CHAPTER 13

Slander of Title
and Assorted Slings and Arrows
of the Property Bar

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§ 13.01. Introduction.

This Chapter was prompted by a surge in litigation involving slander of title and related claims in oil and gas litigation. The claims arise in title, leasing, and drilling disputes. A perusal of the oil and gas cases indicate they do not present issues distinguishable in general from property and title disputes, but are simply reflective of the increasingly litigious society in which we live.

§ 13.02. Slander of Title.

[1]--Introduction.

Slander of title is a traditional common law remedy, which fell out of vogue earlier this century but is receiving renewed interest from practitioners. Thus, while slander of title is a well-recognized tort, the caselaw is often of hallowed vintage. In addition, there exists a dearth of secondary authority on the tort, so readers are referred to W. Prosser & P. Keeton, The Law of Torts, (1) The American Law Institute's Restatement (Second) of Torts, (2) and several American Law Reports Annotations. (3)

[2]--Definition.
Slander of title is a relatively easy tort to understand, with both well-defined elements and a generally accepted definition. Slander of title is traditionally defined as "a false and malicious publication, oral or written, of words which disparage a person's title to property resulting in special damages." The generally accepted elements of the cause of action are:

1. a publication of words,
2. which are false,
3. uttered maliciously,
4. resulting in special damages,
5. to the victims who owned or possessed an interest in the property slandered.

[3]--Protected Interests.

While we normally think of a "slander of title" cause of action as involving claims impugning one's title to real property, the tort is actually much more expansive. It encompasses any kind of legally protected interest in land, chattels, or intangibles. Protected interests include mortgages, leases, easements, reversions, remainders, whether vested or contingent, executory interests, trusts or other equitable interests, patents, trademarks, and copyrights. By way of illustration, an 1866 Minnesota case involved slander of title to a racehorse.

In general, the cause of action arises in cases involving aspersions upon the title to property, as by placing a cloud on the title, or its quality. For some courts, the essence of the cause of action is the invasion of the owner's interest in marketability. A marketable title is one which a reasonably prudent person would accept free from all reasonable doubt, in law or fact, as to its viability. It is important to recognize that expert witnesses can readily testify that the effect of filing a lis pendens is to render property unmarketable.

[4]--Practices Held to Constitute Slander of Title.

The most common act giving rise to a slander of title suit is the filing of a lis pendens. A lis pendens is simply one example of a whole gamut of legal document filings that may trigger a slander of title action. These include attorneys' charging liens, fraudulent deeds, invalid purchase contracts, quit claim deeds, real estate broker liens, materialmen's liens, mechanics' liens, leases, deeds of trust, unenforceable or otherwise invalid purchase or sale agreements, false or fraudulent assignments, labor liens, levy of an execution, as well as the failure to discharge a mechanics' lien after the account is paid in full, or the failure to discharge oil and gas leases upon expiration. The key in all these situations is the malicious recording of, or failure to remove, a document that casts a cloud upon another's title to real estate.

There need not be a complete denial of title. Any unfounded claim of an interest in the property that throws doubt upon its ownership will suffice.

It is also critical to note that the defamation need not occur through a written document. The tort may be committed through oral statements.
Physical acts, short of litigation, can also give rise to a slander of title claim. For example, one case involved the posting of a sign at the entrance to a right-of-way stating heavy trucking was prohibited on the road. The effect was to prevent delivery and service vehicles from entering plaintiff's premises, as well as discouraging potential buyers of the property. In another case, a fence was erected cutting off access to a disputed area and road.

Elsewhere, the cause of action has been based upon a communication to the Federal Land Bank asserting a claim even though the preexisting lis pendens had been expunged. Other actionable acts have included delivery of a "notice and demand" to all banks in Montana, asserting liens on all checking accounts, savings accounts, stocks, bonds, and safe deposit boxes of the other party.

[5]-Elements.

[a]--Publication.

Publication of the offensive remark is critical to a slander of title claim i.e., communicated to a third party who does not have an interest in the matter. There is no actionable publication when a letter is sent to a party having an interest in the matter. A limited exception to this requirement occurs when there is a filing or recording of an unfounded claim against the property of another. The act of recording constitutes "publication" since the filing is a matter of public record, open to anyone who wishes to search the record.

[b]--Malice.

Unlike other common law causes of action for defamation, slander of title is not a strict liability offense. The existence of malice is an essential element of the cause of action. However, courts have used several definitions of "malice." One of the most commonly cited sources is the famous New York Times v. Sullivan definition of malice: Publication of the matter with "knowledge that it is false or with reckless disregard as to whether it is false or not."

Courts often use traditional common law definitions of malice: a lack of good faith or probable cause; an attempt to vex, injure, or annoy the other party; an intent to deceive or injure; a statement made with full knowledge of its falsity and for the purpose of injuring the plaintiff; deliberate conduct without reasonable cause; and hatred or ill will. Others have inferred malice from an absence of probable cause or justifiable motives. Malice may also be inferred from the language and the character of the act committed. One other approach is to determine if the person making the statement does so for any reason other than to protect an interest for the protection of which a privilege is given. Florida follows the view that proof of malice is unnecessary to support a slander of title action if the act constituting disparagement is unprivileged.

[c]--Special Damages.

One of the few areas of widespread confusion and uncertainty lies with the requirement that plaintiff establish special damages. Most jurisdictions require a showing of special damages. Unlike other areas of defamation law, damages are not presumed.

Texas has the tightest special damages requirement. Plaintiff must show the loss of a specific sale to a
specific person. It has been held elsewhere that the plaintiff must either allege the names of inquirers who became disinterested or who abstained from buying, after the alleged slander of title, or show the impossibility of making those specific allegations. While this showing would certainly constitute special damages elsewhere, most jurisdictions are less restrictive in defining special damages. Loss of a lease will suffice. Kentucky has held that special damages can be shown by a diminution in the fair market value of the property.

For most jurisdictions, special damages can include pecuniary losses, loss of a lease or building permit, depreciation in value of a leasehold interest, litigation expenses incurred in removing the effects of the slander, prevention of prospective purchasers' bidding at a public sale, and tying up property preventing its development or sale during a twenty eight month period.

Many jurisdictions also recognize attorneys fees and other costs of quieting or clearing title as special damages. Impaired vendibility of the land is sometimes stated as the special damages for which recovery is permitted.

The minority rule does not require special damages. The plaintiff is entitled to nominal or actual damages.

[d]--Special Standing Requirements.

Special damages are normally a prerequisite to a cause of action for slander of title. Unlike other forms of defamation, there is no such thing as "slander of title per se." In addition, plaintiff is normally required to show an interest in the affected property. Thus, there is no standing to sue if plaintiff parted with all legally protected interests in the property before the lis pendens was filed. Similarly, a leasee's contractor, who was to drill an oil well, lacked standing even though he certainly had an economic stake in the matter. Illinois requires the plaintiff to have legal title to the real estate in question. California has held that a title acquired through adverse possession is not marketable and, hence, cannot be slandered until the title is established by judicial procedures. Louisiana limits recovery to a plaintiff in actual possession of the property. On the other hand, an older Oregon case allowed the holder of an option to purchase land standing.

[6]--Damages.

[a]--Compensatory Damages.

Compensatory damages include whatever economic loss was incurred by the plaintiff as a result of the defendant's act. It does not include loss of the use of the money had the prospective sale been consummated at an earlier date. In an oil and gas leasehold case, the court stated:

In slander of title case resulting in the loss of an oil lease, a plaintiff may recover the amount for which he could and would have sold the lease, had the sale not been frustrated, less the amount for which he could have sold a lease on the land at the time of the trial with the cloud removed.

The cause of action is for an injury to one's interest in property. Consequently, emotional distress is not, in general, a recoverable damage in slander of title cases and, hence, cannot serve as special damages.
[b]--Attorneys Fees.

The cases are split on whether attorneys fees and costs involved in clearing the title are recoverable. For many courts, a clear example of special damages are the costs of clearing title, which, of course, include attorneys fees and the general costs of litigation. The contrary position is based on the "American Rule" that attorneys fees are not generally recoverable by the winning party; attorneys fees and costs of suit are borne where they lie. Statutes may provide for the award of attorneys fees.

Under the American Rule, litigation expenses in the slander of title action are not recoverable without a statutory provision to the contrary.

[c]--Punitive Damages.

The general common law rules for punitive damages apply in slander of title actions. There is a requirement of actual malice, as well as actual damages, prerequisite to the award of punitive damages. The majority rule, therefore, requires that special damages be established as a prerequisite for punitive damages. The minority approach holds that an award of nominal damages will suffice to support an award of punitive damages.

[7]--Defenses.

[a]--General.

Several defenses are factual, and go to refuting the basic elements of the cause of action. For example, the defendant might show that the disputed facts were true, or that the defendant lacked the requisite malice. Good faith in asserting an interest in property is a complete defense. Thus, the defendant might show he acted in the reasonable belief that he had a valid claim against the property. Similarly, the defendant might establish a good intent and honest belief in filing suit to settle a dispute over title or that the defendant possessed probable cause to believe the truth of the statement. The filing of a suit with probable cause, accompanied by the filing of a lis pendens, does not constitute a slander of title. An assertion of a claims based upon advice of counsel is privileged so long as the facts are fully and correctly revealed to the attorney.

[b]--Statutory Privileges.

Some jurisdictions provide an absolute, statutory privilege for the filing of judicial documents. In these states, the filing of a lis pendens or mechanics lien is protected by the statutory privilege. Other jurisdictions recognize that the mere filing of a lis pendens, or other document, such as a mechanics lien, should not be actionable as a slander of title since the filer is simply complying with the statutory means to protect his interests, as well as informing the public of pending litigation involving real property. California would permit a malicious prosecution suit in this situation if the requisite elements for that cause of action are met.

[c]--Statute of Limitations.

As usual, there is the standard statute of limitations defense. Some jurisdictions have a specific statute of
The "discovery rule" applies in determining when the requisite time period starts to run, i.e., when plaintiff could reasonably be expected to discover the existence of the claim. It has also been held that the statute of limitations does not begin to run as long as defendant maintains the claim against the plaintiff's property.

[d]--Qualified Privilege.

The Restatement (Second) of Torts recognizes a qualified privilege to disparage another's title whenever it would exist in a case of personal defamation.

[8]--Statutory Causes of Action.

A few jurisdictions expressly create a statutory cause of action. For example, Arizona allows $1,000 or three times actual damages, whichever is greater, plus reasonable attorneys fees and costs of suit, for the filing of false documents in the county recorder's office. Georgia allows the owner of any estate in land to maintain an action for libelous or slanderous words which falsely and maliciously impugn his title if any damage has accrued to him therefrom. Special damages are a prerequisite to recovery under the Georgia statute.

[9]--Common Oil and Gas Situation.

In most situations, there is nothing to distinguish oil and gas disputes from other slander of title actions. Most cases, regardless of their origin, involve "routine" title disputes.

However, there is one scenario in the oil and gas industry which has given rise to extensive litigation. It involves successive oil and gas leases to the same tract. The resolution of the dispute generally depends upon whether the first lease expired for failure to comply with one of its terms and conditions, such as drilling and production provisions or shut-in royalty requirements. Occasionally, the first leasee, upon expiration of the lease, will not file the prescribed notice to release the recorded lease claim. One way to resolve these disputes is through a traditional trespass action, where malice and special damages are not preconditions.

[10]--Emerging Area of Environmental Disputes.

Attempts to stop unwanted development, often referred to as LULU's (Locally Unwanted Land Uses), entail a number of techniques, often involving the courts through administrative appeals, statutory causes of action, filing of lis pendens, and the like. There is a large scale effort by some developers to fight back by filing countersuits against the opponents. These countersuits have been labeled "SLAPP" suits (Strategic Lawsuits Against Public Participants). SLAPP suits involve malicious prosecution, abuse of process, tortious interference with advantageous relations, and defamation claims. The SLAPP suits usually fail, often on First Amendment grounds, and may subject the developer to a new round of litigation, including Rule 11 sanctions.

A different type of claim involves allegations that one's property has been exposed to toxic chemicals and that occupants bear an increased risk of cancer. In today's world of heightened environmental awareness, such an allegation can be devastating to property values and marketability. Such a claim goes not to the title to the property, but to the "quality" of the owner's interest.

§ 13.03. Other Causes of Action.
While slander of title has received the most attention recently, there are other causes of action arising out of property disputes. These torts have a broad application across the litigation spectrum; they include abuse of process, malicious prosecution, interference with contractual relations, interference with advantageous relations, trespass, and the *prima facie* tort.

[1]--Abuse of Process.

The tort of abuse of process occurs when a legal procedure, although set out in proper form, has been perverted to accomplish an ulterior or wrongful purpose for which it was not designed. The essence of the cause of action is the misuse or misapplication of process, justified in itself, for an end other than that for which it was designed to accomplish. The common example is that of a creditor using the criminal process for debt collection purposes. In property disputes, the cause of action may arise when a defendant files a claim, such as a mechanics lien, knowing that the claim is not valid so solely to induce a lessor to pressure a third party into paying an obligation.\(^\text{102}\) The critical issue is the purpose for which the process is used.\(^\text{103}\) When defendants are relying upon the advice of counsel, there has to be a full and fair disclosure of all material facts to counsel before that advice can constitute a valid defense.\(^\text{104}\)

[2]--Malicious Prosecution.

Closely related to abuse of process is malicious prosecution, which is defined as "a suit for damages resulting from a prior criminal or civil legal proceeding that was instituted maliciously and without probable cause and that terminated unsuccessfully for the plaintiff therein."\(^\text{105}\) Several general elements and rules apply, including: (1) an original criminal or civil lawsuit, (2) instituted maliciously, (3) without probable cause, which suit (4) has terminated in favor of the defendant in the original suit.\(^\text{106}\) The defendant in the first suit is now the plaintiff in the malicious prosecution case. Malicious prosecution deals with maliciously causing process to issue, while abuse of process is concerned with the misuse of process after it is issued.\(^\text{107}\)

The cause of action for malicious prosecution, as with abuse of process, is heavily disfavored by courts. The burden of proof is on the party alleging malicious prosecution.\(^\text{108}\) The plaintiff, therefore, must establish both malice and a lack of probable cause on the defendant's part to establish the cause of action.

It is easy to determine if the initial lawsuit was resolved in favor of the original defendant. It is often held that the existence of malice may be inferred from a lack of probable cause. Consequently, in many malicious prosecution suits the critical question will be the presence or absence of probable cause. The *Restatement (Second) of Torts* defines probable cause as follows:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

(a) correctly or reasonably believes that under these facts the claim may be valid under the applicable law, or

(b) believes to this effect in reliance upon the advise of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.\(^\text{109}\)

Prosecution of the suit with knowledge of the falsity of the claim constitutes the requisite lack of probable cause.\(^\text{110}\) It is generally held that probable cause is conclusively established when the party who instigated
the proceeding is successful in the trial court even if that court is reversed on appeal.

[3]--**Prima Facie Tort.**

The *prima facie* tort is a "catch-all" intentional tort, which fell into disfavor in recent decades, but is currently making a comeback. It is exceedingly expansive in its coverage. As stated in *Sulphur Springs Realty, Inc. v. Blackstone*:(112) "A so-called *prima facie* tort is the intentional infliction of injury upon another without excuse or justification by an act which in and of itself may not be unlawful." Liability may be imposed even if the actor's conduct does not come within a traditional category of tort liability.(113)

[4]--**Tortious Interference with Contractual Relations.**

The cause of action for tortious interference with contractual relations arises when a party seeks to interfere with an existing relationship. It entails five elements:

1. Existence of a valid contract between plaintiff and a third party;
2. Knowledge by the defendant of the contract or knowledge of facts which should lead him to inquire as to the existence of the contract;
3. Intent by the defendant to induce or cause the third party not to perform;
4. Action by the defendant which induces or causes non-performance of the contract; and
5. Resulting damage to the plaintiff.

As with slander of title, special damages are a precondition of recovery.(114) Unlike slander of title though, malice is not a prerequisite.(115)

Damages for interference with contractual relations are measured by tort law and not by contract law.(116) Thus, the damages may include the pecuniary losses of the benefits of the contract, consequential losses for which the tortious act is the legal cause, and emotional distress and actual harm to reputation, if they are reasonably to be expected to flow from the tortious act. Punitive damages are also available pursuant to the normal rules.(117)

*Interference with Prospective/Advantageous Contractual Relations.* Unlike interference with contractual relations, this cause of action is not dependent upon the existence of a present contract. To the contrary, the tort is based upon a showing of intentional and improper interference which prevents formation of a contract.(118) As set out in the *Restatement (Second) of Torts*:

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.(119)

Comment b to Section 767 continues:

The issue in each case is whether the interference is improper or not under the circumstances; whether, upon
a consideration of the relative significance of the factors involved, the conduct should be permitted without
iliability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of
values in each situation. This Section states the important factors to be weighed against each other and
balanced in arriving at a judgment; but it does not exhaust the list of possible factors . . ..(120)

[5]-Trespass.

The last tort in our survey is trespass, a traditional tort remedy. It is especially useful in situations where a
tenant or lessee, such as an oil and gas lessee, refuses to vacate land. Its advantages for the owner, or one
with rightful possession, are twofold. First, the good faith of the lessee is not a defense. The trespassory
invasion of the rightful possessor's right to exclude others is the essence of the cause of action. The
trespasser's motive (malice or good faith) is irrelevant to the determination of liability, although its motive
may go to damages. Second, the rightful possessor does not have to show special damages, such as the loss
of a specific opportunity to sell the property.

§ 13.04. Conclusion.

At the time of completion of this Chapter, the West Virginia Supreme Court issued an opinion in TXO
Production Corp. v. Alliance Resources Corp.,(121) affirming a slander of title judgment against TXO in the
amount of $19,000 in compensatory and $10,000,000 in punitive damages. If for no other reason than the
size of the punitive award, 526 times the compensatory award, there should be even greater attention paid in
the future to the slander of title tort in title and lease disputes.

§ 13A. APPENDIX A: Primary Sources.

[1]-States.

Alabama: Alabama Power Co. v. Laney, 428 So. 2d 21 (Ala. 1983); Procter v. Gissendaner, 579 F.2d 876
(5th Cir. 1978).


California: Albertson v. Raboff, 295 P.2d 405 (Cal. 1956); Gudger v. Manton, 134 P.2d 217 (Cal. 1943);
Cal Rptr. 282 (Cal. Int. App. Ct. 1987) ($2.5 million punitive damages award struck down as excessive);


Florida: Tishman-Speyer Equitable South Florida Venture v. Knight Investments, Inc., 591 So. 2d 213 (Fla.
Investment & Realty Co. v. Wakesman, 437 So. 2d 162 (Fla. Int. App. Ct. 1983); Colen v. Patterson, 436 So.
Donald M. Patterson, Inc., v. Bonda, 425 So. 2d 206 (Fla. Int. App. Ct. 1983); Local Mortgage Company of


**Iowa:** Belcher v. Little, 315 N.W.2d 734 (Iowa 1982).


**Kentucky:** Ideal Savings Loan & Building Ass’n. of Newport v. Blumberg, 175 S.W.2d 1015 (Ky. 1943); Hardin Oil Co. v. Spencer, 266 S.W. 654 (Ky. 1924); Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765 (Ky. Int. App. Ct. 1980); General Electric Co. v. Sargent & Lundy, 916 F.2d 1119 (6th Cir. 1990) (injurious falsehood); Kidd v. Burlew, 407 F.2d 204 (6th Cir. 1969).

**Louisiana:** Daigle v. Pan American Production Co., 108 So. 2d 516 (La. 1958).

**Maryland:** Rite Aid Corp. v. Lake Shore Investors, 471 A.2d 735 (Md. 1984).

**Mississippi:** Dethlefs v. Beau Maison Development Corp., 511 So. 2d 112 (Miss. 1987).


**Montana:** Johnson v. Murray, 656 P.2d 170 (Mont. 1982) ($101,500 in general and compensatory damages and $100,000 in punitive damages); Jumping Rainbow Ranch v. Conklin, 538 P.2d 1027 (Mont. 1975); Continental Supply Co. v. Price, 251 P.2d 553 (Mont. 1952).


**New Mexico:** Den-Gar Enterprises v. Romero, 611 P.2d 1119 (N.M. Int. App. Ct. 1980); Bynum v. Bynum,


Oregon: Hubbard v. Scott, 166 P. 33 (Or. 1917).


[2]--Oil and Gas Cases.


[2]--Pooling Disputes.


§ 13B. APPENDIX B: Secondary Sources.

[1]--Law Reviews.


Casenote, "Oil and Gas," 21 Tex. L. Rev. 448 (1943).

Note, "Disparagement of Property" 13 Columb. L. Rev. 13 (1913).

[2]--A.L.R. Annotations.


[3]--Treatises.

W. Prosser & P. Keeton, The Law of Torts (5th Ed. 1984) § 128 (Injurious Falsehood), § 129 (Interference With Contractual Relations), and § 130 (Interference With Prospective Advantage).

Restatement (Second) of Torts, Ch. 28: Injurious Falsehood, § 624: Slander of Title (1977).


[5]--SLAPP Suits.


2. 2. Restatement (Second) of Torts § 624 (1977).

3. 3. See text, infra, at § 13B[2].


5. 5. Belcher v. Little, 315 N.W.2d 734 (Iowa 1982); Schoen v. Maryland Casualty Co., 93 S.E. 82 (Ga. 1917); New England Oil & Pipe Line Co. v. Rogers, 7 P.2d 638, 640 (Okla. 1931).


7. 7. Wilson v. Dubois, 29 N.W. 68 (Minn. 1886).


34. 376 U.S. 254 (1964).


65. Hubbard v. Scott, 166 P. 33 (Ore. 1917).


69. See Rite Aid Corp. v. Lake Shore Inv., 471 A.2d 735, 741 (Md. 1984).

70. See e.g., Peckham v. Hirschfeld, 570 A.2d 663 (R.I. 1990). In general, see Restatement (Second) of Torts § 633 (1977).


73. In general, see Marvel, Annot., Allowance of Punitive Damages in Action for Slander of Title or Disparagement of Property, 7 A.L.R.4th 1219 (1981).


75. Rite Aid Corp. Lake Shore Inv., 471 A.2d 735, 742 (Md. 1984); Cates v. Barb, 650 P.2d 1159 (Wyo. 1982).

76. McDonald v. Amoret Farm Supply, 634 S.W.2d 255 (Mo. Int. App. Ct. 1982).


78. Berryman v. Sinclair Prairie Oil Co., 164 F.2d 734 (10th Cir. 1947).

80. Hardin Oil Co. v. Spencer, 266 S.W. 654 (Ky. 1924).


91. Restatement (Second) of Torts § 646A (1977).


96. See e.g., Berryman v. Sinclair Prairie Oil Co., 164 F.2d 734 (10th Cir. 1947).


104. 3. Id. at 30.


111. 10. Serhienko v. Kiker, Jr., 392 N.W.2d 808 (N.D. 1986).


