

Creative Strategies for Defending Cases Involving Tortious Interference With Inheritance Expectation Claims

Over the last few years, an increasing number of cases have been filed in which plaintiffs assert a claim for tortious interference with inheritance expectation (TI) to recover assets that are not distributed under the operative will or revocable trust. This upward trend does not appear to be waning. The reasons for the proliferation of such claims include, but are not limited to, the ability to potentially expedite tort claims (which effectively bypass the estate or trust administration), minimize the number of necessary parties to the litigation, and obtain the right to a jury trial. These factors often have the effect of increasing the settlement value of a plaintiff's case.

TI is a relatively new tort, and few cases have actually made it to a jury trial. Thus, little caselaw exists with respect to many of these issues. For example, few cases analyze whether a judge must resolve equitable claims when a plaintiff requests a jury trial seeking monetary damages arising from the same facts as the equitable claims.

Unlike cases involving equitable claims, cases involving TI claims present opportunities for motions and other creative strategies. This article discusses several strategies that a defense practitioner should consider pursuing during the pendency of these cases.

Motion To Stay TI Claim

First, a defendant may consider filing a motion to stay¹ the TI claim pending the adjudication of the equitable claims if the plaintiff's entitle-

ment to damages is dependent upon the outcome of a probate or trust administration, or a challenge to the validity of a will or trust.

• *Entitlement to Damages Dependent Upon Outcome of Will or Trust Contest* — In TI cases filed with a companion will or trust contest, the plaintiff's interest in the decedent's estate plan could be a critical factor in determining the amount of potential damages in the TI case. For example, if a plaintiff inherited 50% of the decedent's assets under an earlier trust, but 25% of the assets under a subsequent trust, the amount of potential damages would be diminished by one-half if the subsequent trust is determined to be valid or controlling. As such, a defendant should argue that the adjudication of the trust contest (*i.e.*, equitable claims) must occur prior to a jury's adjudication of the TI claim and damage determination.

In some cases, a plaintiff's standing to pursue a TI claim is dependent on a finding that the plaintiff is a beneficiary under the decedent's will or trust. If the plaintiff is not a beneficiary under the decedent's will or trust, it might not be possible for the plaintiff to benefit from a meritorious TI claim at all (*i.e.*, if the plaintiff is not a beneficiary of the estate or trust that would benefit from the TI claim). In these cases, a defendant should seek to stay or dismiss the TI claim until the plaintiff has established that the plaintiff is a beneficiary under the decedent's will or trust.

A plaintiff can, however, oppose a motion to stay, sever, or bifurcate the TI claim on the grounds that the facts and issues underlying the

equitable and monetary claims are intertwined.² In *Magram v. Raffel*, 443 So. 2d 396, 397 (Fla. 3d DCA 1984), the court explained that "where one is entitled to a jury trial on issues sufficiently similar or related to the issues not triable to a jury, and where a determination by the first factfinder would necessarily bind the later factfinder, such issues may not be tried non-jury by the court because to do so would deprive the litigant of his constitutional right to trial by jury."

• *Entitlement to Damages Dependent Upon Outcome of Probate or Trust Administration* — Further, where the claimed TI damages would flow through — or return property to — a probate estate or trust, a defendant could also argue that until the decedent's estate has been fully administered (*i.e.*, with all claims satisfied), it is impossible for any jury to determine the damage allegedly sustained by the plaintiff. For instance, if a claimant established the validity of a \$1 million claim against the estate, the claim must be paid before any distributions to beneficiaries can be made. In other words, the beneficiaries are only entitled to distributions from the net estate (*i.e.*, probate estate reduced by claims, taxes, and necessary expenses).³ Thus, the plaintiff's damages under a TI claim are subject to such reductions, and the amount of the reductions must be determined before damages can be assessed.

As explained by the Second District Court of Appeal on a similar issue:

The residual beneficiaries cannot claim to have sustained direct damage and could not measure the extent of any damage until the personal representative and

the administrator ad litem have finished gathering all of the [e]state's assets, have satisfied all of its liabilities, and have made final distributions, if any, to the residual beneficiaries.⁴

Offer of Judgment or Proposal for Settlement

A defendant to a TI claim may consider serving an "offer of judgment" or "proposal for settlement" on the plaintiff. If a defendant serves an offer of judgment on the plaintiff, and if the plaintiff does not obtain a verdict or judgment in excess of 75% of the offer, the defendant is entitled to recover fees and costs from the plaintiff (including a set-off of this amount against the plaintiff's judgment).⁵ Similarly, a plaintiff can serve a proposal for settlement on the defendant, and if the plaintiff obtains a verdict or judgment in excess of 125% of the offer, the plaintiff is entitled to recover fees and costs from the defendant.⁶

Given the significant amount of attorneys' fees incurred in these cases, a party's potential exposure to pay the opposing party's fees could be significant. If a plaintiff believes he or she could be personally liable for the defendant's attorneys' fees and costs, it could materially change the plaintiff's risk tolerance for proceeding to trial on the claim.

It is not completely clear whether an offer of judgment is permitted in cases that involve both equitable and monetary claims. In *Winter Park Imports, Inc. v. JM Family Enters.*, 66 So. 3d 336 (Fla. 5th DCA 2011), the court opined that an offer of judgment may be used if it was directed solely to the count seeking monetary damages but not the count seeking equitable relief. The recipient of an offer of judgment may consider filing a motion to strike the offer on the basis that the monetary claim overlaps with the equitable claim. The court will allow or disallow the offer of judgment depending on whether the "central" point of the action was to obtain equitable or monetary relief.⁷

Motion In Limine

Given that a jury may decide the TI claim, a defendant in a TI suit should consider filing a "motion in limine" to

prevent the admission of irrelevant evidence that may prejudice the defendant.⁸ Many plaintiffs attempt to tarnish the defendant's character with arguably irrelevant "evidence" to undermine the defendant's case. A motion in limine may prevent the jury from hearing any of this prejudicial and irrelevant evidence.

A judge may be more inclined to grant such a motion if a jury will be the factfinder. For example, evidence that a defendant stole from the decedent's trust during the decedent's lifetime could give rise to a TI claim. If a TI claim based on the validity of a will or trust is heard simultaneously with the theft claim, the jury might consider evidence of the defendant's theft relevant to the claim challenging the validity of the will or trust. When the amount stolen is modest in comparison to the benefit the defendant received from the alleged TI, the defendant could be unfairly prejudiced, especially when the evidence of the defendant's involvement with the creation of the documents is scant. A motion in limine should be filed to minimize the prejudice to the defendant in such circumstances.

Motion To Compel Election of Remedy

Before the trial, a defendant may file a motion to compel the plaintiff to elect a remedy.⁹ Florida caselaw provides that an election between legally inconsistent remedies can be made at any time prior to the entry of judgment.¹⁰ Thus, it is possible that the judge may not compel the plaintiff to elect a remedy prior to the jury's verdict on the TI claim. It is also possible, depending on the facts and the judge, that the plaintiff could be compelled to choose a remedy prior to the trial.¹¹

Motion To Clarify What Issues Will Be Decided by Judge or Jury and Sequence of Adjudication

In cases containing both equitable and monetary claims, it is rarely clear what issues will be adjudicated by the judge or jury. To be as prepared as possible for trial, attorneys should consider filing either a motion to

strike jury trial demand or a motion to clarify which counts, if any, will be adjudicated by the jury. Since a litigant's trial preparation will vary significantly based on whether the issues are being decided by a judge or a jury, counsel should obtain clarification on these issues — in the form of a court order — as early as possible. This could impact settlement considerations as juries are less predictable than judges.

Without question, the defendant should file a motion to confirm that any claims related to the validity of the estate planning documents or breach of fiduciary duty should be decided by the judge and not a jury.¹²

In cases in which certain issues are being decided by a judge and other issues by a jury, litigants should also seek clarification on the sequence in which these claims will be adjudicated.¹³ It is rare that a jury and judge will simultaneously determine claims. The motion to clarify trial procedure should propose alternatives.

In most instances, the plaintiff will seek to have all claims tried and decided at once. By contrast, the defense will seek to have the judge decide the validity of the will or trust first. Then, once the validity issues are decided, the jury determines any other unresolved issues, such as monetary damages. If such issues are decided together, a dispute will arise as to whether the judge is going to rely on the jury's findings of fact to determine whether the will or trust is valid. Stated another way, is the jury going to decide the underlying findings of fact, after which is the judge going to use the jury's findings to determine whether the documents are valid? This issue should be raised in a pretrial motion.

Motion To Bifurcate Liability and Damages

Florida law provides that when damages are merely speculative until the underlying liability has been established, a court has discretion to bifurcate and continue the trial as to damages.¹⁴ In bifurcating damages, potentially significant cost savings can be achieved by avoiding layperson and expert testimony on the issue of

the amount of damages (prior to the plaintiff's establishment of the entitlement to damages). Conversely, a party may resist having the issues bifurcated, arguing that it would be less efficient to have two separate trials (i.e., if both trials are relatively short and require the same witnesses). The party opposing bifurcation may also assert that the issues surrounding liability and damages are "interrelated and intertwined," and, thus, it would effectively be unconstitutional to have separate trials.¹⁵

Conclusion

Invariably, a plaintiff will attempt to increase the value of the TI claim by: 1) having a jury adjudicate equitable claims that are traditionally determined by a judge; 2) having the issue of damages adjudicated simultaneously with liability; and 3) introducing inflammatory and arguably irrelevant evidence in front of jurors. The attorney defending a TI claim should utilize all available motion practice and litigation strategies to ensure that the defendant is not disadvantaged at trial and to obtain the best possible result. □

reconsideration in part, 2015 WL 8660682 (M.D. Fla. Dec. 14, 2015), the magistrate judge noted that Florida courts have permitted the use of an offer of judgment in cases where money damages are the point of an equitable action, citing *Stewart v. Tasnet Inc.*, 718 So. 2d 820, 822 (Fla. 2d DCA 1968) (offer of judgment applies to subrogation claims).

⁸ A "motion in limine" is a pretrial motion that seeks to exclude specific evidence or arguments from being presented during a trial and is decided by the judge outside of the presence of the jury. The purpose for this motion is to address potentially prejudicial, irrelevant, or inadmissible information that could unduly influence a jury or hinder the fair administration of justice. See Cornell Law School Legal Information Institute, *Motion in Limine*, https://www.law.cornell.edu/wex/motion_in_limine.

⁹ The doctrine of elections of remedies exists to prevent a party from recovering twice for the same wrong. *Villeneuve v. Atlas Yacht Sales, Inc.*, 483 So. 2d 67, 69 (Fla. 4th DCA 1986), approved, *Barbe v. Villeneuve*, 505 So. 2d 1331 (Fla. 1987).

¹⁰ See *Erwin v. Scholfield*, 416 So. 2d 478, 479 (Fla. 5th DCA 1982); *Monco of Orlando, Inc. v. ITT Indus. Credit Corp.*, 458 So. 2d 332, 334-35 (Fla. 5th DCA 1984) (finding that the trial court erred in requiring election of remedies prior to trial).

¹¹ See *Rolf's Marina, Inc. v. Rescue Serv. & Repair, Inc.*, 398 So. 2d 842, 843 (Fla. 3d DCA 1981) (concluding that the trial court properly required plaintiff to elect either rescission or damages prior to trial on a breach of contract claim, but the first trial for rescission does not bar a second trial for damages). Further, it is unclear what would happen when there are multiple plaintiffs and a conflict exists between the plaintiffs as to their respective preferred remedy (i.e., equitable or monetary).

¹² There is no right to a jury trial in actions arising in equity. *381651 Alberta, Ltd. v. 279298 Alberta, Ltd.*, 675 So. 2d 1385, 1388 (Fla. 4th DCA 1996). When a plaintiff seeks damages with respect to a trust, it constitutes either a claim for restitution of a trust estate, a form of equitable relief, or an incidental monetary award arising out of administration of an express trust, which is also an equitable remedy. See *Circle Fin. Co. v. Peacock*, 399 So. 2d 81, 84-85. According to the RESTATEMENT (SECOND) OF TRUSTS §201 (1959), a beneficiary's remedies against a trustee for a breach of trust are "always equitable." See also *Flagship Bank of Orlando v. Reinman, Harrell, Moule & Graham, P.A.*, 503 So. 2d 913, 916 (Fla. 5th DCA 1987) (holding that a money judgment in an action for breach of trust is the amount necessary to restore the value of trust property to what it would have been, absent the breach).

¹³ The trial court has broad discretion to submit factual questions related to the equitable claims to the jury. *In re Estate of Fanelli*, 336 So. 2d 631, 632 (Fla. 2d DCA 1976) ("While a party was not entitled as a matter of right to a jury trial in probate proceedings under the former probate laws, there was nothing to prevent a pro-

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¹⁴ FLA. R. CIV. P. 1.270(b); *Hernandez v. Leiva*, 391 So. 2d 292, 293-94 (Fla. 3d DCA 1980); *Watts v. Mantooth*, 196 So. 2d 230 (Fla. 2d DCA 1967); *Zuniga v. Eisinger*, 954 So. 2d 634 (Fla. 3d DCA 2007).

¹⁵ *Rooss v. Mayberry*, 866 So. 2d 175, 176 (Fla. 5th DCA 2004) (holding that a unified trial, rather than bifurcated action as to liability and damages issues, was required to affect substantial justice in medical malpractice action brought by a German national).

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² *Marlette v. Carullo*, 347 So. 3d 556 (Fla. 2d DCA 2022); *Chenery v. Crans*, 497 So. 2d 267 (Fla. 2d DCA 1986).

³ See, e.g., FLA. STAT. §733.805(1).

⁴ *All Children's Hosp., Inc. v. Owens*, 754 So. 2d 802, 807 (Fla. 2d DCA 2000).

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⁷ *In re Proceeds of Jackson Nat'l Life Ins. Co. Policy #'s 04124519 and 04148540*, 2015 WL 7272737 (M.D. Fla. 2015), on

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