

VIGILANTE REGULATION: When Anti-Pipeline Activism Becomes Tortious Interference

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Executive Summary

After years of failing to stop pipeline projects around the nation through normal regulatory processes, some opposition groups to oil and gas have become radicalized. They have crossed the line from peaceful, acceptable protests to sabotaging pipelines and their funding. This report discusses their recent efforts to target private banks to force the banks into breaching their existing contractual obligations to fund pipeline construction. These tactics are unlawful, and, as this report explains, tort law is available for holding people accountable when they tortiously interfere with such valid contractual relations.

- **A Group of Activists Are Using Unlawful Tactics.** Some activists have turned to campaigns of intimidation, coercion, threats, and other illicit tactics to force banks into cutting off funding to pipeline projects. Activists have also backed up these so-called “defunding protests” with illegal sit-ins and other inappropriate actions calculated to apply economic pressure to banks to breach their contractual obligations.
- **Pipeline Projects Already Receive Extensive Scrutiny.** The purpose of these protests is to impose their own regulatory agendas onto the American public, regardless of the law, facts or efforts made to address their concerns through the normal regulatory processes. Pipelines already undergo many levels of government review, including for environmental impacts. Any individual can participate in these processes. Once a decision is final, vigilante regulation should be unacceptable.
- **Tort Law Provides a Remedy.** There is a common-law cause of action for intentional interference with a contract. This tort provides a remedy against anyone who intentionally interferes with the contractual rights and interests of private parties. The tort’s purpose is to preserve the sanctity of contracts, which are essential to orderly societies, and prevent tactics such as coercive pressure, threats, and fraud.
- **Activists Should Be Accountable for Unlawful Protests.** Illegal campaigns to undermine banking relations meet the elements and purpose of a tortious interference claim. Such conduct is unlawful, and courts should apply the tort in this context.
- **These Claims Do Not Interfere with Free Speech.** Protesting is a time-honored American tradition, but it is not free speech to use unlawful tactics, such as coercion and threats, to destroy another’s property or their property interests in a contract.
- **Pipeline Companies Should Consider Suit.** If a pipeline developer has a contract with a bank broken by protesting activity, the company should consider filing a claim for tortious interference against the activists who caused the breach.

Introduction

Activists bent on stopping the use of fossil fuels are increasingly taking matters into their own hands. One of their key targets is stopping the infrastructure needed to move oil and natural gas, namely pipelines. Their goal is not merely to ensure that pipelines are built in an environmentally friendly way, but to stop pipeline construction at all costs. They are now publicly pressuring banks to pull out of contracts to fund pipeline construction.

Protesting, of course, is a time-honored American tradition, as is the right to organize and use the political and regulatory processes to advance political agendas. Government agencies intensely vet and approve all intrastate, interstate, and international pipelines. These processes require comprehensive environmental assessments with many and substantial opportunities for public input. Once the government makes a final decision, though, the law requires that people follow that decision. Taking matters into one's own hands through use of threats and force should not be tolerated in an orderly society.

Sabotaging private funding commitments for pipeline development crosses this line from normal opposition to unlawful conduct. These actions fall outside the law and norms of public protest. The campaigns seek to use intimidation and exert extreme pressure on banks to tear up existing financing agreements with developers. It is immaterial to these protests that developers obtained all of the necessary government approvals, including those related to environmental matters, and satisfied financing contingencies.

America still needs pipelines to deliver the affordable energy we all need to fuel our economy, security, and way of life.

In business, people who intentionally interfere with the lawful business of another can be subject to liability through tort law for the damages they cause. The tort is called "tortious interference" and is actionable when companies, such as the banks here, are pressured to breach their contractual obligations to another party. We are a society of laws. Abusive, back-alley campaigns to disrupt lawful commerce can be actionable misconduct.

America still needs pipelines to deliver the affordable energy we all need to fuel our economy, security, and way of life. Political battles, over where and how to build pipelines or over fossil fuels generally, must remain with the government bodies responsible for deciding these

issues. People who disregard the law and pursue vigilante regulation should be held accountable for the unlawful damages they cause.

America's Pipelines and The Defund Protests

America's pipelines are the veins and arteries that pump a stable energy supply through vast reaches of this country—both populous and rural—in a safe and cost-effective manner. According to the U.S. Department of Homeland Security and the U.S. Department of Energy, the country's pipelines are critical infrastructure, essential to national security.¹

Oil and natural gas heat our homes, churches, hospitals, factories, and offices; they fuel our vehicles and keep us safe. The pipelines that transport these energy resources are vital parts of this process; they also support thousands of high-paying American jobs.

¹ U.S. Dep't of Homeland Security, *Securing the Veins of the American Economy*, <https://www.tsa.gov/news/testimony/2016/04/19/hearing-pipelines-securing-veins-american-economy>; U.S. Dep't of Homeland Security & U.S. Dep't of Energy, *Energy: Critical Infrastructure and Key Resources Sector-Specific Plan as Input to the National Infrastructure Protection Plan (Redacted)*, (May 2017), https://www.energy.gov/sites/prod/files/oeprod/DocumentsandMedia/Energy_SSP_Public.pdf.

For the most part, activist organizations with abundant resources have failed in their efforts to block major pipeline projects through normal regulatory and political channels. Their efforts, though, have made approvals more burdensome, costly, and time-consuming.² Administrations of both political parties have carefully considered the activists' steadfast opposition, and have approved these needed projects anyway.

Undeterred, the anti-pipeline movement has now opened a new front in its ever-evolving war on pipeline infrastructure. Banks are the activist organizations' new targets of attack. These banks are subjected to coordinated "defund protests" urging them to sever existing obligations to pipeline builders.

Across the nation and around the globe, banks are being besieged by these activists demanding that they breach their contracts to fund pipelines or face campaigns of mischief orchestrated to harm the banks' business and reputation.

Some banks have surrendered to this pressure. In 2017, the Norwegian Bank DNB, one of the original funders of the Dakota Access Pipeline (DAPL), reportedly canceled its \$2.5 billion credit line to pipeline developers after a delegation of tribal protesters traveled 5,000 miles to face off with bank executives.³ Other targeted European banks have done the same, resulting in millions of dollars in severed financing commitments from ING of the Netherlands and BNP Paribas of France.

Now, environmental activists are pressuring domestic banks to withdraw funding from all major U.S. pipeline projects, including TransCanada's Keystone XL Pipeline,⁴ Energy Transfer Partners' DAPL project,⁵

the Line 3 Pipeline,⁶ the Pilgrim Pipeline,⁷ and the Bayou Bridge Pipeline.⁸ Well-funded organizers have developed websites and published articles identifying the banks with existing funding commitments for these pipelines. The websites and articles often disseminate false or misleading information about the projects and provide roadmaps on how their supporters should attack the banks.

One tactic is to incite institutional investors to pull their money from banks that do not give into their demands. In 2017, activists convinced the City of Seattle to withdraw more than \$3 billion from Wells Fargo to punish the bank for not retracting its funding commitment for the DAPL project.⁹ Other cities have joined them, and the protesters plan to target many more financial institutions with known credit facilities for pipeline infrastructure projects. Their hope is to start a "nationwide divestment drive."¹⁰



The activists have also engaged in disruptive actions at bank offices and branches and at shareholder meetings. In Baltimore in 2016, a group of environmental activists staged a sit-in at a Wells

2 David Blackmon, *Anti-Pipeline Activists Play a Cynical, Costly Game*, Forbes (Oct. 9, 2018), <https://www.forbes.com/sites/davidblackmon/2018/10/09/anti-pipeline-activists-play-a-cynical-costly-game/#5a21837833be>.

3 WECAN, *PRESS RELEASE - DNB Bank Divests: Responses from Standing Rock Indigenous Women's Divestment Delegation to Norway* (Mar. 27, 2017), <https://wecaninternational.org/news/1670/press-release-dnb-bank-divests-responses-from-standing-rock-indigenous-women%E2%80%99s-divestment-delegation-to-norway>.

4 The Boycott, <https://mazaskatalks.org/pipelines/#thepipelines>.

5 Joint #DefundDAPL, <http://www.defunddapl.org/defund>.

6 Stop Line 3, <https://www.stopline3.org/#intro>.

7 Coalition Against Pilgrim Pipeline, <https://stopilgrimpipeline.com/finance/>.

8 No Bayou Bridge, <https://www.nobayoubridge.global/>.

9 Jimmy Tobias, *These Cities are Pulling Billions from the Banks that Support the Dakota Access Pipeline*, The Nation (Mar. 20, 2017).

10 *Id.*

Fargo branch office.¹¹ Protesters took over the lobby of the bank, disrupting business and demanding loudly that “Wells Fargo divest from the Dakota Access Pipeline.”¹²

These protests differ in kind and degree from traditional social divestiture efforts. Pipelines are essential parts of the economy and are carefully studied and approved by the federal government. Activist groups have no right to trespass, take over lobbies, or intimidate banks into voiding their legitimate, existing contracts. Otherwise, there would be no end to the political battles that could be waged by attacking private-sector entities.

Pipeline projects are legitimate endeavors. They are subject to considerable regulatory scrutiny and must satisfy extensive legal requirements for approval.

The Roles of Banks and Regulators

In our system of representative democracy, it is not for banks to establish public policy. Private lending institutions are engines of commerce, not administrative agencies or legislative bodies. Bank officers are neither elected government officials nor arbiters of economic, social, or environmental issues. They fund legitimate business enterprises, and large-scale infrastructure developments are lawful, profitable endeavors for them.¹³

To be sure, pipeline projects are legitimate endeavors. They are subject to considerable regulatory scrutiny and must satisfy extensive legal requirements for approval. Most pipelines require both energy and environmental permits.¹⁴ The government approval process is extensive, and there are many opportunities for those with opposing political agendas and the

public at large to provide input and critiques of how and where particular pipeline projects will be built.¹⁵

Specifically, before construction can begin, the government may require either a full-blown Environmental Impact Statement or an Environmental Assessment under the National Environmental Policy Act. Both processes involve coordination

of multiple agencies and solicitation of and responses to public comments, scoping meetings, and hearings.

Opponents also have the opportunity to request a rehearing of a final agency decision.¹⁶ The public is involved at each step of this process, which can last years.¹⁷

The anti-pipeline activists’ failure to shut down a pipeline through this process does not give them the license to disregard the result and nonetheless impose their political agendas onto the American public. Our system of representative democracy works only when the people accept the final decisions of the government, whether those decisions be through legislation, civil or criminal court rulings, or regulation.

11 Brandon Soderberg, *In solidarity with Standing Rock, a sit-in at Wells Fargo building downtown*, CityPaper (Nov. 25, 2016), <https://www.citypaper.com/blogs/the-news-hole/bcpnews-sit-in-at-wells-fargo-bank-in-solidarity-with-standing-rock-20161125-story.html>.

12 *Id.*

13 See Thomas Miesner & William L. Leffler, *Oil & Gas Pipelines in Nontechnical Language* 218-23 (2006) (discussing pipeline economics).

14 See *id.* at 300 (For “projects [with] high public interest, requiring massive studies and public hearings, the seeming interminable permitting process can last for years”); William Bauer, *Pipeline Regulatory and Environmental Permits in Pipeline Planning and Construction Field Manual* (2011), https://booksite.elsevier.com/samplechapters/9780123838674/Chapter_3.pdf.

15 See Matt Koch & Dan Byers, *New Infographic Illustrates the Unnecessary Complexity of Pipeline Permitting*, Fuel for Thought (Dec. 11, 2018), <https://www.globalenergyinstitute.org/new-infographic-illustrates-unnecessary-complexity-pipeline-permitting>.

16 William Bauer, *Pipeline Regulatory and Environmental Permits in Pipeline Planning and Construction Field Manual* (2011), https://booksite.elsevier.com/samplechapters/9780123838674/Chapter_3.pdf.

17 Miesner & Leffler, *supra* note 13, at 300.

An Overview of Tortious Interference with Contract Claims

The tort of intentional interference with contractual relations has a long history in the United States of protecting lawful businesses and the sanctity of contracts. It provides a potent cause of action for those whose contract rights or business relationships are trampled by third-party misconduct. The tort recognizes that a company's economic relations are valuable property interests that, like any other property, are entitled to protection from improper obstruction by others.¹⁸

Contracts are worthy of such protection because they are essential to functioning economies. They provide stability for the transactions integral to the legal, social, and financial systems upon which our country depends.¹⁹ Courts developed this tort to inhibit competitors from using improper tactics or “sharp elbows” in business dealings and to safeguard the integrity of lawful contracts and economic relations.

With some variation in terminology and application, courts in every U.S. jurisdiction have identified the following basic elements required to establish liability:

- The plaintiff business had a valid contract, or legitimate and identifiable business expectancy with another entity;

- A third party seeks to interfere with that contract or expectancy and knew or should have known of the contract or expectancy;
- That third party acted intentionally to induce the other entity into a breach of that contract or loss of that expectancy; and
- The plaintiff business suffered damages caused by that interference.²⁰

Liability generally is easier to establish when an existing contract—as opposed to a prospective business relationship—is at stake.

An important consideration is whether the actor's conduct was “improper” or unjustified under the circumstances. Impropriety is an element of the tort in many states, while in others the burden shifts to defendants to attempt to justify their conduct that interferes with contractual rights or business expectancies.²¹ Also,

motive is not an element of the tort.²² The conduct is adjudged on its face. Wrongful conduct may take many forms, including threats, intimidation, coercion, misrepresentation, or unlawful persuasion.²³

Also, such tort liability may be imposed not only for interference with existing contracts, but also for interference with prospective or expected commercial relations.²⁴ Liability generally is easier to establish, however, when an existing contract—as opposed to a prospective business relationship—is at stake. Indeed, “intentionally interfering with an existing contract is a ‘wrong in and of itself.’”²⁵ A claim for tortious interference may also be available for induced termination of an at-will or voidable contract.²⁶

18 See generally 2 Joseph D. Zamore, et al., *Business Torts* § 12.01[2] (2018); 5 J.D. Lee & Barry A. Lindahl, *Modern Tort Law Liability & Litigation* § 45:11 (2d ed. 2002).

19 See 1 Joseph D. Zamore, et al., *Business Torts* § 11.01[2] (2018).

20 See generally Gary C. Crapster & Jessica C. Smith, *Interference with Contractual and Economic Relationships*, *Business Torts Litigation* 55 (2d ed. 2005); *Cornelison v. TIG Ins.*, 376 P.3d 1255, 1269 (Alaska 2016); *Ballard Grp., Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, 14 (2014); *Bishop & Assocs., LLC v. Ameren Corp.*, 520 S.W.3d 463, 472 (Mo. 2017).

21 See generally Crapster & Smith, *supra* note 20, at 56.

22 See 5 Lee & Lindahl, *supra* note 18, at § 45:9 (citing *Tamiami Trail Tours, Inc. v. Cotton*, 463 So. 2d 1126 (Fla. 1985)).

23 See, e.g., *Hannigan v. Sears Roebuck & Co.*, 410 F.2d 285 (7th Cir. 1969) (holding defendant liable when it threatened a party with severe economic hardships if it did not breach its contract with the plaintiff); see generally 5 Lee & Lindahl, *supra* note 18, at § 45:10 (citing cases).

24 Restatement (Second) of Torts § 766 (1979).

25 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003).

26 *Id.* § 45:8 (citing *PG&E v. Bear Stearns & Co.*, 791 P.2d 587 (Cal. 1990)).

Further, knowledge of the existence of a contract may be sufficient to show that the conduct was not only improper, but also malicious thereby potentially opening the door to punitive damages.²⁷ Finally, it is no defense to the tort that the plaintiff would likely have a direct claim for breach of contract against the other party to the agreement, which would be the banks in this instance.²⁸ A person who intentionally interferes with another's contract or business expectancy is responsible for his or her own conduct.

The Defund Protests and Tortious Interference

Courts should apply the tort of intentional interference with contract or business relations to anti-pipeline defund protests when the protests cross the line and involve threats, intimidation, misrepresentation, coercion, trespass, or other such misconduct. This application of the tort is consistent with the tort's elements and public policies. The basic elements—existence of a known and valid contact or expectancy, intent to induce a breach, and damages—could hardly be disputed given the well-publicized purpose of the defund protests to coerce banks into tearing up pipeline financing agreements.

Whether for economic or political reasons, the tort is intended to stop threats, intimidation, misrepresentation, coercion, trespass, or other improper conduct against a business's contractual relationships.

Further, it is not necessary to show that the protesters acted to gain some unfair economic advantage for themselves. What matters is that their methods in targeting banks can be improper and destructive, impairing private contract rights and business enterprises. Whether for economic or political

reasons, the tort is intended to stop threats, intimidation, misrepresentation, coercion, trespass, or other improper conduct against a business's contractual relationships.²⁹

When the intent is to destroy a pipeline company's rights and interests in existing contracts, impropriety could be established as a matter of law in many jurisdictions. Intentionally inducing a bank to breach fiduciary obligations to its shareholders might also be actionable.³⁰ Even if the

lost opportunity involves only prospective business relations that have not yet been reduced to contract, independently tortious acts such as defamation, misrepresentation, or trespass can support a claim, as can improper campaigns involving violence, threats, coercion, economic pressure, or intimidation.³¹

The U.S. District Court for the District of Columbia allowed a suit of this nature to go forward in the mid-1990s. A pharmaceutical company allegedly threatened to cut off substantial business to a public relations firm unless the firm ordered one of its subsidiaries to stop working for a religious institution

²⁷ See *5 Lee & Lindahl, supra note 18, at § 45:4* (citing *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597 (S.D.N.Y. 2007)).

²⁸ *Id.* § 45:2.

²⁹ Paul Driessen, *Foes of New Sandpiper Pipeline in North Dakota Funded by Putin's Pals*, Investor's Business Daily (May 14, 2015), <https://www.investors.com/politics/commentary/russians-paying-to-kill-us-sandpiper-pipeline/>; see also Miesner & Leffler, *supra note 13, at 326* ("Competing interests may fund advocacy groups. For example, the maritime industry may try to stop pipeline construction into coastal areas that would eliminate barge construction").

³⁰ See generally *Sandra S. Baron, et al., Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WILLIAM & MARY BILL OF RIGHTS J. 1027, 1061 (1996) ("Plaintiffs may be able to recover punitive damages if a defendant induces breach of a fiduciary duty or a contract designed to protect a fiduciary duty").

³¹ See e.g., *Scutti Enters., LLC v. Park Place Entm't Corp.*, 322 F.3d 211, 216 (2d Cir. 2003); see also generally *Crapster & Smith, supra note 20, at 61*.

that had been opposing the use of certain prescription drugs.³² The court determined that the religious institution presented sufficient evidence to allege that the company's exertion of economic pressure and an ultimatum could amount to an improper attempt to inflict harm on an adversary with differing ideological views and interests.³³

First Amendment Considerations

It can be expected that the anti-pipeline groups will argue that their protests are protected under the First Amendment. Peaceful, lawful protests would likely garner such protection. But the First Amendment does not and should not provide blanket protection for those who depart from reasoned policy debates and engage in threats, coercion, and intimidation aimed at destroying the private contract rights of lawful enterprises.

Courts have appreciated this dividing line. In *Environmental Planning & Information Counsel v. Superior Court*, for example, the Supreme Court of California held that the First Amendment and corollary provisions in the state's constitution protected an environmental group from liability for publishing a criticism of a newspaper's editorial policy and suggesting a future boycott of its advertisers.³⁴ The group's actions were peaceable and implicated only potential, not current, business relations. The Court noted that it might not be as easy to justify any defense to tort liability if the group had sought to impinge on established rights under existing contracts.³⁵ This differs greatly from "defund protests" exerting pressure on banks' current clients to withdraw money or pull out of contractual business dealings with a bank in protest of existing pipeline loans.

A lower California court applying this law found that the First Amendment did not protect an anti-abortion activist's conduct because his actions included shouting, harassment, intimidation, and stalking of a clinic's patients.³⁶ The protester crossed the line and could be subject to liability under the tort of intentional interference with business expectancies. This same reasoning should be applied to the anti-pipeline protests here.

Conclusion

Courts are traditionally hesitant to get involved in political fights, but there is no room for "vigilante regulation." There are appropriate ways to engage in the political and public policy debate, and when it comes to pipelines, the law provides significant opportunities for such involvement. When anti-pipeline activists ignore these norms and use wrongful tactics deliberately to obstruct recognized property interests and economic rights of developers, tort law should be available to redress these wrongs.

Concerted efforts to coerce private banks into voiding their contracts are as harmful as acts of physical destruction of pipeline assets. Banks are not elected to make public-policy decisions, and pressuring them to get out of the pipeline business, including existing contractual relationships, is the definition of tortious interference. This tort can serve as both a check and a means of remedy in these situations. People who violate the law or engage in tortious activity, including to advance their own political or public-policy preferences, should be accountable for their actions.

³² *Church of Scientology Int'l v. Eli Lilly & Co.*, 848 F. Supp. 1018, 1029 (D.D.C. 1994).

³³ *Id.*

³⁴ *Env'tl. Planning & Info. Council v. Superior Court*, 680 P.2d 1086 (Cal. 1984).

³⁵ *Id.* at 1090.

³⁶ *Gehrs v. Planned Parenthood Golden Gate*, No. A092215, 2001 WL 1589217, at *5 (Cal. App. Dec. 12, 2001) (unreported).

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