COMMENT

Tortious Interference with Contract Under Section 301

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The federal circuits are divided over whether a claim for tortious interference with contract can be brought under section 301(a) of the Labor Management Relations Act. The author argues that the federal common law of labor contracts should recognize an interference cause of action, pointing to analogous causes of action under the NLRA, Title VII, and ERISA. Such a cause of action would serve the legislative goals of encouraging contract compliance and making victims of contract breach whole, while avoiding the risk of inconsistent contract interpretation arising from both state and federal courts deciding whether a contract was breached.

INTRODUCTION

Most breaches of collective bargaining agreements are handled through the arbitration procedure customarily established by these agreements. If one party fails to submit the dispute to arbitration, the other

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party may file a petition to compel arbitration in either federal district court or a state trial court. If the agreement lacks a mandatory arbitration clause, one party may sue the other directly for damages caused by the breach. Both kinds of suit are brought under section 301(a) of the Labor Management Relations Act.\(^1\) Thus the overwhelming majority of suits under section 301 involve one party to the agreement seeking to enforce it against the other contracting party.\(^2\)

However, in a variety of situations a section 301 plaintiff might seek to hold a third party liable for causing a contracting party to violate the labor agreement. Such a plaintiff is likely to explore suing for tortious interference with contract. All state courts but one recognize the interference cause of action,\(^3\) which is generally defined as follows:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.\(^4\)

This Comment seeks to analyze the relevance of the interference concept to modern labor law. In particular, it seeks to address the division between federal circuits as to whether someone not a party to a collective bargaining agreement can be held liable under section 301(a) of the Labor Management Relations Act for interference with that agreement.\(^5\)

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1. 29 U.S.C. § 185(a) (1982) [hereinafter § 301] provides as follows:

   Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction over the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. District 2, Marine Eng'rs Beneficial Ass'n v. Grand Bassa Tankers, 663 F.2d 392, 397 (2d Cir. 1981).


4. RESTATEMENT (SECOND) OF TORTS § 766.

5. In what is hereinafter called the “broader” view (see infra Part IV.B, pp. 277-81), both jurisdiction and a claim for relief under § 301 for interference have been found by the Third, Eighth, and Eleventh Circuits in Hillard v. Dobelman, 774 F.2d 886 (8th Cir. 1985); Local 472, Serv. Employees Union v. Commercial Property Servs., 555 F.2d 499 (6th Cir.), cert. denied, 106 S. Ct. 147 (1985); Lumber Prod. Indus. Workers Local 1054 v. West Coast Indus. Relations Ass’n, 116 L.R.R.M. (BNA) 3174 (N.D. Wash. 1984), rev’d on other grounds, 775 F.2d 1042 (9th Cir. 1985).

By contrast, what is hereafter termed the “narrower” view (see infra Part IV.C, pp. 281-84) holds that there is no jurisdiction over tortious interference claims, or no jurisdiction generally over claims against nonsignatories to the labor agreement. Circuits following this view include the First, Second, Fifth, Sixth, and Seventh Circuits: Local 47, Serv. Employees Union v. Commercial Property Servs., 755 F.2d 499 (6th Cir.), cert. denied, 106 S. Ct. 147 (1985); Carpenters Local 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489 (5th Cir.), cert. denied, 464 U.S. 932 (1982); Loss v. Blanken-
Under what circumstances would a claim for tortious interference arise in labor relations? Such a claim might be attempted whenever a contract breach was at least to some degree caused by a third party's conduct. One example is when an international union or union council induces a local union to break a no-strike pledge. Suing the international or council becomes even more imperative when the local is judgment-proof but the international or council has adequate assets. An analogous situation is where a parent corporation induces its subsidiary to breach its union contract, and the subsidiary lacks the assets necessary to provide reemployment or meet a damages judgment.

Another common situation is where an employer, in its eagerness to sell its business to a new owner, breaches a term of a labor agreement requiring that a condition of any sale of the business be the assumption of the labor contract by the buyer. If it can be shown that the new owner caused this breach, a tortious interference claim could be asserted. An interference action might to some degree compensate for the weaknesses of current remedies in successorship situations. For example, under present law, it is possible for a new employer to avoid both a duty to bargain and a duty to arbitrate. Reinstatement, the typical arbitral remedy, is difficult to impose once the business has changed hands. In

ship, 673 F.2d 942 (7th Cir. 1982); Bowers v. Upliano Casal, Inc., 393 F.2d 421 (1st Cir. 1968); Aacon Co. v. Association of Catholic Trade Unionists, 276 F.2d 958 (2d Cir. 1960), aff'g and adopting 178 F. Supp. 129 (E.D.N.Y. 1959).


6. See, e.g., Carbon Fuel Co. v. UMv., 444 U.S. 212, 218 (1979) (international union held not liable under § 301 for local's strike where no participation, ratification or approval by international).


10. NLRB v. Burns International Security Services, 406 U.S. 272, 295 (1972), holds that a successor has no duty to bargain with the union if less than a majority of its employees were employed by the predecessor. Accordingly, "it is, of course, quite unlikely that many successors will hire incumbent employees. Selection of too many predecessor employees triggers legal obligations that invite constraints, albeit minimal ones, on employer discretion." Silverstein, supra note 9, at 172.


addition, there are various obstacles to obtaining a court injunction against the sale—assuming the union has discovered the sale well enough in advance. Accordingly, if the new employer were found liable under a tortious interference theory, employees would stand a better chance of being reinstated to their old jobs, and some part of the gap in successorship remedies would be closed.

Other circumstances calling for interference claims might arise where the third party was the "prime mover" in the contract breach. For example, unions have brought interference suits against management consultants, alleging that the consultant tortiously interfered with a longstanding cooperative collective bargaining relationship. Similarly, a nonunion general contractor in construction might use its economic power over a potential subcontractor to convince the latter to violate the labor agreement and use nonunion employees on that job. Thus there are many situations where interference suits could play an important role in labor relations.

13. Several courts will grant injunctions against employer actions allegedly in violation of contract, known as "reverse Boys Markets injunctions," only if the labor agreement contains a provision requiring maintenance of the status quo pending arbitration. Transit Union, Div. 1384 v. Greyhound Lines, 550 F.2d 1237, 1239 (9th Cir.), cert. denied, 434 U.S. 837 (1977). Plaintiffs also have a great burden in proving irreparable injury, as the effects of job loss are usually not viewed as irreparable harm. Aluminum Workers Int’l Union v. Consolidated Aluminum Corp., 696 F.2d 437 (6th Cir. 1982). But see Panoramic, 668 F.2d at 286-88 (finding irreparable injury in the permanent loss of jobs threatened by a successorship).

14. An example of employees discovering a sale “late in the game” is Martin Podany Assocs., 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.) (sale closed on Thursday, employer notified employees and closed down on Friday, successor started up on Monday).


17. Tortious interference is also of growing importance in labor law for practical reasons: discharged employees have often tried suing individual supervisors who were alleged to have been responsible for the employer’s disciplinary action. See cases cited infra note 229.

18. Another reason interference suits are of practical import is the potential for larger-than-normal recoveries. One famous example is the $11 billion jury verdict in Pennzoil Co. v. Texaco Inc. (151st Judicial Dist. Ct., Houston, Tex., Dec. 10, 1985), (summarized in Texaco Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986). Under state law, the measure of damages on interference claims often includes emotional distress and punitive damages, which are not available under traditional contract law. W. PROSSER & P. KEETON, supra note 3, at 1003-04 nn.65, 68 & 70 and accompanying text. Most courts hold that punitive damages are not available under § 301. See Shaller, The Availability of Punitive Damages in Breach of Contract Actions Under Section 301 of the Labor Management
The thesis of this Comment is that interference should be recognized as a claim for relief under section 301. An interference claim would serve two goals of section 301: first, it would ensure that those who are injured by a contract breach are made whole by whoever caused the contract breach.\(^{18}\) At present, the make-whole purpose of section 301 is ill-served when the breaching party has sold its business or is judgment-proof.

Second and more importantly, an interference cause of action would help prevent breaches of contract in the first place, and thus serve the legislative intent to enhance industrial stability.\(^ {19}\) The fundamental reason for the passage of section 301—congressional concern over the social effects of strikes\(^ {20}\)—parallels the reason for having an interference tort under state law:

> By expressing society's interest in the integrity of contract, and by making contracts marginally more reliable, the tort implicitly encourages strangers to a given contract to plan their own commercial activity by relying on the terms of that contract. Thus, the tort facilitates the ability of contracts to stabilize commercial activity—to provide economic predictability not only for the parties to a contract but also for strangers.\(^ {21}\)

Allowing a section 301 interference cause of action serves the interests of "commercial stability" and "contractual integrity" which lie behind both the interference tort\(^ {22}\) and section 301.

The question of whether to recognize an interference cause of action under section 301 has been addressed by a recent Columbia Law Review Note.\(^ {23}\) The Columbia Note's thesis is that section 301 "does not provide a federal tort claim against interfering third parties, nor does it authorize the federal courts to develop one."\(^ {24}\) The author contends that the legis-
lative history shows that the "specific intent" of Congress was to provide contracting parties with a remedy against each other: "While section 301 is concerned with enforcing contractual obligations between parties, tortious interference serves the secondary function of protecting contractual rights from outside interference." 25 The author then analyzes the general jurisprudence of implied rights of action, and finds no support within it for an interference cause of action under section 301. 26 Finally, the Columbia Note finds no federal common law authority to recognize a section 301 interference action because "the federal common law that has been developed beyond statutory authority in other areas is based on special circumstances in each area and does not apply to the enforcement of labor contracts under federal law." 27

It is the position of this Comment that the Columbia Note's analysis is questionable as to both precedent and labor policy. The Supreme Court recognized forty years ago in Textile Workers Union v. Lincoln Mills 28 that Congress expected federal courts to develop a common law of labor contracts to serve national labor policy. 29 This Comment argues that finding an interference cause of action under section 301 adheres to the teachings of Lincoln Mills in two ways: first, it is more consistent with the labor policies of making victims whole and encouraging compliance with labor agreements; and second, it follows from Lincoln Mills' instruction to look at the operation of other labor statutes in interpreting section 301. 30 Under section 8 of the National Labor Relations Act, as well as under Title VII and ERISA, the courts have recognized claims analogous to tortious interference. 31

This Comment is structured as follows: Part I addresses the question whether the general jurisprudence of implied rights of action poses a barrier to recognizing an interference claim for relief under section 301. Part II considers section 301's sparse legislative history and legislative intent. Part III demonstrates that claims analogous to tortious interference have been found to arise under other federal statutes governing the workplace. Part IV looks at the federal case law examining whether section 301 offers jurisdiction for claims against those not party to the labor agreement. Part V analyzes whether the substantive law of section 301 should provide a claim for relief for tortious interference, even though interference has its origin in tort rather than in contract. Part VI considers the academic critique of the interference tort generally. Finally, Part

25. Id. at 1057-58.
26. Id. at 1059-60.
27. Id. at 1062.
29. Id. at 455.
30. Id. at 456-57.
31. Infra, Part II.
VII addresses practical concerns such as whether recognition of interference as a section 301 claim will significantly increase the workload of the federal courts.

I

THE JURISPRUDENCE OF IMPLIED RIGHTS OF ACTION

On its face section 301 does not expressly provide for an interference cause of action. Therefore, it is necessary to look at how courts find implied rights of action in statutes. Outside the labor law context, the Supreme Court's recent tendency has been to refuse to recognize implied causes of action. The Columbia Note argues that federal courts will find implied remedies in only two circumstances: first, to expand the class of plaintiffs who may demand redress for violations of a predefined obligation on the part of specific defendants; and second, to protect federal interests which arise under comprehensive federal programs such as admiralty law, federal proprietary interests, international law, and cases in which a state is a party.

The Columbia Note's position overlooks several principles in the jurisprudence of implied rights which support finding implied causes of action under section 301. First, many of the recent cases denying an implied right of action have stressed that the statutory schemes at issue are "comprehensive" and include "an integrated system of procedures for enforcement." Compared to many of these statutes, section 301 does not contain "carefully integrated enforcement provisions"; nor is it a "complex," "interrelated" and "comprehensive" remedial scheme.

Second, recent cases denying an implied cause of action involve recently enacted statutes. While the proper inquiry is whether it was the intent of Congress "to create rights against third parties in enacting section 301," the Supreme Court has observed that this test takes on a different slant when dealing with older statutes. This less hostile view towards implying causes of action in older statutes was announced in Merrill Lynch, Pierce, Fenner & Smith v. Curran. The Curran Court

33. Columbia Note, supra note 19, at 1058-60.
36. Columbia Note, supra note 19, at 1060.
explained that in the era before *Cort v. Ash* 38 federal courts were much freer in recognizing implied rights of action regarding "the denial of a remedy as the exception rather than the rule."39 Moreover, "congressional silence or ambiguity was an insufficient reason for the denial of a remedy."40 When Congress enacted broad statutes in the pre-*Cort* era, it often simply intended that the courts continue to find implied causes of action in those statutes. Indeed, the holding of *Lincoln Mills* is that Congress intended to give the courts in labor cases the full range of powers given common law courts to define the substantive law.41

The Columbia Note contends that the jurisprudence of implied rights of action aims solely at "fashion[ing] a means for enforcing predefined obligations against specific defendants. The courts merely expand the class of plaintiffs . . . ."42 However, *Curran* refutes the suggestion that rights may be implied only in favor of new plaintiffs, rather than against new defendants. *Curran*’s first holding was that the Commodities Exchange Act allowed an implied private right of action for violation of the Act’s prohibition of price manipulation by those enumerated in the statute. However, plaintiffs also sued others not enumerated in the statute; some were pursued because they had allegedly conspired to manipulate the market, and others were commodities exchanges which allegedly failed to enforce their own rules against such manipulation. The Court held that a cause of action was available against both the exchanges and the alleged conspirators, and rejected the argument that there must be contractual privity between plaintiffs and defendants.43 Thus, the Court’s analysis does not seem to differentiate significantly between implying a right of action against a new defendant and implying a right in favor of a new plaintiff.44

The other framework under which remedies are implied is the exercise of federal common law powers. As mentioned above, the Columbia Note argues that federal common law only exists in four areas, but not in federal labor law. The plain language of *Lincoln Mills* disproves this no-

40. *Id.* at 377.
44. Other opinions which focus on the defendant’s identity in implying a cause of action include *Davis v. Pissman*, 442 U.S. 228 (1979) (finding implied right of action for employment discrimination under fifth amendment against a Congressman, with primary focus of both majority and dissent not on plaintiff’s characteristics, but on defendant’s status); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (finding implied cause of action for damages against individual government agents under fourth amendment, although plaintiffs already had some remedy against government as an entity via a suit in equity and via the exclusionary rule).
To similar effect is Texas Industries v. Radcliff Materials,\textsuperscript{46} where the court noted that while there are only four areas where federal common law exists "absent some congressional authorization, . . . federal common law may also come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law."\textsuperscript{47} The Court's prime example of the latter was section 301.\textsuperscript{48}

The Columbia Note argues further that the four areas of federal common law involve "special circumstances" which are not present under section 301 and which call for a freer exercise of common law powers.\textsuperscript{49} However, there are sufficient similarities between section 301 and the other four areas to justify a common law approach under section 301. For example, admiralty law is characterized by "judge-made rules" of law, and the Court has found admiralty analogous in this respect to section 301.\textsuperscript{50} Moreover, while it is true that there is a "need for uniformity" in international law, where the problems are said to be "uniquely federal,"\textsuperscript{51} the same conclusion was reached by the Supreme Court in Local 174, International Brotherhood of Teamsters v. Lucas Flour regarding section 301.\textsuperscript{52} Thus, the differences between section 301 and other areas of federal common law do not call for greater hesitance in recognizing claims for relief under section 301.\textsuperscript{53}

Finally, attempting to define section 301 by using the modern jurisprudence of implied rights of action may be questioned, given the tendency of courts to treat issues concerning the scope of labor laws generally as sui generis and not subject to the same defining principles as

\textsuperscript{45} 353 U.S. at 456 ("the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws").
\textsuperscript{46} 451 U.S. 630 (1981).
\textsuperscript{47} Id. at 641-42.
\textsuperscript{48} Id. at 642-43.
\textsuperscript{49} Columbia Note, supra note 19, at 1062, text accompanying n.83.
\textsuperscript{50} Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 96 n.35 (1981).
\textsuperscript{51} Columbia Note, supra note 19, at 1061 n.72.
\textsuperscript{52} 369 U.S. 95 (1962).
\textsuperscript{53} In international law, there is a cause of action analogous to the interference tort. \textsuperscript{49} \textsuperscript{54} Restatement of the Foreign Relations Law of the U.S. § 196 provides that it is wrongful for a state to forbid an alien from engaging in a previously lawful gainful activity unless either the state provides just compensation, or the prohibition is for bona fide reasons of public policy and is applied to all nationals and aliens, or the alien receives reasonable notice and opportunity to engage in other gainful activities or depart.

The Columbia Note errs when it suggests that the Court has consistently "refused to exercise its common law powers in cases that involve the rights of private parties relating to federally created property." Columbia Note, supra note 19, at 1061-62 & nn.75-79. Rather, there is a long line of authority finding that suits brought against sureties to federal contracts, or involving subcontracting to federal contractors, may be brought under federal law. See cases collected in International Ass'n of Machinists v. Central Airlines, 372 U.S. 682, 693 n.17, reh'g denied, 373 U.S. 947 (1963) (relying on these cases and on section 301 for source of common law power to imply rights under the Railway Labor Act).
The uniqueness of labor law has been noted several times by members of the Supreme Court, from perspectives as diverse as those held by Justice Rehnquist and Justice Goldberg. However, the most basic aspect of the jurisprudence of implied rights—and one observed in labor cases as well—is to start by looking at legislative intent, to which we now turn.

II
THE LEGISLATIVE INTENT OF SECTION 301

As the Court observed in Lincoln Mills, "the legislative history of Section 301 is somewhat cloudy and confusing." This is especially true on the question of whether a section 301 suit may be maintained against a nonparty to the agreement. Much of the congressional discussion of section 301 focused on suits against the contracting party. However, most of the congressional discussion centered upon suits against unions, with almost no discussion of suits against employers. Nonetheless, Lincoln Mills explicitly rejected an interpretation of section 301(a) which would limit it to suits against unions only.

Further insight into congressional intent can be gleaned from earlier but rejected versions of the bill, which only provided for suits against contracting parties. The immediate forerunner of the Taft-Hartley Act

54. One notable example of how section 301 has been defined uniquely relative to other areas of the law is the hybrid breach of contract-duty of fair representation suit. If section 301 were defined merely as a kind of federal breach of contract action, traditional contract law would not bar a third-party beneficiary from suing on the contract unless she first proved that the party who negotiated her benefits had also breached a duty to her. Yet that is how the matter is handled under section 301. Vaca v. Sipes, 386 U.S. 171 (1967).

55. Golden State Transit Corp. v. City of Los Angeles, 106 S. Ct. 1395, 1403 (1986). In his dissent, Justice Rehnquist complained at length that preemption under the NLRA has far exceeded the scope of preemption in other areas of federal law.

56. Concurring in Humphrey v. Moore, 375 U.S. 335, 358, reh'g denied, 376 U.S. 935 (1964), Justice Goldberg wrote: "[I]n this Court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process."

57. 353 U.S. at 452.

58. For example, Representative Robison stated that section 301 provides that "if either party breaks the contract and the other suffers loss or damage thereby, the party who is at fault must respond in fair and just damages." 93 CONG. REC. 7491 (1947), quoted in Lincoln Mills, 353 U.S. at 546 (Appendix to Frankfurter, J., dissenting). Similarly, Senator Smith commented that this statute "merely provides for suits by and against labor organizations, and requires that labor organizations, as well as employers, shall be responsible for carrying out contracts legally entered into as a result of collective bargaining. That is all Title III does. I cannot imagine of any sound reason why a party to a contract should not be responsible for the fulfillment of the contract . . . ." 93 CONG. REC. 4410 (1947), reprinted in 2 NAT'L LAB. RELATIONS BD., LEGISLATIVE HISTORY OF THE LMRA 1145-46 (1985) [hereinafter LEGISLATIVE HISTORY].

59. 353 U.S. at 456 ("We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.").
was the Case Bill, which originally provided only for enforcement of labor contracts "against each of the parties thereto." The alterations made in this proposal might have been designed to delete any requirement that the suit be against a contracting party, because broader language—"suits for violations of contracts"—was used instead.

Another indication that Congress did not want to exclude the possibility of suits against nonparties stems from the extensive discussion of state law suits against those who many viewed as not truly "party" to the agreement between union and employer: namely, individual employees. Rather than addressing this issue by banning all suits against nonparties, Congress addressed the problem by providing in section 301(b) that no money judgment could be enforced against individual employees.

However, some observers have attempted to draw a contrary inference from the language of section 301(b). One court opposing recognition of a section 301 interference action noted that section 301(b) makes an employer liable for the acts of its agent, and therefore the plaintiff union already had a remedy against the employer which hired the defendant management consultant. The court contended that "[t]his clear assignment of liability to the employer for the type of wrong alleged in this case" argued against recognizing an interference cause of action. The problem with this argument is that it does not apply when the contracting employer or union is judgment-proof. Moreover, as already noted, the alleged interferer might not be an agent of the contracting employer, but rather a successor employer or general contractor.


61. This bill provided as follows:

All collective bargaining contracts shall be mutually and equally binding and enforceable either at law or in equity against each of the parties thereto. In the event of a breach of any such contract or of any agreement contained in such contract by either party thereto, then a suit for damages for such breach or for injunctive relief in equity may be maintained by the other party or parties in any United States district court.

92 CONG. REC. 765 (1946), quoted in Lincoln Mills, 353 U.S. at 485 (Appendix to Frankfurter, J., dissenting).

62. For the leading expression of the view that it is the union and not individual employees which is party to a labor agreement, see Feller, A General Theory of the Collective Bargaining Agreement, 61 CALIF. L. REV. 663, 773-92 (1973) ("The collective bargaining agreement is not a contract between the employer and any employee and neither may bring suit against the other for its breach." Id. at 773.).

63. Section 301(b) provides: "Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affects commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 29 U.S.C. § 185(b) (1982).

64. Loss v. Blankenship, 673 F.2d 942, 947 (7th Cir. 1982).
Nonagents will often be defendants in interference suits, given that the state law of tortious interference generally holds an agent "privileged" to interfere in her principal's contracts, making a claim such as the one against the consultant extremely difficult to win. Thus section 301(b) only offers insight into a few situations where a nonparty is pursued for interference.

The Columbia Note also relies on section 301(b), noting that its references to service of process and damages in section 301(b) apply only to unions and employers. However, these references do not allow the inference that the unions and employers involved in the section 301 suit must be in privity with each other. A review of the reported interference suits shows that it is usually the case that the third-party interferer is also an employer or a union.

The legislative history of section 301(b) does not support a view of this provision as limiting liability under section 301(a) to only those employers and unions which are party to the contract. Rather, the primary intent of section 301(b) was to eliminate the doubts that had arisen in state litigation over whether a union's assets could be reached for damages caused by a union officer's conduct.

Finally, section 301(b) suggests that when Congress intended to exclude someone from section 301 liability, it knew how to do so explicitly, for it declared that "[a]ny money judgment against a labor organization . . . shall not be enforceable against any individual member or his assets." On balance, then, section 301(b) narrowly supports the view that noncontracting parties can be held liable when they induce a labor contract violation.

The clearest aspect of section 301's legislative history is that Congress was primarily concerned with difficulties experienced in enforcing no-strike clauses in the state courts. Congress was not focusing on who

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65. Restatement (Second) Torts, § 770; W. Prosser & P. Keeton, supra note 3, § 129, at 985 n.72. The Loss court thus had the option of recognizing both § 301 jurisdiction and a § 301 claim for relief for tortious interference, but nonetheless ruled on summary judgment for defendant Blankenship on a privilege defense. That has been the approach of at least two cases involving § 301 interference suits against individual supervisors for their role in causing plaintiffs' discharges. Larry v. Penn Truck Aids, 567 F. Supp. 1410, 1416-17 (E.D. Pa. 1983); Watts v. Grand Union Co., 115 L.R.R.M. (BNA) 4211, 4216 (N.D. Ga. 1982).

66. Columbia Note, supra note 19, at 1057.


70. Lincoln Mills, 353 U.S. at 453.
would be plaintiff or defendant; rather, it was trying to address a larger social problem of industrial instability. *Lincoln Mills* stressed that Congress was “interested in promoting collective bargaining that ended with agreements not to strike,” and quoted a Senate report hoping for “freedom from economic warfare” and expressing a desire to “stabilize industrial relations” and “to encourage the making of agreements and to promote industrial peace.” Not cited by the Court were other declarations—found throughout the legislative history—of the broad aims of encouraging compliance with labor agreements.

Even if this legislative policy is reduced to its most immediate concern—strikes and picketing—this policy would be served by holding someone liable for inducing a union’s violation of a no-strike pledge to an employer. Moreover, instances of unions picketing employers who violated the labor agreement might be fewer if those who induced the employer to violate the agreement were liable under section 301. Viewing section 301’s goal more broadly as that of encouraging industrial stability, this goal would be served by holding a successor employer liable for inducing a predecessor to breach a successorship clause. As the successor will pay more in interference damages if it refuses to rehire the predecessor’s employees, the successor will have an incentive to assure continuity of employment. In short, consideration of the legislative history of section 301, and the broad aims and language of that statute, cuts in favor of recognizing an interference cause of action under section 301.

### III

**ANALOGIES TO INTERFERENCE LIABILITY IN FEDERAL LAWS GOVERNING THE WORKPLACE**

In *Lincoln Mills*, the Court held that the federal common law of section 301 was for the courts to “fashion from the policy of our national labor laws . . . . The Labor Management Relations Act expressly furnishes some substantive law . . . . Other problems will lie in the penum-

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71. *Id.* at 453-54.

72. The Senate Report also stated: “In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur . . . .” *S. Rep. No. 105* on S. 1126 at 15, *reprinted in 1 LEGISLATIVE HISTORY, supra* note 58, at 421. The Senate Report continued: “Statutory recognition of the collective bargaining agreement as a valid, binding and enforceable contract . . . will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.” *Id.* at 423. This view was reiterated in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509 (1962), which described the NLRA as “a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored.”
bra of express statutory mandates." Accordingly, the operation of other statutes concerning the employment relationship is an essential guide in deciding whether a third party can be held liable for interference with contract. Here the focus is on whether a third party to the employment relationship can be held liable for interfering with it, or for inducing a party to breach a statutory duty related to employment.

One persuasive guide to section 301 is offered by the National Labor Relations Act. The courts have frequently relied on the NLRA for developing section 301 common law, most notably on questions of the most appropriate statute of limitations. The NLRA analogy is especially persuasive because the NLRA was amended simultaneously with the enactment of section 301, as part of the Taft-Hartley Act.

It has been repeatedly held that an employer may violate the NLRA with respect to employees not his own. In Hudgens v. NLRB, the Supreme Court addressed the question of whether a shopping mall owner could lawfully bar the employees of a mall tenant from picketing within

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73. 353 U.S. at 456-57. For an example of an analysis of § 301 issues relying on law developed under the NLRA and Title VII, see Shaller, supra note 17.

74. This author's research found only one court which might arguably be said to have addressed the impact of the NLRA on the issue of suing those not party to the labor agreement. District 2, Marine Engineers Beneficial Association v. Grand Bassa Tankers, Inc., 663 F.2d 392 (2d Cir. 1981) held that a union could not hold an employer liable under § 301 for breaching a contract which pledged that the employer would only subcontract to unionized subcontractors, but contained no other terms and conditions of employment, and under which the union did not represent the employer's employees. The Second Circuit's comments went beyond this factual setting in dicta which could be read to reaffirm that circuit's position that § 301 does not encompass interference claims: "Of the hundreds of actions invoking federal jurisdiction under the employer-labor organization contract clause of Section 301(a) we have not found any case which did not involve an agreement relating to the employer's relationship with its own employees. . . . The reasonable conclusion to be drawn from the legislative history of Section 301 and numerous decisions interpreting its employer-labor organization contract clause is that the term 'employer' therein refers to the person or entity employing persons who are the subject of the contract with the labor organization and that Congress did not intend to create federal jurisdiction over all contracts between labor organizations and others merely because they happened to be employers. Such an interpretation, carried to its logical extreme, would entitle one party to sue the other for breach or enforcement of a contract for the sale of an automobile, as long as one was an employer and the other a labor organization. Surely Congress did not intend to create such all-inclusive federal jurisdiction when it enacted Section 301(a)." Id. at 398. The opinion rejects reliance on the Hudgens and Austin principles more fully set forth below without any explanation other than the obvious fact that these cases involve the NLRA and not § 301, and without even mentioning Lincoln Mills. Id. at 401. While the dissent sets forth the holding of Hudgens and Austin, it too ignores the question of how much guidance in interpreting § 301 can be found in the NLRA, and Lincoln Mills is not cited. Id. at 404. Even circuits which reject liability for interference nonetheless have implicitly rejected the Grand Bassa holding by finding § 301 jurisdiction over an employer for allegedly violating a "project agreement" whereby it agreed to employ unionized subcontractors. Sheetmetal Workers Union, Local 110 v. Public Serv. Co., 771 F.2d 1071, 1073 (7th Cir. 1985).

75. DelCostello v. Teamsters, 462 U.S. 151 (1983) (involving "hybrid" DFR/§ 301 claims); see also International Bhd. of Teamsters Local 315 v. Great W. Chem. Co., 781 F.2d 764 (9th Cir. 1986) (extending DelCostello to "pure" § 301 actions to compel arbitration).


the mall. The Court approved the long-standing Board doctrine that "a statutory 'employer' may violate section 8(a)(1) with respect to employees other than his own." The origin of this doctrine is the Board's decision in Austin Co. In Austin, an employer was found to have violated sections 8(a)(1) and 8(a)(3) of the NLRA when it canceled a contract with a subcontractor because the subcontractor's employees did not belong to a particular union. The Board focused on the lack of any language in sections 8(a)(1) and 8(a)(3) expressly restricting liability to actions taken towards one's own employees, contrasting this to other sections of the Act which speak to an employer's relations with "his" employees.

The Austin doctrine has an added bite when one looks at the question of backpay liability. The Board has held that when an "outsider" causes another employer to discharge an employee in violation of the Act, the outsider will be liable for backpay beyond the point at which he tells the employer that he has no objection to the rehiring of the dis-

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78. Id. at 510 n.3.
80. 29 U.S.C. § 158 (1982). The text of these sections, in relevant part, reads as follows: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."
81. The Board commented as follows:

"The statute, read literally, precludes any employer from discriminating with respect to any employee, for Section 8(a)(3) does not limit its prohibitions to acts of an employer vis-a-vis his own employees. Significantly, other sections of the Act do limit their coverage to employees of a particular employer. Thus, Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees . . . " and Section 8(b)(4)(B) prohibits a labor organization from striking to force or require any other employer to recognize the labor organization "as the representative of his employees . . . " (emphasis supplied). Thus, the omission of qualifying language in Section 8(a)(3) cannot be called accidental.
82. 29 U.S.C. § 152(3) (1982). If a valid argument, this reasoning would have some force in the § 301 context because § 2(3) is expressly made applicable to § 301 by § 501(3) of the Taft-Hartley Act. However, some courts have interpreted § 2(3) with an eye to particular legislative history showing that it was "intended to protect employees when they engage in otherwise proper concerted activities in support of employees other than their own." Eastex Inc. v. NLRB, 437 U.S. 556, 564 (1978). In addition, "the legislative history of the Act reveals that, in amending the definition of employee under Section 2(3), Congress was primarily concerned to make clear that an employee who had ceased work as a consequence of a current labor dispute, and was therefore not an employee of any particular employer at that time, nevertheless retained his employee status for purposes of the NLRA." Grand Bassa, 663 F.2d at 399. Moreover, the cross-reference achieved by § 501 "appears to have been done as a matter of 'drafting economy.' " Id. (quoting District 2, Marine Eng'rs Beneficial Ass'n v. Amoco Oil Co., 554 F.2d 774, 776 (6th Cir. 1977)). Thus the argument to § 2(3) in Austin is not a very weighty one, either for the NLRA, or extended to § 301.
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criminatee. Rather, just like a direct employer, the outsider is held liable for backpay until the point where the discriminatee is either rehired or obtains substantially equivalent employment elsewhere.83 While the Austin doctrine has its limits,84 it nonetheless remains well settled that someone not party to an employment relationship regulated by the NLRA can be held liable for certain kinds of interference in that relationship.85 By extension of the reasoning in Austin, employees should be able to bring suit under section 301 against an employer not their own—and thus an employer not party to the agreement which they claim was breached.

A second area of employment law where “outsiders” have been held liable for interfering with the employment relationship is Title VII. In the leading case of Sibley Memorial Hospital v. Wilson,86 the plaintiff was a male private duty nurse who had been asked by a female hospital patient to care for her on defendant hospital’s premises. The hospital blocked plaintiff’s access to the patient simply because the nurse and patient were of different sexes. The hospital moved for summary judgment based on the fact that plaintiff was not directly employed by the hospital. In reversing the grant of summary judgment, the D.C. Circuit declared as follows:

To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual’s employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.87

It has been observed that the Sibley interpretation in effect “reads into Title VII a remedy against aiding, abetting, inciting, coercing, or compelling discrimination where the ‘ aider and abettor ’ is an employer covered

84. In St. Francis Hospital, 263 N.L.R.B. 834 (1982), enf’d sub nom St. Francis Federation of Nurses v. NLRB, 729 F.2d 844 (D.C. Cir. 1984), the Board held that a consulting firm which directed an antiunion organizational campaign at the hospital was not liable for unfair practices, despite the unfair practices being found so “serious and pervasive” as to call for the unusual remedy of a bargaining order against the hospital. The ALJ contended that the Board will only hold an independent Respondent liable if it possesses control over the § 7 rights alleged to have been restrained or coerced. The ALJ found no such control because the hospital supervisors committing most of the unfair practices were employed by the hospital and not by the consultant. Id. at 848-50, enf’d, 729 F.2d at 857-58. Thus the nature of the liability of an employer for practices committed against employees other than his own has less than clear contours in the Board law. For a thorough critique of the holding in St. Francis on this point, reviewing NLRB case law which suggests that “causation” rather than “control” suffices to hold an independent employer liable, see Bethel, supra note 15, at 536-41. For a view supportive of St. Francis, see Note, supra note 15.
86. 488 F.2d 1338 (D.C. Cir. 1973).
87. Id. at 1341.
by Title VII.\textsuperscript{88}

The Sibley doctrine has been applied in a wide variety of factual contexts, such as where employees of a subcontractor sue the entity which hired the subcontractor,\textsuperscript{89} and where a doctor sues a hospital even though there is no employment relationship between them.\textsuperscript{90} Other examples include employee suits against outside institutions which license the employee,\textsuperscript{91} or provide employee insurance benefits,\textsuperscript{92} or supervise the plaintiff's employer.\textsuperscript{93}

The Sibley line of cases can be analogized to section 301 to suggest that remedies for unfair employment practices may be had against those who are not parties to the employment contract. Just as Congress intended to eliminate discriminatory employment practices, even where the source of those practices was not the employee's own employer, so too did Congress intend to see that labor contracts were followed. The policies of encouraging contract compliance and ending discrimination are no less affected when a third party induces conduct contrary to these policies.\textsuperscript{94}

The Sibley court offered several reasons for its holding which are arguably unique to the Title VII context. For one, Title VII provides


\textsuperscript{89} See, e.g., EEOC v. KDM School Bus Co., 612 F. Supp. 369, 373 (S.D.N.Y. 1985) (state properly named as defendant where it contracted for bus services with requirement that bus company follow age 65 mandatory retirement); Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, 347 (S.D.N.Y. 1984) (clerical employed by temporary agency may sue company which contracted with the temporary agency).


\textsuperscript{94} See Shaller, supra note 17, at 240-41, noting the analogous aims of § 301 and Title VII.
that complaints may be brought by a “person aggrieved,” and does not use the term “employee.” The Sibley court interpreted this as an indication that the proscriptions of Title VII reach beyond the immediate employment relationship. While section 301 has no comparable “person aggrieved” language, the common law of section 301 allows someone not a party to a labor contract, such as an employee covered by that agreement or her beneficiaries, to sue to enforce the contract. Thus, the common law of section 301 has eliminated any possible distinction between section 301 and Title VII based on who is entitled to bring suit.

Another possible reason for distinguishing section 301 from Title VII stems from Sibley’s reliance on the fact that the statute expressly addresses suits against those who are neither employer nor employee: that is, labor unions and employment agencies. Section 301 has no comparable express provision for suits against those not party to the labor agreement. However, the inference drawn in Sibley from these statutory provisions does not seem a particularly strong one: it does not follow that because a person may sue her union or employment agency, that therefore she may sue anyone who has a discriminatory effect on her employment. These statutory provisions could equally well give rise to an inference that Congress considered interference liability generally, but decided to limit it to two institutions. However, Sibley does not rest in significant part on this inference. Rather, it relies primarily on an analysis of the congressional concerns behind Title VII. Accordingly, the absence of comparable provisions in section 301 does not call for a result at variance with Sibley.

The final area of employment law which has addressed whether “outsiders” may be held liable is the Employee Retirement Income Security Act. ERISA is inextricably linked with section 301, as nearly every collective bargaining agreement in the U.S. addresses retirement or welfare plans covered by ERISA, and numerous suits are brought asserting jurisdiction under both ERISA and section 301 for the same substantive claims. ERISA sets out a variety of fiduciary duties for individuals who have any control over such plans; these individuals are often officials of the unions and employers which signed the labor

95. Sections 706(b), (c), (e), (f)(1) & (f)(3), codified at 42 U.S.C. §§ 2000e-5(b), (c), (e), (f)(1) & (f)(3) (1982).
96. 488 F.2d at 1341.
98. 488 F.2d at 1342 (citing §§ 703(b)-(c), 42 U.S.C. §§ 2000e-2(b)-(c) (1982)).
102. Such duties are set out in 29 U.S.C. §§ 1104(a) & 1106(b) (1985).
agreement establishing the benefit plan.\textsuperscript{103}

Under ERISA it has repeatedly been held that nonfiduciaries can be held liable for their involvement in breaches of fiduciary duties.\textsuperscript{104} The theory of liability being utilized by the courts is not entirely clear; however, many courts rely on the common law of trusts, which imposes liability for "knowing participation" in a breach of trust.\textsuperscript{105} In defining this term, trust law (and ERISA cases) have employed the fiction of "constructive knowledge."\textsuperscript{106} Liability based on a nonparty's constructive knowledge goes beyond what would be imposed under the common law of tortious interference, which requires actual knowledge of the contract and intentional actions by the tortfeasor which she actually knows are "substantially certain" to interfere with the contract.\textsuperscript{107} Moreover, "participation" sufficient to hold a nonfiduciary liable under ERISA includes receipt of trust assets, as such receipt makes it more difficult to trace the assets once they have been misappropriated, and hence furthers the breach.\textsuperscript{108} However, under tortious interference doctrine, a nonparty to a contract cannot be held liable merely for receiving assets from the contract's violator.\textsuperscript{109} In short, ERISA is quite strict in imposing liability on those outside the direct fiduciary relationship.

In summary, important federal labor laws other than section 301 allow for a cause of action analogous to interference. *Lincoln Mills* directive to use other labor laws to formulate section 301 common law leads to recognition of a section 301 cause of action against those who are not party to a labor agreement, but who unjustifiably interfere in its performance.

\textsuperscript{103} Section 302(c)(5)(A)-(C) of the LMRA describes the basic operation of and restrictions upon jointly administered employee benefit trust funds. 29 U.S.C. § 186(c)(5)(A)-(C) (1982).


\textsuperscript{106} Schmoutey, 592 F. Supp. at 1396 (citing Smith v. Ayer, 101 U.S. 320 (1879)) (under common law of trusts, nonfiduciary lender liable when trustee pledged notes belonging to trust as collateral for trustee's personal borrowing, despite lack of proof of lender's actual knowledge of breach); see also Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (W.D. Wis. 1979). For able arguments as to why constructive knowledge is the most appropriate standard of nonfiduciary liability for breaches of fiduciary duties under ERISA, see Schwartz, *supra* note 105, at 565-69.

\textsuperscript{107} RESTATEMENT (SECOND) OF TORTS § 766, comments i and j, at 11-12 (1977).

\textsuperscript{108} United States v. Dunn, 268 U.S. 121, 132 (1925); G. BOGERT, *supra* note 105, §§ 868 & 901; Schwartz, *supra* note 105, at 570-72 (citing RESTATEMENT (SECOND) OF TRUSTS § 297, comment 1 (1959)).

\textsuperscript{109} Since the breach will have already occurred, it is hard to see how the third party's receipt of profits from breach by itself is an intentional act which induces the contracting party to breach the contract. However, an agreement between the two in advance of the breach might call for different results.
IV
Federal Case Law Concerning Section 301 Jurisdiction over Nonparties

A. A Prefatory Note

The federal courts are divided over whether tortious interference claims are available under section 301. Analysis of the debate between the broad and narrow positions is made difficult by some confusion in the terms of the debate. Most of the courts discuss whether there is "jurisdiction" under section 301, while the underlying question seems to be whether plaintiff has stated a claim for relief. The difficulty caused by the courts' mixing of these concepts is often aggravated by perfunctory reasoning. In particular, many courts following the narrower view proceed by simply stating that section 301 offers no jurisdiction against anyone not party to the agreement, citing similar holdings to the same effect, and attempting to distinguish contrary authority. Accordingly, a logical place to begin is with the cases upholding the broader view, as their analysis is more thorough.

B. The Broader Approach

The first court to hold that a section 301 suit could be maintained against a nonparty was the Ninth Circuit in Alvares v. Erickson. In that case, union sued trustees of a multiemployer trust fund, based on the trustees' alleged failure to comply with a trust agreement
which had been incorporated into the collective bargaining agreement. The court went through a three-step analysis in order to find that there was subject matter jurisdiction under section 301. First, the Ninth Circuit found that a contract between an employer and a labor organization existed. Second, it found that this contract had possibly been breached by the trustees. Third, the court rejected the trustees' claim that the employees' action failed "the 'betweenness' requirement of Section 301 jurisdiction because neither a labor union nor an employer is a party to this lawsuit." The court's argument on this score relied on Smith v. Evening News Association for the proposition that the "betweenness" requirement mandated only that the contract be between a labor organization and an employer; the lawsuit, however, could be between other kinds of parties.

As much of the debate surrounding section 301 jurisdiction over claims against nonparties concerns Evening News, it is worthwhile to consider that case in detail. Smith sued his employer based on a collective bargaining agreement between his union and the employer. The trial court dismissed the action for want of jurisdiction, ruling that the claim was within the exclusive jurisdiction of the NLRB over unfair labor practices. The Supreme Court reversed, but considered further arguments by the employer as to why no section 301 jurisdiction existed. The Court stressed that section 301 "is not to be given a narrow reading," and found that "[t]o exclude these claims from the ambit of section 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." More specifically, the Court addressed the employer's contention that the word "between" in section 301 "refers to 'suits', not 'contracts', and that therefore only suits between unions and employers are within the purview of section 301." The Court summarily rejected this argument, finding that "[n]either the language and structure of section 301 nor its legislative history require or persuasively support

115. Alvares, 514 F.2d at 161.
116. Id. at 162. The conclusion that a trustee can be said to breach an agreement (with no breach by either union or employer involved, unlike the tortious interference context) is questionable. See infra note 179 and accompanying text.
117. Id. at 162.
119. Alvares, 514 F.2d at 162.
120. While the Court stated at one point that it was not deciding whether "petitioner, under this contract, has standing to sue for breach" of contract (371 U.S. at 201 n.9), the rest of the opinion does seem to say that there was § 301 jurisdiction over petitioner's claim. The latter is the reading given Evening News by subsequent Supreme Court opinions. See, e.g., DelCostello v. Teamsters, 462 U.S. 151, 163 (1983).
122. Id. at 200.
this restrictive interpretation, which would frustrate rather than serve the congressional policy expressed in that section."

The willingness of Alvares to read the language in Evening News beyond its immediate factual underpinnings has been maintained by the Ninth Circuit in subsequent cases. The circuit finds section 301 jurisdiction "as long as the suit is for violation of a contract between a union and employer even if neither party is a union or an employer." In Painting & Decorating Contractors Association v. Painters & Decorators Joint Committee, the court argued that forcing the plaintiff to pursue a state law remedy raised the possibility of a federal court interpreting a labor agreement one way while a state court interpreted it another way. This prospect, the court stated, "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements," at odds with the labor policy reflected in section 301.

Most recently, in Lumber Workers Local 1054 v. West Coast Industrial Relations Association, a union sued management consultants claiming that they had interfered with the union's prospective contractual relations with the employer. The district court had held that section 301 offered both jurisdiction and substantive relief for such a claim. The Ninth Circuit reversed this holding on the sole ground that there was no contract in force, either actual or implied, when the consultants had taken their actions, and therefore there was no breach of contract upon which to base section 301 jurisdiction. This narrow ground of reversal suggests that the Ninth Circuit may yet recognize an interference claim under the common law of section 301.

123. Id.
124. Rehmar v. Smith, 555 F.2d 1362, 1366 (9th Cir. 1976).
125. 707 F.2d 1067 (9th Cir. 1983), cert. denied, 466 U.S. 927 (1984). The facts of the case are rather complicated: a local employer association in Sacramento sued a Joint Committee which represented several local employer associations and local unions from different areas in Northern California, which together were party to a single collective bargaining agreement. The collective bargaining agreement called for the Joint Committee to issue "shop cards" to those employers who observed the terms of the agreement, and provided that the unions would not provide workers to any employers lacking a card. The Sacramento group alleged that the Joint Committee had violated the agreement by failing to issue a shop card to employers in the Sacramento area, due to a dispute between several of the local employer associations. While the Columbia Note argues that this case involved tortious interference, the court never refers to this cause of action. Columbia Note, supra note 19, at 1056 & n.39.
126. Painting & Decorating, 707 F.2d at 1071-72.
127. 775 F.2d 1042 (9th Cir. 1985).
129. 775 F.2d at 1046-47. West Coast Industrial discussed uncritically the first case finding both a claim for relief and jurisdiction under § 301 for interference claims, Wilkes-Barre Publishing Co. v. Newspaper Guild, 647 F.2d 372 (3d Cir. 1981), cert. denied, 454 U.S. 1143 (1982), and distinguished it as involving an actual breach of contract, rather than breach of prospective contractual relations.
130. As noted supra note 125, Painting & Decorating can be read as already having openly recognized interference as a § 301 claim for relief. However, an argument that § 301 jurisdiction does not exist over interference claims could turn to the vague statement in West Coast Industrial
The Third Circuit authority has followed a line of developments similar to the Ninth Circuit's, but has made it more explicit that interference claims will lie within section 301 jurisdiction. Like the Ninth Circuit, the Third Circuit first approached this question in a suit against trustees of a jointly-administered benefit fund. In Nedd v. United Mine Workers, a fund beneficiary sued trustees for failing in their duty—made explicit in the labor agreement—to pursue employers which were delinquent in making fund contributions. The Third Circuit held that section 301 jurisdiction existed over such claims, despite the fact that the trustees were not parties to the contract. The court relied on the above-noted arguments in Evening News, and on the Court's comment in Chemical Workers v. Pittsburgh Glass, that a section 301 remedy would exist for any pensioner whose vested rights were altered without his consent. The Third Circuit noted that there would have been section 301 jurisdiction in any case if the plaintiffs had chosen as third-party beneficiaries to sue the delinquent employers, stating that "[i]t is but a small step further to suggest that the same federal common law of collective bargaining agreements permits a suit against the Fund Trustees, and the Union which allegedly acted in concert with them for the destruction of the value of bargained-for and vested contract rights." Finally, the Third Circuit noted that the policy considerations favoring recognition of uniform federal law of collective bargaining agreements applied with equal force to a claim against a trustee for failing to enforce such an agreement.

The Third Circuit adopted an even broader view of section 301 jurisdiction as reaching "not only suits brought on labor contracts, but also suits seeking remedies for violation of such contracts," in Wilkes-Barre Publishing Co. v. Newspaper Guild. This case is extremely significant, as it was the first circuit opinion adopting tortious interference as a valid cause of action under the federal common law of section 301. The case involved an unusual fact situation. During the Newspaper Guild's dispute with the Publishing Company over the terms of a renewal agree-

that "the rights and liabilities of the parties to an action under section 301(a) must be a product of the bargaining agreement itself, and not of some other origin." West Coast Industrial, 795 F.2d at 1046 (citing Carpenters S. Cal. Admin. Corp. v. Majestic Hous., 743 F.2d 1341, 1345 (9th Cir. 1984)) (no § 301 jurisdiction for a pension fund trustee's suit against the nonparty surety of a breaching employer). Addressed infra, text accompanying notes 178-79, is the illogic of limiting § 301 jurisdiction over nonparties to situations where the collective bargaining agreement sets out duties for the nonparty.

132. Id. at 197.
134. Nedd, 556 F.2d at 197.
135. Id. at 197-98.
137. Id. at 380-81.
ment, several unions created a nonprofit corporation which published a newspaper in competition with the Company's. The agreement between the Guild and the Company contained a provision barring Company employees from any service on their nonworking hours "for publications in direct competition with" the Company. The Third Circuit decided that section 301 jurisdiction existed for a tortious interference claim against the unions' nonprofit corporation. The court found the decision in Nedd "suggestive but not controlling": "suggestive" because it involved a suit against a nonparty, and because it recognized "the undesirability of delegating issues bearing on liability for violations of collective bargaining agreements to state law"; "not controlling" because the defendants in Nedd were under a fiduciary obligation to the plaintiffs, while the nonprofit corporation competing with the employer had no such obligation. The Third Circuit gained further guidance from the admonition of Evening News not to read section 301 narrowly, and observed that protection from tortious interference "involves protection of a property interest—a labor contract—which has its being in and draws its vitality from the federal common law of labor contracts." Accordingly, the court held that an interference claim arises under federal common law. The Third Circuit's analysis in Wilkes-Barre has been followed by the Eleventh Circuit and several district courts in other circuits.

C. The Narrower View

The crux of the debate between the circuits rests on how broadly to read the Supreme Court's general admonitions about section 301 generally, and Evening News in particular. Several circuits have openly disagreed with the Wilkes-Barre approach to these issues. The Fifth Circuit was the first to do so, in Carpenters Local 1846 v. Pratt-Farnsworth, Inc. Concluding that a union could not sue an employer association for allegedly conspiring with and encouraging several employers to breach these employers' individual contracts by "double breasting,"
the Fifth Circuit relied upon its assessment of the weight of authority.\textsuperscript{145} It also relied upon a district court opinion which found no section 301 jurisdiction for an interference suit because "[b]etween the parties to this action . . . there is no collective bargaining agreement of any kind."\textsuperscript{146} However, this was also true in \textit{Evening News}—yet the district court failed to mention that decision. The Fifth Circuit found \textit{Evening News} "inapposite" simply because the issue before the Supreme Court was "whether section 301 causes of action encompassed suits by individual union employees for the enforcement of rights guaranteed by a collective bargaining agreement entered into by their unions."\textsuperscript{147}

Other circuits rejecting section 301 jurisdiction over nonparties have similarly attempted to limit \textit{Evening News} to its facts. The Seventh Circuit argued at length for this view in \textit{Loss v. Blankenship}.\textsuperscript{148} The plaintiff union sued the consultant hired by the employer, alleging that he tortiously interfered by encouraging employees to reject a proposed collective bargaining agreement.\textsuperscript{149} The Seventh Circuit found that \textit{Evening News} offered no reason for departing from the majority rule that nonparties may not be sued under section 301. The court argued that this decision "was clearly limited to the situation in which an employee was a plaintiff under 301(a)" because \textit{Evening News} had commented on how important individual employee claims are to collective bargaining. The \textit{Loss} court contended that \textit{Evening News} was based primarily on an analysis of legislative intent, and merely "recognized that employees, as the intended beneficiaries of the LMRA, should be able to bring suit." However, the Seventh Circuit saw no similar legislative intent justifying suits against nonparties.\textsuperscript{150}

While the \textit{Loss} court is to be commended for analyzing legislative intent, its conclusions on the issue are questionable. If any one group was the intended beneficiary of section 301, it would be employers as a class, not individual employees.\textsuperscript{151} Giving an employer a right of action against those who induce a union’s breach of a no-strike clause serves

\textsuperscript{145} As observed \textit{supra} note 113, the \textit{Pratt-Farnsworth} claim to majority support is arguably mistaken.

\textsuperscript{146} Dixie Machine Welding, Inc. v. Marine Eng’rs Beneficial Ass’n, 243 F. Supp. 489, 491 (E.D. La. 1965).

\textsuperscript{147} \textit{Pratt-Farnsworth}, 690 F.2d at 500.

\textsuperscript{148} 673 F.2d 942, 947 n.3 (7th Cir. 1982).

\textsuperscript{149} Since no breach of a collective bargaining agreement is evident in the Seventh Circuit’s summary of the facts, one wonders why the court did not decide the case on the basis used in \textit{West Coast Industrial} on similar facts: plaintiff may have suffered the loss of a prospective contractual relationship, but there was no breach of an existing collective bargaining agreement. 775 F.2d at 1046-47; see also United Mine Workers v. G.M. & W. Coal Co., 642 F. Supp. 57, 60 (W.D. Pa. 1985).

\textsuperscript{150} \textit{Loss}, 673 F.2d at 947 n.3.

\textsuperscript{151} \textit{Cf. supra} notes 70-72 and accompanying text.
section 301’s “intended beneficiaries.” Thus, Loss’ attempt to limit Evening News on the basis of legislative intent is unconvincing.

However, the Loss court found further support in case law, arguing that Alvares and Nedd had allowed only for a narrow exception “to the general rule that non-parties to the collective bargaining agreement cannot be sued under the LMRA.” The court noted first that these cases involved suits against pension fund trustees, and argued that “these decisions can fairly be limited to suits against one owing a ‘fiduciary duty’ to the plaintiff.” Second, the Loss court found that the Alvares-Nedd exception depended on the absence of alternative remedies against the trustees. Because consultant Blankenship owed no fiduciary duty to the plaintiffs, and because the plaintiffs had alternative remedies in the form of a suit or NLRB charges against their employer directly, the Loss court found the Alvares-Nedd exception unavailable.

The Loss court had the opportunity to review only one decision which applied Alvares and Nedd beyond the trustee context—Wilkes-Barre. The Seventh Circuit rejected Wilkes-Barre for several reasons: first, it found in Wilkes-Barre the objectionable “suggestion” that “no independent state law remedies exist for tortious interference with labor contracts.” The Seventh Circuit noted that this conclusion would be inconsistent with the congressional purpose to “supplement, and not to encroach upon, the pre-existing jurisdiction of the state courts.”

However, it is difficult to find in Wilkes-Barre the suggestion which the Loss court found. Rather, the Wilkes-Barre court appeared to assume that, without section 301 jurisdiction, tortious interference claims would be brought under state law. This assumption was necessary for Wilkes-Barre to even consider “the undesirability of relegating issues bearing on liability for violations of collective bargaining agreements to state law.”

Perhaps what Loss meant was that the congressional intent behind

152. Loss, 673 F.2d at 947.
153. Id. at 948.
154. Id. at 947-48.
155. It should be noted that Loss also attempts to distinguish Wilkes-Barre, on the ground that the employer in the latter case “was faced with a situation in which joining the competitor in the action was necessary to insure that a remedy would be provided under section 301(a).” 673 F.2d at 948 n.6. However, one finds no such mention of a lack of alternative remedies in the Wilkes-Barre opinion. In fact, it seems obvious that if § 301 jurisdiction had been rejected, the employer could have pursued a state law claim in state court against the competing newspaper. Moreover, to the extent that the competitor was a council established by the signatory unions, and staffed by the members of those unions who worked for the plaintiff, the relief running against those unions for breach of contract could have provided all the relief sought by the employer. Nothing in the Wilkes-Barre opinion suggests that the union defendants were judgment proof.
156. Loss, 673 F.2d at 948 n.6.
157. Id. (quoting Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 245 (1970)).
158. Wilkes-Barre, 647 F.2d at 380.
section 301 calls for narrowly construing that statute so as to favor independent state law remedies. Loss' citation of Charles Dowd Box Co. v. Courtney seems intended to go to this point. In Dowd Box, the Supreme Court decided that there was concurrent jurisdiction between state and federal courts to enforce section 301. However, the Court's subsequent decision in Lucas Flour made it clear that the law to be applied in state courts was federal substantive law, not independent state law remedies. Thus the Seventh Circuit seems here to have "confused the availability of state court jurisdiction with the applicability of state law," as one court has expressed it, for the Supreme Court's construction of section 301 has been to disfavor independent state law remedies.

Loss' second attack on Wilkes-Barre was that state law interference suits do not create a valid concern over nonuniform contract interpretation. The Seventh Circuit argued that "[p]arties to the collective bargaining agreement will still be able to have their respective obligations to one another determined by federal law." In making this argument, the Loss court did not address the fact that a prerequisite for liability under tortious interference doctrine is an actual breach of the contract. Accordingly, state courts addressing tortious interference lawsuits will be called upon to interpret the collective bargaining agreement in the first place. In the facts involved in Wilkes-Barre, the Loss approach would force the employer to sue the competitor in state court, whereas the claims against the union would likely end up in federal court. Thus, one can easily imagine a state court deciding a tortious interference suit by finding no contract breach, but a federal court reaching the opposite conclusion in a section 301 action. It is this very inconsistency of contract interpretation about which Lucas Flour and Wilkes-Barre are concerned. Thus, one court has commented that the Loss court "improperly applied the policy of uniformity. Relying on different bodies of law to provide remedies against different defendants for the same breach of the same contract would undercut the Act and defeat its policy."

D. Erosion of the Narrower View

It is unclear whether the Loss opinion represents a decision limited to its facts or a general rule of nonliability for third parties. For example, the court did not directly question the results reached in Alvares and Nedd allowing suits against fiduciaries. Loss also made the fact-specific argument that "the Act was not designed to impose personal liability on employees of corporate organizations," referring to the assignment of lia-

160. 369 U.S. 95 (1962).
161. West Coast Industrial, 116 L.R.R.M. (BNA) at 3177 n.3 (emphasis in original).
162. Loss, 673 F.2d at 948 n.6.
163. West Coast Industrial, 116 L.R.R.M. (BNA) at 3177 n.3.
bility for an agent’s conduct under section 301(b). However, other portions of the Loss opinion leave little room for any of the arguments in the broader line of cases.

The Seventh Circuit amplified the ambiguity of Loss in later action. In Chicago Area Vending Employers Association v. Custom Coffee Service, the court distinguished Loss on its facts in order to find section 301 jurisdiction over a nonsignatory. A multiemployer association had sued the union with which it had a collective bargaining agreement, joining as a defendant an individual employer and association member, Custom Coffee Service (“CCS”). The association claimed that the union violated the agreement by “cutting a deal” with CCS to postpone a wage increase scheduled in the association agreement. The Seventh Circuit quietly recharacterized Loss as holding “that third person non-parties to collective bargaining agreements may not be sued under Section 301 unless the plaintiff is an intended beneficiary of the agreement provision or is owed a fiduciary duty by the person to be sued.”

Custom Coffee also seemed to replace the simple jurisdictional inquiry suggested by Loss—in effect, “is the defendant a party to the contract?”—with a flexible and fact-specific inquiry. Custom Coffee first noted that the facts in Loss involved plaintiffs and a defendant not party to the agreement, “and the alleged wrongdoing, fostering of antiunion sentiment, was not at all related to any provision of the collective bargaining agreement.” The court then found these facts distinguishable from the claim against CCS for two reasons: first, CCS was “arguably” a party to the agreement, as it was mentioned by name in the collective bargaining agreement; and second, the CCS dispute was “directly related to a provision in the collective bargaining agreement.” Custom Coffee thus suggests a multifactor inquiry into flexible concepts such as whether the dispute “arguably” involves a party and is “directly related” to a collective bargaining agreement.

Regardless of the workability of its ambiguous kind of jurisdic-

164. Loss, 673 F.2d at 946-47; see supra notes 64-65 and accompanying text.
165. Loss states its holding broadly: “The allegations in the complaint establish that Blankenship is not a party to the collective bargaining agreement. Thus, he is not within the class of persons who may be subject to liability under Section 301(a).” Id. at 946. “We hold, therefore, that a complaint for interference with a collective bargaining agreement, against a nonparty to that agreement, is not actionable under section 301(a) of the LMRA.” Id. at 948.
166. 100 Lab. Cas. (CCH) ¶ 10,953 (7th Cir. 1984), aff’g 564 F. Supp. 1186 (N.D. Ill. 1983). No report of the Seventh Circuit’s decision appears in the official reporters, but district courts within the Circuit accept it as good law. See, e.g., Sprague Iron Works v. Urbauer, 604 F. Supp. 733, 736 (N.D. Ill. 1985).
167. Custom Coffee, 100 Lab. Cas. (CCH) at ¶ 21,703.
168. Id.
169. Id.
170. An ambiguous and fact-centered test for jurisdiction is problematic because in the typical
tional inquiry, Custom Coffee is significant as an indication that the Seventh Circuit’s opposition to section 301 jurisdiction against nonparties is eroding. Notably, Custom Coffee is silent on the Loss court concern with infringing on state law remedies.

In the Sixth Circuit, there seems to be a similar pressure to soften the rule against section 301 jurisdiction over nonparties. While Metropolitan Detroit Bricklayers District Council v. J.E. Hoetger & Co. stated that “courts have generally held” that section 301 jurisdiction does not exist over nonparties, Local 47 v. Comercial Property Services subsequently acknowledged Wilkes-Barre and Painting & Decorating Contractors without openly rejecting them. Rather, Commercial Property carefully distinguished the facts of Wilkes-Barre and Painting & Decorating Contractors on the basis of closeness of relationship between the nonparty defendants and the signatories. In Commercial Property, the union’s suit named a building manager, First Union, as one of several defendants. First Union had removed a unionized cleaning subcontractor and replaced it with a nonunion concern which allegedly was the alter ego of the unionized subcontractor. Noting that “neither the rights of First Union are in any way protected nor are its duties set forth in the provisions of the Local 47-CPS collective bargaining agreement,” the Sixth Circuit found no section 301 jurisdiction over First Union.

These comments have subsequently been read by a district court in the Sixth Circuit having eroded “the traditional rule” and having “implied that subject matter jurisdiction might also be found over a non-signatory whose ‘rights or duties . . . are stated in the terms and conditions of the contract.’”

This district court’s attempt to find jurisdiction over nonparties in cases where the nonparty has “rights or duties stated in the terms and conditions of the contract” has subsequently been read by a district court in the Sixth Circuit in the case of United Association of Journeymen Plumbers v. Local 334, United Association of Journeymen Plumbers, 452 U.S. 615 (1981), the Court of Appeals had contended that jurisdiction over suits based on union constitutions were only within § 301 where they potentially “have a significant impact on labor-management relations or industrial peace.” Id. at 618 (citing 628 F.2d 812, 820 (3d Cir. 1980)). The Supreme Court held that “adoption of the ‘significant impact’ test urged by the Court of Appeals would engage the federal courts in the sort of ad hoc judgments on the jurisdictional sufficiency of the pleadings that the unfettered language of § 301(a) belies.” Id. at 625 n.10.

But see Sheet Metal Workers Union v. Public Serv. Co., 771 F.2d 1071, 1076 n.3 (7th Cir. 1985) (dicta citing Loss for broad view that § 301 suits may not be brought against nonparties).
conditions of the contract"\textsuperscript{178} is unpersuasive. Section 301 cannot provide a claim for relief or jurisdiction unless there has been an actual violation of the labor agreement. When two parties to a contract have inserted language giving an outsider certain purported duties, the outsider's failure to perform those "duties" is hard to perceive as a "violation" or "breach" of the contract.\textsuperscript{179} Thus, finding a section 301 claim for relief against a stranger merely because the contract states a function for the stranger is a more radical position than finding a section 301 claim for interference where a contracting party has breached the contract in the first place.

In conclusion, there is pressure within those circuits following the narrower view to find exceptions to a rule of nonliability. One can only speculate as to why this erosion is occurring, but it is perhaps due to a tension between the narrow view and some aspects of Supreme Court precedent. Cases following the narrower view attach little import to two aspects of \textit{Evening News}: its directive to interpret section 301 broadly, and its reading of the word "between" in the language of section 301 as referring to who is party to the contract, not to the lawsuit. Moreover, cases following the narrower view have difficulty addressing \textit{Lucas Flour}'s concern over state and federal courts reaching conflicting interpretations of the same labor agreement. Finally, all the cases adhering to the narrower view were decided before the Supreme Court's recent expansive view of section 301 in \textit{Allis-Chalmers v. Lueck},\textsuperscript{180} as more fully discussed in the next Part of this Comment.

\textbf{V}

TORT VERSUS CONTRACT AND THE IMPACT OF \textit{ALLIS-CHALMERS}

One argument against recognizing a cause of action for interference under section 301 is that interference has its origins in tort rather than contract.\textsuperscript{181} The Columbia Note states a similar position when it argues that "[w]hile section 301 is concerned with enforcing contractual obligations between parties, tortious interference serves the secondary function

\textsuperscript{178} As noted supra note 130 and accompanying text, there is some possibility that the Ninth Circuit may adhere to a similar view.

\textsuperscript{179} Stone, \textit{A Path of No Return: Employer Overpayments Into Employee Benefit Plans}, 8 \textsc{Indus. Rel. L.J.} 68, 98 (1986) ("It is questionable whether trustees, non-signatories to the labor-management contract, can breach that contract.").

\textsuperscript{180} 471 U.S. 202 (1985).

\textsuperscript{181} UAW v. Northern Telecom, Inc., 434 F. Supp. 331, 336-38 (E.D. Mich. 1977) (relying on tort-contract distinction, finds no \textsection 301 jurisdiction because union's interference claims against employer's parent company seek "recovery for torts arising from the negotiation" of a labor agreement, but \textsection 301 only covers "those claims dealing with the enforcement of the collective bargaining contract itself").
of protecting contractual rights from outside interference.

However, other causes of action which do not take the form of traditional contract actions have been held to state section 301 claims for relief. The Wilkes-Barre court notes two of these noncontract claims: breach of the duty of fair representation in enforcing a contract, and violating a fiduciary duty by failing to enforce the contract. Thus Wilkes-Barre concludes that tortious interference is not outside the substantive law of section 301 merely because its origins are in tort:

An essential element of the cause of action, whether injunctive relief or damages is sought, is a violation of the collective bargaining agreement. The relief sought is to recover for or prevent that violation. The label attached to the remedy as tort or contract is not dispositive of the scope of federal common law which under section 301(a) it is our responsibility to create.

This conclusion is further justified by the changing nature of our legal system. When Congress passed section 301, there was no doubt a rigid line between what was "contract" and was "tort," but that is far less true today. The world of employment law in particular has been heavily impacted by the tort of wrongful discharge. It is a significant step towards the law of tort to find in all employment contracts an implied-in-law duty of good faith and fair dealing. Also, in many states a breach of contract in bad faith calls for extracontractual damages, such as punitive damages. Allowing a claim with origins in tort under section 301 would mean nothing more than federal common law accommodating changes in its legal environment.

The Supreme Court recognized this breakdown of the tort-contract distinction in labor law—and expanded the preemptive scope of section 301 as a result—in Allis-Chalmers Corp. v. Lueck. The Court held

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184. Wilkes-Barre, 647 F.2d at 380-81.
185. See, e.g., Comment, Tortious Breach of Contract in Oklahoma, 20 Tulsa L.J. 233, 234 (1984) ("there appears to be a trend toward the creation of a new tort that could apply to any sufficiently malicious breach of contract").
186. The volume of wrongful discharge suits has mushroomed in recent years. See generally Lopatka, The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s, 40 Bus. Law. 1 (1984). This is coupled with a considerable doctrinal expansion of the aspects of wrongful discharge which sound in tort, such as violations of public policy. See, e.g., Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (public policy discharge action may rest on the constitutional guarantee of free speech, even though no state action present).
that an employee's suit in tort over an employer's alleged bad faith handling of an insurance claim was preempted by section 301. The Court's justifications for ignoring the tort-contract distinction are worthy of quotation at length:

If the policies that animate § 301 are to be given their proper range, however, the pre-emptive effect of § 301 must extend beyond suits alleging contract violations. . . . The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal labor law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their contract claims as claims for tortious breach of contract. 190

The Court stressed that the tort claim brought by Lueck "inevitably will involve contract interpretation," and concluded that section 301 preemption exists "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."191 Following Allis-Chalmers, several courts found that section 301 preempted state law interference claims where the contract in issue was a collective bargaining agreement.192

The hard question after Allis-Chalmers is how far one can read the Court's rejection of the tort-contract distinction. Is the Court saying that tort actions are preempted by section 301, but that section 301 provides no remedy for the conduct complained of in tort? Section 301 preemption could be that type of preemption known as "field preemption" or "preemption by occupation," whereby state law is preempted even if federal law offers no similar remedy. Field preemption is to be contrasted to the usual method of preemption under the supremacy clause, under which only those state laws inconsistent with a federal law are preempted. The best known example of field preemption is "Machinists" preemption under the NLRA, whereby state laws which "upset the balance of power between labor and management expressed in our national labor policy" are preempted.193

190. 471 U.S. at 210-11.
191. Id. at 218-20.
193. Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427
Certainly *Allis-Chalmers* hints at field preemption in its final remarks:

We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claims must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law.¹⁹⁴

This comment about dismissal is difficult to comprehend because section 301 preemption has not heretofore been viewed as field preemption, where dismissal is the typical outcome. Elsewhere in *Allis-Chalmers*, the Court recognized NLRA “Machinists” field preemption and distinguished it from the preemption doctrine at work with section 301.¹⁹⁵ The circuit courts have also held that section 301 preemption is different from NLRA preemption, and have rarely found section 301 preemption unless federal law offered a similar remedy.¹⁹⁶

Two courts have expressly found that *Allis-Chalmers* calls for recognizing an interference cause of action under section 301, thereby implicitly finding *Allis-Chalmers* was not meant to establish field preemption without remedies under section 301. In *Hillard v. Dobelman*, a discharged employee brought an interference suit against her three supervisors because of their efforts to have her terminated allegedly without cause. In a per curiam opinion, the Eighth Circuit held that although the plaintiff styled her complaint as one of state law, the district court correctly refused to remand her claim to state court because “it had subject-matter jurisdiction over the action because Hillard had in fact stated a federal claim arising under section 301.”¹⁹⁷ The Eighth Circuit based

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¹⁹⁴. 471 U.S. at 220.
¹⁹⁵. Id. at 212 n.6. The author would like to thank Professor David Feller for calling the author's attention to the questionable language about dismissal in *Allis-Chalmers*. The Columbia Note, however, reads this sentence in *Allis-Chalmers* to mean that “preemption of state law by § 301 is similarly based on occupation” and further claims that *Lucas Flour* calls for the same conclusion. Supra note 19, at 1063 & nn.89-91. This is to ignore the conclusion in *Lucas Flour* that “in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.” 369 U.S. 95, 104 (1962) (emphasis added).
¹⁹⁶. Williams v. Caterpillar Tractor Co., 786 F.2d 928, 934 n.3 (9th Cir. 1986), aff'd on other grounds, 107 S. Ct. 2425 (1987) ("(t)he NLRA may constitute a fairly unique area of law" and thus "the preemption analysis applied under the NLRA should be distinguished from the approach taken with regard to § 301").
¹⁹⁷. See, e.g., Dougherty, 824 F.2d at 1483 (Gilmore, J., dissenting) (objects to finding interference claim preempted because Circuit does not permit § 301 claims against nonparties, and thus preemption grants "what effectively amounts to immunity" to interferer). While federal courts addressing § 301 preemption in removed cases have often discussed whether federal law offered a remedy comparable to state law (see cases cited id. at 933-35, n.3), the Supreme Court recently noted in dicta that finding a comparable remedy is not a prerequisite to finding § 301 preemption. Caterpillar, Inc. v. Williams, 107 S. Ct. 2425, 2429 n.4 (1987).
¹⁹⁸. 774 F.2d 886 (8th Cir. 1985) (per curiam).
¹⁹⁹. Id. at 887.
this conclusion on a broad view of Allis-Chalmers, arguing that a section 301 claim was present because both "the plaintiff's asserted right and defendants' alleged duty (not to interfere with Hillard's employment contract) arise from the collective-bargaining agreement."²⁰⁰

The second case holding that section 301 as interpreted in Allis-Chalmers provides an interference claim was International Union, UMWA v. Eastover Mining Company.²⁰¹ The Mine Workers had a contract with a provision stating that if the signatory employer, Eastover, sold the operation, the buyer would be required to assume the labor contract. The buyer, Virginia City Coal Company, induced Eastover to sell the business without requiring an assumption of the labor agreement. Relying on Allis-Chalmers, the court noted that "Virginia City's alleged liability, at least at a threshold level, has hinged on a judicial interpretation of that agreement. . . . Consequently, to hold that UMWA must try its case against Virginia City in state court would create the possibility of conflicting substantive interpretation [of the labor agreement] under competing legal systems."²⁰²

The Columbia Note argues that Eastover Mining is incorrect because Allis-Chalmers' fears of conflicting contract interpretations cannot be taken at face value, and must rather be narrowed to the facts before the Allis-Chalmers Court:

A close reading of Allis-Chalmers reveals that the Court was concerned with preemption of state laws that modify relationships created by collective bargaining agreements . . . . [T]he Court was not concerned merely with the interpretation of the terms by a state court. Indeed, state courts have concurrent jurisdiction with federal courts to enforce labor contracts under section 301 . . . . The Allis-Chalmers standard preempts when state law modifies the obligation created by the terms of the contract. No modification of contractual terms occurs when a state court resolves a tortious interference claim.²⁰³

There are three errors in this interpretation. First, if the interference action is deemed wholly one of state law, there is nothing which compels the state court to apply the federal law of labor contract interpretation in the interference action. Even more worrisome is the likelihood of simultaneous proceedings concerning the same alleged breach. Under the Columbia Note's approach, two separate suits based on the same set of

²⁰⁰. It can be argued that Hilliard's conclusion was dicta, since under the recent Supreme Court dicta in Caterpillar, 107 S. Ct. 2425, a claim can be removed under § 301 without a court finding that federal law provides a comparable remedy. However, prior to Caterpillar, lower courts believed themselves required to determine whether § 301 provided a comparable remedy. See, e.g., Williams v. Caterpillar Tractor, 786 F.2d at 933-35 n.3. Accordingly, Hilliard still has some persuasive power in assessing what constitutes a § 301 claim for relief.


²⁰². Id. at 1144.

²⁰³. Columbia Note, supra note 19, at 1063-64 (emphasis in original).
events might often end up proceeding simultaneously at the state and federal levels. Thus the concurrent jurisdiction of state courts to enforce contracts under section 301 does not alleviate concern over state courts interpreting contract terms when state courts alone address interference claims.  

If the Columbia Note reads *Allis-Chalmers* correctly as requiring that a state claim “modify the relationship” between the contracting parties, interference liability has this modifying effect. An example is the situation in *Eastover Mining*: would the buyer have insisted that Eastover Mining break its labor contract if the buyer had known that it would be held liable for back pay for Eastover employees and payments to the UMWA trust funds? Eastover would probably not have violated its contract unless there had been pressure from the buyer, and this fact alone is a modification of the relationship between Eastover and the UMWA. An interference remedy adds to the protections for a victim of a contract breach, which is especially significant in the labor context. The parties to a labor agreement fully expect that contract violations will occur, and devote special attention to enforcement mechanisms such as grievance and arbitration procedures. Thus while an interference remedy does not change the meaning of the words in the contract, the additional protection it gives the victim of a breach makes for a significant change in the relationship of the contracting parties.

The Columbia Note’s third error is to argue that *Allis-Chalmers* calls for preemption only if state remedies modify the contracting party’s duties. This argument parallels the rejected contention of the state court in *Allis-Chalmers*. The state court argued the bad faith tort was independent of the contract: the tort did not alter the employer’s contractual duties, but rather merely added an additional duty. The Court appeared to reject this analysis because the contract could be read as containing the same implied duties as the tort imposed, and it was for federal law to determine in the first instance if such implied duties existed. The Court seemed to say that so long as contract interpretation

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204. As in *Wilkes-Barre* and *Eastover Mining*, plaintiffs are likely to sue both the contracting party in breach and the interferer. Even if the plaintiff brought both claims in state court, the contracting party defendant could always remove the claim against it to federal court, and might well have incentives to do so in (1) avoiding more liberal state standards or procedures granting a jury trial to plaintiff, (2) desiring the speedier resolution which the federal courts often offer, or (3) avoiding injunctive relief because of the applicability of the Norris-LaGuardia Act in federal courts, whereas some states lack “little Norris-LaGuardia Acts.”

205. This liability is likely to be large, considering that in most takeover situations, the proportion of the seller’s employees rehired is likely to be less than 50%. See supra note 10.

206. See Feller, supra note 62, at 742 (“the enforcement mechanism, then, is the essence of the industrial collective bargaining agreement”). See generally id. at 740-55.

207. The Court stated:

[T]hat independence does not suffice to avoid the preemptive effect of § 301. The assumption that the labor contract creates no implied rights is not one that state law may make.
might be involved, it was a matter for section 301, and that this would be true even if the tort did not actually impose any duties beyond what the contract did by implication. Under *Allis-Chalmers*, then, section 301 preemption does not merely affect those state law claims which change the nature of the parties' duties to one another.

A broad view of *Allis-Chalmers* is further justified by the Court's remarks about the conflict between state tort liability and "the central role of arbitration in our 'system of industrial self-government.'" This conflict is equally present where tortious interference is involved, because a court will not compel the interferer to arbitrate under an arbitration agreement to which it is not party. However, if the court interprets section 301 to allow the joining of the interference suit with the breach of contract claim in federal court, then the court can order the interference suit stayed until an arbitration takes place between the parties to the arbitration agreement. This outcome, which is exactly the outcome in *Wilkes-Barre*, demonstrates the value of addressing interference claims under section 301 rather than under state law.

VI

ACADEMIC CRITIQUES OF THE INTERFERENCE TORT

The academic analysis of the interference cause of action provides another possible source of guidance as to whether section 301 should encompass this claim. While the state courts have expanded the reach of the interference tort, there has been significant academic backlash. Some of this criticism has focused on the unsightly historical origins of the independent tort of interference with contract: actions by one employer against another for "stealing" a servant. Certainly in the labor field, the history of interference claims is not much prettier. Prior to the passage of the NLRA, unions were routinely sued for interfering with an employer's contracts. Rather, it is a question of federal contract interpretation whether there was an obligation under this labor contract to provide payments in a timely manner.

471 U.S. at 215.

208. *Id.* at 219 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960)).

209. John Wiley & Sons v. Livingston, 376 U.S. 543, 547 (1964) ("The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.").


211. Dobbs, *Tortious Interference With Contractual Relationships*, 34 ARK. L. REV. 335, 336 (1980) (noting its origins in "a repressive scheme of compulsory labor imposed by the feudal powers of the 14th century," author comments that "one would not expect such an authoritarian principle to commend itself to a free society"); see also *Note, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tor*, 93 HARV. L. REV. 1510 (1980).
with individual employment contracts between strikebreakers and the employer, or with commercial contracts between the strike-bound employer and its customers or suppliers.\textsuperscript{212} However, modern courts have tended to find this application of the tort preempted by the NLRA, as the scope of NLRA preemption has grown over the years.\textsuperscript{213} In any event, this sort of \textit{ad hominem} argument against interference liability has apparently carried no weight within this nation's judiciary.

Another criticism of the tort is based on efficient breach theory: courts should avoid placing burdens on contract breaches because such breaches reflect the fact that there is a more efficient alternative open to the breacher.\textsuperscript{214} However, the market model underlying efficient breach theory is utterly at odds with the nature of the labor contract. A labor contract bears no resemblance to the idealized contract in Justice Holmes' aphorism that "[a] duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."\textsuperscript{215} Employers cannot breach their labor agreement and then shop among unions for a better deal, the way they might interact with suppliers or customers. Many an employer no doubt could prove it economically efficient to dispense with a union contract, but federal law refuses to sanction an employer flexing its market power, through firing and blacklisting union members in order to achieve an efficient breach. In short, criticisms of interference based on efficient breach theory are not applicable to the section 301 context.

Finally, some in academia have argued that the uncertain confines of interference liability call for dismantling this tort.\textsuperscript{216} Similarly, the Columbia Note expresses the fear that federal courts under section 301 would be rudderless: "[U]nlike areas in which rights of action are implied to enforce statutorily defined obligations, the courts would themselves have to develop the parameters of the duties imposed by the

\textsuperscript{212} W. Prosser & P. Keeton, \textit{supra} note 3, § 129 at 1002, and § 130 at 1026-27.

\textsuperscript{213} \textit{Id.} at 1027; see International Bhd. of Teamsters, Local 20 v. Morton, 377 U.S. 252 (1964) (employer may not hold union liable under state law for NLRA-protected peaceful picketing when customer of employer induced to cease doing business with employer).

\textsuperscript{214} See, e.g., Dobbs, \textit{supra} note 211, at 360-61; Perlman, \textit{Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine}, 49 U. Chi. L. Rev. 61, 79-85 (contending that interference should only be actionable where independently unlawful means of interference used). Perlman states that the concern with the tort's inefficiency is less pronounced in the employment context, given the absence of pure competition in the employment market, and the presence of unusually high transaction costs in enforcing such contracts. \textit{Id.} at 85-86. Thus, he makes an exception to his insistence on unlawful means where a third party has induced an employer to terminate its contract with an employee through lawful economic pressure on the employer. \textit{Id.} at 115-18.

\textsuperscript{215} O. Holmes, \textit{The Path of the Law}, in \textit{Collected Legal Papers} 167, 175 (1920), cited in Dobbs, \textit{supra} note 211, at 360 n.91.

\textsuperscript{216} Dobbs, \textit{supra} note 211, at 346 ("the tort remains an unknown tort whose rules and contours are not, and cannot be, described by law. It is hard not to recall Kafka's book, \textit{The Trial}."); Perlman, \textit{supra} note 214, at 61, 64.
tort." However, the Supreme Court answered a similar argument in *Lincoln Mills* by indicating its faith in "judicial inventiveness," guided by the lessons of other federal labor laws and state law. Federal courts have much experience with the interference tort through diversity actions, including actions based on labor contracts. While state courts disagree on important questions, such as what mental state is required for liability and when interference is "privileged," there is now widespread acceptance of the general rules of interference liability. Given the doctrinal uncertainty and flexibility which characterizes much of the law the federal courts handle, the doctrinal problems posed by interference liability do not seem significant enough to prevent recognition of an interference cause of action under section 301.

VII
PRactical Concerns

The Supreme Court has acknowledged that policy concerns—particularly those of judicial administration—impact its decision on recognizing an implied cause of action. One risk is that acceptance of an interference cause of action would swell the number of section 301 suits. However, there are three compelling reasons why it is doubtful that there would be a significant increase in the federal courts' workload. First, several elements of this cause of action provide safeguards against frivolous suits. The plaintiff has an enormous burden of proof—namely, showing that the defendant acted with the intention to interfere with the contract and without "justification" or "privilege." Second, the courts are likely to avoid reaching the merits of interference claims where the labor contract provides for binding arbitration. Third, the courts will dismiss some interference suits because of the role of the National Labor Relations Board.

Interference liability requires that the defendant "must have either desired to bring about the harm to the plaintiff or have known that this result was substantially certain to be produced by his conduct." The plaintiff therefore must show that "the actor [has] knowledge of the contract with which he is interfering." In many states plaintiffs have the

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217. Columbia Note, supra note 19, at 1059-60.
218. 353 U.S. at 457.
220. *Note, supra note 210, at 1116-17.
221. Obvious examples of doctrinal uncertainty include the questions of the duty of fair representation, unreasonable search and seizure, libel, and the definition of pornography.
223. *Restatement (Second) of Torts*, Introductory Note to Chapter 37 at 5.
224. *Id.* at § 766, comment i, at 11.
burden of proving this knowledge in order to establish a prima facie case.225 This is a considerable burden, considering that the proof of such knowledge necessarily lies in the defendant's head. In several labor cases, this intentionality requirement has prevented the plaintiff from proceeding.226

If, however, the plaintiff gets past the intentionality stumbling block, she still must show that the defendant's interference was without justification or was unprivileged. The Restatement (Second) uses the term "improper" rather than "privilege," and suggests a flexible balancing test of the relative social interests served by the plaintiff's contract and the defendant's activity.227 The authorities are divided on whether the plaintiff or defendant bears the formal burden of proof on the question of justification,228 but the justification issue is usually central to a plaintiff's interference case. Where the lack of justification is obvious—for example where the defendant interfered by such unlawful means as violence or fraud—the law usually provides a remedy for this kind of behavior independent of the interference tort, thus making an interference claim unnecessary. In the more typical interference suit, where the defendant's interference is achieved through lawful means, a glance at the reported cases shows plaintiffs losing far more often than winning.

Plaintiffs' difficulties are revealed in a brief review of a few interference cases involving labor relations. The most common setting where a "nonparty" induces a labor contract breach is where a company supervisor causes the discharge of an employee without just cause.229 However, the law grants a supervisor a broad privilege to interfere in her em-

226. See, e.g., Province v. Cleveland Press Publishing Co., 787 F.2d 1047, 1056 (6th Cir. 1986) (employees unsuccessful in interference claim against successor employer because unable to establish knowledge of the labor agreement on the successor's part).
227. 4 Restatement (Second) of Torts § 767 & comment g.
ployer's contracts with others. Some states hold this privilege unavailing where the defendant acted with actual "malice," in the sense of an improper motive; a few others will ignore the privilege when there is both ill will and a managerial action which is contrary to the best interests of the corporation. However, even these softened versions of the manager's privilege are problematic for most plaintiffs. Supervisors in unionized enterprises will tend not to openly express ill will towards an employee when they consider the negative effects of such comments on an arbitrator's evaluation of whether the employee's discharge was for just cause. Moreover, courts are extremely reluctant to second-guess a manager's assessment of what is in the company's best interests.

Free speech is another privilege which poses an obstacle to potential plaintiffs. In *Local 472, United Association of Journeymen Plumbers v. Georgia Power Co.*, an international union responded to an employer's complaints about Local 472 by transferring the employer's workforce into another local's jurisdiction. The court found that Local 472's interference claim stated a claim for relief under section 301, but held that a federal common law privilege protected the employer and international union:

> In this case, each of the defendants had economic interests at stake. . . . The defendants expressed their concerns to each other . . . In our view, these were reasonable and proper actions. There must exist open lines of communication between labor and management. The free exchange of opinions, however harsh or one-sided, is essential to the smooth functioning of relations between labor and management. Here, Georgia Power Company and the contractors believed that Local 472 was unwilling or incapable of correcting its internal management problems. Their complaints to the International were an effort to alleviate difficulties at the local level; which, if unresolved, could have adversely affected all of the defendants. Such communications must be permitted . . . [a]s a matter of law . . .

Obviously, the *Georgia Power* rationale could be subject to expansive interpretation, given that most interference with labor contracts will in-

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230. See, e.g., *Mendelson v. Blatz Brewing Co.*, 101 N.W.2d 805 (Wis. 1960) (fired employee may pursue action against corporate executive where employee alleges that executive's motive was to give the job to executive's son). *Compare Swager, 77 Ill. 2d at 191, 395 N.E.2d at 928 (rejecting an exception to managerial privilege where managerial action allegedly not taken "in good faith," for this exception "would quickly swallow the rule itself").


234. *Id.* at 727-28.
volve defendants acting in their own economic self-interest and interfering via written and oral communications.

Other actions which courts have held privileged under state law include a parent corporation’s interference in its subsidiary’s contracts in order to protect its investment,\(^2\)\(^3\)\(^5\) interference by an international union in its local’s contracts,\(^2\)\(^3\)\(^6\) and interference by attorneys in their clients’ contracts.\(^2\)\(^3\)\(^7\) Accordingly, federal courts relying on state law to formulate a common law of interference are likely to leave only narrow circumstances where interference will be unprivileged.

The second reason interference claims will probably add little to federal court workloads is that the common law of section 301 is characterized by extreme deference to arbitration.\(^2\)\(^3\)\(^8\) Accordingly, where the interference plaintiff has not taken advantage of a contract’s arbitration clause, courts may stay the interference action pending arbitration, following Wilkes-Barre.\(^2\)\(^3\)\(^9\) Moreover, where the arbitrator has ruled against an interference plaintiff, courts have refused to reexamine the merits of the contractual dispute.\(^2\)\(^4\)\(^0\) Where an arbitrator ruled in an employee’s favor, but awarded less in damages than he desired, a court refused to allow the employee to pursue the third party for the balance of monies sought.\(^2\)\(^4\)\(^1\) Thus, even where interference is seen as a section 301 claim, it will only be in unusual circumstances that a federal court rather than an arbitrator will address the merits of the labor dispute.\(^2\)\(^4\)\(^2\)


\(^{237}\) See, e.g., Los Angeles Airways v. Davis, 687 F.2d 321 (9th Cir. 1982) (applying California law, upholds summary judgment for defendant attorney; holds that privilege protects an advisor whose primary motive was to further her own interests, so long as advisor also motivated in part to benefit her principal).


\(^{239}\) 674 F.2d at 383.

\(^{240}\) Larry v. Penn Truck Aids, Inc., 567 F. Supp. 1410, 1415 (E.D. Pa. 1983) (where no showing of breach of duty of fair representation, arbitration decision against plaintiff given collateral estoppel effect under § 301). Contrast this to the results where interference suits have been brought under state law: Sullivan v. American Airlines, 613 F. Supp. 226, 230-32 (S.D.N.Y. 1985) (gives collateral estoppel effect to arbitrator’s decision finding that third party’s charges against employee which led to his firing were true); Kobielnik v. Union Carbide Corp., 110 L.R.R.M. (BNA) 2478 (E.D. Pa. 1981) (contra on similar facts, but suggesting that result would be different under § 301).


\(^{242}\) Such circumstances might include (1) contracts which do not provide for binding arbitra-
The third barrier to proliferation of interference cases is the role of the NLRB. Where courts have viewed interference claims as matters of state law, they have frequently found such claims preempted by the NLRA. For example, the Ninth Circuit held preempted a suit alleging that a management consultant disrupted a union’s long-peaceful relationship with the employer because the consultant’s actions were arguably prohibited under section 8(a)(5) of the NLRA.

One of the major exceptions to the extremely broad reach of NLRA preemption is that established in Smith v. Evening News Association—namely, that section 301 actions alleging breach of contract are not preempted by the NLRA. However, subsequent to Evening News courts have found opportunities to defer to the NLRB despite an allegation of a contract breach. For example, the Ninth Circuit maintains there are cases “where deference to the Board’s expertise requires recognition of its primary jurisdiction notwithstanding that the suit is based on section 301.” This category includes cases raising questions of representation and appropriate bargaining units. A court has also declined the exercise of section 301 jurisdiction where the plaintiff alleged antiunion discrimination as a contract violation, with the court stating that an unfair labor practice proceeding should be pursued instead.

In Amoco Oil Co. v. Local 99, IBEW, the court declined to exercise section 301 common law authority against a nonparty because of NLRA occupation of the field. Amoco sued several unions for picketing Amoco in order to persuade it to cease doing business with nonunion

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244. Lumber Prod. Indus. Workers v. West Coast Indus. Relations Ass’n, 775 F.2d 1042, 1047-49 (9th Cir. 1985).


248. Buscemi v. McDonnell Douglas, 736 F.2d 1348, 1350 (9th Cir. 1984) (court construes state law wrongful discharge claim as within § 301, but finds that “deference to the ‘exclusive competence’ of the NLRB was proper” with regard to retaliatory discharge allegations).

subcontractors. The suit alleged a section 301 common law claim against the defendant unions for allegedly inducing Amoco employees to breach the no-strike clause in the Amoco labor agreement. The court held that the secondary boycott provisions of the NLRA and section 303 of the LMRA occupied the field and left no room for a federal common law remedy. This case suggests that federal courts will decline to exercise section 301 common law authority over interference claims where the conduct complained of is also an unfair labor practice under the NLRA. For these reasons, any fear of federal courts being overwhelmed by a plethora of interference suits is not justified.

CONCLUSION

Lincoln Mills discerned a congressional directive to develop a federal common law of labor contracts. Denying relief under section 301 merely because the defendant is not a party to the labor agreement ignores the common law tradition of providing remedies where wrongs have been committed. The key sources of guidance for section 301 common law—state law and other federal labor laws—have all recognized an interference cause of action or its analogue. While interference has its origins in tort, the common law of section 301 has already recognized the decline of the tort-contract distinction in modern law.

Decisions subsequent to Lincoln Mills have affirmed the need to read section 301 broadly, especially where there is a threat of divergent results coming from state and federal courts in interpreting labor agreements. Forcing interference suits to proceed in state courts, while the same contract breach is litigated simultaneously before an arbitrator or in federal court, impinges too greatly upon the national labor policy of uniformity of contract interpretation.

Finally, an interference cause of action would serve the legislative intent of encouraging compliance with labor contracts. There can be no doubt that a contracting party is less likely to breach an agreement when outsiders are not pressuring it to do so. For these reasons, the conflict between the federal circuits should be resolved in favor of recognizing a section 301 cause of action for interference with contract.

250. Section 8(b)(4)(B) makes it unlawful for a union to "induce or encourage any individual employed by any person . . . to engage in, a strike . . . where . . . an object thereof is . . . (B) forcing or requiring any person to . . . cease doing business with any other person." 29 U.S.C. § 158(b)(4)(B) (1982).