

Table of Contents

CHAPTER 1 **BUSINESS TORTS** *by Anne-Louise Mittal & Eric G. Pearson*

- I. Scope of Chapter [§ 1.1]**
- II. Introduction to Business Torts [§ 1.2]**
 - A. What Is a “Tort”? [§ 1.3]
 - B. What Is a “Business Tort”? [§ 1.4]
- III. Tort Versus Contract [§ 1.5]**
 - A. In General [§ 1.6]
 - B. Economic Loss Doctrine—Defined [§ 1.7]
 - C. Development of the Economic Loss Doctrine in Wisconsin [§ 1.8]
 - D. Economic Loss Doctrine and Contracts for Services [§ 1.9]
 - E. Punitive Damages [§ 1.10]
- IV. Torts Involving Injuries to Customers [§ 1.11]**
 - A. In General [§ 1.12]
 - B. Products Liability [§ 1.13]
 - 1. In General [§ 1.14]
 - 2. Strict Liability for Product Defects [§ 1.15]
 - 3. Negligence in Products Liability Actions [§ 1.16]
 - C. Misrepresentation [§ 1.17]
 - 1. In General [§ 1.18]
 - 2. Intentional Misrepresentation [§ 1.19]
 - 3. Negligent Misrepresentation [§ 1.20]
 - 4. Strict Liability Misrepresentation [§ 1.21]
 - 5. Procedural Matters in Misrepresentation Cases [§ 1.22]
 - D. Fraudulent Advertising Under Wis. Stat. § 100.18 [§ 1.23]
 - E. Negligent Provision of Services [§ 1.24]
 - F. Breach of Fiduciary Duty [§ 1.25]
 - G. Invasion of Privacy [§ 1.26]

- V. Torts Involving Injuries to Competitors [§ 1.27]**
 - A. In General [§ 1.28]
 - B. Tortious Interference with Contract [§ 1.29]
 - C. Civil Conspiracy [§ 1.30]
 - D. Unfair Competition, Misappropriation, and Infringement [§ 1.31]
 - 1. In General [§ 1.32]
 - 2. Wis. Stat. § 100.20 [§ 1.33]
 - 3. Trademark Infringement [§ 1.34]
 - 4. Common-Law Misappropriation [§ 1.35]
 - 5. Misappropriation of Trade Secrets Under Wis. Stat. § 134.90 [§ 1.36]
 - E. Trade Libel, Product Disparagement, and Commercial Defamation [§ 1.37]

CHAPTER 2

ACTIONS AGAINST CORPORATIONS, OFFICERS, DIRECTORS, AND SHAREHOLDERS

by Barry R. White

- I. Scope of Chapter [§ 2.1]**
- II. Actions Against Corporations [§ 2.2]**
 - A. In General [§ 2.3]
 - B. Corporation as a Separate Legal Entity [§ 2.4]
 - 1. Independent Existence [§ 2.5]
 - 2. Residency of Corporation and Jurisdiction over Corporation [§ 2.6]
 - 3. Service on a Corporation [§ 2.7]
 - C. Preincorporation Liability [§ 2.8]
 - 1. Preincorporation Contracts [§ 2.9]
 - 2. Preincorporation Torts [§ 2.10]
 - 3. Liability for Defective Incorporation [§ 2.11]
 - D. Corporate Liabilities [§ 2.12]
 - 1. In General [§ 2.13]
 - 2. Board Decisions [§ 2.14]
 - a. In General [§ 2.15]
 - b. Board Action [§ 2.16]
 - c. Delegating Board Authority [§ 2.17]

- 3. Corporate Authority [§ 2.18]
 - a. In General [§ 2.19]
 - b. Actual Authority [§ 2.20]
 - c. Implied Authority [§ 2.21]
 - d. Apparent Authority [§ 2.22]
 - e. Ratification [§ 2.23]
- 4. Respondeat Superior [§ 2.24]
- 5. Successor Liability [§ 2.25]
- E. Shareholder Litigation [§ 2.26]
 - 1. In General [§ 2.27]
 - 2. Direct Versus Derivative Actions [§ 2.28]
 - a. In General [§ 2.29]
 - b. Relationship Between Direct and Derivative Claims [§ 2.30]
 - c. Overlap of Direct and Derivative Claims [§ 2.31]
 - 3. Prerequisites to Derivative Suits [§ 2.32]
 - 4. Defenses to Derivative Suits [§ 2.33]
 - a. In General [§ 2.34]
 - b. Procedural Defenses [§ 2.35]
 - c. Business Judgment Rule [§ 2.36]
 - d. Substantive Defenses [§ 2.37]
 - 5. Litigation Expenses [§ 2.38]

III. Actions Against Directors and Officers [§ 2.39]

- A. In General [§ 2.40]
- B. Officers' Duty of Care, Generally [§ 2.41]
 - 1. In General [§ 2.42]
 - 2. Directors' Liability, Generally [§ 2.43]
 - 3. Officers' and Directors' Duty of Loyalty [§ 2.44]
 - 4. Directors' Function [§ 2.45]
 - 5. Formulation of Directors' Duties of Loyalty and Care [§ 2.46]
 - 6. Limitations of Directors' Liability [§ 2.47]
 - 7. Business Judgment Rule [§ 2.48]
 - 8. Inaction or Lack of Attention [§ 2.49]
- C. Conflict of Interest [§ 2.50]
 - 1. In General [§ 2.51]
 - 2. Common Law [§ 2.52]
 - 3. Statutory Rules [§ 2.53]
 - 4. Transactions Authorized, Approved, or Ratified [§ 2.54]

- 5. Transactions That Are Fair to the Corporation
[§ 2.55]
- 6. Loans to Officers and Directors [§ 2.56]
- D. Corporate Opportunities [§ 2.57]
- E. Statutory Liability [§ 2.58]

IV. Actions Against Shareholders [§ 2.59]

- A. Liability for Debts of Corporation [§ 2.60]
- B. Duties of Shareholders [§ 2.61]
- C. Limitations on Distributions to Shareholders [§ 2.62]
- D. Shareholder Liability After Dissolution [§ 2.63]
- E. Piercing the Corporate Veil [§ 2.64]

V. Indemnification [§ 2.65]

- A. Mandatory Indemnification [§ 2.66]
- B. Permissive Indemnification [§ 2.67]

VI. Corporation's Modification of Statutory Indemnification [§ 2.68]

VII. Commercial Docket Pilot Project [§ 2.69]

VIII. Benefit Corporations [§ 2.70]

CHAPTER 3
ADDRESSING ALLEGATIONS OF
CORPORATE CRIMES: INITIAL CONSIDERATIONS
FOR THE CORPORATE COUNSEL
by Christopher L. Strohbehn

- I. Scope of Chapter [§ 3.1]**
- II. A Hypothetical Situation [§ 3.2]**
- III. Is ABC's Sales Manager Subject to Allegations of Criminal Misconduct? [§ 3.3]**
- IV. Could ABC Be Criminally Liable for Its Sales Manager's Conduct? [§ 3.4]**

V. How Would the Prosecutor Determine Whether ABC Would Be Charged? [§ 3.5]

- A. Prosecutorial Discretion [§ 3.6]
- B. Prosecution of Corporations [§ 3.7]
- C. Factors Considered by the Government [§ 3.8]

VI. The Government's Options [§ 3.9]

VII. The Government's Investigative Tools [§ 3.10]

VIII. ABC's Considerations in Addressing the Allegations [§ 3.11]

IX. ABC's Representation [§ 3.12]

- A. Multiple Representation Issues [§ 3.13]
- B. Initial Considerations for the Formation of ABC's Representation Team [§ 3.14]

X. ABC's Preservation of Evidence [§ 3.15]

XI. Corporate Compliance Program [§ 3.16]

XII. Corporate Compliance and Artificial Intelligence [§ 3.17]

XIII. Conclusion [§ 3.18]

CHAPTER 4
DETERMINING DAMAGES IN BUSINESS LITIGATION
by Matthew V. Fisher

I. Scope of Chapter [§ 4.1]

II. In General—Measure of Damages [§ 4.2]

III. Lost Profits [§ 4.3]

- A. In General [§ 4.4]
- B. Determining Reduced Economic Benefits [§ 4.5]
- C. Lost Economic Benefits [§ 4.6]
 - 1. In General [§ 4.7]

- 2. Recovery of Lost Profits of an Unestablished Business [§ 4.8]
- D. Mitigation of Damages [§ 4.9]
- E. Net Lost Profits [§ 4.10]
- F. Taxability of Lost Profits [§ 4.11]

IV. Net Benefit to the Defendant [§ 4.12]

V. Lost Value [§ 4.13]

VI. Specific Damage Factors and Remedies [§ 4.14]

- A. In General [§ 4.15]
- B. Intellectual Property Actions [§ 4.16]
- C. Dissenting Stockholder Actions [§ 4.17]
- D. Economic Loss Doctrine [§ 4.18]

VII. Proof of Damages [§ 4.19]

- A. In General [§ 4.20]
- B. Present Value of Projected Lost Profits [§ 4.21]

VIII. Experts [§ 4.22]

- A. In General [§ 4.23]
- B. Consultants Versus Expert Witnesses [§ 4.24]
- C. Retaining the Consultant or Expert [§ 4.25]
- D. *Daubert* Challenges [§ 4.26]

CHAPTER 5

ARBITRATION IN A BUSINESS SETTING

by Andrea Contreras

I. Scope of Chapter [§ 5.1]

II. Arbitration Defined [§ 5.2]

III. Legal Environment [§ 5.3]

- A. In General [§ 5.4]
- B. Overview of the Federal Arbitration Act [§ 5.5]
 - 1. In General [§ 5.6]
 - 2. Jurisdiction of the Federal Arbitration Act [§ 5.7]
 - 3. Presumption of Arbitrability Under the FAA [§ 5.8]

- 4. Core Provisions of the FAA [§ 5.9]
- 5. Federal Preemption of Arbitral Regulation [§ 5.10]
- C. Uniform (State) Arbitration Act [§ 5.11]
 - 1. In General [§ 5.12]
 - 2. Objectives of the Uniform (State) Arbitration Act [§ 5.13]
 - 3. Wisconsin's Arbitration Statutes [§ 5.14]
- D. Revised Uniform Arbitration Act [§ 5.15]
- E. Wis. Stat. § 802.12 [§ 5.16]

IV. Arbitral Systems [§ 5.17]

- A. In General [§ 5.18]
- B. Administered (Institutional) Arbitration [§ 5.19]
- C. Non-Administered (Ad Hoc) Arbitration [§ 5.20]
 - 1. In General [§ 5.21]
 - 2. Large Cases: The CPR Institute for Dispute Resolution [§ 5.22]
 - 3. Smaller Cases: BBB Arbitration Rules [§ 5.23]

V. Role of the Contract [§ 5.24]

- A. In General [§ 5.25]
- B. Party Autonomy [§ 5.26]
- C. Authority to Bind a Party to Arbitrate [§ 5.27]
- D. Arbitrability [§ 5.28]
- E. Scope of the Agreement [§ 5.29]
- F. Powers of the Arbitrator [§ 5.30]
- G. Governance of the Process [§ 5.31]
- H. Law of the Contract [§ 5.32]
- I. Types of Arbitration Agreements [§ 5.33]
 - 1. In General [§ 5.34]
 - 2. Pre-Dispute Agreements [§ 5.35]
 - 3. Post-Dispute (Submission) Agreements [§ 5.36]
- J. Choosing an Arbitral System and Related Rules [§ 5.37]
- K. Challenging the Contract: Unconscionability [§ 5.38]

VI. Screening for Arbitral Suitability [§ 5.39]

- A. In General [§ 5.40]
- B. General Considerations [§ 5.41]
- C. Legal Implications [§ 5.42]
- D. Economic Factors [§ 5.43]

VII. Relations with the Arbitrator [§ 5.44]

- A. In General [§ 5.45]
- B. Key Ethics Considerations [§ 5.46]
 - 1. In General [§ 5.47]
 - 2. Neutrality and Conflicts of Interest [§ 5.48]
 - 3. Confidentiality [§ 5.49]
 - 4. Ex Parte Communications [§ 5.50]
- C. Selecting an Arbitrator [§ 5.51]
- D. Arbitrator's Fees and Costs [§ 5.52]

VIII. Pre-Arbitration Judicial Proceedings [§ 5.53]

- A. In General [§ 5.54]
- B. Staying a Civil Action Pending Arbitration [§ 5.55]
- C. Compelling Arbitration; Waiver and Estoppel [§ 5.56]
- D. Appointing an Arbitrator [§ 5.57]
- E. Enforcing Arbitral Subpoenas and Orders [§ 5.58]

IX. Advocacy in Arbitration [§ 5.59]

- A. In General [§ 5.60]
- B. Commencing Proceedings: Arbitration Pleadings [§ 5.61]
- C. Prehearing Conferences [§ 5.62]
- D. Consolidation and Severance [§ 5.63]
- E. Discovery [§ 5.64]
 - 1. Overview [§ 5.65]
 - 2. In General [§ 5.66]
 - 3. Depositions [§ 5.67]
 - 4. Interrogatories [§ 5.68]
 - 5. Protecting Privileged Matter [§ 5.69]
- F. Motion Practice [§ 5.70]
- G. Proving the Claim (Rules of Evidence) [§ 5.71]
 - 1. In General [§ 5.72]
 - 2. Evidentiary Objections [§ 5.73]
 - 3. Scope of Cross-Examination [§ 5.74]
 - 4. Witnesses [§ 5.75]
 - a. In General [§ 5.76]
 - b. Taking Testimony by Telephone [§ 5.77]
 - c. Taking Testimony by Deposition [§ 5.78]
 - d. Affidavit Evidence [§ 5.79]
 - 5. Expert Witnesses [§ 5.80]
 - 6. Privileged Matter [§ 5.81]
 - 7. Documentary Proof [§ 5.82]

- 8. Offers of Proof [§ 5.83]
- 9. Subpoenas [§ 5.84]
- 10. Witness Fees [§ 5.85]
- H. Briefing and Argument [§ 5.86]
- I. Record of the Hearing [§ 5.87]
- J. Common Errors in Arbitration Advocacy [§ 5.88]

X. Available Remedies [§ 5.89]

- A. In General [§ 5.90]
- B. Equitable Relief [§ 5.91]
- C. Punitive Damages [§ 5.92]
- D. Attorney Fees [§ 5.93]
- E. Costs [§ 5.94]
- F. Provisional Remedies [§ 5.95]

XI. Awards [§ 5.96]

- A. In General [§ 5.97]
- B. Orders and Directions Distinguished [§ 5.98]
- C. Interim Awards [§ 5.99]
- D. Requisites of the Award [§ 5.100]
- E. Reasoned and Unreasoned Awards [§ 5.101]

XII. Post-Award Proceedings [§ 5.102]

- A. In General [§ 5.103]
- B. Correction or Modification of an Award [§ 5.104]
- C. Confirmation and Enforcement of the Award [§ 5.105]
- D. Vacation (Vacatur) of an Award [§ 5.106]
 - 1. In General [§ 5.107]
 - 2. Undue Means [§ 5.108]
 - 3. Award Procured by Fraud [§ 5.109]
 - 4. Evident Partiality [§ 5.110]
 - 5. Expanded Scope of Judicial Review by Contract [§ 5.111]
 - 6. Exceeding and Imperfect Execution of Arbitrator's Powers [§ 5.112]
 - 7. Manifest Disregard of the Law [§ 5.113]
 - 8. Waiver and Estoppel [§ 5.114]
 - 9. Post-Vacatur Proceedings [§ 5.115]
 - 10. Prospects for Success in Vacatur Proceedings [§ 5.116]
- E. Sanctions for Frivolous Motions to Vacate Awards [§ 5.117]

- F. Appeals from Orders and Judgments Respecting Arbitration [§ 5.118]

XIII. Appeals of Judicial Decisions in Aid of Arbitration [§ 5.119]

XIV. “Class Action” Arbitration [§ 5.120]

CHAPTER 6

MEDIATION IN A BUSINESS SETTING

by Andrea Contreras

I. Scope of Chapter [§ 6.1]

II. Mediation Defined [§ 6.2]

III. Legal Environment [§ 6.3]

- A. In General [§ 6.4]
- B. Wis. Stat. § 802.12 [§ 6.5]
- C. Uniform Mediation Act [§ 6.6]

IV. Screening for Mediation Suitability [§ 6.7]

- A. In General [§ 6.8]
- B. General Considerations [§ 6.9]
- C. Legal Implications [§ 6.10]
- D. Economic Factors [§ 6.11]

V. Mediation Systems [§ 6.12]

- A. In General [§ 6.13]
- B. Institutional (Administered) Mediation [§ 6.14]
- C. Non-Administered (Ad Hoc) Mediation [§ 6.15]
 - 1. In General [§ 6.16]
 - 2. Larger Cases: CPR Institute for Dispute Resolution [§ 6.17]
 - 3. Smaller Cases: Better Business Bureau [§ 6.18]

VI. Styles of Mediation [§ 6.19]

- A. In General [§ 6.20]
- B. Facilitative Methodology [§ 6.21]
- C. Evaluative Methodology [§ 6.22]
- D. Combined Facilitative-Evaluative Style [§ 6.23]

VII. Role of the Contract [§ 6.24]

- A. In General [§ 6.25]
- B. Self-Determination [§ 6.26]
- C. Responsibilities of the Mediator [§ 6.27]
- D. Powers of the Mediator [§ 6.28]
- E. Civil Immunity for Mediators [§ 6.29]
- F. Electing Between Mediation Systems [§ 6.30]
- G. Electing Between Mediation Styles [§ 6.31]

VIII. Relations with the Mediator [§ 6.32]

- A. In General [§ 6.33]
- B. Key Ethical Considerations [§ 6.34]
 - 1. Neutrality [§ 6.35]
 - 2. Confidentiality [§ 6.36]
 - 3. Permissible Communications [§ 6.37]
 - 4. Guidance for Ethical Practice by Mediators [§ 6.38]
- C. Selecting a Mediator [§ 6.39]
- D. Mediator's Fees and Costs [§ 6.40]
- E. Golden Rules for Mediators [§ 6.41]

IX. Advocacy in Mediation [§ 6.42]

- A. In General [§ 6.43]
- B. Timing the Mediation [§ 6.44]
- C. Deciding Where to Mediate [§ 6.45]
- D. Commencing Mediation: The Agreement to Mediate [§ 6.46]
- E. Attorney Preparation [§ 6.47]
- F. Gauging the Mediation Setting [§ 6.48]
- G. Client Preparation [§ 6.49]
- H. What Clients Expect from Mediation Counsel [§ 6.50]
- I. Presession Submissions [§ 6.51]
- J. Opening Statements [§ 6.52]
- K. Confidential Communications [§ 6.53]
- L. Requesting Discovery in Mediation [§ 6.54]
- M. Avoiding Escalation of Commitment [§ 6.55]
- N. Caucus Process [§ 6.56]
- O. Ethics in Advocacy and Dealing with Deception [§ 6.57]
- P. Reaching Agreement [§ 6.58]
 - 1. In General [§ 6.59]
 - 2. Noneconomic Solutions [§ 6.60]

- 3. Objective Criteria [§ 6.61]
- 4. Rationales for Demands and Offers [§ 6.62]
- 5. Mediator's Proposal [§ 6.63]
- 6. Knowing When to Stop [§ 6.64]
- Q. Settlement Agreements [§ 6.65]
- R. Co-Mediation [§ 6.66]
- S. Why Mediation Sometimes Fails [§ 6.67]
- T. Court Supervision of Mediation [§ 6.68]

X. Mediation of Class Actions [§ 6.69]

APPENDIX

A Sample (A)DR Agreements and Clauses

TABLE OF CASES

TABLE OF STATUTES, REGULATIONS, AND RULES

INDEX