



SIKICH FORENSICS ACADEMY

**CALCULATING DAMAGES IN TORTIOUS
INTERFERENCE MATTERS**

Webinar

April 11, 2018



ACCOUNTING TECHNOLOGY ADVISORY

SIKICH.COM

PROGRAM AGENDA

- Welcome and Introduction
- Presentation on “Calculating Damages in Tortious Interference Matters”
- Conclusion
- Question and Answer Session

HOUSEKEEPING ITEMS

- Attendance certificates will be sent to you at the completion of the program
- This program has been approved for CLE credit in Illinois, Texas, Missouri and Kansas
- This program has been approved for 1.2 hour of CPE credit for CPAs
- Polling questions will launch throughout the webinar
- Please be sure to complete the evaluation that will pop up at the conclusion of the webinar (respective state bar numbers are required for attorneys)
- If you have any questions or comments, please email Eileen Keeley (Eileen.Keeley@Sikich.com)

SHAWN FOX



Shawn Fox

CPA/ABV, CFA®, ASA

*Managing Director,
Dispute Advisory*

- **Education**

BBA in Accounting from the University of Iowa

- **Experience**

Shawn has more than 20 years of experience providing forensic accounting and litigation services as an expert witness to a wide range of organizations and their counsel.

Shawn directs forensic investigations and analysis across many areas, including complex damages, lost profits, intellectual property infringement, mergers and acquisitions, class actions, and bankruptcy litigation, as well as valuation and insurance coverage disputes.

Shawn has testified in more than 40 different cases at deposition, trial, and arbitration as an expert witness and has served as a court-appointed receiver. Shawn has been qualified as an expert witness in federal district and bankruptcy courts and state courts across the U.S.

- **Contact Information**

200 West Madison Street, Suite 3200
Chicago, Illinois 60606
D: (312) 648-6655
Shawn.Fox@Sikich.com

DAVID WHARTON



David Wharton

*CPA/CFF, CFE
Senior Manager
Dispute Advisory*

- **Education**

BS Accounting from the University of Missouri-Kansas City

- **Experience**

David has more than 13 years of experience providing forensic accounting services in dispute resolution and investigative matters to organizations and their counsel.

David's experience covers a wide array of complex matters including: commercial litigation, determination of lost profits, class actions, intellectual property disputes, corporate financial fraud investigations, white-collar criminal matters, whistleblower investigations, and insurance claims investigations including business interruption and fidelity bond claims.

- **Contact Information**

1201 NW Briarcliff Parkway, Suite 217
Kansas City, Missouri 64116
D: (816) 673-7534
David.Wharton@Sikich.com

ALEX BRANDON



Alex Brandon

ASA

*Senior Manager
Dispute Advisory*

- **Education**

Bachelor's in Business Administration and a Master of Business Administration from the University of Missouri

- **Experience**

Alex is an Accredited Senior Appraiser and has 11 years of experience providing valuation, forensic accounting and litigation services to organizations and their counsel assisting in all phases of litigation.

Alex has performed analyses related to lost profits, diminution of value, economic loss, reasonable royalty, and unjust enrichment and has served as an expert witness.

- **Contact Information**

12655 Olive Blvd, Suite 200

St. Louis, Missouri 63141

D: (314) 590-2427

Alex.Brandon@Sikich.com

TORTIOUS INTERFERENCE

- Governed by both federal and state law
- Tortious interference is improper intentional interference with another party's
 - Contractual relationships (existing or prospective)
 - Business relationships with a third-party
 - Economic advantages/opportunities (also referred to as business expectancy)
- However, not all actions that interfere with business or contractual relations are improper and tortious
- Many times tortious interference claims are included with other legal claims

TORTIOUS INTERFERENCE

- Courts may look at a number of factors to determine if the defendant's actions are improper including the following:
 - Type of conduct defendant engaged in
 - Defendant's motives, intent, and knowledge
 - Defendant's interests which they seek to advance
 - Plaintiff's interests with which the defendant's conduct interferes with
 - Interests of any third parties involved
 - Social interests in balancing defendant's freedom to act against the contractual interests of the plaintiff
 - **The "proximity or remoteness" of the conduct relative to the interference claimed by plaintiff**
 - The relationship between the plaintiff and defendant

TORTIOUS INTERFERENCE

- General elements for proof of tortious interference with a contract
 - A valid contract existed between the plaintiff and a third party
 - Defendant knew about the contract
 - Defendant acted intentionally and improper
 - **Defendant's actions were the proximate cause of the plaintiff's injury**
 - **Plaintiff suffered a loss**

- General elements for proof of tortious interference with business relationship
 - Plaintiff had a business relationship with another entity or person
 - Defendant knew about the relationship
 - Defendant intentionally acted in a manner that interfered with and caused the relationship to deteriorate or end
 - **Defendant's actions were the proximate cause of the plaintiff's injury**
 - **Plaintiff suffered a loss**

TORTIOUS INTERFERENCE

- General elements for proof of tortious interference with business expectancy
 - A reasonable expectation by plaintiff of entering a valid business relationship
 - Defendant's knowledge of the expectation
 - **Defendant's intentional interference prevents the plaintiff's expectation from developing into a business relationship**
 - **Defendant's actions were the proximate cause of the plaintiff's injury**
 - **Plaintiff suffered damages as a result of the defendant's actions**

TORTIOUS INTERFERENCE

- **Examples**
 - Hiring someone who is breaching an employment agreement with their current employer by coming to work for you when you know about the existing employment agreement but hire the person anyway.
 - Inducing someone to breach their non-compete / non-solicitation clauses of active employment agreements with former employers, which you are aware of, to solicit former co-workers to come work for your competing company.
 - Knowingly and falsely disparaging a competitor's product so that the competitor's customers will breach their contracts with your competitor.
 - Party A convinces the seller of a commercial property that they should not go through with a pending sale contract with Party B for a knowingly false reason. The seller is now unable to sell the property whose proceeds would have funded the purchase of a new location for the business.
 - A business is planning to expand its warehouse and has a contract with a construction firm to complete the expansion. A third party shares false information about the financial condition of the expanding business and convinces the construction firm to break the contract for constructing the expansion.

DAMAGES GENERALLY RECOVERABLE FOR ALLEGED INTERFERENCE

- Governed by both federal and state law but may include:
 - Plaintiff's financial losses
 - Plaintiff's lost profits
 - Plaintiff's direct expenses associated with the loss
 - Plaintiff's loss of business goodwill
 - Plaintiff's reputational damages
 - Unjust enrichment by disgorgement of defendant's profits in certain limited circumstances
 - Punitive / exemplary damages
 - Attorney's fees
 - Injunctive relief
- Generally the amount of actual damages must be proven with reasonable, not absolute, certainty and be based on a reasoned approximate computation which permits a reasonably close estimate of the loss.

DAMAGES GENERALLY RECOVERABLE FOR ALLEGED INTERFERENCE

Example: Minnesota State Law

- The damages remedy provided by Minnesota law for interference with contract is generally to compensate the victim for the damages that resulted from the loss of the contract. [Storage Technology Corporation v. Cisco Systems, Inc., 395 F.3d 921 (Minn. 2005).]
- The measure of damages for an action for interference with contractual relations generally will include (a) the pecuniary loss of the benefits of the contract or the prospective relation and (b) consequential losses for which the interference is a legal cause. [Douglas E. Potthoff v. Jefferson Lines, Inc. and Daniel Prins, 363 N.W. 2d 771 (Minn. 1985).]
- In addition, Minnesota law “permits a court to award attorney fees as damages if the defendant’s tortious act thrusts or projects the plaintiff into litigation with a third party.” [Kallok v. Medtronic, Inc., 573 N.W.2d 356, 363 (Minn. 1998).]

PLAINTIFF'S LOSS OF THE BENEFITS OF THE CONTRACT

- Understanding the key provisions of the contract
 - Term
 - Expected revenues and timing thereof
 - Other financial terms
 - Renewal provisions
- Compensatory damages
- Expectation/benefit-of-the bargain damages

PLAINTIFF'S CONSEQUENTIAL LOSSES / DIRECT EXPENSES PROXIMATELY CAUSED BY A DEFENDANT'S WRONGFUL CONDUCT

- Loss of the customer relationship
- Loss of an employee(s)
- Examples of potential direct expenses incurred by the business
 - Corrective advertising
 - Communications or public relations
 - Customer service related
 - Recruiting and hiring
 - Training
 - Others

PLAINTIFF'S LOST PROFITS

- Lost profits represent the difference between the profits a business would have earned with and without the defendant's wrongful conduct
- Lost revenue less avoided costs = lost profits
- Determining the loss period
 - Breach of contract
 - Length of the contract
 - History of contract extensions
 - Torts
 - Date of wrongful act until the date operations return to normal
 - Normal is defined as an equivalent position prior to dispute or to a position that takes into account changes that otherwise would have occurred absent the tort
 - May never return to normal as a result of the wrongful conduct

PLAINTIFF'S LOST PROFITS

- **Determining lost revenues**
 - Revenues plaintiff would have received “but for” the defendant’s wrongful conduct
 - Historical component
 - Projected future component
- **General methods for calculating lost revenues include:**
 - The “Before and After” method
 - The “Yardstick” method
 - Plaintiff’s performance at a different location
 - Plaintiff’s actual performance versus budgeted results
 - Pre-litigation projections by plaintiff
 - Actual experience and/or projections of similar businesses unaffected by defendant
 - Industry averages
 - An approach based on the terms of the underlying contract
 - Others

PLAINTIFF'S LOST PROFITS

- Calculating avoided costs
 - Incremental costs the plaintiff did not incur as a result of the lost revenues but would have incurred in connection with the generation of the lost revenues
 - Analysis of plaintiff's cost structure to identify cost drivers
 - Fixed versus variable costs
 - Non-statistical methods
 - General ledger account analysis
 - Direct cost assignment
 - Accounting estimates
 - Cost accounting allocations
 - Ratio analysis
 - Graphical approaches
 - Statistical methods

PLAINTIFF'S LOST PROFITS

- Analyzing the effect of other outside factors in a business' lost profits
 - Changes in the economy (macro and micro)
 - Competitive pressures
 - Business, product or technology lifecycles
 - Business mismanagement
 - Increases in the costs of doing business
- Reasonableness tests
 - Do the lost revenues make sense?
 - Do the avoided costs make sense?
 - Does the amount of lost profits make sense?
- Analysis of plaintiff's mitigation

PLAINTIFF'S LOST PROFITS

- Prejudgment interest on past losses
 - Varies by jurisdiction
- Discounting of future lost profits to present value
 - Selection of discount rate
 - Time value of money
 - Risk
 - Approaches utilized for determining the discount rate
 - Weighted Average Cost of Capital or WACC
 - Cost of equity
 - Build-up method
 - Capital asset pricing model (CAPM)
 - Others
 - Cost of debt

PLAINTIFF'S LOSS OF BUSINESS GOODWILL OR DAMAGE TO THE PLAINTIFF'S REPUTATION

- Valuing a business before and after the interference
- Generally, the loss of business value is intangible in nature
- Business valuation methods
 - Cost approach
 - Market approach
 - Income approach

DEFENDANT'S UNJUST ENRICHMENT - DISGORGEMENT OF PROFITS

- Utilized in limited circumstances where a restitution claim has been made with the purpose of preventing the defendant's unjust enrichment by measuring the gains of the defendant as a result of the wrongdoing
- Often paired with a claim for injunctive relief
- Utilized when plaintiff is not profitable or less profitable than defendant

DEFENDANT'S UNJUST ENRICHMENT – DISGORGEMENT OF PROFITS

- Calculating the Defendant's ill-gotten gains and disgorgement of profits
 - Determination of revenues obtained from the wrongdoing
 - Allocation of expenses
 - Incremental costs versus full absorption costing
 - Approach depends on the jurisdiction
 - Incremental – those costs directly attributable to the revenues obtained from the wrongdoing
 - Full absorption – deduction of all expense items allocable to the revenues obtained from the wrongdoing

CONCLUSION

Tortious Interference damages can be wide ranging.

A thorough understanding of the applicable laws and damages methodologies and professional standards are required to determine the appropriate damages.

Please complete the survey that you will receive after this course.

QUESTION AND ANSWER SESSION



Shawn Fox
CPA/ABV, CFA®, ASA
*Managing Director,
Dispute Advisory*
shawn.fox@sikich.com



David Wharton
CPA/CFF, CFE
*Senior Manager
Dispute Advisory*
david.wharton@sikich.com



Alex Brandon
ASA
*Senior Manager
Dispute Advisory*
alex.brandon@sikich.com

ABOUT SIKICH

- **MULTI-DISCIPLINARY:** We are a professional services firm specializing in auditing, accounting, technology and advisory services with clients in the U.S. and around the world.
- **EXCELLENT REPUTATION:** With a reputation for professional excellence, Sikich provides unsurpassed client service as well as timely and cost-effective services.
- **STRONG TALENT:** We employ more than 750 talented people including nearly 100 partners, all of whom devote their careers to a focused area.
- **AWARD-WINNING:** Sikich has been ranked as the country's 27th largest accounting firm, as well as the seventh-largest value-added technology provider nationally, both by Accounting Today.

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HONORS & RECOGNITION

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- **#27** in Accounting Today's 2017 Top 100 Accounting Firms
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- National Best and Brightest Companies to Work For
- When Work Works 2017 recipient, Naperville, Illinois office
- National Best and Brightest in Wellness

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- **Top 1%** of all technology solution partners in the world
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- Microsoft Dynamics **President's Club**
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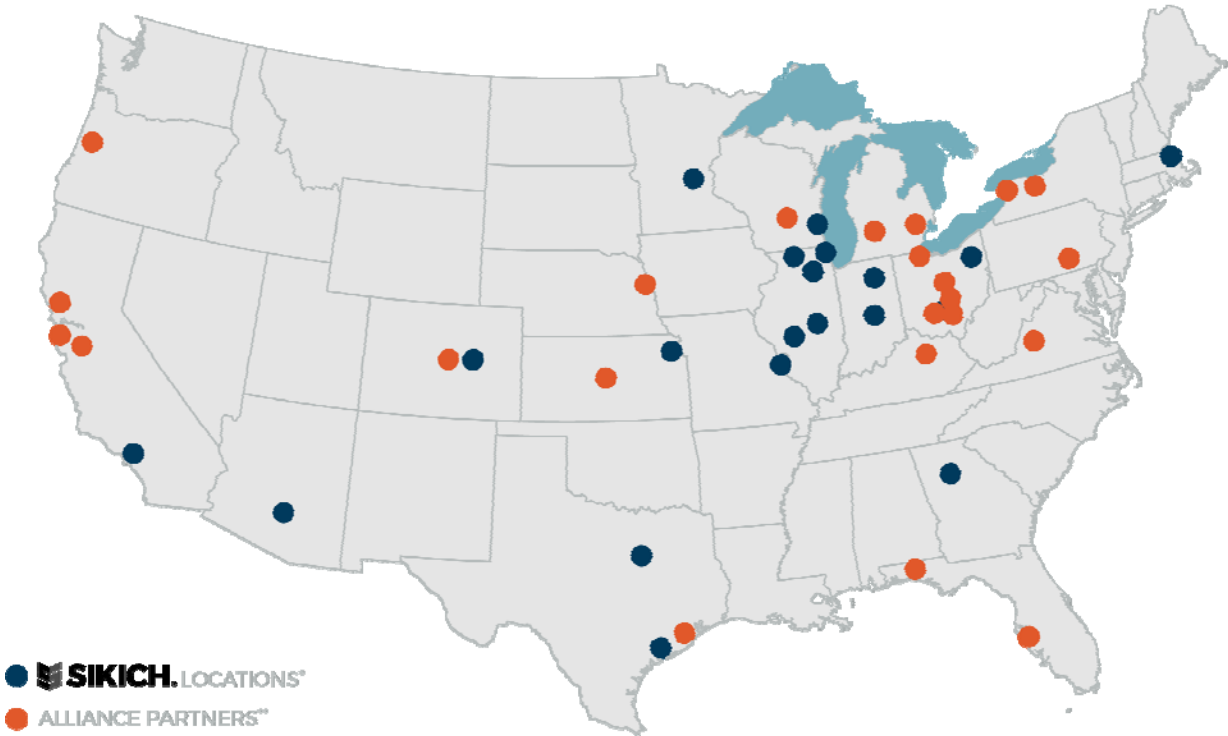
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