

IDC Defense UPDATE

MAY 2014
VOL. 15 NO. 1

A publication generated by the Illinois Association of Defense Trial Counsel Commercial Law Committee

Anticipatory Repudiation Claim Rejected

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The Illinois Appellate Court in *Kelly v. Orrico*, 2014 IL App (2d) 130002, recently addressed the doctrine of anticipatory repudiation. In *Kelly*, the plaintiffs and defendants entered into a contract for the defendants to purchase plaintiffs' house for \$1.2 million and the closing date was set. The defendants then told the plaintiffs that they could not find a buyer for their residence. The parties agreed that the plaintiffs could list their house for sale again. Subsequently, the plaintiffs entered into another contract for the sale of their home for the same price and scheduled the closing date with a second couple. The defendants did not object.

Prior to the scheduled closing date, agreed upon by the plaintiffs and defendants, the plaintiffs attorney contacted defendants to inform them that plaintiff would consider them to be in breach of the contract if they failed to close on the purchase of the house. The defendants failed to perform on the closing date. The second couple who had also agreed to buy the house then defaulted on their contract and forfeited their earnest money to the plaintiffs. The plaintiffs sold their home approximately 10 months later to a new party for \$1 million.

The plaintiffs then sued the defendants for breach of contract. The plaintiffs alleged they had fulfilled their contractual obligations, whereas, the defendants, "failed to perform their obligations as they failed to close on the purchase of the plaintiff's house on the agreed upon closing date." *Id.*, ¶8.

The circuit court held a bench trial and entered judgment in the plaintiffs' favor. The defendants appealed alleging that (1) the trial court's judgment did not match the pleadings, because the plaintiffs presented a case for recovery for anticipated repudiation, and (2) the evidence at trial did not demonstrate a clear and unequivocal repudiation of their contract with the plaintiffs.

The appellate court reversed the judgment of the trial court since the plaintiffs only pled a breach of contract suit and failed to allege that the defendants anticipatorily repudiated the contract by exhibiting a clear manifestation not to perform. The appellate court noted that the plaintiffs could have amended their pleading to conform to the proof of the anticipatory repudiation case, which they could have done at any time before or after the judgment of the trial court.

The appellate court then examined the Illinois law on anticipatory repudiation. The court noted that the Illinois Supreme Court has summarized the doctrine of anticipatory repudiation as:

The doctrine of anticipatory repudiation requires a clear manifestation of an intent not to perform the contract on the date of performance. The failure

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of the breaching party must be a total one which defeats or renders unattainable the object of the contract. That intention must be a definite and unequivocal manifestation that he will not render the promised performance when the time fixed for it in the contract arrives. Doubtful and indefinite statements that performance may or may not take place are not enough to constitute anticipatory repudiation. *Id.* at ¶27 quoting *In re Olson*, 124 Ill. 2d 19, 24 (1988).

The appellate court reversed the judgment of the trial court since the plaintiffs only pled a breach of contract suit and failed to allege that the defendants anticipatorily repudiated the contract by exhibiting a clear manifestation not to perform.

The appellate court held that, at best, the defendants had created an ambiguous implication as to whether they would perform on the closing date. The court held that when the defendants were informed by the plaintiffs that they entered into contract with another party for the sale of the house at the same price that it was not an anticipatory breach by the defendants when they stated they would not pay the commission fee as result of the contract. Specifically, the refusal to pay the fee by the defendants was not a clear and unambiguous repudiation as to whether or not they would perform at the closing date, approximately two months in the future. Nor was it an anticipatory breach by the defendants when they stated to the plaintiffs that they should proceed with their contract with the third party. The appellate court supported its reasoning that “a party to a contract may not lull another party into a false assurance that strict compliance with a contractual duty will not be required and then sue for noncompliance.” *Id.* at ¶33.



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Agreements Only Terminable by the Mutual Consent are Contracts at Will and Unenforceable


by Cecil E. Porter
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In a recent case, the Illinois Appellate Court had to decide whether a contract only terminable by mutual consent of the parties was enforceable. *Rico Industries, Inc. v. TLC Group, Inc.*, 2014 IL App (1st) 131522. There, the plaintiff was in the business of manufacturing novelty products. The plaintiff had a written contract with the defendant to be its exclusive sales representative of its products to Wal-Mart. The contract contained a termination provision providing that it could only be terminated by the written agreement of the parties. The plaintiff had a dispute with the defendant over the commissions and wanted to terminate the contract.


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The plaintiff filed a declaratory action requesting a judgment that the contract was terminable at will since the termination clause created a perpetual contract which was contrary to Illinois public policy. The defendant filed a section 2-615 motion for judgment on the pleadings arguing that the termination did not violate public policy and hence enforceable. The section 2-615 motion was granted by the trial court which found that the termination clause was enforceable. The trial court agreed with the defendant that the termination clause created an objective event that allowed the contract to be terminated, which was the requirement of the mutual agreement of the parties to terminate the contract.

The appellate court disagreed and reversed the order of the trial court. The appellate court found that Illinois had a long standing public policy of upholding the right of parties to freely contract. However, the court noted that the public policy in Illinois does not permit perpetual contracts. Here, the court found there was a perpetual contract because there may never be a mutual agreement between the plaintiff and the defendant that would allow the contract to be terminated. Since the contract was of indefinite duration, it was contrary to Illinois public policy and thus terminable at will.



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Court Finds Tortious Interference with Contract

by John O'Malley
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TABFG, LLC v. Pfeil, 7th Cir., No. 12-3557, March 20, 2014. It involves a tortious interference with a contract claim. There, a joint venture was formed between two limited liability companies, TABFG and NT Prop Trading for the purpose of trading securities. TABFG was responsible for the actual trading. NT Prop was going to fund the venture. NT Prop was owned by two limited liability corporations, NT Financial and Pfeil Commodities. However, for all practical purposes, NT Prop was owned and run by Richard Pfeil.

At first, the joint venture was a success, earning profits of \$3.4M. However, a problem arose because the individuals who made up TABFG were former employees of another trading group and were eventually prohibited from continuing to trade on behalf of TABFG, because of restrictive covenants with their former company. That effectively ended the joint venture because their trading was the cornerstone of the venture.

The joint venture agreement provided that upon termination of the joint venture, the profits were to be evenly split between TABFG and NT Prop, less expenses and payments. Eventually, Pfeil caused NT Prop to distribute \$360,000 to TABFG and \$3.2M to NT Financial and Pfeil Commodities, his companies.

TABFG subsequently filed a lawsuit against Pfeil alleging that Pfeil tortuously interfered with the contractual obligations of NT Prop to the joint venture. TABFG asserted that when Pfeil, who was not an officer, director or manager of NT Prop, engineered a distribution of the bulk of the joint venture funds to himself, he tortuously caused NT Prop to breach its contractual obligations under the joint venture agreement to TABFG.

After a bench trial, the district court ruled in favor of TABFG and awarded judgment to TABFG against Pfeil. Pfeil raised two objections to the district court's decision. First, he asserted that the claim of tortious interference

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was barred by the statute of limitations. The statute of limitations for a claim of tortious interference with contract is five years. The joint venture agreement required a distribution of profits 15 days after its termination. Pfeil argued that the limitation period began to run 15 days after the joint venture was effectively terminated when the traders were enjoined from continuing to trade for the joint venture. However, the court found that the 15 day period for distribution of profits was not the relevant time from which to measure the statute of limitations. The parties had not treated any of the dates in the joint venture agreement as material and continued to argue about the distribution of the profits long after the 15-day period had expired. Rather, the court used the date in which Pfeil had actually transferred the money to different parties as the date when the statute of limitations began to run and that date was within the statute of limitations.

Pfeil's second challenge to the district court's decision was his contention that his distribution of funds was privileged. The Illinois Supreme Court has recognized a privilege in tortious interference cases where the interest which the defendant was acting to protect is one which the law deems to be of equal or greater value than the plaintiff's contractual rights. Illinois has granted a conditional privilege to managers or corporate officers that protect them from personal liability for their decisions made on behalf of the corporation. The privilege is necessary because the corporation acts through its agents and the duty that those agents owe to the corporation's shareholders outweigh the officers' duty to the corporation's contract creditors.

For example, a company facing a liquidity crisis may need to take measure to address the cash flow problems such as deferring payments to vendors and renegotiating terms with suppliers. Such actions taken to protect the future of the company and the ongoing validity of those business relationships should not result in tort liability to those agents acting in the company's best interests.

However, the privilege extends only to acts undertaken on behalf of the corporation and corporate officers "are not justified in acting solely for their own benefit or solely in order to injure the plaintiff because such conduct is contrary to the best interests of the corporation." Pfeil argued that a person subject to the privilege cannot be held liable unless that person was acting only for his own personal benefit **and** acted contrary to the interests of the corporation.

The Court of Appeals held that the record supported the district court's decision that Pfeil was acting solely for his own personal benefit and not actions taken in the interests of the corporation. Pfeil had failed to ascertain the legal obligations of NT Prop with regard to repayment to TABFG. The court concluded that Pfeil's failure to ascertain the legal obligations of NT Prop and the allocation of the funds for his own personal benefit support the district court's determination that Pfeil was acting solely in his own interests and not in the best interests of NT Prop. The court concluded that Pfeil was not shielded from liability by privilege and affirmed the district court's judgment.



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■ **John J. O'Malley** is a partner in the Chicago office of *Seyfarth Shaw LLP* and has over 35 years of experience in commercial litigation, professional liability and product liability and tort defense. Mr. O'Malley is the current vice-chair of the Commercial Law Committee and the past co-chair of the Civil Practice Committee of the IDC, a past chair of the Civil Practice Committee of the Chicago Bar Association and a past chair of the Insurance Law Section Council of the Illinois State Bar Association. He is a member of the DRI and the Litigation and Tort and Insurance Practice Sections of the American Bar Association and the Lawyer's Club of Chicago. Mr. O'Malley received his undergraduate degree from the College of the Holy Cross and received his J.D., *cum laude*, from DePaul University where he was a member of the law review. A former law clerk for Justice John J. Stamos of the Illinois Appellate Court, Mr. O'Malley has served as a lecturer at the John Marshall School of Law. He is the author of a number of articles on litigation and tort law and is a frequent workshop panelist and lecturer on litigation.

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