majority of American workers<sup>8</sup> are at-will employees<sup>9</sup>; Montana is the only American state that has not adopted the doctrine as its default rule.<sup>10</sup>

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<sup>3</sup> See, e.g., SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT LAW 39 (3d Ed. 2008); Debbie Ho, *Employment Law-Exceptions to the At-Will Doctrine-The Adoption of the Public Policy Exception in Two Specific Situations Could Signal the Adoption of Additional Exceptions to the Doctrine*, 64 MISS. L.J. 257, 259 (1994); Cheryl S. Massingale, *At-Will Employment: Going, Going . . .*, 24 U. RICH. L. REV. 187 (1989-1990).

<sup>4</sup> In 1877, Horace G. Wood proposed the initial version of the employment-at-will rule. H.G. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT 157 (1st ed. 1877). Wood stated that where an employee was hired for an indefinite term, it was a *prima facie* at-will relationship. Though Wood’s research and conclusion has since been widely criticized, the employment-at-will rule nonetheless became an accepted part of American jurisprudence by the end of the 19<sup>th</sup> century. Richard A. Lord, *The At-Will Relationship in the 21<sup>st</sup> Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 707-08 (2006) (citing authority).

<sup>5</sup> See, e.g., Martin Wald & David W. Wolf, *Recent Developments in the Law of Employment at Will*, 1 LAB.LAW. 533, 534 (1985); Joseph Z. Fleming, *Labor and Employment Law: Recent Developments—At-Will Termination of Employment Has Not Been Terminated*, 20 NOVA. L. REV. 437 (1995).

<sup>6</sup> See *infra* Section I.B for a discussion of the erosion of the employment-at-will doctrine.

<sup>7</sup> Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 8 (1993).

<sup>8</sup> Interestingly, although the vast majority of American employees work at-will, it appears that many misunderstand the nature of their own employment. For example, “[i]n a 1997 law review article, Pauline T. Kim reported that 89% of respondents to her survey, conducted to test employee’s knowledge of the employment-at-will rule, believed that the law forbids a termination based on personal dislike.” Alex Long, *The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L.J. 491 (2001) (hereinafter, “Disconnect”) (citing Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133-34 (1997)).

<sup>9</sup> See, e.g., Matthew C. Palmer, *Where Have You Gone, Law and Economics Judges? Economic Analysis Advice To Courts Considering The Enforceability of Covenants Not To Compete Signed After At-Will Employment Has Commenced*, 66 OHIO ST. L.J. 1105, 1110 (2005).

<sup>10</sup> Mont. Code Ann. §§ 39-2-901 to 915 (2003) (legislatively setting forth a ‘just-cause’ default rule).

### A. *Common Justifications and Criticisms*

The employment-at-will doctrine grew primarily out of employer property rights and freedom to contract theories.<sup>11</sup> Indeed, “freedom of contract, while it is no longer a constitutional barrier to most regulation of employment, remains the crucial background against which all workplace regulation operates and effectively governs most of what takes place within the employment relationship.”<sup>12</sup> At-will relationships are governed by the general rule safeguarding lawful competition.<sup>13</sup> This Note argues that the one of the most important policies advanced by the employment-at-will doctrine is the promotion of free and fair competition.<sup>14</sup> Accordingly, the doctrine not just permits but encourages employers and employees alike to continually re-evaluate their relationship and, if appropriate, search for greener pastures.

Though apparently<sup>15</sup> well-settled in American jurisprudence, the doctrine is not without critics. Indeed, in the absence of a statutory or common law exception, the doctrine leaves at-will employees subject to arbitrary employer action regardless of years of service, firm-specific investments or the insubstantiality of the reasons for termination.<sup>16</sup> Opponents to the at-will rule chiefly “focus on the costs to wrongly-fired employees, whether those costs are economic,

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<sup>11</sup> Cynthia L. Estlund, *The Changing Workplace: Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1658 (1996). See also Massingale, *supra* note 3, at 187 (stating that the at-will employment doctrine illustrates the “prevailing principle” that parties are free to determine the terms of their own contract).

<sup>12</sup> Estlund, *supra* note 11, at 1658 (internal citation omitted).

<sup>13</sup> Frank J. Cavico, *Tortious Interference with Contract in the At-Will Employment Context*, 79 U. DET. MERCY L. REV. 503, 539-40 (2002) (citing *Restatement (Second) of Torts* 768 cmt. e. (1977)).

<sup>14</sup> See Yoichiro Hamabe, *Japan Trade: Inadvertent Support of Traditional Employment Practices: Impediments to the Internationalization of Japanese Employment Law*, 12 UCLA PAC. BASIN. L.J. 306, 306 (1994) (noting that the American at-will employment system arguably promotes fair and free competition for workers and jobs resulting in an efficient labor market).

<sup>15</sup> See *infra* Section I.B for a discussion of whether increased judicial acceptance of exceptions to the at-will rule signals the end of the doctrine as the default rule.

<sup>16</sup> Estreicher, *supra* note 3, at 39.

dignitary, or psychological.”<sup>17</sup> In addition to the argument that the doctrine provides inadequate job security, it is also argued that the doctrine creates a presumption of at-will status that is at odds with the parties’ true intent.<sup>18</sup> Despite those criticisms, the doctrine survives as the default rule in 49 out of 50 American States.<sup>19</sup> While the criticisms of the employment-at-will doctrine are not without merit, the doctrine has endured as the default rule because courts and legislatures alike find that its justifications outweigh its criticisms.

*B. Increasing Limitations and the Resulting Uncertainty*

Modern jurisprudence has tempered the strict interpretation of the employment-at-will doctrine. Legislatures and courts are imposing an increasing number of exceptions that limit some of the harsher applications of the doctrine. For example, the employment-at-will rule was initially eroded by state and federal statutes that prohibited an employer from terminating an employee in violation of collective bargaining agreements, most of which impose a just-cause requirement for terminations.<sup>20</sup> Since then, anti-discrimination statutes such as Title VII of the 1964 Civil Rights Act,<sup>21</sup> the Age Discrimination in Employment Act<sup>22</sup> and the Americans with Disabilities Act<sup>23</sup> have further limited employers’ discretion in terminating employees. A host of other state and federal statutes prohibit terminations for activities such as serving on a jury,

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<sup>17</sup> Daniel J. Libenson, *Leasing Human Capital: Toward A New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 123 (2006). See also Massingale, *supra* note 3, at 201. (“The United States worker, like those in other civilized nations, has a strong interest in employment security and should reasonably be able to expect continued employment where the worker does the job expected within legal, moral, and ethical limits. Society is better served when job security for America’s work force is not linked to unreasonable employer expectations.”).

<sup>18</sup> Estreicher, *supra* note 3 at 39.

<sup>19</sup> See *supra* note 10.

<sup>20</sup> Massingale, *supra* note 3, at 190 (citing Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to “Just Cause Protection Under Title VII,”* 2 IND. REL. L.J. 519, 522 (1978)).

<sup>21</sup> 42 U.S.C. §2000e *et seq.*

<sup>22</sup> 29 U.S.C. §621 *et seq.*

<sup>23</sup> 42 U.S.C. §12101 *et seq.*

garnishment of wages, filing worker's compensation claims and refusal to submit to polygraph tests.<sup>24</sup>

The judiciary has followed a parallel path in narrowing the applicability of the employment-at-will rule by awarding relief under various common law causes of action. Tortious interference claims are one example of a tort claim that chips away at the at-will employment rule.<sup>25</sup> Wrongful discharge suits provide yet another common law limit on an employer's traditionally unlimited power to terminate an employee. Wrongful discharge suits are typically based on either tort or contract theories of recovery. Wrongful termination suits sounding in tort are traditionally grounded on a violation of public policy of some sort.<sup>26</sup> Some common examples include: whistleblower protection;<sup>27</sup> performance of public obligations;<sup>28</sup> and refusal to commit a crime.<sup>29</sup>

Wrongful discharge claims based on contract theories of recovery are independent of public policy considerations.<sup>30</sup> Under this heading, one approach that courts take to limit the reasons for which an employer can terminate an employee is to show greater receptiveness in

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<sup>24</sup> Massingale, *supra* note 3, at 191(citing Jane P. Mallor, *Punitive Damages for Wrongful Discharge*, 26 WM. & MARY L. REV. 449, 456 (1985); Jury System Improvement Act of 1978; Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 (1988); 29 U.S.C. § 1875; Occupational Safety and Health Act, 29 U.S.C. § 651).

<sup>25</sup> See, e.g., Cavico, *supra* note 13, at 503; Alex B. Long, *Tortious Interference with Business Relations: "The Other White Meat" of Employment Law*, 84 MINN. L. REV. 863, 914 (2000) (hereinafter, "White Meat") (stating that tortious interference claims "represent a significant loophole in the employment-at-will context."); Long, *Disconnect*, *supra* note 8, at 493 ("[T]he insertion of interference claims into the workplace tends to undermine the employment at-will default rule."); Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J 93, 103-04 (2009) (noting that tortious interference with economic advantage claims against chief executive officers provide an employee with a cause of action where one against the employer may not be cognizable).

<sup>26</sup> Massingale, *supra* note 3, at 191 (citing *Palmateer v. International Harvester Co.*, 85 Ill.2d 124 (1981)).

<sup>27</sup> See Estreicher, *supra* note 3, at 209-15 (citing *Geary v. United States Steel Corp.*, 456 Pa. 171 (1974); *Palmateer*, 85 Ill.2d 124 (1981)).

<sup>28</sup> See Estreicher, *supra* note 3, at 188-90 (citing *Nees v. Hocks*, 272 Or. 210 (1975)).

<sup>29</sup> *Collins v. Rizkana*, 73 Ohio St.3d 65 (1995).

<sup>30</sup> Massingale, *supra* note 3, at 195.

finding express promises of job security.<sup>31</sup> But perhaps the more prevalent approach utilized to challenge an allegedly improper termination is the implied contract theory.<sup>32</sup> Other contract-based doctrines that are sometimes successful in challenging employment terminations are implied covenants of good faith and fair dealing<sup>33</sup> and promissory estoppel.<sup>34</sup>

The erosion of the employment-at-will rule has led some scholars to question whether the doctrine truly remains the default rule in American jurisprudence.<sup>35</sup> Members of the American Law Institute (ALI) Working Group on the proposed Restatement of Employment Law have expressly questioned the ALI's conclusion that employment-at-will<sup>36</sup> remains the default.<sup>37</sup> They offer several reasons for their conclusion. One is a uniquely high number of concurring and dissenting opinions, which shows that the law in this area is in considerable flux.<sup>38</sup> Additionally, there is wide diversion among various American jurisdictions regarding application of the various exceptions to the at-will rule.<sup>39</sup> Moreover, some appellate courts have gone so far as to

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<sup>31</sup> Estreicher, *supra* note 3, at 45.

<sup>32</sup> Massingale, *supra* note 3 at 195 (noting that implied contracts may be found in an employee handbook, policy manual, memorandum or an employer's oral statements).

<sup>33</sup> *Id.* at 198 (stating that some jurisdictions hold that contracting parties have an implied duty to exercise good faith and fair dealing and the failure to do so constitutes bad faith, potentially giving rise to tort damages).

<sup>34</sup> *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985).

<sup>35</sup> The increased application of exceptions to the at-will rule has also led to uncertainty regarding what sort of terminations will be considered wrongful by a court. Massingale, *supra* note 3, at 187.

<sup>36</sup> Specifically, the ALI states the rule as follows:

Unless an agreement, statute or other law or public policy limits the right to terminate, either party may terminate an employment relationship with or without cause.

Restatement (Third) of Employment Law § 2.01 (Default Rule of At-Will Employment Relationship) (Council Draft No. 3, 2008).

<sup>37</sup> Finkin, *supra* note 25.

<sup>38</sup> *Id.* at 95.

<sup>39</sup> *Id.* at 97. As evidence for this proposition, the authors cite *Murphy v. American Home Products*, 58 N.Y.2d 293 (N.Y. 1983). They explain:

In *Murphy*, a long-time employee was fired in retaliation for truthfully whistle-blowing and was discharged in an abusive manner. Some states, notably California, would provide Murphy relief under an "implied in fact" theory of contract, providing good cause job security, given the length of his employment. Some states, notably Alaska, would provide an employee like Murphy relief under a covenant of good faith and fair dealing rubric. Some states – probably the majority of states – would provide Murphy relief under a public policy rubric for his truthful whistle-blowing

hold that a jury instruction stating that an employer can fire an employee for any reason constitutes reversible error.<sup>40</sup>

C. *Extending the Erosion: From Protecting Job Security to Embracing Employee Mobility*

Whether or not the exceptions to the employment-at-will doctrine truly swallow the rule is still up for debate. What is clear, however, is that courts are limiting an employer's traditionally unlimited power under the employment-at-will doctrine.<sup>41</sup> Indeed, "[t]he once impenetrable fortress of at-will employment is no longer a reality."<sup>42</sup> This recent judicial trend is markedly pro-employee as the decrease in employer power signifies an increase in employee protection. This supports the argument for a narrow standard of liability in tortious interference with employment relationship claims. Just as employers are subject to increasing restrictions for the reasons they can terminate an employee, courts should also subject them to a corollary restriction that limits their ability to curb their employees' future employment opportunities.

## II. TORTIOUS INTERFERENCE CLAIMS

### A. *Generally*

Tortious interference claims are a "curious blend" of negligent and intentional torts<sup>43</sup> and represent a blend of tort, contract, property, antitrust and (potentially) agency<sup>44</sup> law.<sup>45</sup> There are

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activity. Still others would provide Murphy with relief for the abusive and undignified way that he was publicly treated as a criminal and his possessions were dumped out when he came to retrieve them, (notably Iowa, Texas, Oregon, and Arkansas). In other instances and in other states, promissory estoppel rules provide employees with cushions against the unjust harshness of the strict application of the at-will rule.

*Id.* at 98 (internal citations omitted).

<sup>40</sup> *Id.* at 103 (internal citations omitted).

<sup>41</sup> See, e.g., Massingale, *supra* note 3, at 187 (noting that the employment-at-will doctrine is undergoing serious erosion); Long, *Disconnect*, *supra* note 8, 520 (2001) (noting that scholars agree that modern employment law lessened the unfairness of the pure notion of the employment-at-will).

<sup>42</sup> Massingale, *supra* note 3, at 204.

<sup>43</sup> Long, *White Meat*, *supra* note 25, at 871 (citing *International Union, United Mine Workers v. Covenant Coal Corp.*, 977 F.2d 895, 899 (4th Cir. 1992)).



two types of tortious interference claims: (1) tortious interference with contract; and (2) tortious interference with prospective contractual relations.<sup>46</sup> The most common approach for analyzing the interference torts comes from the Restatement.<sup>47</sup>

### B. *Tortious Interference with Contract*

The Restatement § 766 outlines the tort of interference with contract as follows:

One who intentionally and improperly<sup>48</sup> interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.<sup>49</sup>

As the text makes clear, the existence and breach of a valid contract which gives the plaintiff legal rights<sup>50</sup> is a prerequisite to the interference with contract tort.<sup>51</sup> Because the parties formalized their agreement, the law justifiably affords the relationship greater protection.<sup>52</sup> Consequently, the Restatement does not recognize competition as a defense to tortious interference with contract claims.<sup>53</sup>

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<sup>44</sup> See Rebecca Bernhard, Note, *The Three Faces of Eve: Tortious Interference Claims in the Employment-At-Will Setting*, 86 MINN. L. REV. 1541 (2002).

<sup>45</sup> Long, *White Meat*, *supra* note 25, at 871 (citing Gary D. Wexler, Comment, *Intentional Interference with Contract: Market Efficient and Individual Liberty Considerations*, 27 CONN L. REV. 279, 282 (1994)).

<sup>46</sup> See Long, *White Meat*, *supra* note 25, at 868.

<sup>47</sup> *Id.*

<sup>48</sup> What constitutes “improper” interference and which party has the burden to prove the interference was improper has been the subject of considerable confusion among courts. Indeed, “[a]s worded, the burden would appear to be on the plaintiff to establish that the interference was improper as part of her prima facie case. However, the authors [of the Restatement] chose to hedge on this issue by stating that a plaintiff is ‘well advised’ to plead that the interference is improper, but noting that the matter may also be held to be one of defense.” *Id.* (citing *Restatement (Second) of Torts* 767 cmt b. (1977)).

<sup>49</sup> *Restatement (Second) of Torts* 766 (1977).

<sup>50</sup> The presence of a definite contract is also important as it defines the plaintiff’s interests and therefore the plaintiff’s damages. Cavico, *supra* note 13, at 506.

<sup>51</sup> *Id.*

<sup>52</sup> See Thomas J. Collin et al., *Ohio Tortious Interference Law and the Role of Privilege and Competition*, 18 DAYTON L. REV. 635, 637 (1993) (noting that interference with a formal contract is more likely to be improper than is interference with a less formalized business relationship).

<sup>53</sup> Long, *White Meat*, *supra* note 25, at 872 (citing the *Restatement (Second) of Torts* 768(2) (1977)).

C. *Tortious Interference with Prospective Contractual Relations*<sup>54</sup>

The elements of a tortious interference with prospective contractual relations claim are similar to the tort of interference with contract. As one would guess, the major difference is that the prerequisite of an existing contract is exchanged for a prospective contractual relation or business expectancy,<sup>55</sup> which encompasses the prospect of obtaining or maintaining employees.<sup>56</sup>

The Restatement defines the tort as:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.<sup>57</sup>

Some jurisdictions choose not to follow the Restatement's formulation, instead requiring that a plaintiff prove: "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference inducing or causing a breach of termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted."<sup>58</sup> After the plaintiff establishes that prima facie case, the burden shifts to the

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<sup>54</sup> Tortious interference with prospective contractual relations claims are also commonly referred to tortious interference with expectancy or tortious interference with business relations claims.

<sup>55</sup> Long, *White Meat*, *supra* note 25, at 868.

<sup>56</sup> Cavico, *supra* note 13, at 507 (citing *Restatement (Second) of Torts 766B* (1979)).

<sup>57</sup> *Restatement (Second) of Torts 768B* (1977).

<sup>58</sup> Long, *White Meat*, *supra* note 25, at 869 (citing *Chaves v. Johnson*, 335 S.E.2d 97, 102-03 (Va. 1985); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 591-92 (W.Va., 1998)).

defendant to prove a justification or privilege affirmative defense which could have its basis in legitimate competition.<sup>59</sup>

The main criticism of the latter approach is particularly relevant to the ultimate analytical framework this Note proposes. One author cogently described that criticism as requiring “too little of the plaintiff, because the major issue in the controversy – justification for the defendant’s conduct – is left to be resolved on the affirmative defense of privilege.”<sup>60</sup> On the other hand, most courts adopting the Restatement put the “very significant burden” on the plaintiff to show the interference was improper or unjustified.<sup>61</sup> Regardless of the criticisms, a privilege for fair competition is explicitly recognized by the tort of interference with business expectancy or prospective contractual relations.<sup>62</sup>

*D. Tortious Interference with At-Will Employment Relationships: Recommended Approach*

Most jurisdictions hold that an aggrieved party can bring a tortious interference claim with respect to an at-will contract.<sup>63</sup> Which, then, of the above standards should such a claim be governed under? This Note argues that tortious interference with employment relationship claims should be governed under the framework for tortious interference with prospective contractual relations claims.

Jurisdictions take a variety of approaches when applying tortious interference claims to at-will relationships. A minority of jurisdictions hold that at-will contracts cannot give rise to

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<sup>59</sup> Long, *White Meat*, *supra* note 25, at 869 (citing Chaves, 335 S.E.2d at 103). *See also* Cavico, *supra* note 13, at 509 (noting that a greater freedom to compete is recognized in at-will contracts).

<sup>60</sup> Long, *White Meat*, *supra* note 25, at 869 (citing Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 303 (Utah, 1982). *See also* Gary Myers, *The Differing Efficiency and Competition and Antitrust and Tortious Interference Law*, 77 MINN L. REV. 1097, 1112 (1993) (arguing the better approach is to put the burden of demonstrating impropriety on the plaintiff).

<sup>61</sup> Long, *White Meat*, *supra* note 25, at 870 (citing King v. Sioux City Radiological Group, 985 F.Supp. 869, 881-82 (N.D.Iowa 1997) (applying Iowa law); Leigh Furniture, 657 P.2d at 303).

<sup>62</sup> Long, *White Meat*, *supra* note 25, at 872

<sup>63</sup> Cavico, *supra* note 13, at 513.

tortious interference claims at all.<sup>64</sup> Some jurisdictions treat it as tortious interference with a business expectancy or prospective contractual relationship.<sup>65</sup> Even those jurisdictions that classify interference torts in at-will situations as one with contract narrow the circumstances under which the defendant is liable,<sup>66</sup> making the claim functionally similar to the interference with expectancy tort. Still others fail to distinguish between the two claims.<sup>67</sup> Even the Restatement seems confused on the matter. In the very same comment where it states that at-will relationships are “valid and subsisting” contracts, it goes on to state:

One’s interest in a contract terminable at will is *primarily an interest in future relations* between the parties, and he has no legal assurance of them. For this reason, an interference with this interest is *closely analogous to interference with prospective contractual relations*. If the defendant was a competitor regarding the business involved in the contract, his interference with the contract may not be improper.<sup>68</sup>

The sounder approach is to permit tortious interference claims in at-will relationships but provide a narrow scope of liability.<sup>69</sup> Accordingly, this Note takes the position that tortious interference claims in the at-will context should be governed under the prospective contractual relations scheme. While it is technically true that the employee had a contract with his previous employer, that contract was an at-will one. At-will contracts are essentially prospective

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<sup>64</sup> *Id.* at 508-09 (citing *Stanton v. Tulane Univ. of Louisiana*, 777 So.2d 1242, 1252 (La. App. 2001); *McManus v. MCI Comm. Corp.*, 748 A.2d 949, 957 (D.C. 2000); *GAB Bus. Serv., Inc. v. Lindsey & Newsom Claim Serv., Inc.*, 99 Cal. Rptr.2d 665, 677 (Cal. Ct. App. 2000)).

<sup>65</sup> *Id.* at 513.

<sup>66</sup> *Id.* at 511-13 (noting that those jurisdictions take the at-will nature of the relationship into account when determining what interference actions are proper or improper, may use the at-will nature of the contract to place the burden of proving impropriety on the plaintiff and take it into account when determining the extent of the plaintiff’s damages)(citing cases).

<sup>67</sup> *See, e.g., Speakers of Sport, Inc. v. Proserv, Inc.*, 178 F.3d 862, 865 (7th Cir. 1999) (applying Illinois law) (Posner, J.) (noting that inducing the termination of an at-will contract is actionable under Illinois law, either as interference with prospective economic advantage or as interference with the contract at will itself, and that “[n]othing turns on the difference in characterization.”).

<sup>68</sup> *Restatement (Second) of Torts* 766, cmt. g (emphasis added) (internal citations omitted).

<sup>69</sup> Tortious interference claims are often criticized for their adverse impact on competition and efficiency. Long, *White Meat*, *supra* note 25, at 872 (citing Myers, *supra* note 60, at 1100). A narrow standard of liability helps to alleviate those ill-effects. *See Cavico*, *supra* note 13, at 566 (noting that a broad conception of the interference torts, especially prospective contractual relations, can hinder legitimate competition).

contractual relations as the parties have specifically chosen to enter an agreement that lacks the definiteness present in, for example, a contract containing temporal or just-cause guarantees. The absence of a temporal promise or just-cause restriction engenders different expectations among the parties than where an employer and employee bargain for a certain, specified term.

For example, picture the situation where a professional sports franchise signs an experienced athlete to a four year contract in the hopes that the player can provide supplemental scoring and veteran leadership. In that situation, the franchise is justified in taking steps to structure their game-day preparation around the fact that, in the absence of injury, they will have a veteran player to provide leadership and (hopefully) put points on the board for the next four years. Similarly, knowing that he will most likely be with that franchise for the next four years, the veteran makes team-specific investments in order to fulfill his contractual obligations. He takes the time to learn a new offensive and defensive scheme, develop a comfort level with his new coaches and teammates and may even change his style of play in order to mesh with his new team.

That is not true where the franchise signs the veteran on an at-will basis. In that situation, all would agree the team would be ill-advised to structure a long-term plan that relies heavily on the veteran. Indeed, if the veteran may only be on the team for a short period of time, it is likely the team will not even expose the veteran to its entire playbook. Similarly, the veteran is unlikely to make valuable team-specific investments for the franchise that offered him no guarantee of sustained employment.

That example, while somewhat crude, is meant to illustrate the differences in the contracting parties' expectations in an at-will versus definite contract and how parties justifiably rely on them. In the at-will context, the parties can only expect the relationship to continue into

the future. The employer expects the employee to show up for work on Monday, but there is no guarantee she will. And the employee expects that when she shows up for work on Monday, her job will be waiting for her, but there is no promise that it will. Therefore, tortious interference with at-will employment relationship is properly analyzed under the framework governing tortious interference with prospective contractor relations.

### III. NON-COMPETE COVENANTS<sup>70</sup>

While there is little empirical data on the use of non-compete clauses, all indications are that restrictive covenants are becoming increasingly common in modern employment relationships,<sup>71</sup> including at-will employment.<sup>72</sup> Non-compete covenants<sup>73</sup> restrict an employee from competing with his former employer within a specific geographic region for a certain period of time<sup>74</sup> after the employment relationship ends.<sup>75</sup> Employers utilize noncompetition agreements in order to prevent competitors and former employees from appropriating proprietary business information.<sup>76</sup>

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<sup>70</sup> This Note addresses only the situation where the non-compete covenant was signed at the same time that the employment relationship began.

<sup>71</sup> Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation From Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB L. 287, 289 (2006) (noting that the “single formal attempt to quantify the volume of noncompetes and their use is now over fifteen years old.”) (citing Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483 (1990)). See also Gerald T. Laurie, David A. Harbeck, *Balancing Business Protection with Freedom to Work: A Review of Noncompete Agreements in Minnesota*, 23 WM. MITCHELL L. REV. 107, 108 (1997).

<sup>72</sup> Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 738-39 (2002) (noting the increased use of restrictive covenants in the employment-at-will context).

<sup>73</sup> In order to avoid repetition, this Note refers to non-compete covenants, noncompetition agreements, covenants not to compete and restrictive covenants interchangeably.

<sup>74</sup> “Given the explosive growth of the Internet and the fast pace of business today, courts are likely to examine the duration of noncompetition agreements more closely. The traditional advice that noncompetition agreements of one to two years duration are ‘reasonable,’ may need to be reexamined to in particular industries and businesses.” Laurence H. Reece, III, *Legal Analysis: Employee Noncompetition Agreements: Four Recurring Issues*, 46 BOSTON BAR J. 10, 11(March/April 2002).

<sup>75</sup> Whitmore, *supra* note 71, at 484.

<sup>76</sup> T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 3 (2005). When determining the enforceability of non-compete clauses, courts consider the following factors: the length of the temporal restriction; the breadth of the geographic restriction; the overall hardship to the parties; the employee’s

Noncompetition agreements in the employment relationship are carefully scrutinized by courts and often construed against the employer.<sup>77</sup> One author describes the competing policy concerns underlying the judicial scrutiny:

The public policy benefits derived by enforcing these covenants are the protection of proprietary interests, facilitation of investment in research, and the encouragement of development in human capital (personnel). The public policy costs of enforcing restrictive covenants include the potential of limiting competition, impeding the dissemination of information, and retarding the economic mobility of employees. These conflicting concerns have been the motivating factor in continued judicial scrutiny of restrictive employment covenants.<sup>78</sup>

A. *Inconsistency with Employment-at-Will*

Because non-compete covenants restrain trade, courts are rightfully careful when scrutinizing their validity. In fact, by restraining trade and competition, noncompetition agreements are inconsistent with the very nature of at-will relationships, which promote competition.<sup>79</sup> Indeed, one author stated:

Every time a noncompetition clause is litigated, the court is forced to grapple with two conflicting policies. The first policy is the freedom to contract. . . . In the noncompetition clause setting, strict adherence to this doctrine would result in complete enforcement of all noncompetition clauses. The second doctrine . . . is the doctrine against contractual restraints of trade. This doctrine holds that parties may not make contracts which overly restrict the fundamental right to practice a trade. . . . Strict adherence to this doctrine, then, would result in judicial rejection of all noncompetition clauses. Obviously, these two fundamental principles of contract law are in direct conflict.<sup>80</sup>

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level of access to confidential information; the employee's relationship with the employer's customers; the employee's occupation; and the public interest. Whitmore, *supra* note 71, at 489-90 (citing D. Aspelund & C. Eriksen, *Employee Noncompetition Law* § 1.01, at 6-1 to 6-2 (1988); A. Valiulis, *Covenants Not to Compete: Forms Tactics, and the Law* ix 183-84 (1985)).

<sup>77</sup> Reece, *supra* note 74, at 10.

<sup>78</sup> Anenson, *supra* note 76, at 503. See also Stone, *supra* note 72, at 723 (noting the "the murky intertwine of conflicting interests" underlying the determination of whether to enforce non-compete clauses signed at the commencement of employment as: "employee interest in job mobility; employer interest in protecting their business secrets; society's interest in a free and competitive labor market; and judicial interest in enforcing contracts.").

<sup>79</sup> See *supra* Section I.B. See also Stone, *supra* note 72, at 742 ("Restrictive covenants involving at-will employees are particularly problematic and sometimes receive additional scrutiny.").

<sup>80</sup> Whitmore, *supra* note 71, at 486-87.

This Note concedes that the law should permit an employer to extract a non-compete clause from at-will employees, but maintains the clause should have limited enforceability because the policy against contractual restraints of trade trumps the freedom of contract argument under these circumstances. The basis for this argument lies with the realities of the ‘new workplace in the new economy’<sup>81</sup> and a fundamental disagreement with the mistaken assumption that a noncompetition agreement in the at-will employment context should occupy the same legal footing as other bargained-for contracts.

The modern workplace is a stark departure from the model that was in place during much of the previous century.<sup>82</sup> Indeed, “[t]he secure, long-term employment relationships associated with an earlier era are largely obsolete today, having been replaced with a variety of short-term employment arrangements . . . . From the perspective of employees, job tenure is in decline and job hopping is commonplace.”<sup>83</sup> Modern employees often experience many lateral moves between and within companies throughout the course of their careers.<sup>84</sup> Gone are the days where a newly hired employee could realistically believe that if she performed adequately and was loyal to her employer, she would be compensated with a lifetime job and steady pay.<sup>85</sup> Back then, such an employee “could safely invest in acquiring firm-specific skills and rely on the company to manage his or her career expectations.”<sup>86</sup> Nowadays, rather, “[t]he new understanding between employers and employees is that, rather than grooming employees for

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<sup>81</sup> Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1198 - 1203 (2001) (explaining how the modern workplace departs from prior models of employment relationships).

<sup>82</sup> *Id.* at 1198.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1200.

<sup>85</sup> *Id.* at 1201.

<sup>86</sup> *Id.*



internal promotion, employers will offer employees work experience that will keep them marketable to other employers in the event that they are terminated.”<sup>87</sup>

The realities of the modern workplace mandate a narrow standard of liability in tortious interference claims between employers. If the nature of modern employment relationship envisions (indeed, requires) a more mobile employee, it would be illogical for the law to cast a blind eye to that reality by imposing a broad standard of liability under these circumstances. A broad liability framework ignores that “the employer’s promise of long-term employment has been replaced by a promise of employability, and the new understanding is that the employee’s lifelong relationship will be with the market rather than the company.”<sup>88</sup> An employer should not be subjected to the possibility for potentially substantial monetary liability for participating in the market.

Moreover, in the at-will employment context, non-compete covenants are not truly bargained-for as the employer and employee possess drastically different bargaining power, with the employer enjoying the upper hand.<sup>89</sup> In fact, for most employees, signing a covenant not to compete is usually a precondition to employment.<sup>90</sup> “Even the balance between the mutual right of the employer and the employee to terminate is tipped in favor of employer because in the in the real world of industrial relations, employees seldom quit voluntarily.”<sup>91</sup> The current job

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<sup>87</sup> *Id.* at 1201-02.

<sup>88</sup> *Id.* at 1202.

<sup>89</sup> Massingale, *supra* note 3, at 200 (noting the considerable disparity between the employer and employee’s bargaining position); Laurie, *supra* note 71, at 110 (noting that employees traditionally have little power with regard to non-compete agreements).

<sup>90</sup> Laurie, *supra* note 71, at 110.

<sup>91</sup> Massingale, *supra* note 3, at 200 (citing Theodore St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Towards Full Flower*, 67 NEB. L. REV. 56, 67-68 (1988)) (internal quotations omitted).

market makes that difference even clearer as employees are “prone to sign any document placed before them” in order to obtain employment.<sup>92</sup>

Furthermore, because the non-compete clause is not a salient feature of her employment contract, an employee’s assent to such a restrictive covenant should not be given full legal force. In fact, because of the lack of a truly negotiated contract, employment contracts (for most employees) are similar to standard form contracts in the everyday consumer context. While some terms, such as salary, are more likely to be negotiated on an individual basis (for a certain category of employees), a boilerplate contract is likely to be the norm. In such a situation the employment contract resembles a contract by adhesion as the employer offers the contract – the salary, the benefits and the non-compete clause – on a take it or leave it basis.<sup>93</sup> Courts, however, have traditionally enforced such contracts “whether or not that party approves of the terms provided, understands those terms, has read them, or even has the vaguest idea what the terms might be about.”<sup>94</sup> While that may be the common approach, it is not necessarily the wisest or most efficient one.<sup>95</sup> Because employees are only boundedly rational, they only consider certain attributes of an employment offer when deciding to accept an offer – ignoring all others.<sup>96</sup>

Consider the employee who receives an offer of employment that includes many terms and conditions of her future employment such as salary, job description, medical benefits,

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<sup>92</sup> See Theodore St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 789 (2008) (noting that pre-dispute arbitration agreements signed at the commencement of employment are less fair to the employee than post-dispute arbitration agreements).

<sup>93</sup> Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204 (2003). See also Kate O’Neill, “*Should I Stay or Should I Go?*” – *Covenants Not to Compete in a Down Economy: A proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L.J. 83, 93 (2010) (noting that employee assent to employment contracts are adhesive if required to obtain or retain employment-at-will).

<sup>94</sup> Korobkin, *supra* note 93, at 1204.

<sup>95</sup> See Korobkin, *supra* note 93. While Korobkin’s article applies to shoppers and consumers, most employees are in an analogous situation.

<sup>96</sup> *Id.* at 1206.

retirement benefits, fringe benefits and a noncompetition agreement. The restrictive covenant gets lost in the mix. The employee is focused on the short term and, upon just getting hired, is not thinking about what will happen if the employment relationship ends. And, as a result, the noncompetition clause is not a salient<sup>97</sup> term to the employee.

A contract term that is actually considered by an employee is considered a salient term.<sup>98</sup> Conversely, non-salient terms are those terms that the employee does not focus on.<sup>99</sup> In order to gain salience, a contract term must capture the employee's limited attention span.<sup>100</sup> With the immediate impact accompanying other terms, it is not surprising that the non-compete covenant fails to catch the employee's attention. When an employment relationship has just begun, employees do not think about how it will end and how a non-compete covenant could impact their future employment prospects. Rather, the employee's chief concerns are how much money she will make and what benefits she is entitled to.

Bounded rationality causes inefficiency in contracts.<sup>101</sup> In order to reduce that inefficiency, Korobkin offers the following:

Courts' initial step should be an analysis of whether a challenged contract term is salient to a significant number of buyers. When a contract term is salient to purchasers, the market can be trusted to provide an efficient version of the term . . . . When a contract term is non-salient to most purchasers, the market check on seller overreaching is absent, and courts should be suspicious of the resulting term. Put slightly differently, whenever a term in a form contract is non-salient to most purchasers, those purchasers are incompetent to protect their interests vis-a-vis that term.<sup>102</sup>

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<sup>97</sup> See Korobkin, *supra* note 93.

<sup>98</sup> *Id.* at 1206.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1230.

<sup>101</sup> *Id.* at 1207.

<sup>102</sup> *Id.*

Korobkin's statement applies with equal force to employees who are unable to negotiate the terms of their employment contract.

Given the judicial scrutiny of non-compete covenants, it seems that courts already agree with Korobkin that a decision-maker should be suspicious of non-salient contractual terms. Because the non-compete clause is not salient to the employee, the employer has an incentive to provide a socially inefficient one. Courts should curb employer opportunism and promote efficiency and society's interest in free competition by continuing to cast a skeptical eye on non-compete clauses in the at-will employment context. This supports a narrow standard of liability in the tortious interference because a narrow standard of liability curbs a different sort of employer opportunism – seeking financial windfalls (via tort damages) from their competitors for engaging in fair competition.

That is not to say that an employer lacks a legitimate interest that it should be able to protect by extracting a non-compete clause. Indeed, trade secrets<sup>103</sup>, customer lists, confidential information and goodwill are all examples of proprietary information that successful businesses must protect. That is not to mention that, where an employee holds a key position within a company, a sudden and unexpected departure can cause considerable hardship on the employer.<sup>104</sup> Indeed, some employers believe their employee's knowledge is a major asset and a primary source of competitive advantage.<sup>105</sup> This Note disputes neither the validity of those

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<sup>103</sup> “The modern concept of a trade secret encompasses any information which endows the holder with a competitive advantage and which is not generally known or available within the industry.” Arnov-Richman, *supra* note 81, at 1177 (citing cases). In addition to traditional trade secrets, there are also “negative trade secrets”, which encompass an employee's knowledge of products tested or systems tried that were ultimately unproductive. Stone, *supra* note 72, at 737.

<sup>104</sup> Massingale, *supra* note 3, at 202. *See also* Stone, *supra* note 72, at 737 (noting that employers value not only technical knowledge, but also the “more mundane types of knowledge, such as how the business operates, how the goods are produced, how the paperwork flows, and how files are organized.”).

<sup>105</sup> Stone, *supra* note 72, at 721. *See also* Stone at 723 (noting that employers believe that if they have imparted valuable skills or knowledge on their employees, they should own that human capital, i.e. being able to ensure that it is utilized on behalf of the firm).

protectable interests nor the hardship an employer endures through the loss of a meaningful employee. What this Note does argue, however, is that the law should not allow the employer to have his cake and eat it too – to not only provide an employee with little to no job security, leaving him susceptible to termination at almost any time for almost any reason, but also restrict that employee’s opportunities once the employment terminates. As stated by one author:

If an at-will employee is fired without cause, she has no redress for her unjust dismissal; yet, if there is a [restrictive] covenant in effect, she can be prevented from performing another job. Because courts usually enforce noncompete covenants with injunctions, an at-will employee who has been fired unfairly can be barred from accepting all subsequent employment in the type of work that she is best able to perform. That is, an employee subject to a restrictive covenant, who is fired unfairly, is left without a job and is unable to take another one in her specific area of expertise.<sup>106</sup>

As discussed below, the law should require the employer to take additional measures to protect his proprietary information beyond routine insertion of a non-compete covenant in its employment contracts. Normative concerns about an at-will employee’s ability to bargain effectively and the impact of noncompetition agreements on those employees’ economic freedom mandate that restrictive covenants are only enforceable to protect discrete business interests.<sup>107</sup> Such a scheme protects employee mobility, yet still permits employers to protect their proprietary information without imposing significant costs on them.

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<sup>106</sup> *Id.* at 742 (internal citations omitted). Admittedly, this Note does not address the situation where the employee was fired unfairly. While the argument for a narrow standard of liability may be most strong in that context, the merits of that argument extend to the factual scenario addressed by this Note because both situations are envisioned and permitted under the employment-at-will doctrine. As mentioned above, under that rule, an employee may terminate the relationship when she pleases just as the employer can (in most circumstances) fire the employee for any reason, including an unfair one. That rationale, though, is more complicated because of the presence of the noncompetition clause which is meant to prohibit the employee from working for a competitor, which alters the nature of the at-will relationship to an extent. As discussed above, however, the non-compete covenant should not occupy full legal force in the at-will employment context, making the new employer’s choice to hire a former employee of a competitor less likely to give rise to liability.

<sup>107</sup> Arnov-Richman, *supra* note 81, at 1170.

B. *Application to Tortious Interference Claims: Taking Issue with the Restatement*

By adding a contractual layer to an expectancy relationship, the presence of the non-compete covenant complicates formulating an appropriate liability framework.<sup>108</sup> Without the restrictive covenant, the employer has only an expectancy that the employee will show up for work and thus only an interest in prospective contractual relations. But once the employer extracts the noncompetition agreement, it has the added definitive expectation that the employee will not compete against it.

Though it is less than clear, the Restatement appears to treat at-will contracts as prospective contractual relations, which embraces fair competition.<sup>109</sup> The Restatement states, however, that there is an exception to its free competition rule in the at-will context if a valid non-compete covenant is connected to the at-will agreement.<sup>110</sup> In that situation, “even though a competitor in the same business may be justified in inducing the at-will employee to quit his or her job, the competitor would not be excused from hiring that employee if to do so would mean a contravention of the non-competition covenant.”<sup>111</sup>

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<sup>108</sup> Indeed, the Restatement notes that an exception to its at-will free competition rule arises if there is a valid non-compete covenant. Cavico, *supra* note 13, at 539-40 (citing *Restatement (Second) of Torts 768(1)*, cmt. i.).

<sup>109</sup> Cavico, *supra* note 13, at 513-14; *Restatement (Second) of Torts 768(1)*.

<sup>110</sup> Cavico, *supra* note 13, at 539.

<sup>111</sup> *Id.* at 539-40 (citing *Restatement (Second) of Torts 768(1)*, cmt i). Specifically, the Restatement states:

*i. Contracts terminable at will.* The rule stated in Subsection (1) that competition may be an interference that is not improper also applies to existing contracts that are terminable at will. If the third person is free to terminate his contractual relation with the plaintiff when he chooses, there is still a subsisting contract relation; but any interference with it that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person there is no breach of it. The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination. Thus he may offer better contract terms, as by offering an employee of the plaintiff more money to work for him or by offering a seller higher prices for goods, and he may make use of persuasion or other suitable means, all without liability.

An employment contract, however, may be only partially terminable at will. Thus it may leave the employment at the employee's option but provide that he is under a continuing obligation not to engage in competition with his former employer. Under these circumstances a defendant engaged

This Note argues that the Restatement’s approach is flawed because it mistakenly looks only at the presence of the non-compete clause and ignores the defining quality of the employment relationship – at-will employment. The employer offered at-will employment. The employee accepted. That at-will label is the lynchpin of their relationship and must guide the court’s analysis. Moreover, as discussed above, the noncompetition clause in the at-will context does not occupy the same legal footing as other bargained-for contracts. Therefore, imposing the stricter tortious interference with contract framework on an expectancy relationship with only a contractual gloss is improper.<sup>112</sup> Considering the parties’ relationship as a whole, it becomes obvious that a standard closer to tortious interference with prospective contractual relations is proper.<sup>113</sup>

#### IV. PROPOSED ANALYTICAL FRAMEWORK

##### A. *Framing the Issue*

This Note argues that tortious interference claims with at-will employment relationships are properly characterized as tortious interference with expectancy claims. The presence of a valid non-compete agreement complicates the issue, however, by adding a contractual layer to an otherwise expectancy relationship. How, then, should the law treat this situation? In order to

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in the same business might induce the employee to quit his job, but he would not be justified in engaging the employee to work for him in an activity that would mean violation of the contract not to compete.

*Restatement (Second) Torts § 768 cmt. i.*

<sup>112</sup> There is also the argument that, as an employer, the plaintiff would benefit from a less strict standard of liability. A strict standard of liability could chill good employees from working for an employer on an at-will basis if the employer insists on a non-compete clause.

<sup>113</sup> “When a contract is terminable at will there is only an expectancy that the relationship will continue.” Cavico, *supra* note 13, at 555 (citing *Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, 629 So.2d 252, 255 (Fla. Dist. Ct. App. 1993)). In fact, as mentioned above, some courts refuse to even allow a tortious interference claim in the at-will context because they are “concerned that a too expansive application of the interference tort to at-will employment will hinder the legitimate interests of employees in seeking employment and advancing their careers . . . .” *Id.* at 509 (citing *GAB Bus Serv., Inc v. Lindsey & Netso Claim Serv., Inc.*, 99 Cal. Rptr.2d 665, 677 (Cal. Ct. App. 2000)).

determine a proper analytical framework, the issue must first be framed; that is, what exactly is the employee's new employer (the defendant) interfering with? This Note takes the position that the defendant interferes with the employment relationship as a whole, not simply the non-compete covenant. The relationship includes a non-compete covenant to be sure, but the defining characteristic of the relationship is that it is terminable at-will.

Assuming that the noncompetition agreement is valid, the employer's interest in the relationship warrants increased protection. The overarching nature of the relationship, however, remains at-will. For that reason, this Note argues that the standard of liability should blend together the flexibility of tortious interference with prospective contractual relations theory and some protections of tortious interference with contract framework. As one court stated while declining to recognize an employer's right to sue for interference in the at-will employment context:

Expanding the tort to include employer claims could have the unintended consequence of chilling employment opportunities: Faced with the likely prospect of litigation, employers may reasonably conclude that hiring a competitor's employees could be much more trouble than it's worth.<sup>114</sup>

This Note's proposed framework seeks to avoid that result.

### *B. Blended Liability: A Proposed Framework*

Any framework that is proposed to analyze liability in an expectancy relationship with a contractual gloss should incorporate aspects of both claims' liability schemes into its framework. Because the lynchpin of the employment relationship is at-will, the policies embodied in prospective contractual relations claims must take precedence. The framework, however, must

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<sup>114</sup> Cavico, *supra* note 13, at 567 (citing GAB Bus. Serv., Inc., 99 Cal. Rptr. at 677).



still respect the contractual layer that the parties added to the relationship via the non-compete covenant.<sup>115</sup> This Note proposes a three-step analytical framework.<sup>116</sup>

### 1. The Plaintiff's Prima Facie Case

First, the plaintiff must prove a prima facie case. That requires proof of the following elements by a preponderance of the evidence: (1) the existence of an employment relationship; (2) the defendant's knowledge of that relationship; (3) the defendant's interference with the employment relationship for an improper purpose; and (4) the interference was the proximate cause of the plaintiff's harm. If the plaintiff meets this burden, the full spectrum of tort damages is available.

As an initial matter, since tortious interference claims are intentional torts, actual knowledge, rather than constructive knowledge, is required for the second element.<sup>117</sup> The most difficult element for the plaintiff to prove is that the defendant's interference was improper. Section 767 of the Restatement lists the following factors to consider in analyzing whether a defendant's interference is improper:

- (a) the nature of the actor's conduct<sup>118</sup>;
- (b) the actor's motive;
- (c) the interests of the other with which the actor's conduct interferes;
- (d) the interests sought to be advanced by the actor;

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<sup>115</sup> Cavico, *supra* note 13, at 506 (citing *Restatement (Second of Torts 768B* cmt. c. (1979)) (“[A]s the Restatement indicates, ‘the added element of a definite contract may be a basis for greater protection.’”). *But see supra* Section III.A for a discussion of why non-compete covenants in this context deserve less protection in the employment-at-will context than other contracts.

<sup>116</sup> The idea for a three-part liability framework was derived from the employment discrimination and disparate treatment analysis. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>117</sup> *See Collin, supra* note 52, at 643 (citing cases).

<sup>118</sup> This factor is irrelevant in determining whether the defendant's *purpose* for interfering was improper. Rather, at the second level of the proposed liability framework, the defendant will have the burden to show that the nature of his conduct was proper.

- (e) the societal interests 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.<sup>119</sup>

When analyzing the impropriety element, the court should also consider the accepted ethical standards as well as industry practice to determine whether the defendant's conduct was "sanctioned by the rules of the game."<sup>120</sup> Additionally, while malice may bear on the issue of liability or punitive damages, personal ill will, spite or hatred on the part of the interferor is not an essential element of the cause of action.<sup>121</sup>

This Note places the burden of proving that the *purpose* behind the defendant's interference was improper on the plaintiff, rather than requiring that the defendant prove it was proper as part of an affirmative defense. This is consistent with the argument that tortious interference claims in the at-will employment context should impose liability in only a narrow set of circumstances. By setting a higher bar for proving a prima facie case, the proposed framework imposes a burden on the plaintiff that will help weed out meritless claims while preserving the plaintiff's claim for damages where the defendant's purpose was truly improper.<sup>122</sup>

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<sup>119</sup> *Restatement (Second) of Torts* 767 (1977).

<sup>120</sup> Collin, *supra* note 52, at 642-43 (citing *Restatement (Second) of Torts*, Chap. 37, Introductory Note cmt. k.).

<sup>121</sup> *Id.* at 644 (citing *Restatement (Second) of Torts* 766C (1977)).

<sup>122</sup> While there is a valid argument that this burden should be on the defendant since it is the party with the best access to the information, it is inconsistent with this Note's argument for a narrow standard of liability. Placing this burden on the defendant makes proof of a prima facie case (and the availability of tort damages) much easier, while making proof of an affirmative defense much harder, which would impose liability in a much greater number of cases.

## 2. The Defendant's Fair Competition Affirmative Defense

After the plaintiff proves a prima facie case, the defendant possesses a “fair competition” affirmative defense which, if proved, can limit the plaintiff’s damage award. The affirmative defense involves an analysis of three factors: (1) the extent of the at-will nature of the employment relationship; (2) the propriety of the new employer’s *method of* interference (*i.e.* the actor does not employ wrongful means); and (3) evidence that the interference was for purely competitive purposes and with an intent to further his own business. If the defendant carries this burden, punitive damages are unavailable.

In practice, whether, and to what extent, an employee is ‘at-will’ is not always clear. For example, some employees may be employed at-will yet still have some implied job protections, such as a mandatory written warning and re-training period prior to termination. For that reason, this Note views the ‘nature’ of at-will employment relationships as falling on a spectrum. Employees falling at one end of the spectrum are truly employed at-will and enjoy no implied job protections whatsoever. Employees at the other extreme, while having no express temporal or just-cause guarantees, are subject to many implied job protections. Most employees would seem to fall somewhere between these two extremes.

Determining where the employee at issue falls on this spectrum is the focus of the first factor of the affirmative defense. The closer the employee is to the first extreme (that is, no implied job protections), the more competition is permitted and thus the more likely the defendant is to succeed on his affirmative defense. The opposite is true at the other extreme where the employer offers his employee meaningful implied job protections. In that situation, the employee is acting more opportunistically by terminating the relationship, making the imposition

of a non-compete clause more justifiable because the former employer was not simply extracting a noncompetition agreement without giving the employee some measure of job security.

The second factor questions the *method* that the defendant utilized to interfere, as opposed to the *purpose* of the defendant's interference. Even in an expectancy relationship, the new employer can still be subject to liability if he uses improper means to compete.<sup>123</sup> The Restatement defines improper means as unlawful restraints on trade, fraud, physical violence and generally predatory means, but finds persuasion and limited economic pressure to be permissible.<sup>124</sup> Indeed, simply making an at-will employee a better offer should not lead to tort liability.

Finally, the defendant must proffer evidence establishing that his interference was for competitive purposes. While this would be a fact-intensive inquiry depending on case-specific circumstances, the defendant should have at least some positive evidence of what his competitive plans were and how the employee fit into those plans. If the defendant is able to offer enough evidence to prove his fair competition affirmative defense by a preponderance of the evidence, it strips away the plaintiff's right to an award of punitive damages. Even if the defendant is successful, however, the plaintiff still has an opportunity to recover otherwise available tort damages and potentially injunctive relief.

### 3. The Plaintiff's Second Chance

Even if the defendant establishes its affirmative defense, the plaintiff can still seek otherwise remaining tort damages and injunctive relief. This inquiry focuses on the non-compete covenant and the circumstances surrounding it and is meant to be the analytical step that incorporates the protections of the tortious interference with contract claims. The court must first

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<sup>123</sup> *Restatement (Second) of Torts* 768(1) & cmt. a.

<sup>124</sup> Cavico, *supra* note 13, at 536-37 (citing *Restatement (Second) of Torts* 768(1) & cmt. e.; Lockheed Martin Corp. v. Atlas Commerce Inc., 725 N.Y.S.2d 722, 725-26 (N.Y. App. Div. 2001)).

determine whether the restrictive covenant is valid and enforceable.<sup>125</sup> If the enforceability of the noncompetition agreement is established, the plaintiff is entitled to any monetary damages that it can prove with reasonable certainty.<sup>126</sup> Of course, as the Restatement points out, the uncertainty inherent in prospective employment relationships is relevant to determining a damage award.<sup>127</sup>

Once the plaintiff establishes the validity of the non-compete covenant, the court must examine the following factors to determine whether injunctive relief is appropriate: (1) whether the plaintiff took other measures to protect the confidentiality of the claimed proprietary information; (2) the employer informed the employee of both the presence of the non-compete clause and its potential impact on the employee's future employment opportunities; and (3) that the employee, as a result of his position in the company,<sup>128</sup> had access to proprietary information and used that information in performing his job.

The first factor requires a showing that the information that the plaintiff seeks to protect is indeed proprietary. Typically, protectable interests are broken into two categories: (a) customer relationships and goodwill; and (b) confidential or secret business information.<sup>129</sup> Customer relationships and/or goodwill typically come into play with salespersons or customer account representatives that market products to clients.<sup>130</sup> Noncompetition agreements that prohibit such employees from marketing comparable products in the same geographic region on

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<sup>125</sup> Noncompetition agreements arising in the employment context are closely scrutinized by the courts and strictly construed against the employer. Reece, *supra* note 74, at 10. Perhaps the most common test for analyzing the validity and enforceability of non-compete clauses comes from Section 187 of the Restatement (Second) of Contracts. That section provides that, to be valid, non-compete clauses must be: (1) ancillary to a valid contract; (2) necessary to protect an employer's legitimate business interest; and (3) reasonable in terms of activity, duration and geographic scope.

<sup>126</sup> Of course, if the noncompetition agreement is invalid, then the remaining analysis of this element is moot and the plaintiff is not entitled to any damage award.

<sup>127</sup> *Restatement (Second) of Torts* (1977).

<sup>128</sup> See Reece, *supra* note 74, at 10 (noting that resolution of noncompetition agreements often hinges on fact-specific issues, including whether the employee poses an actual threat to the company's good will or trade secrets).

<sup>129</sup> Arnow-Richman, *supra* note 81, at 1176 (citing cases).

<sup>130</sup> *Id.* (citing cases).

behalf of a competitor are commonly enforced by courts.<sup>131</sup> Regarding business information, courts generally hold that employers do not have a protectable interest in an employee's "general skill or know-how."<sup>132</sup> The type of business information, however, that is protectable include: "customer lists, pricing methods, marketing strategies, product specifications, costs, and profit margins."<sup>133</sup>

Plaintiffs can rest assured that the first factor will not impose undue cost or hardships on them; in fact, it should involve no more than a *de minimis* cost. This involves being able to show that, *inter alia*, it noted that all confidential information was confidential and that it restricted access to the information to those individuals who reasonably needed it for their job performance.

The second factor likewise will not require much by of increased costs. The plaintiff can satisfy this factor by simply pointing out the presence of the non-compete and briefly explaining of the legal significance of the restrictive covenant on the employee's future employment opportunities should their relationship terminate. This promotes social efficiency by making the non-compete covenant a more salient term.

The third element is present as another method of ensuring that the plaintiff is not attempting to restrict competition per se by the use of his restrictive covenant and requires the plaintiff to show that the employee has knowledge that threatens the employer's legitimate and protectable business interests. Indeed, in order to "legitimize a noncompete agreement based on business information, an employer must do more than simply supply the employee with general

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<sup>131</sup> *Id.* (citing cases).

<sup>132</sup> *Id.* at 1177 (citing cases).

<sup>133</sup> *Id.* (citing cases).

training or experience; it must demonstrate that the employee was privy to trade secrets or other confidences.”<sup>134</sup>

### C. *Justification*

Plaintiffs are likely to object to the above liability framework on several grounds – that the scheme is too protective of defendants, that it restricts the availability of punitive damages and imposes significant barriers to obtaining an injunction (because not only does it have to show his restrictive covenant is reasonable but also that he took extra measures to protect proprietary information).

While those concerns are not without merit, the policy reasons articulated throughout this Note justify imposition of this standard. The liability framework does not favor one party over another – it is meant to promote fair competition and employee mobility while still protecting proprietary information. It safeguards that important public policy. Moreover, whatever increased burden is imposed on the plaintiff by the framework is placed on it because it is the one with access to the information and is not so significant so as to deter legitimate suits. Moreover, the former employer’s objections are ameliorated by the fact that it will not always be the former employer. Indeed, looking through the *ex ante* lens, the liability framework proposed herein incentivizes employers to make attractive offers to at-will employees of their competitors. This framework discourages meritless litigation by making it less likely that plaintiffs will receive a financial windfall (via punitive damages) and also, significantly, making available the most valuable form of relief (an injunction) to employers who truly have legitimate business information to protect and took reasonable means to protect it beyond the mere routine insertion of a non-compete clause into their employment contracts.

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<sup>134</sup> *Id.* (citing cases).

## CONCLUSION

The employment-at-will doctrine is the bedrock of modern American employment jurisprudence. Because either party to the employment agreement is free to terminate the relationship at almost any time for almost any reason, the rule naturally promotes freedom of contract and, with it, fair competition. While the employment-at-will doctrine is the default rule in the vast majority of American jurisdictions, it is being limited by an increasing number of legislatively and judicially created exceptions. The erosion of the rule illustrates a jurisprudential policy favoring employees. This Note argues that policy logically extends to protecting employee mobility and, consequently, increased protection for the employee's new employer who acquired the at-will employee through lawful competition. This lays the foundation for this Note's argument that there should be a narrow standard of liability under tortious interference claims under the factual scenario presented in this Note.

Building on that foundation, this Note argues that tortious interference claims with at-will employment relationships are properly classified as ones with prospective contractual relations. While an at-will agreement is a contract in one sense, it lacks the definiteness present in employment contracts containing temporal guarantees or just-cause restrictions. Those differences engender different expectations among the contracting parties which give rise to a more permissible array of interference behavior. Tortious interference with prospective contractual relations claims follow that lead and embrace lawful competition, holding that it is not unlawful interference.

The employer muddies the analysis by extracting a non-compete covenant from an at-will employee because, without the restrictive covenant, the employer can only hope that the employee shows up for work. With the restrictive covenant, however, the employer has the



definite expectation that the employee will not compete against it. While this Note in no way disputes an employer's legitimately protectable interests, it argues that noncompetition agreements in at-will employment contracts cannot occupy the same legal force as other contracts because of the realities of the modern workplace, are not truly bargained for and involve a non-salient term.

With all that in mind, this Note proposes an analytical framework that fairly and competently addresses the problem by incorporating the freedom to compete embraced by the tortious interference with prospective contractual relations claims with some of the increased protections embodied in tortious interference with contract claims. This liability framework prohibits improper financial windfalls to plaintiffs by eliminating punitive damages, but still permits them to seek the most valuable award, an injunction, to protect their truly proprietary information.