***ABA Negotiated Acquisitions Committee***

***Presentation Nuggets[[1]](#footnote-1)***

**Tortious Interference with   
Merger Agreements, Exclusivity Agreements and Letters of Intent   
by a Third-Party Bidder**

***October 21, 2006***

1. Even where there is a fiduciary out, a merger or business combination agreement can be breached, giving rise to third-party liability for the tort of interference with the merger agreement.
2. Even where there is a break-up fee paid to the original bidder, where the merger or business combination agreement was breached, the third-party bidder, in a tortious interference claim, may be liable to the original bidder for damages (whether compensatory or punitive) suffered by it that are not sufficiently covered by the break-up fee. Although payment of the break-up fee by the target may mitigate, in part, a claim for compensatory damages, it may not be sufficient, and it is not likely to cover a claim for punitive damages.
3. When a non-binding letter of intent includes, or is accompanied by, a binding exclusivity agreement and an obligation to negotiate in good faith, it binds the parties to undertake good faith negotiations within the scope of the letter of intent. A higher third-party bid, however, may expand the permissible scope of good faith negotiations. This is useful not only because the target can ask for significantly higher price from the original bidder in consideration of the higher third-party bid, but also because it announces to potential third party bidders that they may gain an advantage by making a higher offer to the target and legitimately usurping the original bidder, or ultimately making the deal more expensive for the initial bidder—-a possible competitor—-by increasing the target’s bargaining power.
4. Merely sending a better offer to the target company will not, in most cases, be sufficient to trigger the liability of the third-party bidder, so long as its intent is to do the deal, and not simply to scuttle the other parties’ deal. Whether an outside bidder can be held to have induced the breach will ultimately depend on the reasonableness and fairness of its conduct, particularly in light of business standards and ethics in the community. A third-party bidder is liable if its conduct amounts to an intentional and improper interference with the letter of intent or exclusivity agreement.

1. These presentation nuggets prepared by Arman J. Kuyumjian of McCarthy Tétrault LLP and John F. Cermak, Jr., of Jenkens & Gilchrist, LLP, are qualified in their entirety by, and are intended to be read in conjunction with, the memorandum dated August 3, 2006, presented by the authors to the Judicial Interpretations Working Group of the Negotiatied Acquisitions Committee of the American Bar Association. [↑](#footnote-ref-1)