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Susan C. Smith **May 15, 2014**

UNFAIRNESS OR PUBLIC CORRUPTION IN GOVERNMENT CONTRACTING

So you have been through the public procurement bid process and were awarded a contract, but the government has not acted in good faith to implement the contract. Commonly, disputes over government contracts occur where multiple parties have been awarded contracts in response to a public procurement bid offering. Typically, there are disputes over whether one of the awarded bidders is receiving preferential treatment in the allocation of work under the contracts. Sometimes there is public corruption in the process.

What are the legal remedies where the material fairness of the public bid process has been compromised after the contracts have been awarded? Depending on the specific facts, there are potential remedies under Florida law, including but not limited to: (1) breach of contract; (2) breach of covenant of good faith and fair dealing; (3) fraud in the inducement; (4) deceptive and unfair trade practices; (5) public corruption; (6) tortuous interference with a business relationship; and (7) The Florida Whistleblower Act. This article will address some of the potential causes of action, remedies, and statute of limitations for the various causes of action that might be brought where the fundamental fairness of a public procurement contract has been compromised. While outside the scope of this article, there are also several potential federal law claims that might be applicable as well.

BREACH OF CONTRACT

A contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981); *see also* 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 1:1 (4th ed. 2007). In order to prevail on a breach of contract claim, a plaintiff must prove: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of

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"However, where the breach of contract is accompanied by an independent tort, such as fraud, for which exemplary damages may be recovered, punitive damages can be awarded"

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the breach.

There are two distinct categories of remedies available for a breach of contract: general damages and special damages. General damages flow naturally from a breach of contract. *See* 24 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 64:12 (4th ed. 2002). Special damages compensate a plaintiff for additional losses that are incurred as a result of a defendant's breach, but that do not include the value of the promised performance. The classic example of a special damage is lost profits because lost profits do not necessarily result from a breach of a contract, but may be recoverable if the lost profits were both proximately caused by the alleged breach and reasonably foreseeable at the time the parties entered into the contract. *Id.* Whether or not damages exist is a question of fact for a jury. *See* 23 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 63:5 (4th ed. 2002).

If damages are difficult to establish, the amount of damages does not need to be established with absolute certainty. Reasonable certainty will suffice where a plaintiff provides a basis upon which damages may be estimated. *See* Mercer Mgmt. Consulting, Inc. v. Wilde, 920 F. Supp. 219, 238 (D.D.C. 1996)(citing Garcia v. Llerena, 599 A.2d 1138, 1142 (D.C. Cir. 1991)); *see also* Restatement (Second) of Contracts § 352 (1981)(stating "[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty"). Permissible methods of estimating lost profits in connection with a breach of contract claim include evidence of past performance or demonstrating profits earned by others. *See* Schonfeld v. Hilliard, 218 F.3d 164, 175-76 (2d Cir. 2000).

Because damages for breach of contract are generally limited to the pecuniary loss sustained, punitive or exemplary damages are not ordinarily recoverable in actions for breach of contract, even where the breach is willful and flagrant or oppressive. However, where the breach of contract is accompanied by an independent tort, such as fraud, for which exemplary damages may be recovered, punitive damages can be awarded. Grupo Televisa, S.A. v. Telemundo Communications Group, *Inc*., 485 F.3d 1233 (11th Cir. 2007); Lewis v. Guthartz, 428 So. 2d 222 (Fla. 1982); Grossman Holdings Ltd. v. Hourihan, 414 So. 2d 1037, 41 A.L.R.4th 125 (Fla. 1982); Ghodrati v. Miami Paneling Corp., 770 So. 2d 181 (Fla. Dist. Ct. App. 3d Dist. 2000); U.S. Resico, Inc. v. Henry, 590 So. 2d 1107 (Fla. Dist. Ct.

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App. 2d Dist. 1991); Floyd v. Video Barn, Inc., 538 So. 2d 1322 (Fla. Dist. Ct. App. 1st Dist. 1989), cause dismissed, 542 So. 2d 1335 (Fla. 1989); *A*ero Intern. Corp. v. Florida Nat. Bank of Miami, 437 So. 2d 156 (Fla. Dist. Ct. App. 3d Dist. 1983). Pleading punitive damages requires court permission after a showing that there is a reasonable basis for an award of punitive damages. Fla. Stat. § 768.72 (2013).

Sovereign immunity is waived by entering into a contract. *See* Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984)(holding state sovereign immunity does not apply in breach of contract actions: "where the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties."). However, sovereign immunity is only partially waived by the government for tort actions and does not include waiver for punitive damages. Generally, punitive damages can only be brought against government officials in their individual capacity and not against the sovereign. *See* Fla. § 768.28(9) (2013); *see also* Everton v. Willard, 468 So. 2d 936, *fn 6* (Fla. 1985).

The statute of limitations for bringing a claim for breach of contract is five years. Fla. Stat. § 95.11(2)(b) (2013). However, there are factual issues that can toll the statutes of limitations in particular circumstances. *See* Morsani v. Major League Baseball, 739 So. 2d 610 (Fla. 2d DCA 1999).

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

Florida contract law recognizes the implied covenant of good faith and fair dealing in every contract. *See* Burger King Corp. v. Weaver, 169 F.3d 1310, 1315 (11th Cir.1999)(cert. denied, 528 U.S. 948, 120 S.Ct. 370, 145 L.Ed.2d 287 (1999)); Barnes v. Burger King Corp., 932 F.Supp. 1420, 1438 (S.D.Fla.1996); County of Brevard v. Miorelli Eng'g, Inc., 703 So. 2d 1049, 1050 (Fla.1997); Fernandez v. Vazquez, 397 So. 2d 1171, 1174 (Fla. 3d DCA 1981). This covenant is intended to protect "the reasonable expectations

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"The duty of good faith and fair dealing must relate to express term of the contract and is not an independent term of a contract which may be asserted as a breach..."

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of the contracting parties in light of their express agreement." Barnes, 932 F.Supp. at 1438.

However, there are two important restrictions on causes of action for the breach of good faith and fair dealing. First, the implied covenant of good faith and fair dealing should not be invoked to override the express terms of the agreement between the parties. *See, e.g.,* Burger King Corp. v. Weaver, 169 F.3d 1310, 1317–18; Barnes, 932 F.Supp. at 1438; City of Riviera Beach v. John's Towing, 691 So. 2d 519, 521 (Fla. 4th DCA 1997). Second, there must be an allegation that an express term of the contract has been breached. *See, e.g.,* Burger King Corp. v. Weaver, 169 F.3d 1310, 1317–18; Nautica Int'l, Inc. v. Intermarine USA, L.P., 5 F.Supp.2d 1333, 1340 (S.D.Fla. 1998); Anthony Distrib., Inc. v. Miller Brewing Co., 941 F.Supp. 1567, 1574 (M.D.Fla. 1996); Barnes, 932 F.Supp. at 1438–39; Burger King Corp. v. Holder, 844 F.Supp., 1528, 1530 (S.D. Fla. 1993). The duty of good faith and fair dealing must relate to express term of the contract and is not an independent term of a contract which may be asserted as a breach when all other terms have been performed pursuant to the contract. Id.*; see also* Hospital Corp. of America v. Florida Med. Ctr., Inc., 710 So. 2d 573, 575 (Fla. 4th DCA 1998); Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1314 (11th Cir.1998)("[G]ood faith requirement does not exist 'in the air'. Rather, it attaches only to the performance of a specific contractual obligation."). Allowing a claim for breach of the implied covenant of good faith and fair dealing "where no enforceable executory contractual obligation" remains would add an obligation to the contract that was not negotiated by the parties. Hospital Corp., 710 So. 2d at 575.

That said, Florida courts have inconsistently applied these caveats. For example, in Cox v. CSX Intermodal, Inc., 732 So. 2d 1092 (Fla. 1st DCA 1999), CSX had exclusive rights to the plaintiffs' trucking services. CSX also had contracts with other trucking companies. Under the terms of the agreement, CSX was not required to furnish any specific amount of freight or number of loads for transport at any particular time or to any particular place. The plaintiffs sued alleging that CSX's employee was exercising its discretion in allocating the loads to the various companies, in an arbitrary, fanciful and unreasonable manner. Although the appellate court found no breach of the express terms of the contract, it determined that issues of fact existed as to whether the manner in which

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CSX exercised its discretion violated the implied duty of good faith. *Id*. at 1098. However, that case was distinguished by the Fourth District Court of Appeal in Insurance Concepts and Design, Inc. v. Healthplan Services, Inc.,785 So. 2d 1232 (4th DCA 2001), holding: "Unlike the case at bar, in Cox there was an express provision in the contract, the allocation of loads between Cox and other carriers, that was allegedly not performed in good faith. The plaintiff here can point to no such provision in the contract."

In Ernie Haire Ford, Inc. v. Ford Motor Co. 260 F.3d 1285 (11th C.A. Fla. 2001), the court distinguished the *Cox* case granting summary judgment precluding the contract claims holding:

With the implied covenant, one party cannot capriciously exercise discretion accorded it under a contract so as to thwart the contracting parties' reasonable expectations. *See* Sepe v. City of Safety Harbor, 761 So.2d 1182, 1185 (Fla. 2d DCA 2000)(holding that, even where one party has "sole discretion" under a contract, that party, in exercising its discretion, must act in good-faith and in accordance with the contracting parties' expectations*);* Cox v. CSX Intermodal, Inc., 732 So.2d 1092, 1097–98 (Fla. 1st DCA 1999) (stating "where the terms of the contract afford a party substantial discretion ..., the duty to act in good faith ... limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party"). Yet, the limit placed on a party's discretion is not great. As the Florida Second District Court of Appeal has stated, "Unless no reasonable party ... would have made the same discretionary decision ..., it seems unlikely that [the party's] decision would violate the covenant of good faith...." Sepe, 761 So.2d at 1185.

* * *

Appellants' reliance on *Cox* is misplaced. The central purpose of the contract in *Cox* was the hauling of freight. By failing to assign freight, CSX frustrated that purpose and the reasonable expectations of the parties. Here, however, the central purpose of the Dealership Agreement was to sell cars, not to relocate the dealership. In disapproving the relocation, Appellee did not preclude Appellants from selling cars. Instead, based on "its best judgment," Appellee forbid the relocation of the dealership to a site where, granted, Appellants would have financially benefitted. Although Appellee's decision was not in Appellants' best interests, it was neither capricious nor in contravention of the parties' reasonable expectations. Therefore, the district court properly granted summary judgment on Appellants' breach of contract claims.

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In 2012, in Burger King Corp. v. Broad Street Licensing Group, LLC 469 Fed. Appx. 819 (11 Cir. C.A. Fla. 2012), the Eleventh Circuit addressed the *Cox* decision and the implied duty of good faith holding where discretion is a part of a contract and no methodology is supplied for applying the discretion, the implied covenant of good faith and fair dealing will be imposed as a gap-filling to determine how the discretion should be applied:

Broad Street also alleges that BKC's repudiation of the licensing agreement breached the implied duty of good faith and fair dealing under Florida law. Where a contract vests a party with discretion, but provides no standards for exercising that discretion, Florida courts have held that the implied duty of good faith and fair dealing attaches as a gap-filling default rule. Speedway SuperAmerica, LLC v. Tropic Enter., Inc., 966 So. 2d 1, 3 (Fla.Dist.Ct.App. 2007); Publix Super Markets, Inc. v. Wilder Corp. of Del., 876 So.2d 652, 654 –55 (Fla.Dist.Ct.App. 2004). This standard imposes a duty upon the party vested with discretion to act in a commercially reasonable manner, or a manner that satisfies the reasonable expectations of the other party. *See, e.g.,* Publix Super Markets, 876 So. 2d at 655 (holding that exercise of discretion was reasonable based upon evidence of the commercial needs of the party vested with discretion); Cox v. CSX Intermodal, Inc., 732 So. 2d 1092, 1098 (Fla.Dist.Ct.App.1999) (considering whether exercise of discretion would unreasonably deprive other party of meeting its "costs of operation").

We agree with Broad Street that paragraph 4(G) of the contract is governed by the implied duty of good faith and fair dealing. This paragraph vests BKC with discretion to terminate any licensing agreement without Broad Street's approval. But, it contains no standards for BKC's exercise of that discretion. See Cox, 732 So. 2d at 1098. Further, Broad Street has alleged an expectation that compensation for its services would consist of, in part, a percentage of any revenue collected and paid to BKC for any license agreement secured by Broad Street.

BKC argues in response that the implied duty of good faith and fair dealing "may not be imposed to override express terms in a contract." Burger King Corp. v. Weaver, 169 F.3d 1310, 1316 (11th Cir.1999)(quotation marks and alterations omitted)(applying Florida law). While we agree with this generic statement of law, we

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do not believe that imposing a duty of good faith and fair dealing in this case would vary the terms of paragraph 4(G). As Florida courts have recognized, where a discretionary clause is "silent with regard to the methodology or standards to be used" in exercising that discretion, imposing a reasonableness standard of good faith and fair dealing does not vary any express contractual terms. *Cox*, 732 So. 2d at 1098. Therefore, insofar as Broad Street alleges that BKC breached the implied duty of good faith and fair dealing, we hold that it has successfully stated a claim, notwithstanding BKC's rights under paragraph 4(G).

However, in that case in a footnote the court pointed out that paragraph 4(G) did not expressly vest BKC with absolute discretion to terminate a licensing agreement, and implied that if it had done so there could be a different result. Also, in that case, the court ultimately relied upon another provision in the contract to determine there were no damages for terminating the license because the implied duty of good faith could not overrule an express term of the contract.
In summary, the determination of whether there is a breach in the duty of good faith and fair dealing will be a factually specific determination. The issue will most likely turn on how necessary the implied duty of good faith and fair dealing is to purpose of the contract.

"One of the essential elements of a contract is that parties to the contract enter into it freely without fraud, mistake, duress, or undue influence."

FRAUD IN THE INDUCEMENT

One of the essential elements of a contract is that parties to the contract enter into it freely without fraud, mistake, duress, or undue influence. Fla. Jur. 2d Contracts § 35 (1995). Fraud in the inducement in Florida is a tort independent of breach of contract. See, e.g., Burton v. Linotype Co., 556 So. 2d 1126, 1126 (Fla. 2d Dist. Ct. App. 1989); Johnson v. Bokor, 548 So. 2d 1185, 1186 (Fla. 2d Dist. Ct. App. 1989)(holding that a party fraudulently induced into a contract may sue for fraud in the inducement or breach of contract).

Fraud is a particularly difficult claim to prove because its elements require proof of intent to defraud and reasonable reliance on the misrepresentation. *See* Pettinelli v. Danzig, 722 F.2d 706, 709 (11th Cir. 1984). The elements of fraud are: (1) misrepresentation of material fact; (2) the representor of the misrepresentation knew or should have known of the statement's falsity; (3) intent by the representor that the representation will induce another to rely and act on it; and (4) resulting injury to the party acting in

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justifiable reliance on the representation. *See* Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So. 2d 306, 308 (Fla. 4th Dist. Ct. App. 1990).

To be actionable, the false representation must relate to an existing fact, as opposed to a prediction about a future event, and it must be known to be false at the time the statement is made. *See* Cavic v. Grand Bahama Development Co., 701 F.2d 879 (11th Cir.1983); Finney v. Frost, 228 So. 2d 617 (Fla. 4th Dist. Ct. App. 1969), cert. dismissed, 239 So. 2d 101 (Fla. 1970)(set aside a jury verdict based on insufficient evidence that defendant knowingly provided false information which was intended to induce the plaintiff to act); *see also* American Eagle Credit Corp. v. Select Holding, Inc., 865 F.Supp. 800 (S.D. Fla. 1994). In the seminal case of Besett v. Basnett, 389 So. 2d 995 (Fla. 1980), the Supreme Court of Florida held that a "recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." However, a plaintiff is not precluded from recovery in tort for failing to make an independent investigation of the statement. *Id.; see also* Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (holding the doctrine of caveat emptor does not exempt a seller from false statements that induced the buyer to purchase).

Punitive damages are available in judicial proceedings where there is a fraud claim. *See* Hialeah Automotive, LLC v. Basulto, App. 3 Dist., 22 So. 3d 586 (2009), rehearing denied, review granted 116 So.3d 1259. In HGI Associates, Inc., v. Wetmore Printing Company, 427 F.3d 867, (11th Cir. C.A. 2005) the court held punitive damage, lost profits, and future lost profits were all appropriate damages for fraud in the inducement:

punitive damages are awardable for sufficient fraudulent inducement claims, even when those claims involve facts related to a collateral breach of contract claim. The general rule in Florida states that punitive damages are not awarded for breach of contract claims. See, e.g., Griffith v. Shamrock Vill., Inc., 94 So. 2d 854, 858 (Fla. 1957). However, "where the acts constituting a breach of contract also amount to a cause of action in tort there may be a recovery of exemplary damages upon proper allegations and proof." Id.; accord Ferguson Transp., Inc. v. North Am. Van Lines, Inc., 687 So. 2d 821, 822–23 (Fla. 1996) (per curiam);

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Southern Bell Tel. & Tel. Co. v. Hanft, 436 So. 2d 40, 42 (Fla.1983); see also Kee, 918 F.2d at 1543. The underlying tort cause of action must be based on some sort of "intentional wrong, willful or wanton misconduct, or culpable negligence, the extent of which amounts to an independent tort." Hanft, 436 So.2d at 42.

Wetmore relies on our decision in Kee to assert that punitive damages are not recoverable when the compensatory damages for the breach of contract and fraudulent inducement are the same. That reasoning, however, has been rejected in fraudulent inducement cases. In Kee, we based much of our decision on the Florida Supreme Court's holding in AFM Corp. v. Southern Bell Telephone & Telegraph Co. that stated, "without some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." 515 So.2d 180, 181–82 (Fla.1987); accord Kee, 918 F.2d at 1543. The Florida Supreme Court, however, has subsequently rejected the use of this language to eliminate a legitimate fraudulent inducement cause of action on the sole basis that breach-of-contract claims recover for the same alleged economic injuries. See HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1239 (Fla.1996).

In HTP, the court resolved a conflict between the Florida Courts of Appeal regarding whether a claim of fraudulent inducement is barred in a breach of contract action. See id. at 1238. The court held that a fraudulent inducement is a separate and independent tort when compared to breach of contract. See id. at 1239. The facts concerning fraud committed during the formation of a contract can be distinguished from the facts resulting in the breach of that contract. See id. Thus, an "action on a contract and for fraud in inducing plaintiff to enter into such a contract may exist at the same time, and a recovery on one of the causes will not bar a subsequent action on the other." Id. (citations and quotations omitted).

Florida courts have further explained that the decision in HTP allows an award of punitive damages for fraudulent inducement despite additional claims for breach of contract. *See* Connecticut Gen. Life Ins. Co. v. Jones, 764 So. 2d 677, 680–82 (Fla.Dist.Ct.App. 2000). Indeed, even we have recognized the ability of a party to seek punitive damages for fraud and compensatory damages for breach of contract under Florida law, despite

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both claims arising from the same facts. *See* Palm Beach Atl. Coll., Inc. v. First United Fund, Ltd., 928 F.2d 1538, 1547 (11th Cir.1991). Thus, we conclude that the district court properly granted punitive damages for the acts of fraud perpetuated by Wetmore.

However, sovereign immunity is not waived under Florida law for tort claims so punitive damages can only be brought against the individual government officials in their individual capacity and not against the sovereign. Fla. § 768.28(9) (2013).

The statute of limitations for bringing a claim for fraud in the inducement is four years. Fla. Stat. § 95.11(3)(j) (2013).

DECEPTIVE AND UNFAIR TRADE PRACTICES

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") makes unlawful "[u]nfair methods of competition or deceptive acts or practices in the conduct of any trade or commerce." There are three elements to establish a claim pursuant to FDUTPA: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. Generally, FDUTPA is an attractive claim for plaintiffs because it provides for statutory damages, which are additive to other damages, and has a prevailing party attorneys' fees provision.

Outside of Florida, some courts have held that similar laws only protect "consumers." Thus, where the party filing the claim was the "seller" in the transaction, the claim cannot be actionable. *See e.g.* Channel Companies, Inc. v. Britton, 167 N.J. Super. 417, 400 A.2d 1221 (App. Div. 1979) (holding a seller is not a "consumer" under the New Jersey Consumer Fraud Act); Tex. Bus. & Com. Code §§ 17.41 et seq., (A seller of metering devices is not a "consumer" under the Texas Deceptive Trade Practices Consumer Protection Act); Bostwick v. Liquor Control Systems, Inc., 599 S.W.2d 129 (Tex. Civ. App. Waco 1980)(the Texas Deceptive Trade Practices Consumer Protection Act defines a "consumer" as an "individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease any goods or services." "Goods" are defined as "tangible chattels or real property purchased or leased for use." Applying these definitions to the facts, the court reversed the trial court's decision and rendered judgment for the individual, reasoning that the mere act of receiving a check in exchange for a purchase by the individual does not make the supplier a "consumer" under the law). While the issue has not been

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squarely decided in Florida, the precedent from other states and the overall intention of the federal consumer protection act raises concerns for an awarded bidder to bring this cause of action.

Sovereign immunity could also be a concern. There is only one reported Florida case where FDUTPA was raised against a government entity. *See State, Dept. of Lottery v. Curcio,* 71 So. 3d 931 (Fla. 1st DCA 2011). The reported case law shows the FDUTPA claim survived an interlocutory appeal. However, on remand the trial court entered an order of summary judgment on the FDUTPA claim based upon sovereign immunity. The issue is likely to be subject to an appeal.

The risk to bringing this cause of action is that FDTPA has a prevailing party attorneys' fees provision. Thus, if the plaintiff wins on all other claims, but lose on this particular legal theory, the plaintiff could still end up paying the other parties' attorneys' fees.

No action may be brought by the enforcing authority under this section more than 4 years after the occurrence of a violation of this part or more than 2 years after the last payment in a transaction involved in a violation of this part, whichever is later. Fla. Stat. § 501.207 (5) (2013).

"However, sovereign immunity is not waived under Florida law for tort claims so punitive damages can only be brought against the individual government officials in their individual capacity and not against the sovereign."

PUBLIC CORRUPTION

In certain instances there could be facts that amount to public corruption and might be actionable against the government employee that committed the acts. Article 2 §8 (c) of the Florida Constitution provides:

Any public officer or employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state for all financial benefits obtained by such actions. The manner of recovery and additional damages may be provided by law.

However,. in St. John Medical Plans, Inc., St. John Clinic Medical Center, Inc., and Miguel Angel Cruz Peraza, on behalf of The State of Florida, v. Alberto Gutman, 721 So. 2d 717 (Fla. 1998) Supreme Court of Florida held this constitutional provision was not self executing, meaning there must be a separate statutory cause of action to give an individual standing. There are tax payer standing cases where specific injury to a plaintiff has allowed these types of claims to survive. *See e.g.* Lainhart v. Burr, 438 So. 711 (Fla. 1905)(holding a violation of the public trust does not require a violation of a specific statute); Lovejoy v. Grubbs, 432 So. 2d 678 (5th DCA 1983) (holding one cannot serve two masters and that actions against

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public policy do not require a statute to enforce them as the statute would merely be a declaration of public policy). In Lovejoy, the court also held taxpayers have the right to bring suit against officials that squander public funds. Id.

TORTUOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

Depending on the specific facts, in some instances there may be a claim for tortuous interference with a business relationship. Florida law defines tortuous interference with a business relationship as the unjustified and intentional interference with a contract or advantageous business relationship between two other parties where injury occurs as a result of the interference. *See* Symon v. J. Rolfe Davis, 245 So. 2d 278, 280 (Fla. 4th DCA 1971); *see also* Restatement (Second) Torts § 766. Tortuous interference has five elements: (1) existence of a contract; (2) the defendant's knowledge of a contract; (3) intentional interference with the contract; (4) interference with lack of justification or privilege; and (5) damage resulting from the breach. *See* Special Purpose Accounts Receivable Co-op Corp. v. Prime One Capital Co., 125 F. Supp. 2d 1093, 1103 (S.D. Fla. 2000); McKinney-Green, Inc. v. Davis, 606 So. 2d 393(Fla. 1st DCA 1992).

To maintain a claim for tortuous interference the defendant's interference must be intentional and direct. *See* McCurdy v. Collis, 508 So. 2d at 383; Rosa v. Florida Coast Bank, 484 So. 2d 57, 58 (Fla. 4th DCA 1986); Lawler v. Eugene Wuesthoff Memorial Hospital Association, 497 So. 2d 1261, 1263 (Fla. 5th DCA 1986). The party claiming tortuous interference has the initial burden of proving it. *See* Ahern v. Boeing, 701 F.2d 142, 144 (11th Cir. 1983)(citing Unistar Corp. v. Child, 415 So. 2d 733, 734 (Fla. 3d DCA 1982). Once all of the elements are proven, the burden shifts to the defending party to prove that the interference was justified or privileged, or to establish any other possible defenses. *See* United Yacht Brokers v. Gillespie, 377 So. 2d 668, 672 (Fla. 1979).

Damages for tortuous interference with a business relationship must reasonably flow from the defendant's interference. *See* Ethan Allen, 647 So. 2d 812, 815 (Fla. 1994). The interference of the contract must be the legal or direct cause of the injury suffered. *See* Tietig v. Southeast Regional Const. Corp., 557 So. 2d 98, 98 (Fla. 3d DCA 1990). In Ethan Allen, the furniture dealer told the manufacture that it was no longer

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"[T]axpayers have the right to bring suit against officials that squander public funds."

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selling its furniture. Id. at 814. So, the manufacturer placed an ad announcing the business split and noting that the dealer still had outstanding debt owed to the manufacturer. Id. The dealer claimed that the ad interfered with the prospective relationship with the previous people who shopped at its store. Id. However, the court disagreed with the claim and held the dealer did not suffer any injury from the interference because dealer had no identifiable agreement with the past customers. Id. at 815. Similarly, if no contractual rights are violated, then no damage from the interference occurs. *See* International Expositions, Inc. v. City of Miami Beach, 274 So. 2d 29, 31 (Fla. 3d DCA 1973).

The main defenses against a claim for tortuous interference of a contract are justification, privilege, and sovereign immunity. To determine if the defendant was justified in interfering, the court will balance the importance of the objective obtained through the interference with the importance of the plaintiff's interest that was interfered with. *See* Heavener, Ogier Services, Inc. v. R.W. Florida Region, Inc., 418 So. 2d 1074, 1076 (Fla. 5th DCA 1982). Additionally, Restatement (second) of Torts § 767 looks at other factors to determine if an actor's conduct was proper or justified. The Restatement looks at: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference; and (7) relations between the parties.

Florida law also recognizes that interference with a contract is privileged or justified if the defendant is acting to protect or promote one's own financial interest. *See* Metzler v. Bear Auto Service Co., *SPX*, 19 F. Supp. 2d 1345, 1364 (S. D. Fla. 1998). If a defendant interferes with a contract to protect his or her financial interest, it is generally determined that the defendant's right to protect that interest outweighs the plaintiff's right to be free from interference. *See* Heavener, Ogier Services, Inc., 418 So. 2d at 1076. Some cases require the financial interest to be an investment. *See* Yoder v. Shell Oil Co., 405 So. 2d 743, 744 (Fla. 2d DCA 1981

Additionally, interference may be justified or privileged if the action constitutes legitimate competition for business. *See R*oyal Typewriter Co., a Division of Litton Business Systems, Inc. v. Xerographic Supplies Corp., 719 F.2d 1091, 1105 (11th Cir. 1983); *see also* Ahern, 401 F.2d at 144

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(holding that claim will not be actionable when lawful competition is present, even though a prima facie case of tortuous interference is established). In Royal Typewriter, Royal sold copy machines to Xerographic that they in turn sold to customers. Royal brought suit to recover unpaid amounts and Xerographic countersued claiming that Royal's solicitations in another area interfered with Xerographic's business. The court held that there was no tortuous interference of contract because Royal was only competing for customers. Id.*; see also* Lake Gateway Motor Inn, Inc. v. Matt's Sunshine Gift Shops, 361 So. 2d 769, 771 (Fla. 4th DCA 1978)(holding landlord could negotiate with a potential new tenant even though an existing tenant was leasing the space). Although lawful competition usually justifies interference, competition for business by a competitor may be actionable if the competitor is attempting to induce a customer to breach a contract that is not terminable at will. *See* Advantage Digital Systems, Inc. v. Digital Images Services, Inc., 870 So. 2d 111, 116 (Fla. 2d DCA 2003). The issue usually turns on whether the conduct is considered to be unfair according to contemporary business standards. *See* Azar v. Lehigh Corp., 364 So. 2d 860, 862 (Fla. 2d DCA 1978). Further, an action will not be privileged if undertaken out of malice. *See Wagner v. Nottingham Associates*, 464 So. 2d *166*, 167(Fla. 3d DCA 1985).

THE FLORIDA TORT CLAIMS ACT

The Florida Tort Claims Act, sometime referred to as the Florida Whistle Blower Act, is intended to "prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee." Fla. Stat. §112.3187 (2013). The disclosure of this information must be made to the appropriate person. For violations involving a " local governmental entity, including any regional, county, or municipal entity, special district, community college district, or school district or any political subdivision of any of the foregoing, the information must be disclosed to a chief executive officer… or other appropriate local official." *Id.* Courts have found that a person is an "appropriate local official" when they are empowered to investigate complaints and make reports or recommend corrective action. *See*

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e.g. Quintini v. Panama City Hous. Auth., 102 So. 3d 688, 690 (Fla. 1st DCA 2012) review denied, 116 So. 3d 383 (Fla. 2013) and Burden v. City of Opa Locka, 54 Employee Benefits Cas. 2108 (S.D. Fla. 2012).

In general this act includes remedies to reinstate employees or independent contractors and to make them as whole as they were before the retaliation occurred. However, there are several procedural steps that need to be taken in order to successfully proceed with a claim under this statute. These procedural steps vary based on the type of relationship the person disclosing the information has with the government or state agency. In the context of someone who has been awarded a government contract that is being corruptly administered, the person must make an attempt to resolve the situation by using all available administrative and contractual remedies. If those fail, the person must file an action in civil court within 180 days of the retaliatory act. Further, there is an attorneys' fees provision for successfully bringing this claim. *See id.*

The specific facts of a particular case will control how sovereign immunity impacts this cause of action. While this statute evinces the intent of the legislature to waive sovereign immunity on a broad basis, it must be strictly construed. Fla. Jur. 2d, Government Tort Liability § 9. There are two broad exceptions to the statutory waiver of governmental tort immunity under this statute: (1) discretionary, planning-level governmental functions remain immune from tort liability; and (2) the governmental entity is not liable in tort for breaching a duty which the government owes to the public generally, as opposed to a special tort duty owed to a particular individual. If either exception to the waiver of sovereign tort immunity is applicable, the governmental entity sued is immune from tort liability. Fla. Jur. 2d, Government Tort Liability § 13.