

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 313 Tortious Interference With a Contract or Business Relationship

**SPONSOR(S):** Civil Justice & Property Rights Subcommittee, Persons-Mulicka

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	8 Y, 5 N, As CS	Mawn	Jones
2) Regulatory Reform Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

A "tort" is a wrong for which the law provides a remedy. Florida common law recognizes a tort for the wrongful interference with a contract or business relationship ("tortious interference"), which is established by proving the:

- Existence of a contract or a business relationship;
- Defendant's knowledge of the contract or business relationship;
- Defendant's intentional and unjustified procurement of the contract's breach or interference with the business relationship, which was the proximate cause of the breach or interference; and
- Resulting damage to the plaintiff.

CS/HB 313 provides a statutory cause of action for the tort of tortious interference. Specifically, the bill provides that it is unlawful for any person, by inducement, persuasion, misrepresentation, intimidation, or other unjust means, to intentionally and unjustly:

- Cause the breach of a lawful contract by any party thereto; or
- Interfere with or disrupt a business relationship.

Under the bill:

- Any person injured due to the unlawful breach of a contract or interference with a business relationship has a civil cause of action for treble damages, temporary or permanent injunctive relief, or any other appropriate relief.
- The court may award a prevailing plaintiff in such an action reasonable attorney fees and costs.
- The statutory cause of action does not include the right to enforce a non-competition agreement.

Further, the bill specifies that its codification of tortious interference does not preempt any other remedy or cause of action provided for under any other statute or at common law. Thus, under the bill, a person may obtain a judgment for tortious interference under either the common law remedy or the codified remedy but is not entitled to a judgment under both remedies.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2022.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

A "tort" is a wrong for which the law provides a remedy. The purpose of tort law is to fairly compensate a person harmed by another person's wrongful acts, whether intentional, reckless, or negligent, through a civil action or other comparable process. A properly-functioning tort system:

- Provides a fair and equitable forum to resolve disputes;
- Appropriately compensates legitimately harmed persons;
- Shifts the loss to responsible parties;
- Provides an incentive to prevent future harm; and
- Deters undesirable behavior.<sup>1</sup>

A tort may be statutorily created or recognized at common law.<sup>2</sup> The legislature may codify the common law in statute, but whether a statutory remedy is exclusive or instead cumulative depends upon the legislature's intent as shown in the statute's language.<sup>3</sup> A presumption exists that the legislature's adoption of a statutory remedy does not change the common law remedy unless the statute explicitly and clearly states otherwise.<sup>4</sup>

#### Tortious Interference

Florida common law recognizes the tort of wrongful interference with a contract or business relationship ("tortious interference"), established by the plaintiff proving:

- The existence of a contract or a business relationship;<sup>5</sup>
- The defendant's knowledge of the contract or business relationship;
- The defendant's intentional and unjustified procurement of the contract's breach or interference with the business relationship; and
- Resulting damage to the plaintiff caused by the defendant's actions.<sup>6</sup>

A claim for tortious interference with a contract may only be brought against a person who is not a party to the contract, while a claim for tortious interference with a business relationship may only be brought against a disinterested third party.<sup>7</sup> A person is not considered a disinterested third party to a business relationship if he or she has any beneficial or economic interest in, or control over, that relationship, unless malice is the sole basis for the alleged interference.<sup>8</sup>

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<sup>1</sup> Am. Jur. 2d Torts s. 2.

<sup>2</sup> Common law is law derived from judicial decisions instead of from statutes. Legal Information Institute, *Common Law*, [https://www.law.cornell.edu/wex/common\\_law](https://www.law.cornell.edu/wex/common_law) (last visited Jan. 19, 2022).

<sup>3</sup> *Thornber v. City of Fort Walton Beach*, 586 So. 2d 914 (Fla. 1990).

<sup>4</sup> *Id.* at 918.

<sup>5</sup> A business relationship need not be evidenced by a formal or enforceable contract, but the relationship must be one under which the plaintiff has existing or prospective legal or contractual rights and evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered. *Ethan Allen, Inc. v. Georgetown Manner, Inc.*, 647 So. 2d 812 (Fla. 1994); Fla. Jur. 2d *Interference* s. 2.

<sup>6</sup> *Ethan Allen, Inc.*, 647 So. 2d at 814; *Tietig v. S.E. Reg'l Const. Corp.*, 557 So. 2d 98 (Fla. 2d DCA 1990); Fla. Jur. 2d *Interference* ss. 4 and 11.

<sup>7</sup> *Bortell v. White Mountains Ins. Group, Ltd.*, 2 So. 3d 1041 (Fla. 4th DCA 2009); *Sloan v. Sax*, 505 So. 2d 526 (Fla. 3d DCA 1987); Fla. Jur. 2d *Interference* ss. 3 and 10.

<sup>8</sup> *Astro Tel, Inc. v. Verizon Florida, LLC*, 979 F. Supp. 2d 1284 (M.D. Fla. 2013); *Palm Beach Cnty. Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So. 3d 1090 (Fla. 4th DCA 2009); *Mattlocks v. Black Entm't Television, LLC*, 43 F. Supp. 2d 1311 (S.D. Fla. 2014); Fla. Jur. 2d *Interference* ss. 3 and 10.

## Attorney Fees

Parties to a civil action must generally pay their own attorney fees and costs regardless of who prevails, unless the fees claim is based on a contract or statute.<sup>9</sup> Statutes authorizing the assessment of attorney fees must do so expressly and be strictly construed.<sup>10</sup> Because tortious interference is a common law tort, no statute presently authorizes a party to such a claim to recover his or her attorney fees, but s. 768.79, F.S., the “offer of judgment statute,” may allow litigants to seek and obtain attorney fees in a tortious interference claim under specified conditions.<sup>11</sup>

## Damages

Damages awardable to a plaintiff prevailing in a tortious interference claim are generally actual damages,<sup>12</sup> or those damages reasonably flowing from the unlawful procurement of the contract breach or interference with the business relationship.<sup>13</sup> Uncertainty as to the amount of damages or difficulty in proving the exact amount does not prevent recovery if it is clear that the plaintiff suffered substantial damages and there is a reasonable basis to support the amount awarded.<sup>14</sup> However, a speculative hope of future business is insufficient to sustain a claim for damages for tortious interference with a business relationship.<sup>15</sup>

Florida law also authorizes the award of punitive damages<sup>16</sup> in any civil action where there is “a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.”<sup>17</sup> To award punitive damages, the trier of fact must find, based on clear and convincing evidence,<sup>18</sup> that the defendant was personally guilty of intentional misconduct or gross negligence.<sup>19</sup>

Because a tortious interference claim does not sound in negligence, a punitive damages award in such a claim must be based on the defendant’s intentional misconduct.<sup>20</sup> Florida courts have found that evidence may support a finding of intentional misconduct in the tortious interference claim context but not necessarily a punitive damages award.<sup>21</sup> This is because, in order to sustain a punitive damages claim, the conduct at issue must have been committed in “an outrageous manner or with fraud, malice,

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<sup>9</sup> *Campbell v. Goldman*, 959 So. 2d 223 (Fla. 2007); *Price v. Tyler*, 890 So. 2d 246 (Fla. 2004).

<sup>10</sup> *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210 (Fla. 2003); *Knealing v. Puleo*, 675 So. 2d 593 (Fla. 1996).

<sup>11</sup> The offer of judgment statute provides that, in a civil action for damages, if a: 1) Defendant makes an offer of judgment and the plaintiff does not accept such offer within 30 days, the plaintiff must pay the defendant’s reasonable costs and attorney fees incurred from the date the defendant made the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than the offer; or 2) Plaintiff files a demand for judgment and the defendant does not accept such demand within 30 days, the defendant must pay the plaintiff’s reasonable costs and attorney fees incurred from the date the plaintiff made the demand if the plaintiff recovers a judgment in an amount at least 25 percent greater than the demand.

<sup>12</sup> “Actual damages” are damages awarded to compensate the plaintiff for his or her actual losses. Legal Information Institute, *Actual Damages*, [https://www.law.cornell.edu/wex/actual\\_damages](https://www.law.cornell.edu/wex/actual_damages) (last visited Jan. 19, 2022).

<sup>13</sup> *Ethan Allen, Inc.*, 647 So. 2d at 815.

<sup>14</sup> *Ins. Field Servs., Inc. v. White & White Inspection and Audit Serv., Inc.* 647 So. 2d 812 (Fla. 1994).

<sup>15</sup> *Douglass Fertilizers & Chem., Inc. v. McClung Landscaping, Inc.*, 459 So. 2d 335 (Fla. 5th DCA 1984).

<sup>16</sup> “Punitive damages” are damages awarded in addition to actual damages in order to punish the defendant. Legal Information Institute, *Punitive Damages*, [https://www.law.cornell.edu/wex/punitive\\_damages](https://www.law.cornell.edu/wex/punitive_damages) (last visited Jan. 19, 2022).

<sup>17</sup> S. 768.72(1), F.S.

<sup>18</sup> “Clear and convincing evidence” is evidence that is highly and substantially more likely to be true than untrue. It is a more rigorous standard than the “preponderance of the evidence” standard but a less rigorous standard than the “beyond a reasonable doubt” standard required to prove a defendant’s guilt in a criminal prosecution. Legal Information Institute, *Clear and Convincing Evidence*, [https://www.law.cornell.edu/wex/clear\\_and\\_convincing\\_evidence#:~:text=Definition,the%20contention%20is%20highly%20probable](https://www.law.cornell.edu/wex/clear_and_convincing_evidence#:~:text=Definition,the%20contention%20is%20highly%20probable). (last visited Jan. 19, 2022).

<sup>19</sup> “Intentional misconduct” means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. “Gross negligence” means that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. S. 768.72(2), F.S.

<sup>20</sup> *Bistline v. Rogers*, 215 So. 3d 607 (Fla. 4th DCA 2017).

<sup>21</sup> *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214 (Fla. 1936); *Hosp. Corp. of Lake Worth v. Romaguera*, 511 So. 2d 559 (Fla. 4th DCA 1986).

wantonness, or oppression.”<sup>22</sup> Even where punitive damages are awardable, Florida law generally caps such awards at three times the amount of compensatory damages or \$500,000, whichever is greater.<sup>23</sup>

### Enforcement of Non-Competition Agreements

A non-competition (“non-compete”) agreement is a contractual agreement in which one party promises another party not to compete with the other party’s business in a specified manner for a specified time period.<sup>24</sup> Non-compete agreements are often used in the employment context, where an employee promises not to compete with his or her employer’s business during his or her employment and for a period of time after the employment ends. In Florida, s. 542.335, F.S., governs non-compete agreements entered into on or after July 1, 1996.

A non-compete agreement is enforceable through a breach of contract claim brought against the violating party, and, while monetary damages are awardable in such claims where proven, the usual remedy awarded is an injunction.<sup>25</sup> However, courts have also allowed the enforcement of a non-compete agreement through a tortious interference claim where the elements of tortious interference are proven and the defendant is not a party to the non-compete agreement.<sup>26</sup>

### **Effect of Proposed Changes**

CS/HB 313 codifies within chapter 68, F.S., the tort of tortious interference with a contract or business relationship. Specifically, the bill provides that it is unlawful for any person,<sup>27</sup> by inducement, persuasion, misrepresentation, intimidation, or other unjust means, to intentionally and unjustly:

- Cause the breach or violation of, or the refusal or failure to perform, a lawful contract by any party thereto; or
- Interfere with or disrupt a business relationship.<sup>28</sup>

Under the bill:

- Any person injured by tortious interference as codified by the bill has a cause of action for treble damages,<sup>29</sup> injunctive relief, or any other appropriate relief.<sup>30</sup>
- The court must award a prevailing plaintiff in such an action reasonable attorney fees.
- The statutory cause of action does not include the right to enforce a non-compete agreement.

Further, the bill specifies that its codification of tortious interference does not preempt any other remedy or cause of action provided for under any other statute or at common law. Thus, under the bill, a person may obtain a judgment for tortious interference under either the common law remedy or the codified remedy but is not entitled to a judgment under both remedies. The codified tort differs from the common law tort by:

- Providing for the award of attorney fees to a prevailing plaintiff.

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<sup>22</sup> *Imperial Majesty Cruise Line, LLC v. Weitnauer Duty Free, Inc.*, 987 So. 2d 706 (Fla. 4th DCA 2008).

<sup>23</sup> Where the factfinder determines that the wrongful conduct was motivated solely by unreasonable financial gain and makes other specific findings about the conduct’s nature and likelihood of injury, punitive damages are capped at four times the amount of compensatory damages or \$2 million, whichever is greater. If the factfinder determines that the defendant had a specific intent to harm the claimant at the time of injury and did actually harm the claimant, there is no punitive damages cap. S. 768.73(1), F.S.

<sup>24</sup> Hank Jackson, *Florida’s Noncompete Statute: “Reasonable” or “Truly Obnoxious,”* Fla. Bar Journal Vol. 92, No. 3 (Mar. 2018) p. 10, <https://www.floridabar.org/the-florida-bar-journal/floridas-noncompete-statute-reasonable-or-truly-obnoxious/> (last visited Jan. 19, 2022).

<sup>25</sup> An injunction is a court order requiring a person to do or stop doing a specific action. Injunctions may be permanent or temporary. Legal Information Institute, *Injunction*, <https://www.law.cornell.edu/wex/injunction> (last visited Jan. 19, 2022); *Env’t Servs., Inc. v. Carter*, 9 So. 3d 1258 (Fla. 5th DCA 2009).

<sup>26</sup> See, e.g., *Massey Servs., Inc. v. Sanders*, 312 So. 3d 209 (Fla. 5th DCA 2021); *Gossard v. Adia Servs., Inc.*, 723 So. 2d 182 (Fla. 1998).

<sup>27</sup> The bill defines “person” as an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, club, union, organization, any other legal or commercial entity, or any other combination of individuals having collective capacity.

<sup>28</sup> The bill defines “business relationship” as a relationship between two or more individuals or entities where there exists an oral or written contract or agreement for goods or services.

<sup>29</sup> “Treble damages” are damages awarded in an amount that is three times that of the plaintiff’s actual damages. Legal Information Institute, *Treble Damages*, [https://www.law.cornell.edu/wex/treble\\_damages](https://www.law.cornell.edu/wex/treble_damages) (last visited Jan. 19, 2022).

<sup>30</sup> The issuance of injunctive relief does not affect the availability of damages under the bill.

- Providing for the automatic award of treble damages without a maximum dollar value cap or any requirement for a showing of outrageous misconduct.
- Authorizing suit against a person who was a party to the subject contract or had an interest in the subject business relationship.
- Barring the enforcement of a non-compete agreement under the codified tort.

The bill provides an effective date of July 1, 2022.

**B. SECTION DIRECTORY:**

**Section 1.** Creates s. 68.075, F.S., relating to tortious interference with a contract or business relationship; cause of action; damages; attorney fees and costs.

**Section 2.** Provides an effective date of July 1, 2022.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill authorizes a person:

- Prevailing in a codified tortious interference claim to recover his or her reasonable attorney fees, which are not recoverable at common law.
- To recover treble damages with no maximum dollar value cap or a requirement for a showing of outrageous misconduct as required under the punitive damages statute.
- To bring a cause of action against a person who was a party to the subject contract or had an interest in the subject business relationship (that is, persons who are not subject to suit for tortious interference at common law).

These provisions simultaneously increase a plaintiff's potential financial recovery and a defendant's potential financial liability in a tortious interference claim.

**D. FISCAL COMMENTS:**

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties and municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

Not applicable.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 19, 2022, the Civil Justice and Property Rights Subcommittee adopted a proposed committee substitute ("PCS") and reported the bill favorably as a committee substitute. The PCS differed from the original bill by:

- Requiring that tortious interference with a contract be intentional and unjust to be actionable.
- Redefining "person" to exclude government entities and include unions and other groups with collective capacity.
- Specifying that the civil remedy created by the bill does not preempt any other remedy or cause of action provided for under any other statute or the common law.
- Prohibiting a person from obtaining a judgment for tortious interference under both the civil remedy created by the bill and the common law.

This analysis is drafted to the committee substitute as passed by the Civil Justice and Property Rights Subcommittee.