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## Torts—Unfair Business Competition

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fore the defendant cannot be held liable if his promise was not meant to be taken seriously.

The interest in protecting against false claims is not so clearly satisfied. The cliché that the Statute of Frauds should not be allowed to shield the perpetration of a fraud is of little use because the Statute was enacted not for the purpose of barring justified claims but out of a fear that justified claims could not be distinguished from unjustified claims. The question is whether they can be more easily distinguished in fraud than in contract actions. Two peculiarities of the fraud action would seem to present a satisfactory answer to this question. In the first place the plaintiff must prove that the intent of defendant, at the time of the promise, was not to perform.<sup>91</sup> This intent cannot be inferred from a mere breach of the promise.<sup>92</sup> Thus, proof of actual conduct manifesting such an intent would be required, and this manifestation, in order to justify reliance, would have had to occur upon a different occasion from the making of the promise. Such manifestation would usually amount to something other than mere statements to plaintiff subsequent to plaintiff's reliance; such a defendant would not be likely to tell plaintiff that he had never intended to perform his promise. Thus, independent proof of the requisite intent would tend to establish the existence of the promise. The second distinguishing feature of a fraud action for these purposes is the measure of damages. New York follows the "out of pocket" rather than the "benefit of the bargain" rule in awarding damages in fraud actions. The principle of indemnity is controlling.<sup>93</sup> The incentive to fabricate false claims is greatly reduced because plaintiff can gain nothing; he can only be restored to his position at the time of the alleged promise. Since the Statute of Frauds is deemed a harsh and arbitrary measure and the courts have tended to restrict its application, these substantive differences from the contract action seem adequately to justify the Court's refusal to apply the Statute to a fraud action like the present.

### Unfair Business Competition

Plaintiff corporation was engaged in a business in which by contract with individual householders, it sent out crews of men to perform ordinary house-cleaning chores in an assembly-line manner. Defendants were several of its employees who had quit and formed a competing business for which they solicited customers of plaintiff. Plaintiff in this action asked that they be restrained from engaging in the same business as plaintiff, from soliciting its customers, and for

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91. *Adams v. Clark*, 239 N.Y. 403, 146 N.E. 642 (1925).

92. *Ibid.*

93. *Sager v. Friedman*, 270 N.Y. 472, 1 N.E. 2d 971 (1936); *Foster v. Di Paolo*, 236 N.Y. 132, 140 N.E. 220 (1923); *Reno v. Bull*, 226 N.Y. 546, 124 N.E. 144 (1919); *but cf. Hotaling v. Leach & Co.*, 247 N.Y. 84, 159 N.E. 870 (1928).

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an accounting and damages. The trial court dismissed the complaint,<sup>94</sup> but the Appellate Division reversed on the ground that defendants' plan and agreement, formed during their employment by plaintiff, to quit et masse, establish a competing business, and solicit plaintiff's customers constituted a conspiracy violative of their duties to plaintiff as their employer.<sup>95</sup>

The Court of Appeals held that plaintiff was entitled to relief from the soliciting of its customers and therefore affirmed the order of the Appellate Division remitting the case to Special Term.<sup>96</sup> But the Court dismissed the complaint insofar as it sought any further relief and rejected the notion that defendants' plan to form a competing business constituted an unlawful conspiracy and that defendants could be enjoined from competing.

Plaintiff's method of operation was not considered unique or secret in nature, nor were defendants subject to any negative covenants. The Court distinguished the present fact situation from that of *Duane Jones Co. v. Burke*,<sup>97</sup> upon which the Appellate Division had based its finding of an illegal conspiracy entitling plaintiff to the broad relief requested in its complaint. The Court found that while the plan in *Duane Jones* was to so damage and paralyze the plaintiff corporation as to enable the defendants to take it over by a forced sale on their own terms, there was no such purpose or effect in the present case.

In the Court's holding that defendants should be enjoined from soliciting plaintiffs customers, the predominant consideration was the considerable effort and expense undergone by plaintiff to obtain its customers. Only a small fraction of all householders would be receptive to this type of service, and the discovery of such potential customers required an extensive screening process. That defendants were trying to realize the benefits of plaintiffs efforts was shown by the fact that their soliciting of patronage had been confined to plaintiffs' customers. The Court held that since the customers were not readily discoverable by means of public directories, by their locations, or by any advertised receptiveness to such a business, but rather required substantial expense to become known and were known to the employee only through his employment, the employee would not be allowed to solicit these customers for a competing business, even after terminating his employment.

This test, in which the accessibility of the customers is decisive is well sup-

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94. *Town and Country House and Home Service v. Newberry*, 1 Misc.2d 294, 124 N.Y.S.2d 605 (Sup.Ct. 1953).

95. *Town and Country House and Home Service v. Newberry*, 1 A.D.2d 702, 147 N.Y.S.2d 550 (1st Dep't 1955).

96. *Town and Country House and Home Service v. Newberry*, 3 N.Y.2d 554, 170 N.Y.S.2d 328 (1958).

97. 306 N.Y. 172, 117 N.E.2d 237 (1954).

ported by the authority relied upon by the Court.<sup>98</sup> But the problem has often been treated in terms of trade secret and violation of confidential relation.<sup>99</sup> Such an analysis, however, tends to confuse the issue, and to result in an overemphasis of such facts as that there was no misuse of a written customer list,<sup>100</sup> or that the customers could be discovered by following plaintiff's route driver,<sup>101</sup> and consequent denial of relief. Whether the problem is put in terms of trade secret or violation of confidential relation, the issue of accessibility remains central.<sup>102</sup> And the test affirmed by the present case, in focusing attention upon the employer's interest in his customers as well as the justification for the employee's action, is realistic and direct.

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98. *Boosing v. Dorman*, 148 App.Div. 824, 133 N.Y.Supp. 910 (4th Dep't 1912); *People's Coat, Apron and Towel Supply Co. v. Light*, 171 App. Div. 671, 157 N.Y.Supp. 15, (2d Dep't 1916), *aff'd* 224 N.Y. 727, 121 N.E. 886 (1918); *S.W. Scott and Co. v. Scott*, 186 App.Div. 518, 174 N.Y.Supp. 583 (1st Dep't 1919); *Kleinfeld v. Roburn Agencies*, 270 App.Div. 509, 60 N.Y.S.2d 485 (1st Dep't 1946).

99. *E.g.*, *Progress Laundry Co. v. Hamilton*, 208 Ky. 348, 270 S.W. 834 (1925); Comment, *Protection of Customer Lists in New York*, 1 SYRACUSE L. REV. 110 (1949).

100. *Progress Laundry Co. v. Hamilton*, *supra* note 99. See *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App.Div. 715, 132 N.Y.Supp. 37 (1st Dep't 1911). In *Fleisig v. Kossoff*, 85 N.Y.S.2d 449 (Sup.Ct. 1948) the defendant testified that he had not relied upon a list but had spent ten hours consulting classified directories under fifty industries and picked out the names of firms which he recalled as customers of plaintiff. The court considered a finding that this testimony was false and that defendant had actually relied upon a list as necessary to the granting of an injunction.

101. *Abdallah v. Crandall*, 273 App. Div. 131, 76 N.Y.S.2d 403 (3d Dep't 1948).

102. In comment cited note 99 *supra* the factor of accessibility is considered under the headings "Whether the employee's knowledge of customers was a matter of confidence or a trade secret" and "Whether or not the employee made use of a written list of customers."