TORTIOUS INTERFERENCE WITH THE EXPECTANCY OF ENTITLEMENT BENEFITS

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This Note proposes a new tort to address employers' and their agents' increasing abuse of the Unemployment Insurance appeals process, which interferes with employees' expectancy of entitlement benefits. Though existi ng state Unemployment Compensation statutes sanction both unemployed workers claiming benefits and employers for making fraudulent statements, these provisions approach the issue of fraud too narrowly to combat this growing problem. Meanwhile, no existing remedy properly compensates victims of this sort of abuse, adequately deters abusive behavior by scaling the penalty to the harm, and is accessible to economically disadvantaged plaintiffs. As well as providing an analysis of the specific problem of abuse of the appeals process in the Unemployment Compensation arena, this Note also aspires to provide the framework for a compelling legal argument that such abuse should trigger tort liability in the hopes of easing the work of any public interest attorney interested in bringing such a suit. Although this Note focuses on Unemployment Insurance claims, the principles discussed are generally applicable to a variety of other entitlement benefit claims.

Part I identifies the employer behavior that presents the need for a remedy in tort. Part II articulates the criteria for an adequate remedy. Part III examines potential legal remedies to the problem of abusive appeals by employers during the claim and appeals process and finds them inadequate to protect the pressing economic interests of claimants and society. Part IV proposes the recognition of a new tort to fill this gap, and details both the grounds for liability and the computation of damages flowing from this form of liability.

Part I

Roughly forty-five percent of all Americans live in a household that receives some form of government benefits, including Medicare, Medicaid, Unemployment Compensation, and Energy Assistance.[1] These programs are not designed to produce economic

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1. Thomas Palumbo, U.S. Census Bureau, Economic Characteristics of Households in the United States: Third Quarter 2008, *available at* http://www.census.gov/prod/2010pubs/p70-119.pdf.

windfalls; rather, they are intended to provide a social safety net in order to prevent financial catastrophe in vulnerable families. Unemployment Compensation, for example, is designed only to mitigate the substantial economic pain of unemployment and "lighten its burden which so often falls with crushing force upon the unemployed worker and his family."[2]

But an Unemployment Compensation claim does not just involve a worker and the state. A worker's successful Unemployment Compensation claim affects her former employer's tax rate. Therefore, the law in every state provides procedures by which employers may protest benefit determinations and awards.[3] The employer is sent a questionnaire at the beginning of the benefit determination process to ask about the circumstances of the worker's separation (a worker is not eligible for benefits if, for example, he quit his job voluntarily, or if he was terminated for "misconduct").[4] Even after a worker has begun to receive checks in the mail, an employer may still protest the worker's benefit determination.[5]

Unfortunately, while providing employers with the opportunity to protect their own interests, the employer protest system also creates the potential for abuse. A malicious employer could file baseless protests in order to reduce its tax liability. The claimant would then be forced to take the initiative, time, and expense to pursue an appeal to restore her benefits, which are typically terminated until resolution of the appeal. The additional tax liability, however, visited upon an employer by a single Unemployment Insurance claim is modest. Therefore, one might expect that employers would be deterred from pursuing baseless protests and appeals by the effort and expense required.

This reassuring thought, however, is becoming a fiction as more and more employers outsource the processing of their Unemployment Compensation claims. By lowering costs, outsourcing disturbs the balance of incentives that might have led employers to mount appeals only in good faith. Companies such as Talx Corp.[6] now promise to reduce employers' overall Unemployment Com-

2. MICH. COMP. LAWS § 421.2 (2001).

3. *See, e.g.*, DEL. CODE ANN. tit. 19, § 3323 (2005); GA. CODE. ANN. § 34-8-192 (2008); KY. REV. STAT. ANN. § 341.420 (2007); MICH. COMP. LAWS § 421.32(d) (2001); UTAH CODE ANN. § 35A-4-406 (2005).

4. *See, e.g.*, MICH. COMP. LAWS § 421.29 (2001).

5. *See, e.g.*, DEL. CODE ANN. tit. 19, § 3323 (2005); GA. CODE. ANN. § 34-8-192 (2008); KY. REV. STAT. ANN. § 341.420 (2007); MICH. COMP. LAWS § 421.32(d) (2001); UTAH CODE ANN. § 35A-4-406 (2005).

6. *Manage Your Unemployment Costs with The Industry Leader—Talx*, TALX CORP., http://www.talx.com/Solutions/Compliance/UnemploymentTax/ (last visited Nov. 6, 2011).

pensation costs by easing both employers' administrative burden and their tax liability (by filing more protests and winning more appeals).

While there is little reason to doubt that Talx and other firms can indeed achieve substantial savings through specialization and economies of scale, these savings may come at the expense of social responsibility. Many advocates who have fought protests filed by Talx, for example, report that these protests seem not to have been based upon any investigation at all, but merely filed in the hopes that the worker would not challenge it.[7] Whether a systematic and intentional result of Talx's cost-cutting business practices or an accidental result of Talx's struggle to cope with "tight deadlines, confusing state rules or uncooperative employers,"[8] real workers are deprived of benefits by Talx's failure to litigate in good faith.

This behavior is enabled by lax statutory protections. Although state Unemployment Compensation laws often contain provisions to punish fraudulent statements to state Unemployment Compensation agencies, these provisions calibrate their penalties to the state's loss (through lost tax revenues), not harm to claimants.[9] Further, these statutory fraud provisions typically require a showing of just that: fraud.[10] Thus, there is no statutory penalty for an employer who protests determinations without regard for their accuracy, so long as the employer does not *know* that it is pursuing a false claim.

There is also no recognized private law remedy. Not a single case has been reported that involves a civil suit by a claimant against an Unemployment Compensation cost management firm regarding the firm's behavior in the appeals process. And because any potential plaintiffs in these suits are typically economically disadvantaged, they are poorly situated to protect their rights through creative litigation. Certainly, the behavior of Talx itself seems to show that these firms believe that current law creates no liability for their activities.

It seems almost too obvious to mention that claimants often suffer grave economic harm from bad-faith employer protests.

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7. *See, e.g.*, Jason DeParle, *Contesting Jobless Claims Becomes a Boom Industry*, N.Y. TIMES, Apr. 4, 2010, at A1. (" 'Talx often files appeals regardless of merits,' said Jonathan P. Baird, a lawyer at New Hampshire Legal Assistance. 'It's sort of a war of attrition. If you appeal a certain percentage of cases, there are going to be those workers who give up.' ").

8. *Id.*

9. *See, e.g.*, MICH. COMP. LAWS § 421.54(b) (2001); MO. REV. STAT. § 288.395 (2010); NEV. REV. STAT. § 612.732(2)(a)–(b) (2009); WYO. STAT. ANN. § 27-3-703 (2011).

10. *See, e.g.*, MICH. COMP. LAWS § 421.54(b) (2001); MO. REV. STAT. § 288.395 (2010); NEV. REV. STAT. § 612.732(2)(a)–(b) (2009); WYO. STAT. ANN. § 27-3-703 (2011).

Nonetheless, it is worthwhile to spell out some of the more dramatic consequences.

Unemployment Compensation claimants often have no income other than their Unemployment Compensation benefits—they are, after all, unemployed. Furthermore, the intended and likely effect of an employer's protest is to cause the state agency to find a claimant ineligible for benefits, cutting off the flow of benefits until the claimant is able to mount a successful appeal. In some states, the appeal process can take many months,[11] so if the claimant is unable to find a new job in the meantime, he may face many months with neither employment income nor the benefits intended by the state policy underlying the Unemployment Compensation statute.

Such an extended period of financial catastrophe can bring with it many other harms. After months without income, many jobless workers will have exhausted their savings and be forced to move in with relatives or be forced into homelessness. At the same time, because the appeals process can be confusing and because unemployment creates its own stresses, many workers will fail to meet their appeal deadlines and, therefore, be unable to recover any of the benefits to which they were entitled.

Thus, an employer's bad-faith protest will often cause harms to the claimant beyond the monetary amount of the claim itself, whether or not the claimant is ultimately able to vindicate her rights through the appeal process. Consider three possible outcomes of an employer protest where the worker is genuinely entitled to a benefit amount of $300/week:

1. The worker files a timely appeal of the agency's adverse redetermination (issued in reliance on the employer's protest) and the state Unemployment Compensation agency schedules a hearing. Ten weeks pass before the agency issues the hearing notice, and the hearing itself is not scheduled for another eight weeks after that date. The worker's appeal is ultimately successful, and his benefits are reinstated. He is now entitled to $5,400 in retroactive benefits from the state. Unfortunately, this claimant was unable to pay for the necessary repairs to his car after it broke down three weeks into the appeal process because he had no income. This has greatly limited his ability to find new work; he was offered a new

11. *See* U.S. Dep't of Labor, *State Rankings of Core Measures: Jan–Dec 2010*, http://workforcesecurity.doleta.gov/unemploy/ranking.asp (last visited Sept. 5, 2011) (select "Average Age of Pending Lower Authority Appeals"; then select Jan.–Dec. 2010) (showing that the average Unemployment Compensation lower authority appeal takes 46.5 days to be adjudicated after filing; the average higher authority appeal is not adjudicated for another 105.6 days after filing; this does not include the time that elapses between initial filing, agency determination, protest, and agency redetermination).

job on the other side of town, but was unable to accept it because he had no reliable way of getting there. Thus, our claimant's actual damages from his employer's protest are at least $5,400 in back benefits (already claimed through the appeals process) plus, potentially, the lost income from the job he was unable to accept.[12]

There is an additional potential perversity: a claimant must show that he is "available for work" to be eligible for Unemployment Compensation benefits. In some cases, workers have been disqualified from benefits for restricting the geographic scope of their job search because of transportation difficulties.[13] Thus, a worker whose transportation difficulties are caused by the discontinuation of his Unemployment Compensation benefits might also find himself disqualified from benefits for failing to be available for work.

2. The worker receives notice of the unfavorable redetermination of her eligibility for benefits but does not understand or is intimidated by the appeals procedure (perhaps also believing that she has sufficient savings to last until she is able to find a new job). Two months pass, no new work has come her way, and her savings are exhausted. Newly motivated, she appeals the determination she received two months before. Unfortunately, the deadline to appeal has passed and it will now be extremely difficult for her to revive her Unemployment Compensation claim, regardless of its merits. She will be barred from receiving any benefits until she finds a new job and earns sufficient wages to re-qualify for the Unemployment Compensation program. Fortunately, she is young and able to move back in with her parents. Nonetheless, a year passes before she is able to find new full-time work. She has therefore been deprived of fifty-four weeks of benefits, benefits worth $16,200.

3. The worker files a timely appeal of the agency's redetermination (issued in reliance on the employer's protest). But the state Unemployment Compensation agency, instead of scheduling a hearing, reconsiders their redetermination internally, relying again on information provided in the employer's protest. It again finds in the employer's favor and issues a new adverse redetermination ten weeks later. The worker, desperate and in need of benefits, appeals this redetermination as well and the agency issues a hearing notice ten weeks later. The hearing is scheduled another four weeks after the date of the hearing notice. A favorable decision is issued one week after the hearing. Thus, twenty-five

12. Though this should be offset, of course, by the amount he received in Unemployment Compensation for the period when he could have been employed.

13. *See, e.g.*, Ditmore v. Terry's Lounge, No. 78-838-555-AE (Mich. Cir. Ct. Apr. 20, 1979).

weeks pass between the termination of our claimant's benefits and their subsequent reinstatement. Though our worker is entitled to $7,500 in retroactive benefits and his future benefits are reinstated at the previous rate of $300 per week, this is not enough to undo the damage done in the meantime: after eight weeks without income, he was unable to make rent payments and was evicted from his apartment. Without family to fall back on, he has been living in a homeless shelter since week nine.

The point of harping on these horror stories is not to argue that the employer ought to be liable for all of these harms—they at least present puzzles about proximate causation and quantification of damages. Instead, they illustrate that it is not the unusual case but, rather, the typical one in which the damages caused to a worker by even a temporary denial of benefits exceed (sometimes greatly) the actual monetary amount of the benefits themselves. And they point towards additional costs as well: social costs.

Social welfare programs such as Unemployment Compensation are not simply the benevolent whimsies of a nanny state. They are also premised upon the more hard-nosed, utilitarian notion that we all pay when any one of us falls too far behind. Consider again the declared public policy motivation of the Michigan Employment Security Act:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life.[14]

The idea behind Unemployment Compensation seems to be this: while the law cannot (or, perhaps, should not) ensure equal economic and social outcomes for all its citizens, the law should prevent certain particularly bad outcomes from befalling any citizen because they will also materially impact the lives of everyone around him.

The "crushing" burden of unemployment has been identified as one such unacceptable outcome for a number of reasons. The most basic of these is that, while it might be costly to provide tem-

14. MICH. COMP. LAWS § 421.2 (2001).

porary support for a newly unemployed worker, the possible downstream costs of this worker's indigence—increased burden on social services, socialization of his increased healthcare expenses, increased crime, etc.—are much greater.

Meanwhile, we hope to create a healthier, more efficient labor market through improved job matching. By reducing the unemployed worker's economic peril, we allow him to make wiser long-term decisions about what jobs to accept and which to decline, thus increasing the time the worker will stay with that employer. This means that employers spend less recruiting and training new workers, and workers spend less time on the sidelines searching for jobs.[15]

Unemployment Compensation and other entitlement benefit programs are also components of the nation's economic stabilization apparatus. In times of economic crisis, Unemployment Compensation provides an automatic and immediate economic stimulus, cushioning consumer demand from the otherwise jarring effects of job loss.[16] In fact, Unemployment Compensation in particular is a highly effective means of economic stimulus: between 2010 and 2015 the Congressional Budget Office projects that every dollar spent in Unemployment Compensation payments will boost the national Gross Domestic Product by between $0.70 and $1.90.[17]

Therefore, an employer's bad-faith decision to protest a worker's Unemployment Compensation claim unleashes both private and public harms. These protests can cause economic damages to claimants well in excess of their original benefit amounts. These private harms alone are substantial enough to warrant the attention of the law of torts. But there are public harms as well: such

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15. *See*, Mario Centeno, *The Match Quality Gains from Unemployment Insurance*, 39 J. HUM. RESC. 839, 841 (2004); Marco Caliendo, Konstantinos Tatsiramos, Arne Uhlendorff, *Benefit Duration, Unemployment Duration and Job Match Quality: A Regression-Discontinuity Approach* (Inst. for the Study of Labor, Discussion Paper No. 4670, 2009); NAT'L EMP'T LAW PROJECT, BEYOND SOUND BITES—UNDERSTANDING THE IMPACT OF UNEMPLOYMENT INSURANCE ON THE SEVERITY OF UNEMPLOYMENT (2010), *available at* http://www.nelp.org/page/-/UI/DisincentiveUI.pdf?nocdn=1 [hereinafter BEYOND SOUND BITES]. *But see* Christian Belzil, *Unemployment Insurance and Subsequent Job Duration: Job Matching vs. Unobserved Heterogeneity, Institute for the Study of Labor* (Inst. For the Study of Labor, Discussion Paper No. 116, 2000).

16. *See, e.g.*, Hassan Bougrine & Mario Seccareccia, *Unemployment Insurance and Unemployment: An Analysis of the Aggregate Demand-Side Effects for Postwar Canada*, 13 INT'L. REV. APPLIED ECON. 5, 19 (1999); Jonathan Gruber, *The Consumption Smoothing Benefits of Unemployment Insurance*, 87 AM. ECON. REV. 192, 203 (1997).

17. CONG. BUDGET OFFICE, POLICIES FOR INCREASING ECONOMIC GROWTH AND EMPLOYMENT IN 2010 AND 2011 18 tbl.1 (2010), *available at* http://www.cbo.gov/ftpdocs/108xx/doc10803/01-14-Employment.pdf [hereinafter POLICIES] (Compare this to the $0.40–$1.20 boost from reducing employers' payroll taxes and the $0.10–$0.40 boost from reducing income taxes.).

behavior promotes broader social ills by frustrating the state's economic policies and fraying the social safety net. Therefore, if the law of torts exists to provide a framework for the allocation of harm,[18] it ought to provide a remedy for bad-faith employer protests of Unemployment Compensation claims, as well as other bad-faith interference with entitlement benefit programs.

PART II

Before analyzing existing remedial schemes and considering how they may be improved upon, it will be useful to re-articulate the harms described above into specific law reform goals.

A. Compensation & Distributive Justice

Accepting as a premise that existing entitlement benefit programs promote the just allocation of resources, the disruption of those programs constitutes a distributive injustice.[19] More concretely, when a needy person is deprived of benefits to which they are entitled by law, that person is deprived of resources unjustly. When, as demonstrated in Part I, this primary harm predictably triggers the loss of additional resources (e.g., homelessness caused by wrongful deprivation of Unemployment Compensation), the distributional injustice is compounded. However, existing American tort doctrine does not provide a ready framework for remedying these sorts of harms.[20]

The measure of a remedy for distributive injustice is simple: to what extent does it return resources to their previous, just distribution? Thus, the distributive justice goal for a scheme to remedy wrongful interference with the distribution of entitlement benefits must simply be to fully compensate the victim; that is, it must restore to the victim the resources she would have enjoyed absent the interference.

Entitlement benefits programs typically have economic as well as humanitarian goals,[21] goals that are frustrated when benefits are not distributed to the individuals entitled to them. Therefore, not only does fully compensating the victim of the interference

18. *See, e.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 10 (1st ed. 1941).

19. *See generally* James Konow, *Which Is the Fairest One of All?: A Positive Analysis of Justice Theories*, 41 J. ECON. LIT. 1188 (2003).

20. *See infra* Part III.C–D.

21. *See supra* Part I.

achieve distributive justice goals, but it also minimizes disruption of the economic system effectuated by the entitlement benefits program.

Furthermore, fully compensating victims of interference would promote private policing of fraudulent protests. Whereas entrusting enforcement solely to state agencies makes enforcement a function of political will and state resources, private-law enforcement would help bring the intensity of enforcement into proportion with the magnitude of the abuse. However, would-be plaintiffs will tend to be poor, under-enforcement will remain a difficulty. See *infra* Part II.C.

B. Proportional Deterrence

Similarly, to deter wrongful behavior, an ideal remedy would impose costs on the wrongdoer proportional to the harm caused to the victim. For example, a scheme where the state recouped losses to claimants who missed their appeal deadlines where their claims were wrongfully protested by the employer would fail to discourage employers from wrongfully protesting benefits. A rational (if unscrupulous) employer could take advantage of this situation to minimize its Unemployment Compensation liability by continuing its wrongful protests, thus burdening both claimants and administrative agencies. If, by contrast, employers were made liable for these damages, a rational employer would protest only when it believed success was reasonably likely on the merits, because damages to be paid a would-be plaintiff would almost certainly outweigh an employer's modest tax savings from a successful protest.

C. Accessibility

Because recipients of entitlement benefits are characteristically socially and economically disempowered, claimants whose benefits are wrongfully interfered with will find it particularly difficult to vindicate their rights. Thus, an ideal remedy will be crafted with a view towards accessibility. At the very least, this requires the clear articulation of requirements for liability and recovery. In addition, the availability of punitive damages or statutory penalties, for example, may increase the availability of justice for these individuals by attracting the interest of the plaintiff's bar.

PART III

Today's law provides a number of potential remedies for wrongful interference with benefit claims, though as discussed in Part IV, *infra*, none achieves all three of the goals laid out above. State Unemployment Compensation statutes provide for agency action or criminal prosecution of fraud by claimants or employers; a number of states have passed reforms to curtail procedural abuses; the common law provides a cause of action for abuse of legal process or vexatious litigation. A novel tort theory might also provide a remedy, but the elements of the tort have not yet been articulated.

A. Fraud Provisions

State Unemployment Compensation statutes currently penalize employers and claimants alike for making false statements to the state Unemployment Compensation agency. But these provisions' demanding mental-state requirements insulate employers from liability for all but the most malicious activities. Section 54 of the the Michigan Employment Security Act is typical of state Unemployment Compensation statutes in providing penalties for

> [a]ny employing unit or an officer or agent of an employing unit . . . who makes a false statement or representation knowing it to be false, or knowingly and willfully with intent to defraud fails to disclose a material fact . . . to prevent or reduce the payment of benefits to an individual entitled thereto or to avoid becoming or remaining a subject employer, or to avoid or reduce a contribution or other payment required from an employing unit . . . .[22]

Similarly, New York provides that "[a]ny person shall be guilty of a misdemeanor who willfully makes a false statement or representation . . . in order to reduce the amount of contributions to the fund."[23]

Both provisions are representative of state Unemployment Compensation regimes across the nation in that they require actual "willfulness" or "intent to defraud."[24] Thus, so long as an

22. MICH. COMP. LAWS § 421.54(b) (2001).

23. N.Y. LABOR LAW § 632 (McKinney 2002).

24. *See, e.g.*, 820 ILL. COMP. STAT. 405/2800 (2010); IND. CODE ANN. § 22-4-29-1 (West 2005); MICH. COMP. LAWS ANN. § 421.54(j) (West 2001); VT. STAT. ANN. tit. 21, § 1369 (2009); VA. CODE ANN. § 60.2-518 (2006).

employer believes his statements to be true he does not run afoul of the law even if, for example, the falsehoods are "justified" only by the employer's willful blindness or if the employer believes them to be true unreasonably.

Both provisions are also typical in that they neither create a right of action for the injured claimant nor grant him any part of the statutory penalties imposed.[25] Statutory fraud penalties clearly conceive of Unemployment Compensation fraud as a harm to the state whether perpetrated by the claimant or employer. Thus, the vigor with which these provisions are enforced against employers will primarily be a function of the fraud's cost to the state in the form of lost tax revenues and the executive's political will. No direct incentives are created to account for fraud's social costs (disrupted welfare and economic policies) or fraud's direct pecuniary harm to claimants.

Thus, state fraud provisions fail to achieve any of the three previously articulated remedial goals. They provide no mechanism to compensate claimant-victims for their losses because of the fraud and therefore fail to correct distributive injustice, allow the frustration of the economic goals of Unemployment Compensation, and create no incentive for private enforcement—a moot point, since these statutes create no private right of action in the first place and, thus, are totally inaccessible to claimants as remedial tools.[26] Meanwhile, by calibrating statutory penalties to the state's loss instead of the claimant's, the statutes create uncertain and possibly perverse economic incentives to employers.[27]

B. "Unemployment Compensation Reform"

In response to the troublesome practices of some Unemployment Compensation risk management firms such as Talx, a number of states have enacted "Unemployment Compensation Reform" laws designed to, among other things, curtail abusive behavior by employers' agents.[28]

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25. *See, e.g.*, MICH. COMP. LAWS § 421.54(j) (2001 & West Supp. 2011) (requiring that penalties collected be paid to the "unemployment compensation fund" and the "penalty and interest account of the contingent fund"). Although these statutory penalties can be quite significant, rising to treble damages or even criminal penalties when the damages are particularly large, the damages considered by the statute are exclusively those suffered by the state, not the claimant.

26. *See supra* Part II.A.

27. *See supra* Part II.B.

28. DeParle, *supra* note 7.

Wisconsin and Iowa have targeted a particular employer strategy: failing to respond to agency requests for information only to file a protest after benefits begin flowing to a claimant. Wisconsin law, for example, now punishes employers for this behavior by declining to demand repayment by claimants of benefits already disbursed when the employers' own failure to respond to requests for information caused the benefits to be distributed.[29] Typically, claimants are required to retroactively repay benefits they received but to which further adjudication shows they were not entitled.[30] Similarly, employer agents (such as Talx) may be stripped of their ability to represent employers before the agency if they are found to have failed to respond to requests for information without good cause in more than five percent of the appeals in which they have been involved.[31]

Although such reforms may be helpful in encouraging responsible behavior by Talx and other "risk management" firms, they do not address (and were not designed to address) the broader problem of employers' inaccurate statements and baseless protests brought by employers. Indeed, Wisconsin officials continue to complain that Talx's statements to state agencies are inaccurate, one of them writing "[s]ame problem as always . . . Talx is Talx."[32]

C. Vexatious Litigation & Malicious Prosecution

Tort law provides liability for "[o]ne who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed . . . for harm caused by the abuse of process."[33]

One might suggest that employers (or their agents) who file baseless appeals are using the Unemployment Compensation appeals mechanism, a legal process, to intentionally suppress legitimate Unemployment Compensation claims, a purpose for which the appeals process is not designed.

However, the law seems to indicate that such a purpose, while perhaps unintended in a broad sense, is not "vexatious."

> For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was de-

29. WIS. STAT. § 108.04(13)(c) (2009).
30. *See, e.g.*, *id.* § 108.04(13)(d)(3).
31. *Id.* § 108.105(2).
32. DeParle, *supra* note 7.
33. RESTATEMENT (SECOND) OF TORTS § 682 (1965).

> signed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.[34]

Under this "immediate purpose" analysis, the purpose of the protest is, after all, to win the protest, not to achieve some goal wholly unrelated to the legal process.

Wrongful use of civil proceedings[35] is unhelpful for similar reasons. Like vexatious litigation, this tort also declines to extend liability to those who acted with the belief that the claim "may possibly be adjudicated in his favor."[36] In the context of interference with entitlement benefits, an interfering party will not only typically believe this, but it will also prove to be true all too often. In addition, the tort only extends liability to those who initiate civil proceedings.[37] But an interfering party will never, by definition, be the party who "sets the machinery of the law in motion";[38] instead they are merely influencing the adjudication of a claim already underway.

D. A Novel Tort

It is a bedrock principle of Tort law, and the common law generally, that any harm is to have a legal remedy, not just those that fall within the scope of a cause of action with a name and articulable elements: "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[39] Or, to use an old Roman slogan: "*ubi jus ibi remedium*."[40] Unfortunately, such inspiring sentiments, whether in Latin or English, provide little guidance to the litigant or her

34. *Id.* at cmt. b.
35. *Id.* § 674.
36. *Id.* at cmt. e.
37. *Id.*
38. *Id.* at cmt. a.
39. Marbury v. Madison, 5 U.S. 137 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 109); *see also* Miller v. Monsen, 37 N.W.2d 543 (Minn. 1949) ("Novelty of an asserted right and lack of common-law precedent therefor are no reasons for denying its existence. The common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense.").
40. "Where there is a right there must be a remedy." *See, e.g.*, Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). *See generally* BLACKSTONE, *supra* note 39, at 109; Tracy A. Thomas, Ubi Jus, Ibi Remedium*: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004).

lawyer who must persuade a skeptical judge that "justice, reason, and common sense" require liability for interference with the distribution of a claimant's benefits. Fortunately, however, we find some additional guidance and support in the august volumes of *Law Reports*:

> [I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.[41]

An employer's bad-faith protest clearly satisfies most of the elements of this test: it is harmful, intentional conduct. But a difficult question remains: does the employer have just cause or excuse?

The same problem arises within the analytical framework of unintentional torts. Again, we could show, by hypothesis, that the employer protested unreasonably and that this protest was the proximate cause of the claimant's loss of benefits (and other attendant harms). But the nettlesome question would remain: does the employer owe the claimant a duty to only appeal reasonably and in good faith?

Either way one approaches the issue it reduces to a problem of distinguishing between wrongful and legitimate protests. The solution will both fix the contours of an employer's duties in the context of an unintentional tort, and determine when an employer acts intentionally for "good cause." This approach is promising; it achieves the goals of compensation and proportionality. Because it does not conform to an existing recognized cause of action, however, it places a substantial burden on the claimant's attorney to formulate a wholly novel legal theory; the attorney will have to invent and persuade a judge of the tort's elements and an appropriate method of computing damages.

Having recognized the promise of a novel tort approach—and the inadequacies of several other approaches—it remains to flesh out the elements of this new cause of action. The remainder of this Note does just this in the hopes of reducing the cost to an enterprising practitioner willing to pursue the still considerable challenge of recovering in tort on behalf of a wronged claimant.

41. Mogul S.S. Co. v. McGregor, Gow & Co., (1889) 23 Q.B.D. 598 at 613 (Eng.). *See generally* W.E. Shipley, Annotation, *Prima Facie* Tort, 16 A.L.R.3d 1191 (1967 & Supp. 2011).

PART IV

The problem of identifying whether an employer's protest is wrongful is really a much deeper problem in disguise: what sorts of behavior are actionable in tort law? This question is certainly too broad to answer here (if, indeed, it can be answered anywhere). Fortunately we can avoid the full weight of this question by taking a shortcut: instead of arguing from the first principles of tort law, we can analogize to an existing, well-defined tort. Interference torts are well suited to this task.

The term "interference tort" encompasses a broad set of more specific torts such as interference with the performance of a contract (hereinafter "interference with contract"),[42] employment,[43] prospective business relations,[44] and expectancy of inheritance or gift.[45] Because these labels are vague and often shade into one another,[46] this Note will focus its discussion on tortious interference with contract. The discussion is applicable to other members of the interference-tort family as well.

The contours of modern interference torts are complex and hinge upon, *inter alia*, intent, the propriety of the interfering party's motive, the means of interference, the nature of the relationship interfered with, and whether the interfering party was privileged to interfere as they did.[47] But the most salient features of this sort of tort are displayed in the twin English cases *Lumley v. Gye*[48] and *Temperton v. Russell*.[49]

In *Lumley*, a theater owner was held liable for knowingly enticing an opera singer to break her exclusivity contract with a rival. On these facts, and over the defendant's contention that the plaintiff's remedies were limited to recovery on the contract, the four-judge panel found (in a 3-1 decision) for the plaintiff, each judge issuing his own opinion. Judge Crompton's conclusions

42. *See, e.g.*, Imperial Ice Co. v. Rossier, 112 P.2d 631 (Cal. 1941); Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853); RESTATEMENT (SECOND) OF TORTS § 766A (1979).

43. *See, e.g.*, Nelson v. Fleet Nat'l Bank, 949 F. Supp. 254 (D. Del. 1996), Frank J. Cavico, *Tortious Interference with Contract in the At-Will Employment Context*, 79 U. DET. MERCY L. REV. 503 (2002).

44. *See, e.g.*, Temperton v. Russell, (1893) 1 Q.B. 715.

45. *See, e.g.*, Wilburn v. Meyer, 329 S.W.2d 228 (Mo. Ct. App. 1959), RESTATEMENT (SECOND) OF TORTS § 774B (1979).

46. *See, e.g.*, Builders Corp. of America v. United States, 148 F. Supp. 482, 484 n.1 (1957); Gary D. Wexler, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 300–01 (1994).

47. For a more thorough and systematic discussion of interference torts see RESTATEMENT (SECOND) OF TORTS §§ 762–774B (1979); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 129–130 (5th ed. 1984); Wexler, *supra* note 46, at 284–301.

48. 118 Eng. Rep. 749 (Q.B. 1853).

49. (1893) 1 Q.B. 715.

were representative: "[A] person who wrongfully and maliciously . . . interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service . . . whereby the master is injured, commits a wrongful act for which he is responsible at law."[50] Judge Erle added that "[t]he remedy on the contract may be inadequate . . . . In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor."[51]

Although the facts of *Lumley* suggested that interference might be actionable only for disruption of a master-servant relationship, liability was expanded to include malicious interference with any contractual relationship, actual or prospective, in *Temperton v. Russell*.[52] In *Temperton*, three trade unions pressured suppliers of concrete to break off any economic relations with the plaintiff, a builder, in breach of their existing supply contracts.[53] Because it was "malicious," the unions were held to be liable for this interference.[54]

Today, tortious interference with contract (or, in the language of the Restatement, intentional interference with performance of contract by third persons) is covered by Section 766 of the Restatement, Second, of Torts.[55] The Restatement explains that

> [o]ne who intentionally and improperly 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.[56]

The Restatement introduces the term "improperly"[57] as a substitute for *Temperton's*[58] "maliciousness" requirement and defines it as a function of several factors:

(a) the nature of the actor's conduct,

(b) the actor's motive,

50. *Lumley*, 118 Eng. Rep. at 752–53 (opinion of Crompton, J.).
51. *Id.* at 756 (opinion of Erle, J.).
52. *Temperton*, 1 Q.B. at 727–28.
53. *Id.* at 723–25.
54. *Id.* at 728.
55. RESTATEMENT (SECOND) OF TORTS § 766 (1965).
56. *Id.*
57. *Id.* ch. 37 intro note.
58. (1893) 1 Q.B. 715, 728.

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.[59]

Tortious interference with contract has received a great deal of scholarly attention focusing on the tort's alleged frustration of the economic efficiency goals of contract law and, in particular, the possibility of efficient breach.[60] Though it is an extremely common cause of action in the United States,[61] this attention has exposed some real challenges to the rationale for recognizing this sort of liability.[62] Nonetheless, two distinct themes have emerged, both of which support the existence of a remedy for interfering with the distribution of entitlement benefits at least as well as for interference with performance of contract.

A. Protection of Property Rights

One line of reasoning analyzes and justifies tortious interference with contract as, ultimately, a property tort. In essence, the idea is this: by entering into a contractual relationship, a promisee gains a property interest[63] in the promisor's performance. Improper interference with that interest is then a straightforward property tort.

Benjamin Fine develops this point by way of an elaborate, illuminating, and charmingly arcadian analogy to the classic wild animal pursuit cases.[64] Fine identifies four stages of acquisition of a

59. RESTATEMENT (SECOND) OF TORTS § 767 (1965).

60. *See, e.g.*, Lillian R. BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877 (1990); Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. MIAMI L. REV. 487 (1986); Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 MINN. L. REV. 1097 (1993); Wexler, *supra* note 46.

61. *See* Wexler, *supra* note 46, at 280 n.9.

62. *See* Wexler, *supra* note 46, *passim.*

63. Albeit one shot through with qualifications imposed by the background law of contracts.

64. Benjamin Fine, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1139–42 (1983); *see* Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); Keeble v. Hickeringill, 3 Salk. 9, 91 Eng. Rep. 659 (K.B. 1707); Littledale v. Smith, 1 Taunt. 243a, 127 Eng. Rep. 826 (York Assizes 1788);

property interest by pursuit, each distinguished by differing levels of control by the pursuer over the fugitive resource and, correspondingly, giving rise to differing rights against interference by third parties.[65] Fine thus analogizes the promisee of a contract to a hunter closing in on her prey:

> [l]ike the pursuer of a wild animal who has significantly advanced towards capture, the [promisee] has materially advanced toward obtaining the [promisor's] performance and thereby has a right to acquire that performance, a right that is superior to a third party's right to advance his own commercial interest.[66]

Professor Epstein similarly argues that interference torts analytically reduce to property torts, though he takes a novel approach: he analyzes tortious interference with contract through the analytical framework of ostensible ownership.[67] The services promised by the promisor of a contract are, in effect, converted by a third party who takes them for himself with notice of the prior commitment.[68]

Under the common law of property, a bailee who sells a chattel entrusted to him by the true owner is liable for conversion so long as the purchaser does not know that the transaction is inconsistent with the true owner's rights. If, on the other hand, the purchaser has notice that the party with whom they are dealing is a mere bailee, liability shifts from the bailee to the purchaser.[69]

The parallel between this straightforward property tort and tortious interference with contract is clear: at least in broad strokes, a third party who procures services for himself that the promisor has already promised to someone else is not liable so long as the purchaser did not know[70] that the services were no longer the promisor's to sell. In this scenario, as in the case of the ostensible ownership outlined above, the original promisee has a cause of action for breach of contract against the promisor. If, on the other hand, the third party purchased the services with notice of the pri-

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Hogarth v. Jackson, 2 Car. & P. 595, 172 Eng. Rep. 271 (C.P.D. 1827); Young v. Hichens, 6 Q.B. 606, 115 Eng. Rep. 228 (1844).

65. *Fine*, *supra* note 64, at 1135–39.

66. *Id.* at 1142.

67. Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1 (1987).

68. *Id.* at 2.

69. *Id.* at 2–3.

70. The relationship between notice and malice is a complex one. Judge Crompton held that acting with notice *was* malice. *Lumley*, *supra* note 42, at 752. The Restatement "impropriety" standard clearly presents a more complex picture. *See* RESTATEMENT (SECOND) OF TORTS § 766 (1965).

or obligation, the original promisee also has an action for tortious interference with contract against the new purchaser.[71]

So, as Professor Wexler summarized, intentional interference with contract seems to sit at the intersection of tort, property, and contract law. It provides a cause of action in tort for the violation of property rights that arise in the shadow of contract law.[72] One might, then, imagine analogous torts for interference with property rights generated by other areas of law. And, indeed, we find at least one other example: at the intersection of torts, property, and estate law we also find interference with expectancy of inheritance.[73]

Where these property rights exist, tort law should protect them. Similarly, if entitlement claimants do indeed have property interests in their claims, then tort law should protect these interests as well. And nothing as original as an analogy to *ferae naturae* is necessary to find these rights: the Supreme Court has already concluded that claimants hold property rights, protected by the 14th Amendment,[74] in their entitlement benefits in *Goldberg v. Kelly*.[75] Therefore, because the law of torts protects property rights from interference, it protects claimants' entitlement benefits from interference. Where interference with contract lies at the intersection of tort, property, and contract law and interference with expectancy of inheritance lies at the intersection of tort, property, and estate law, then this tort, interference with entitlement benefits, lies at the intersection of tort, property, and poverty law.

B. Economic Efficiency & Inadequacy of Expectancy Damages

Another common thread in the literature defending tortious interference with contract is the contention that, in a number of common situations, tort liability for an interfering third party is more efficient than the Holmesian, "perform or pay damages"[76]

71. Epstein, *supra* note 67, at 2.

72. Wexler, *supra* note 46, at 282. Professor Wexler also includes a fourth area of law, antitrust.

73. *See, e.g.*, Wilburn v. Meyer, 329 S.W.2d 228 (Mo. Ct. App. 1959) (recognizing the propriety of a tort action for fraudulent suppression of a valid will); RESTATEMENT (SECOND) OF TORTS § 774B (1965) (recognizing a cause of action for fraudulent suppression of a will by a would-be beneficiary).

74. U.S. CONST. amend XIV.

75. 397 U.S. 254, 262 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'").

76. *See* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.").

approach of contract law. As Professor Friedman points out, "the efficient breach rule, while designed to reduce transaction costs, fares poorly precisely because of the expensive transactions [e.g., lawsuits] that it in fact generates."[77] Expanding on this point, Professor McChesney explains that in a typical three-party scenario (in which a third-party tries to appropriate for himself services that have already been promised to another), placing the property right to the services in the promisee rather than the promisor will typically result in lower transaction costs.[78] If the promisor retains the property right as envisioned by efficient breach theory, the inducer will negotiate with the promisor. When, as a result of these negotiations, the promisor breaches, a new transaction, perhaps a lawsuit, is required to vindicate the promisee's contract rights. If, on the other hand, the property right is placed in the promisee as envisioned by tortious interference theory (and, correspondingly, the inducer knows he may find himself the defendant in a lawsuit if he procures the promisor's breach), the inducer will negotiate directly with the promisee. If the inducer is successful in these negotiations, the promisor may then resell his services to the inducer, and neither party need fear an additional lawsuit by the promisee. Thus, if the property right is placed in the promisee only one transaction is required: the inducer's purchase of the services from the promisee. If the property right is left in the promisor, two may be required: the inducer's initial purchase from the promisor as well as a lawsuit by the promisee against the promisor.[79]

William Landes and Richard Posner propose another way in which tortious interference with contract promotes economic efficiency. They theorize that interference torts protect a promisee's interests by allowing her to recover when contract law would not, such as when the promisor is judgment-proof.[80] Similarly, Lillian BeVier argues that the interference tort allows a promisee's disappointment to be more fully compensated than expectancy damages. In a suit for tortious interference with contract, damages for loss of reputation, emotional distress, and other unforeseen harms as well as punitive damages may be available on top of the more conservatively calculated expectancy damages.[81] Thus, tortious interference with contract promotes efficiency by ensuring

77. Daniel Friedman, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 2 (1989).

78. *See* Fred S. McChesney, *Tortious Interference with Contract versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 150–52 (1999).

79. *Id.*

80. William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 552–55 (1980).

81. BeVier, *supra* note 60, at 916–17.

that the inducer values the promisor's services more than the promisee, forcing him to internalize the full costs.[82]

Interference with entitlement benefits also gives rise to inefficient allocations of resources and, therefore, ought similarly to be curbed by tort law. Entitlement programs exist not only to relieve the burdens of the poor, but also to improve the productivity of the national economy. Limited redistribution of resources from comparatively wealthy taxpayers to the very poor yields more productive use of those resources.[83] Furthermore, whatever one's individual views about the substantive economic theory at work here, it is nonetheless true that this economic strategy has been endorsed and adopted by both the national and state legislatures.[84]

Therefore, the economic rationale for a remedy in tort for interfering with entitlement benefits is at least as clear as the economic rationale behind tortious interference with contract. The economic theory underpinning tortious interference with contract is controversial not only in its descriptive accuracy, but in whether it has any explanatory role to play at all in the development of the tort whether accurate or not.[85] By contrast, the economic rationale underlying entitlement benefits and, consequently, a tort remedy for their disruption, is quite explicit and well supported.[86] By disrupting these economic programs, then, interference by third parties promotes inefficiency by blocking the flow of resources from lower to higher value uses. In addition, it increases the burden on already-overwhelmed state hearing offices.[87]

The theoretical justifications for the availability of tort remedies for interference with contract—the protection of property rights and promotion of economic efficiency—support the availability of tort remedies for interference with entitlement benefits. There remains, however, the task of tailoring the tort to ensure that these interests are adequately protected.

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82. *Id.* at 917.

83. *See, e.g.*, BEYOND SOUND BITES, *supra* note 15; POLICIES, *supra* note 17, at 18 tbl.1.

84. *See, e.g.*, MICH. COMP. LAWS § 421.2 (2001); *The Congressional Budget Office's Budget and Economic Outlook: Hearing Before the H. Comm. on the Budget*, 110th Cong. 39 (2008) (testimony of Peter P. Orszag, Director, Congressional Budget Office).

85. Indeed, many commentators assume tortious interference with contract to be an economically inefficient aberration. *See, e.g.*, Dowling, *supra* note 60, at 509.

86. *See, e.g.*, MICH. COMP. LAWS § 421.2 (2001).

87. *See* Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974).

C. Standard of Liability

Just as social interests require that claimants receive the benefits to which they are entitled, social interests also require that claimants not receive benefits to which they are not entitled. Not only would this amount to an unjustified transfer of wealth, but it might also affirmatively cause economic harm. In the Unemployment Insurance context, for example, unemployed workers are not entitled to benefits from an employer they left voluntarily.[88] This restriction protects against the "hazard to [the State], to the economy, and to the workman himself, of compensable self-induced unemployment."[89] A similar rationale underlies the requirement that beneficiaries continue to seek work[90] and not refuse a suitable offer of employment.[91] Therefore, any remedy available for interference with these benefits must be limited in such a way that interested parties are not discouraged from protesting mistaken benefit awards.

A tort remedy for interference with entitlement benefits must respect the tension between a claimant's property interest in her claim—a right that should be protected from improper interference—and other parties' interests in protecting their own rights in the face of benefit awards they believe to be improper. Social interests also track these conflicting individual interests. Just as a regime might err by making it too difficult for a claimant to protect his rights, a regime might also err by making it too easy to obtain benefits, thus chilling legitimate and socially valuable challenges to benefit awards.

Tort law confronts a very similar problem in formulating the elements of the tort of wrongful use of civil proceedings. There, the Restatement requires an absence of "probable cause" for the action.[92] The comments to the Restatement explain that this requirement shields from liability a party who sues believing that the claim "may possibly be adjudicated in his favor."[93]

Rule 11 of the Federal Rules of Civil Procedure establishes a somewhat stricter standard: "to the best of [an attorney or unrepresented claimant's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,"[94] factual

88. *See, e.g.*, MICH. COMP. LAWS § 421.29(1)(a) (2001).
89. Jenkins v. Appeal Bd. of Mich. Emp't Sec. Comm'n, 364 Mich. 379, 384 (1961).
90. *See, e.g.*, MICH. COMP. LAWS § 421.28(1)(a) (2001).
91. *See, e.g.*, MICH. COMP. LAWS § 421.29(1)(e) (2001); S.C. CODE, tit. 68-114(3) (1986).
92. RESTATEMENT (SECOND) OF TORTS § 674 (1967).
93. *Id.* at cmt. e.
94. FED. R. CIV. P. 11(b).

contentions must have "evidentiary support"[95] and "claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[96] Although a party who, because of his ignorance of the law, brings a suit doomed to fail would not be liable for wrongful use of civil proceedings, he might be subject to Rule 11 sanctions.[97]

Between these two standards—malicious prosecution's lack of probable cause, and Rule 11's "stop-and-think" approach[98]—the Rule 11 standard seems the more appropriate test for impropriety. As discussed above,[99] the "probable cause" standard is not appropriate in the context of entitlement benefit claims because most interfering parties (e.g., employers in Unemployment Insurance claims) interfere with the belief that they will succeed in blocking the distribution of benefits. In fact, the frequent success of bad-faith protests is exactly the problem. Furthermore, the typical protest of an entitlement benefit award is more like a filing in an ongoing proceeding than the initiation of a judicial proceeding as required by the tort of malicious prosecution.

On the other hand, Rule 11 serves a purpose very similar to the cause of action proposed in this Note. It is designed to "curb conduct that frustrates the aims of [securing a just, speedy, and inexpensive determination of every action and proceeding]."[100] It imposes a weak objective standard, requiring litigants to conduct a reasonable investigation before making a filing, thus managing to proscribe intentional, reckless, or willfully blind behavior without fostering worries by litigants that they might have unwittingly exposed themselves to liability, worries that might chill desirable, legitimate behavior. Thus, it achieves the balance between protecting claimants' rights by encompassing a great deal of wrongful behavior without unduly deterring third parties from interfering for good cause.

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95. FED. R. CIV. P. 11(b)(3).

96. FED. R. CIV. P. 11(b)(2).

97. For an example of a claim that did indeed warrant Rule 11 sanctions, but probably would not have amounted to malicious prosecution, see Walker v. Northwest Corp., 108 F.3d 158 (8th Cir. 1997) (affirming the award of Rule 11 sanctions for a plaintiff's invocation of diversity jurisdiction without properly alleging factual diversity of citizenship among the parties).

98. FED. R. CIV. P. 11, advisory committee's note to 1993 amendment.

99. *See supra* Part III.C.

100. FED. R. CIV. P. 11, advisory committee's note to 1993 amendment. *See also* FED. R. CIV. P. 1.

Therefore, interference should be improper unless, to the best of the party's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> it is not interfering for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of pursuing the claim;
>
> the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.[101]

The claimant may recover for the pecuniary or other damages proximately caused by this interference. These damages might include the benefit amount itself (if the benefits are no longer available because of the expiration of appeal deadlines, etc.) as well as other consequential damages such as loss of housing, loss of employment, damage to reputation, and emotional distress. Many of these damages should be available regardless of whether the claimant ultimately received benefits or not through the claim-and-appeal process; the delay caused by the appeals process can in itself cause foreseeable harm to vulnerable claimants.[102] In this case, however, if the plaintiff did not prevail in her underlying benefit claim, this causation analysis must include an evaluation of the merits of the plaintiff's underlying claim to benefits. If the claimant's underlying claim was not meritorious to begin with, then outside interference, whether proper or not, was not a cause of the plaintiff's harm and a tort remedy would be inappropriate.

One might worry, however, that this standard places too great a discovery burden on claimants, the party least able to bear its costs. This is indeed a pressing concern; as a practical matter it will often

101. *See* FED. R. CIV. P. 11(b).
102. *See supra* Part I.

be difficult for a claimant to show that her employer, the would-be defendant, failed to suitably investigate its allegations. To do so would likely require discovery of emails and memos as well as depositions of officials of both the defendant and the relevant administrative agencies. This would be an expensive undertaking probably beyond the reach of most claimants.

But, to some extent, this challenge is by design. It is an important check on fraud in entitlement benefit systems to allow third parties (or, in the case of Unemployment Insurance, the claimant's employer) to provide potentially disqualifying information to administrative agencies. Therefore it would be unwise to chill this sort of activity by unduly increasing the risk that they might become embroiled in a spurious lawsuit.

And important situations remain where this burden would not prevent litigation from moving forward. A claimant may have access to evidence of bad faith through his close relationship with the interfering party. An Unemployment Compensation claimant, for example, may have friends who continue to work for his former employer or may even be told directly by his former boss that he intends to block the worker's claim regardless of its merits.[103] This sort of case, where evidence of impropriety is available even without formal discovery, may lower the burden enough that the claimant will be able to find willing representation.

This burden would also present a much smaller bar to a class action lawsuit brought against a frequent offender, where the discovery costs can be divided across a large number of claimants. In the Unemployment Compensation context, this would likely be a large employer or employer's agent with a history of improper interference. In either situation—a class action or an individual action where investigation is straightforward and inexpensive—the potential availability of punitive damages may attract attorneys to the victims of the most egregious violations.

The goals of this common law approach could also, of course, be achieved through legislation. However, today's political climate makes this unlikely. Far from expanding protections for entitlement claimants, the current political mood seems to favor scaling benefits back.[104] And while a statutory solution may be possible, it is

103. This author has personally represented Unemployment Compensation claimants who were told just this by their former employers.

104. Mary Clare Jalonick, Associated Press, *Republican Budget Includes Overhaul of Food Stamps*, BUSINESSWEEK, Apr. 18, 2011, *available at* http://www.businessweek.com/ap/financialnews/D9MLU6M03.htm; Associated Press, *Mich. Governor Signs Cut in Unemployment Benefits*, BUSINESSWEEK (Mar. 28, 2011, 5:05 PM), http://www.businessweek.com/ap/financialnews/D9M8FFUO0.htm; William Selway, *Broke U.S. States' $48 Billion Debt Drives Reductions in Unemployment Aid*, BLOOMBERG (Apr. 15, 2011, 12:01 AM), http://

not necessary; the judiciary and existing common law ought to provide liability for this sort of improper interference. The next step is for attorneys and advocates to bring these arguments before the courts.

CONCLUSION

Thus, the theoretical underpinnings of a tort are in place. Entitlement claimants have a property right in their claims for benefits.[105] Just as the owner of a widget has an action for trespass against a third party who interferes with his enjoyment of it and a buyer of widgets has an action for interference with contract against a third party who improperly induces his supplier to breach his supply contract, a claimant for entitlement benefits ought to have a remedy in tort against someone who improperly interferes with his pursuit of these benefits. This remedy merely reproduces a pattern found throughout the law—the existence of tort remedies for interference with property rights that arise by the operation of a third area of law—to the apparently overlooked area of poverty law. Furthermore, economic efficiency concerns suggest that a tort remedy ought to exist to correct allocative inefficiencies that arise (or persist) through improper interference.[106]

This Note proposes that this sort of improper interference is tortious and suggests the name "interference with distribution of entitlement benefits." To strike an appropriate balance between maximizing the ability of claimants to vindicate their rights in court and minimally chilling legitimate interference, the "stop-and-think" standard from Rule 11 of the Federal Rules of Civil Procedure should be borrowed to distinguish wrongful, liability-triggering conduct, from the legitimate. This would restore the balance of incentives between claimants and employers in the Unemployment Compensation appeal process, preventing form-letter protests from disrupting the flow of benefits to those in need.

www.bloomberg.com/news/2011-04-15/broke-u-s-states-48-billion-debt-drives-unemployment-assistance-cuts.html.

105. *See supra* Part IV.A.

106. *See supra* Part IV.B.