

Rethinking Tortious Interference with Contract

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ABSTRACT

Tortious interference with contract has bedeviled legal commentators for over a century. On the one hand, it sometimes addresses fact patterns in which a wrong has clearly occurred. On the other hand, some applications are at best interpretable as redundant with other causes of action and worst as end-runs around guardrails placed on other private law actions, threats to competition, and tools for control. The doctrine is difficult to square with theories of efficient breach and the long-held view that contracts on their own are not property interests.

Perhaps because of its intellectual awkwardness, tortious interference has historically been a rare doctrine for courts to rely on when resolving cases. More recently, the doctrine has exploded in popularity, bringing with it risks and unsettled questions. Even as states have restricted its use in romantic relationships, it is now appearing in disputes over debt contracts, non-compete clauses, supply chain disruptions, and even Title IX. The time is ripe to revisit the doctrine.

This Article makes three contributions. The first contribution is a thorough description of tortious interference doctrine as it exists today. This Article uses a variety of empirical techniques to take a snapshot of the doctrine. The second contribution is to situate the doctrine in a growing literature on third parties in contract. Where prior literature has focused on third-party beneficiaries in contract, this Article argues that, for better or worse, tortious interference doctrine reveals third party obligations in contracts. Finally, the third contribution is to update our understanding of the theoretical and practical implications of pervasive tortious interference claims.