

OUTSOURCING BENEFICIARIES: CONTRACT
AND TORT STRATEGIES FOR IMPROVING
CONDITIONS IN THE GLOBAL GARMENT
INDUSTRY

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OUTSOURCING BENEFICIARIES: CONTRACT AND TORT STRATEGIES FOR IMPROVING CONDITIONS IN THE GLOBAL GARMENT INDUSTRY

Allie Robbins*

ABSTRACT

In April 2018, the United States Supreme Court found that the Alien Tort Statute does not permit plaintiffs to bring claims in U.S. courts against foreign corporations for human rights abuses.¹ With a primary area of redress closed off, victims of human rights abuses should look to traditional tort and contract principles in order to obtain justice for workers throughout the global garment industry.

For decades, workers and worker advocacy organizations have brought claims in U.S. courts in an effort to hold brands accountable for conditions in factories globally. This Article provides an overview of some of those cases, as well as a recommendation for the use of contract and tort doctrines as tools to uphold workers' rights throughout the supply chain. With respect to contract doctrine, advocates should look to the promises brands make when they enter into licensing and purchasing agreements with colleges, universities and cities. Additionally, advocates should explore the exceptions to the rule that employers are not liable for the conduct of independent contractors, and specifically render the upholding of workers' rights in the global garment industry a non-delegable duty in line with established tort doctrine. The Article also looks at the effectiveness of free trade agreements at holding brands legally accountable for worker rights violations. Ultimately, the Article concludes that only concerted effort on multiple fronts—organizing efforts, litigation efforts, and legislative efforts—will achieve the goal of

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¹ *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1390 (2018).

holding multinational brands primarily responsible for working conditions throughout the supply chain.

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INTRODUCTION

Workers, organizers, and advocates should rethink the use of traditional contract and tort doctrines to reframe their arguments for downstream brand accountability. Holding brands and retailers legally accountable for working conditions throughout global supply chains has been a difficult task. While corporate social responsibility efforts have expanded, corporate social responsibility relies on the good will and public relations efforts of for-profit multinational corporations. For more than two decades, multinational clothing corporations have claimed to use codes of conduct to combat illegal and inhumane working conditions in their supply chains.² These codes are written and adopted by the brands themselves.³ This model leaves enforcement entirely within the hands of the brands and outside of the justice system. Consequently, while codes of conduct have allowed brands to disclaim liability when problems have arisen, and have served as a useful public relations tool, they have not eradicated labor abuses in the garment industry.⁴

Addressing labor issues without an independent authority dedicated to combating illegal and inhumane practices throughout the global garment industry has been quite challenging. Access to Western courts has long been difficult for garment workers overseas, but creative lawyers continue to try.⁵ This Article argues that, while the Ninth Circuit in *Doe I v. Wal-Mart*⁶ made it harder for garment workers to sue multinational brands directly, it left open at least one avenue through which garment workers might access U.S. courts by using third-party beneficiary concepts found in contract doctrine.⁷ Additionally, this Article proposes an advocacy strategy modeled after the non-delegable duty tort exception to the vicarious liability doctrine. Finally, the Article explores the effectiveness of free trade agreements in protecting the rights of workers.

² See *infra* Part I.

³ W. Michael Hoffman, *Corporate Codes of Conduct and Reports on CSR & Sustainability*, BENTLEY UNIV. CENTER FOR BUSINESS ETHICS, <https://www.bentley.edu/centers/center-for-business-ethics/resources/codes-of-conduct>.

⁴ See *infra* Part I.

⁵ A recent example of this type of lawsuit is taking place in Ontario, Canada, where a class of workers is suing Canadian clothing brands for injuries suffered by workers in the 2013 Rana Plaza factory collapse in Bangladesh. *Rana Plaza*, ROCHON GENOVA, <http://www.rochongenova.com/Current-Cases/Rana-Plaza.shtml> (last visited Oct. 8, 2018). The case is set to be reviewed by the Ontario Court of Appeals in early 2018. See Email from Peter Jarvis to Allie Robbins (Aug. 4, 2017); see also *Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375 (Del. Super. Ct. 2016).

⁶ *Doe I v. Walmart Stores Inc.*, 572 F.3d 677 (9th Cir. 2009).

⁷ See *infra* Part II.

Part I of this Article provides a brief overview of the global garment industry and discusses the importance of holding brands legally accountable for working conditions throughout their supply chain. Part II discusses the challenges of bringing such litigation, demonstrated through recent case law. Part III proposes that litigation regarding the global garment industry is best served if it focuses on garment workers as intended third-party beneficiaries of the licensing and procurement agreements signed between brands and universities, and between brands and “sweat-free communities.” Part IV suggests the outsourcing of responsibility for working conditions should be deemed a non-delegable duty, despite the use of independent contractors, in line with current practices in tort law. Part V addresses why trade policy has not yet helped to improve working conditions in the global garment industry.

I. GLOBAL GARMENT INDUSTRY OVERVIEW

The supply chain in the global garment industry begins with growing, ginning, and trading cotton.⁸ It then moves into spinning, knitting or weaving, and dyeing.⁹ After that, a brand orders its apparel.¹⁰ At that stage, a cut-make-trim (“CMT”) factory manufactures the garments.¹¹ The factory then ships the garments to the brand, which distributes the clothing globally through its retail or online operations.¹² Sub-contracting is common, and each of these stages can occur in different countries.¹³ “Supply chains in the garment industry are long, complicated, and filled with middlemen and contractors. Often, the face of a major brand doesn’t even know where their products are made or where the materials to make them come from.”¹⁴ Decisions on where production occurs are based on sourcing requirements, fabric

⁸ HUM. RTS. WATCH, FOLLOW THE THREAD: THE NEED FOR SUPPLY CHAIN TRANSPARENCY IN THE GARMENT AND FOOTWEAR INDUSTRY 1 (2017), https://www.hrw.org/sites/default/files/report_pdf/wrdrtransparency0417_brochure_web_spreads_3.pdf.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Lina Stotz & Gillian Kane, *Facts on The Global Garment Industry*, CLEAN CLOTHES CAMPAIGN, <https://cleanclothes.org/resources/publications/factsheets/general-factsheet-garment-industry-february-2015.pdf> (last visited Oct. 15, 2018).

¹⁴ Kyle Jaeger, *This Chinese Factory is Tied to Ivanka Trump’s Brand*, ATTN: (Apr. 26, 2017), <https://www.atten.com/stories/16772/chinese-factory-tied-ivanka-trumps-brand>.

origin, and production volumes.¹⁵ These long, complicated supply chains have regularly provided plausible deniability for brands, allowing them to say that because they did not know their goods were being manufactured in a particular factory, they therefore cannot be held responsible for working conditions in that factory.¹⁶

The complex nature of these supply chains is precisely why it is critical brands be held accountable for working conditions wherever their goods are made. Without this accountability, workers are left vulnerable to middlemen who are not well-known or well-resourced and are therefore not susceptible to public pressure to maintain proper working conditions. Subcontracted factories operate within a very small profit margin; consequently, they cannot afford to pay workers living wages or create safe and healthy working environments if brands do not provide them with sufficient resources to do so.¹⁷

With relatively few large buyers headquartered in the global North and thousands of small apparel factories located primarily in the global South, the structure of the global apparel industry reflects an oligopsony—a structure where the buyers set prices and the factories, ultimately, take what they are offered. Apparel factories pressured to reduce costs in order to attract or keep production contracts—contracts that can easily be shifted among competing factories in

¹⁵ Florence Palpacuer, *Subcontracting Networks in the New York Garment Industry: Changing Characteristics in a Global Era*, in *FREE TRADE AND UNEVEN DEVELOPMENT: THE NORTH AMERICAN APPAREL INDUSTRY AFTER NAFTA* 53–73 (Gary Gereffi et al. eds., 2009).

¹⁶ For example, J.C. Penney denied that any of its clothes were made in the Rana Plaza factory in Bangladesh that collapsed in 2013. Maria Halkias, *J.C. Penney Says It Didn't Have Suppliers in Collapsed Bangladesh Factory*, *DALLAS NEWS* (Apr. 2015), <https://www.dallasnews.com/business/retail/2015/04/29/j.c.-penney-says-it-didnt-have-suppliers-in-collapsed-bangladesh-factory>. Yet, clothes manufactured there were labeled for sale in J.C. Penney stores. *Id.*

¹⁷ See, e.g., Jessica Goodheart, *Are Your Jeans Ethical?*, *CAP. & MAIN* (July 27, 2017), <https://capitalandmain.com/are-your-jeans-ethical-0727> (“But most apparel companies—DTLD included—do not own the factories that make their clothes. Many source their products from far-flung manufacturers and mills in a global supply chain that has historically been rife with labor and environmental problems. Being an ethical apparel firm is therefore a complex proposition, especially when you add to the equation fickle and price-sensitive consumers with a myriad of buying choices. Very few brands—if any—can claim to have fully minimized their environmental footprint while also guaranteeing living wages to workers from the cotton field to the factory floor.”).

different countries—only further intensify the “race to the bottom,” the phrase coined to describe this relentless search for lower and lower production costs.¹⁸

The vast web of contracted and sub-contracted factories in the global garment industry has made it difficult to achieve meaningful improvements in wages and working conditions.¹⁹ To transform the industry into one where workers’ rights are respected, brand involvement is critical. Despite some recent positive developments,²⁰ the garment industry remains synonymous with the term “sweatshop” for good reason. Workers’ rights concerns are present throughout the industry including health and safety problems,²¹ human rights issues,²² gender discrimination,²³ violations of freedom of association,²⁴ and low wages.²⁵ It is imperative that workers’ voices are heard and that brands are held legally accountable for the conditions that generate their profit. Permitting workers to sue brands in U.S. courts as intended third-party beneficiaries and prohibiting brands

¹⁸ SARAH ADLER-MILSTEIN & JOHN M. KLINE, *SEWING HOPE* 5–6 (Univ. of Cal. Press 2017) (quoting Robert J.S. Ross, *A Tale of Two Factories: Successful Resistance to Sweatshops and the Limits of Firefighting*, 4 LAB. STUD. J. 65, 66 (2006)).

¹⁹ *See id.*

²⁰ *See, e.g., Victory for Bangladesh Garment Workers*, GREEN AMERICA, <https://www.greenamerica.org/blog/victory-bangladesh-garment-workers>; Jack Mahoney, *2013: A Year in Victories for Garment Workers Worldwide*, INT’L UNION LEAGUE FOR BRAND RESPONSIBILITY, http://www.union-league.org/2013_victories; *Press Release: Victory for Uniqlo Garment Workers!*, WAR ON WANT (Jan. 12, 2017), <https://waronwant.org/media/victory-uniqlo-garment-workers>.

²¹ *See, e.g., Karen McVeigh, Cambodian Female Workers in Nike, Asics and Puma Factories Suffer Mass Faintings*, THE GUARDIAN (June 24, 2017), <https://www.theguardian.com/business/2017/jun/25/female-cambodian-garment-workers-mass-fainting>.

²² *See, e.g., Simon Denyer, Activists Investigating Ivanka Trump brands in China Arrested, Missing*, WASH. POST (May 31, 2017), https://www.washingtonpost.com/world/activists-investigating-ivanka-trump-brands-in-china-arrested-missing/2017/05/30/a6cb90f8-459e-11e7-b08b-1818ab401a7f_story.html?utm_term=.c22f9b1635a4.

²³ *See, e.g., Sirin Kale, The Women Who Make H&M’s Clothes Are Fired For Getting Pregnant*, VICE: BROADLY (May 24, 2016), https://broadly.vice.com/en_us/article/bmw993/women-making-hm-clothes-factory-fired-pregnant.

²⁴ *Bangladesh: Stop Persecuting Unions, Garment Workers*, HUM. RTS. WATCH (Feb. 15, 2017, 8:30 AM), <https://www.hrw.org/news/2017/02/15/bangladesh-stop-persecuting-unions-garment-workers>.

²⁵ Harpreet Kaur, *Low Wages, Unsafe Conditions and Harassment: Fashion Must Do More to Protect Female Workers*, GUARDIAN (Mar. 8, 2016, 4:59 AM), <https://www.theguardian.com/sustainable-business/2016/mar/08/fashion-industry-protect-women-unsafe-low-wages-harassment>.

from outsourcing their responsibility for working conditions will meet both of these objectives.²⁶

II. ENFORCEMENT: BLOCKED AVENUES OF REDRESS

Several attempts have been made in recent years to provide redress in U.S. courts for workers throughout global apparel supply chains. Those workers have faced a number of obstacles, both jurisdictional and substantive. These cases serve as important lessons for attorneys seeking to bring class action lawsuits in U.S. courts based on labor rights violations in other countries, both because they can provide insight into unsuccessful arguments, and also because they provide clues for what future arguments may be more successful.

A. Alien Tort Statute Limitations

Early litigation sought to hold multinational corporations accountable for conditions in their supply chain through the Alien Tort Statute (“ATS”).²⁷ The ATS was adopted in 1789 and states, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁸ In recent years, the Supreme Court has limited the scope of the ATS, thereby restricting opportunities for international plaintiffs to use the ATS to hold U.S. companies accountable for atrocities committed outside of the country. In *Kiobel v. Royal Dutch Petroleum*, the U.S. Supreme Court found a presumption against extraterritorial application of American law, where citizens of Nigeria alleged that Royal Dutch Petroleum was complicit in human rights abuses carried out by the Nigerian government.²⁹ The following year, “[i]n *Daimler AG v. Bauman*, the Supreme Court unanimously rejected an attempt by twenty-two Argentinian plaintiffs to sue the German automaker in California for the alleged role of its Argentinian subsidiary in the deaths, kidnappings, torture, and

²⁶ It should be noted that while this article focuses on garment factories outside of the United States, the problem of outsourcing and poor working conditions in garment factories also exists in the United States. Permitting workers from sub-contracted factories to sue as third-party beneficiaries will be helpful to workers in the United States as well. See, e.g., Charles Davis, ‘Made in America’: How Sweatshops Exploit Immigrants to Make Your Cheap Clothes, ATTN: (July 26, 2017), <https://www.attn.com/stories/18483/made-america-how-sweatshops-exploit-immigrants-make-your-clothes>.

²⁷ See, e.g., Terry Collingsworth, *Using the Alien Tort Claims Act to Introduce the Rule of Law to the Global Economy*, INT’L RTS. ADVOC., <http://iradvocates.org/sites/iradvocates.org/files/collingsworth220605.pdf> (last visited Oct. 8, 2018).

²⁸ Alien’s Action for Tort, 28 U.S.C. § 1350 (2018).

²⁹ *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124–25 (2013).

wrongful detention of certain of its employees during that country's notorious 'Dirty War.'³⁰ Citing *Kiobel*, Justice Ginsberg stated, "the transnational context of this dispute bears attention. This Court's recent precedents have rendered infirm plaintiffs' Alien Tort Statute and Torture Victim Protection Act claims."³¹

In October 2017, the Supreme Court heard another ATS case. The Court addressed the question of whether corporations are categorically excluded from the Alien Tort Statute, thus, completely foreclosing corporate liability under the ATS.³² The case originated in the Second Circuit, which found there was no corporate liability under the Alien Tort Statute.³³ In the Supreme Court case *Jesner v. Arab Bank*, plaintiffs alleged Arab Bank was responsible for terrorist attacks carried out by Hamas and other terrorist organizations in Israel and Palestine because the Bank processed financial transactions for these organizations through a New York bank.³⁴ Plaintiffs did not allege the Bank was directly involved in coordinating the terrorist attacks, but rather the Bank set the stage that made the attacks possible.³⁵ Similarly, garment workers argued brands should be held responsible for unlawful and unjust working conditions throughout the supply chain because the brands generate the financing scheme, and facilitate an environment in the global garment industry that encourages violations of workers' and human rights in service of profit.³⁶ In April 2018, the Supreme Court ruled "[f]oreign corporations [cannot] be defendants in suits for alleged human rights abuses under the Alien Tort Statute."³⁷ Thus, the ATS

³⁰ Vivek Krishnamurthy, *Daimler AG v. Bauman: In Latest ATS Decision, the Supreme Court Limits Jurisdiction of U.S. Courts over Multinational Corporations*, CORP. SOC. RESP. & L. (Jan. 18, 2014), <http://www.csrandthelaw.com/2014/01/18/daimler-ag-v-bauman-for-corporations-home-is-now-where-the-lawsuits-must-now-be/>.

³¹ *Daimler A.G. v. Bauman*, 571 U.S. 117, 119 (2014).

³² Adam Liptak, *Supreme Court to Weigh if Firms Can Be Sued in Human Rights Cases*, N.Y. TIMES (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/us/politics/supreme-court-human-rights-arab-bank-terrorism.html?_r=1.

³³ *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 151 (2d Cir. 2015).

³⁴ Liptak, *supra* note 32.

³⁵ *Id.*

³⁶ Nandita Raghuram, *Brands are a Lot More Responsible for Terrible Factory Conditions Than They Want You To Think*, RACKED (May 2, 2017), <https://www.racked.com/2017/5/2/15425728/factory-conditions-brands-los-angeles-worker>.

³⁷ Debra Cassens Weiss, *Supreme Court rules foreign corporations can't be sued for alleged abuses under alien tort law*, ABA J. (Apr. 24, 2018), http://www.abajournal.com/news/article/supreme_court_rules_foreign_corporations_cant_be_sued_for_alleged_abuses_un?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories#When:15:23:00Z.

can no longer be counted on as a mechanism for holding brands legally accountable for conditions in contract factories.

B. *False Advertising and RICO*

In 1998, a California resident sued Nike for false advertising; in *Kasky v. Nike, Inc.*, Mark Kasky alleged that Nike violated its Business and Professions Code when it misrepresented its labor practices in its Asian factories.³⁸ The California Supreme Court found that Nike's advertisements were commercial speech under the First Amendment, and thus could be regulated.³⁹

The U.S. Supreme Court granted certiorari but later dismissed the review as improvidently granted, in part for lack of standing, with six justices filing concurring and dissenting opinions.⁴⁰ The case settled before it could return to the lower court on remand for consideration of whether Nike's speech was misleading or in violation of the California statute. Nike agreed to pay \$1.5 million to the Fair Labor Association⁴¹ (of which it was a member).⁴² A 2004 ballot initiative in California "cut off Kasky-like claims by increasing the standing requirements for private plaintiffs."⁴³ No subsequent cases have been successful at using false advertising or misrepresentation to hold brands accountable for working conditions in their supply chains.⁴⁴

The other major litigation strategy relating to brand liability for working conditions throughout the global garment supply industry originated in a 2002 case against fifty-five retailers who produced garments in Saipan.⁴⁵ The plaintiffs brought claims under the Racketeer Influenced and Corrupt Organizations ("RICO") Act alleging retailers and manufacturers worked together to create the structure for

³⁸ *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

³⁹ *Id.* at 262.

⁴⁰ *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003).

⁴¹ The Fair Labor Association (FLA) is a monitoring agency developed as a result of the White House's Apparel Industry Partnership in the late 1990s. Several major brands serve on the FLA's board. *Board of Directors*, FAIR LAB. ASS'N, <http://www.fairlabor.org/about-us/board-directors> (last visited Oct. 8, 2018).

⁴² Debra Cohen Maryanov, Note, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397, 427–28 (2010).

⁴³ *Id.* at 428.

⁴⁴ See, e.g., *Barber v. Nestlé USA Inc.*, 154 F. Supp. 3d 954 (C.D. Cal. 2015).

⁴⁵ *Does I v. GAP, Inc.*, No. CV-01-0031, 2002 WL 1000068 (D.N. Mar. I. 2002).

sweatshop conditions in their manufacturing supply chain.⁴⁶ The litigation centered around a scheme to recruit workers from China, Bangladesh, Thailand, and the Philippines, force them to work in factories in the Northern Mariana Islands, and deprive them of their basic rights.⁴⁷ The court found that the plaintiffs developed a racketeering enterprise of retailers and manufacturers that directed and controlled individual factories.⁴⁸

After widespread reports in the media that generated negative publicity, the defendants eventually settled (in several waves). The settlements awarded financial compensation to the workers and also included the adoption of a code of conduct by the employers and retailers designed to ensure that the kinds of abuses that the plaintiffs alleged would not reoccur in the future.⁴⁹

The settlement also included a plan for independent monitoring.⁵⁰

The *GAP, Inc.* RICO case regarding factory workers in Saipan is viewed by many labor rights organizations as a significant victory in their fight to hold companies liable for the labor conditions of their downstream suppliers.⁵¹ “This situation is somewhat unique, however, due to Saipan’s relationship with the U.S. and the resultant application of U.S. federal labor laws. But the Saipan case does lend credence to the notion of a private right of action against U.S. companies for their overseas suppliers’ substandard labor conditions.”⁵² On the other hand, in a loss for workers and worker rights, the lawsuit may have led to the demise of the entire

⁴⁶ *Id.*

⁴⁷ Steven Greenhouse, *Suit Says 18 Companies Conspired to Violate Sweatshop Workers’ Civil Rights*, N.Y. TIMES (Jan. 14, 1999), <http://www.nytimes.com/1999/01/14/us/suit-says-18-companies-conspired-to-violate-sweatshop-workers-civil-rights.html>.

⁴⁸ Aaron J. Schindel & Jeremy Mittman, *Workers Abroad, Trouble at Home: Multinational Employers Face Growing Liability for Labor Violations of Overseas Suppliers*, 19 INT’L L. PRACTICUM 40, 43 (2006).

⁴⁹ *Id.*

⁵⁰ Robert Collier & Jenny Strasburg, *Clothiers Fold on Sweatshop Lawsuit/Saipan Workers To get Millions; Levi Holds Out*, SFGATE (Sept. 27, 2002, 4:00 AM), <http://www.sfgate.com/news/article/Clothiers-fold-on-sweatshop-lawsuit-Saipan-2766649.php>.

⁵¹ See Schindel & Mittman, *supra* note 48.

⁵² *Id.* at 43.

garment manufacturing industry in Saipan, which ceased to exist a decade after the lawsuit.⁵³

C. *Wal-Mart's Big Win*

While the ATS, false advertising, and RICO claims did not provide a clear solution for workers' rights issues throughout the global garment industry, one contract theory used in a case against Wal-Mart may provide the path forward for successful litigation. In *Doe I v. Wal-Mart Stores Inc.*, a group of workers from China, Bangladesh, Indonesia, Swaziland, and Nicaragua sued Wal-Mart for failing to comply with its code of conduct, the Standards for Suppliers (the "Standards").⁵⁴ The workers each worked for Wal-Mart's foreign suppliers, which sold goods to Wal-Mart Stores, Inc.⁵⁵ They brought claims based on four legal theories: "(1) Plaintiffs [were] third-party beneficiaries of the Standards contained in Wal-Mart's supply contracts; (2) Wal-Mart [was] Plaintiff's joint employer; (3) Wal-Mart negligently breached a duty to monitor the suppliers and protect Plaintiffs from the suppliers' working conditions; (4) Wal-Mart was unjustly enriched by Plaintiffs' mistreatment."⁵⁶

The Court spent the most time on two third-party beneficiary arguments—first, that Wal-Mart promised to monitor factory conditions, and secondly, that Wal-Mart promised factory conditions would comply with the Standards.⁵⁷ Plaintiffs argued that Wal-Mart's contract with its supplier factories provided that Wal-Mart would monitor the factories' compliance with the Standards; thus, the plaintiffs, as workers in those factories whose rights the Standards were designed to protect, were third-party beneficiaries of that promise.⁵⁸ The Court found, however, while Wal-Mart reserved a right to inspect its contract factories, it did not adopt an affirmative duty to inspect supplier facilities.⁵⁹ Thus, since no promise was made by Wal-Mart to its

⁵³ Haidee V. Eugenio, *Death of Saipan's Garment Industry Shatters Pinoys' Dreams*, GMA NEWS ONLINE (Apr. 27, 2009), <http://www.gmanetwork.com/news/news/content/158764/death-of-saipan-s-garment-industry-shatters-pinoys-dreams/story/>.

⁵⁴ *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 (9th Cir. 2009).

⁵⁵ *Id.* at 679–80.

⁵⁶ *Id.* at 681.

⁵⁷ *Id.* at 680.

⁵⁸ *Id.*

⁵⁹ *Id.* at 681–82 ("Plaintiffs rely on this language in the Standards: 'Wal-Mart will undertake affirmative measures, such as on-site inspection of production facilities, to implement and monitor said standards.' We agree with the district court that this language does not create a duty on the part of Wal-Mart to

contract factories that Wal-Mart would actually conduct inspections, Wal-Mart made no promise to the workers as third-party beneficiaries of any such promise.⁶⁰ Without a promise to monitor conditions in the factories, there could be no third party expected to benefit from such promise.

Alternatively, the plaintiffs argued that the supplier factories promised Wal-Mart they would maintain certain working conditions as outlined in the Standards, and, as such, the workers were third-party beneficiaries of that promise.⁶¹ “This theory fail[ed] because Wal-Mart was the promisee vis-à-vis the suppliers’ promises to follow the Standards, and Plaintiffs ha[d] not plausibly alleged a contractual duty on the part of Wal-Mart that would extend to Plaintiffs.”⁶² In this particular contract, Wal-Mart asked the supplier to promise to abide by the Standards and reserved the right to inspect the factory to monitor compliance.⁶³ Wal-Mart itself made no promises with regard to the working conditions; it was the supplier who promised to uphold lawful working conditions.⁶⁴ The Court found that since it was not Wal-Mart who made promises regarding the working conditions, Wal-Mart could not, therefore, have made any promises to the workers that they could seek to enforce as third-party beneficiaries. Therefore, the workers had no contract claims as third-party beneficiaries.⁶⁵

While the Wal-Mart court did not find a third-party beneficiary relationship in that case, the opinion provides opportunities for future plaintiffs to succeed.⁶⁶ Wal-

monitor the suppliers, and does not provide Plaintiffs a right of action against Wal-Mart as third-party beneficiaries. The language and structure of the agreement show that Wal-Mart reserved the right to inspect the suppliers, but did not adopt a duty to inspect them. The language on which Plaintiffs rely is found in a paragraph entitled ‘Right of Inspection,’ contained in a two-page section entitled ‘Standards for Suppliers.’ And after stating Wal-Mart’s intention to enforce the Standards through monitoring, the paragraph elaborates the potential consequences of a supplier’s failure to comply with the Standards—Wal-Mart may cancel orders and cease doing business with that supplier—but contains no comparable adverse consequences for Wal-Mart if Wal-Mart does not monitor that supplier. Because, as we view the supply contracts, Wal-Mart made no promise to monitor the suppliers, no such promise flows to Plaintiffs.”).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 682.

⁶³ *Id.* at 680.

⁶⁴ *Id.* at 682.

⁶⁵ *Id.*

⁶⁶ *Id.*

Mart was the promisee in this contractual relationship, and not the promisor, which opens the door for further exploration of the third-party beneficiary theory of holding brands accountable for conditions throughout the supply chain.⁶⁷ In agreements where brands make legally enforceable promises to licensors or purchasers regarding working conditions, the brands are the promisors, and the workers are intended third-party beneficiaries of those promises who could hold the brands legally accountable for the content of the promises.⁶⁸

The Court in *Wal-Mart* also rejected the plaintiffs' joint employer theory, finding that Wal-Mart did not exercise sufficient control over the day-to-day activities of its suppliers.⁶⁹ Although Wal-Mart contracted with suppliers regarding methods of production, quality of materials, and deadlines, these supply contract terms were insufficient to find Wal-Mart had immediate day-to-day control over the factories' workers; thus, there was no employment relationship between Wal-Mart and the plaintiffs.⁷⁰ The Court found no common law employment relationship between Wal-Mart as a purchaser, and its supplier employees, and thus held Wal-Mart was not the plaintiffs' employer in any sense.⁷¹

Next, the Court addressed plaintiffs' four negligence claims of "third-party beneficiary negligence, negligent retention of control, negligent undertaking, and common law negligence."⁷² The Court quickly rejected each claim, finding Wal-Mart owed the workers no duty and therefore had no legal obligation to the plaintiffs.⁷³ In a similar case in 2016, the Delaware Superior Court agreed Wal-Mart owed no duty to workers downstream in its supply chain.⁷⁴ There, it found that no duty was owed by J.C. Penney, The Children's Place, or Wal-Mart to the workers in

⁶⁷ See *infra* Part III.

⁶⁸ See *infra* Part III.

⁶⁹ *Wal-Mart*, 572 F.3d at 683.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 684.

⁷⁴ *Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375 (Del. Super. Ct. 2016).

the Rana Plaza factory in Bangladesh,⁷⁵ which collapsed in 2013, causing the death of more than 1,000 workers and the injury of 2,000 more.⁷⁶

Finally, the Court addressed the plaintiffs' claim "Wal-Mart was unjustly enriched at Plaintiffs' expense by profiting from relationships with suppliers that Wal-Mart knew were engaged in substandard labor practices."⁷⁷ The Court found that the relationship between Wal-Mart and the plaintiffs' claim was "too attenuated to support an unjust enrichment claim," as there was no employer-employee relationship, and no other prior relationship that would permit plaintiffs to "disgorge profits allegedly earned by Wal-Mart at Plaintiffs' expense."⁷⁸

The Ninth Circuit's rejection of so many claims chilled related litigation for a number of years. Advocates should revisit contract and tort claims, however, as *Doe I v. Wal-Mart* left open at least two courses of action.⁷⁹ Several attempts have been made over the past two decades to hold companies accountable for the language of their codes of conduct.⁸⁰ While positive settlements have occurred, most litigation has favored the corporations. It is important to learn from these cases and to attempt

⁷⁵ *Id.* A positive development to emerge from the tragedy of the Rana Plaza factory collapse was the creation of the legally binding Accord on Building and Fire Safety in Bangladesh, which was signed on May 15, 2013 and has 200 (primarily European) brand signatories. See ACCORD ON FIRE & BUILDING SAFETY IN BANGL., <http://bangladeshaccord.org/about/> (last visited Oct. 8, 2018). The Accord has conducted more than 1,800 factory inspections and has completed remediation at more than 400 of those factories. *Id.* In addition, hundreds of joint labor-management committees are being trained on basic building and fire safety. *Id.*; Mark Anner, *Binding Power: The Sourcing Squeeze, Workers' Rights, and Building Safety in Bangladesh Since Rana Plaza*, PENN STATE CENTER FOR GLOBAL WORKERS' RIGHTS (Mar. 22, 2018), <http://lser.la.psu.edu/gwr/documents/CGWR2017ResearchReportBindingPower.pdf>. Although the Accord has thus far focused exclusively on building and fire safety, it was recently renewed for an additional five years, with the additional pillar of upholding the freedom of association. See *2018 Accord on Fire and Building Safety in Bangladesh*, <http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf>. Unfortunately, the renewal is presently stayed by the Bangladesh High Court, which enacted the stay because the Accord was renewed without government permission. *Bangladesh High Court Stays New Accord Agreement*, FIBRE2FASHION (Oct. 18, 2017), <http://www.fibre2fashion.com/news/apparel-news/bangladesh-high-court-stays-new-accord-agreement-228601-newsdetails.htm>.

⁷⁶ *Rahaman v. J.C. Penney Corp.*, 2016 WL 2616375, at *1 (Del. Super. Ct. 2016).

⁷⁷ *Wal-Mart*, 572 F.3d at 684.

⁷⁸ *Id.* at 685.

⁷⁹ See *infra* Parts III and IV.

⁸⁰ See *infra* Part III.

a slightly new litigation strategy. A group of Indonesian workers producing for adidas America have done just that.⁸¹

III. WHEN BRANDS MAKE PROMISES: A WAY FORWARD THROUGH THIRD-PARTY BENEFICIARY DOCTRINE

A. *A Case Study: University of Wisconsin v. Adidas America*

Recently, a Wisconsin Court left open the possibility that garment workers could be third-party beneficiaries of a contract between a brand and the university that licensed its logo to that brand.⁸² In early 2011, the PT Kizone factory in Tangerang, Indonesia shut down abruptly and forced nearly 3,000 people out of work.⁸³ The owner of the factory left Indonesia for his native South Korea and did not pay workers legally mandated severance of over \$3 million.⁸⁴ Several well-known U.S. brands produced goods in the factory at the time including Nike, adidas America, and the Dallas Cowboys.⁸⁵ These brands were producing collegiate apparel at the factory,⁸⁶ and were, thus, subject to the codes of conduct embedded in licensing agreements with those universities, and monitored by the Worker Rights Consortium⁸⁷ (an independent monitoring agency with nearly 200 college and university affiliates).⁸⁸

Indonesia requires employers to pay substantial severance to workers in the event that a factory closes, or if workers otherwise lose their jobs through no fault of their own. It is important to understand the central role that mandatory severance plays in a country like Indonesia in protecting workers and their families. Indonesia has no unemployment insurance or other substantial safety-net programs. The purpose of mandatory severance is to play the role that social insurance programs play in wealthier countries like the United States. Workers

⁸¹ See *infra* Part III.

⁸² See *Board of Regents v. Adidas Am. Inc.*, No. 12CV2775, at 8 (Cir. Ct. Dane Cty. Jan. 15, 2013).

⁸³ Memorandum from Scott Nova, Exec. Dir., Worker Rights Consortium to Primary Contacts at WRC Affiliate Colleges and Universities (May 9, 2011) (on file with the Worker Rights Consortium).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *infra* Part III.B.

⁸⁸ See *infra* Part III.B.

also do not make nearly enough money to accumulate significant savings; the regular wage for workers at PT Kizone was about 60 cents an hour. Compliance with the severance requirement is therefore among the most important obligations of employers—because when workers are denied the severance they are legally due, they have nothing else to fall back on.⁸⁹

Lack of severance pay meant workers faced hunger, were unable to pay for their children's schooling, and had difficulty maintaining their homes.⁹⁰

Adidas initially accepted no responsibility for paying workers any part of the severance owed to them.⁹¹ The company claimed its relationship with PT Kizone ended prior to the factory shutdown and subsequent severance violations.⁹² That claim was false because adidas was producing collegiate apparel in the PT Kizone factory before it shut down.⁹³ Students from dozens of U.S. colleges and universities, organized by United Students Against Sweatshops, began pressuring university administrators to take action in response to adidas' unwillingness to pay severance.⁹⁴ Despite this pressure, more than a year after the factory closed, adidas had not contributed any funds to the severance money owed to workers.⁹⁵ Consequently, on July 13, 2012, the Board of Regents of the University of Wisconsin System filed a complaint against adidas America for failing to meet its obligations under its

⁸⁹ Nova, *supra* note 82.

⁹⁰ Memorandum from Scott Nova, Exec. Dir., Worker Rights Consortium & Jessica Champagne, Deputy Dir. for Strategy & Field Operations, Worker Rights Consortium to WRC Affiliate Colleges and Universities (Nov. 21, 2011) (on file with the Worker Rights Consortium); *see also* Memorandum from Scott Nova, Exec. Dir., Worker Rights Consortium & Jessica Champagne, Deputy Dir. for Strategy & Field Operations, Worker Rights Consortium to WRC Affiliate Colleges and Universities (Mar. 26, 2013) (on file with the Worker Rights Consortium).

⁹¹ Memorandum from Scott Nova, Exec. Dir., Worker Rights Consortium, Worker Rights Consortium to WRC Affiliate Colleges and Universities (July 26, 2011) (on file with the Worker Rights Consortium).

⁹² Memorandum from Scott Nova, Exec. Dir., Worker Rights Consortium & Jessica Champagne, Deputy Dir. for Strategy & Field Operations, Worker Rights Consortium to WRC Affiliate Colleges and Universities (Jan. 5, 2012) (on file with the Worker Rights Consortium).

⁹³ *Id.*

⁹⁴ *See* Lingran Kong & Mark Ortiz, *Victory in Nicaraguan Adidas Factory as Adidas Garment Workers Stage Global Protest*, UNITED STUDENTS AGAINST SWEATSHOPS (Nov. 8, 2013), <http://usas.org/tag/badidas/>.

⁹⁵ WORKER RIGHTS CONSORTIUM, WORKER RIGHTS CONSORTIUM REPORT RE PT KIZONE (INDONESIA) STATUS UPDATE 4 (2012).

licensing and sponsorship agreement to comply with Indonesian law and provide severance to the PT Kizone workers.⁹⁶

The union representing 75% of PT Kizone workers filed a motion to intervene in the lawsuit between the University of Wisconsin and adidas, which was supported by the University of Wisconsin and ultimately granted by the Dane County Circuit Court.⁹⁷ The Union alleged the “PT Kizone workers are third-party beneficiaries to the Sponsorship Agreement [between the University of Wisconsin and adidas] and, as such, have the independent right to enforce it.”⁹⁸ Echoing Wal-Mart’s argument in *Doe I v. Wal-Mart*,⁹⁹ adidas argued “the Sponsorship agreement [did] not create rights enforceable by PT Kizone workers . . . because PT Kizone’s agreement with adidas states that only PT Kizone was obligated to pay the workers.”¹⁰⁰ The court found those arguments were attempts to litigate the merits of the dispute, and were thus irrelevant to the motion to intervene.¹⁰¹

The case between the University of Wisconsin and adidas settled before the county court rendered a decision on the substantive issue of whether the PT Kizone workers were third-party beneficiaries of the licensing and sponsorship agreement between the University of Wisconsin and adidas.¹⁰² In a victory for student-worker solidarity, adidas paid out more than \$1 million to PT Kizone workers.¹⁰³

Doe I v. Wal-Mart highlights the power of student, and worker, organizing and activism, when carried out in conjunction with litigation. It demonstrates what is possible when brands are brought to court in the United States and held accountable

⁹⁶ Complaint for Declaratory Judgement at 3–5, Board of Regents v. Adidas Am. Inc., No. 12CV2775 (Cir. Ct. Dane Cty. Jan. 15, 2013).

⁹⁷ Decision and Order on Motion to Intervene at 8, Board of Regents v. Adidas Am. Inc., No. 12CV2775 (Cir. Ct. Dane Cty. Jan. 15, 2013).

⁹⁸ *Id.* at 2.

⁹⁹ See *Doe I v. Wal-Mart*, 572 F.3d 677, 682 (9th Cir. 2009) (“We therefore conclude that Plaintiffs have not stated a claim against Wal-Mart as third-party beneficiaries of any contractual duty owed by Wal-Mart, and we affirm the district court’s dismissal of the third-party beneficiary contract claim.”).

¹⁰⁰ Decision and Order on Motion to Intervene, *supra* note 97, at 2.

¹⁰¹ *Id.* at 3.

¹⁰² Stipulation and Order for Dismissal at 1–3, Board of Regents v. Adidas Am. Inc., No. 12CV2775 (Cir. Ct. Dane Cty. June 3, 2013).

¹⁰³ Letter from Scott Nova, Exec. Dir., Worker Rights Consortium & Jessica Champagne, Deputy Dir. for Strategy & Field Operations, Worker Rights Consortium to WRC Affiliate Colleges and Universities (Aug. 9, 2013) (on file with the Worker Rights Consortium).

for conditions in their supplier factories. Beyond that, however, it also provides a framework for future litigation in situations where garments are being produced in factories that are not only subject to brand codes of conduct, but also licensing and sale agreements with embedded codes of conduct, by which brands promise to abide.¹⁰⁴ In those instances, the brands are the promisors, promising to uphold workers' rights and legal standards. Those agreements have had the most success holding brands legally and publicly accountable for conditions in contract factories; thus, future litigation should focus on those contracts.

B. *The Promise of Procurement and Licensing Agreements*

Advocacy organizations have created model licensing agreement language, which is stronger and more comprehensive than many corporate codes of conduct, in an effort to ensure ethical labor conditions throughout the global garment supply chain.¹⁰⁵ In the 1990s, as the anti-sweatshop movement gained traction, activism coalesced on two fronts: at the local government level and on college and university campuses. The SweatFree Communities movement urges municipalities to adopt procurement policies that require vendors to commit to lawful and ethical practices throughout their global supply chains. The model SweatFree policy focuses on compliance with local laws at the site of production, the enactment of the International Labor Organization's 1998 Declaration on Fundamental Principles and Rights at Work,¹⁰⁶ and the payment of a living wage.¹⁰⁷ The movement has successfully lobbied for legislation that permits municipalities to procure products from the lowest *responsible* bidder, instead of requiring them to always use the bidder with the lowest price. To date, more than a dozen state and local governments have committed to SweatFree's procurement policy.¹⁰⁸

Municipalities that adopt SweatFree's procurement policies embed SweatFree's codes of conduct both into the request for proposals administered at the

¹⁰⁴ See *infra* Part III.B.

¹⁰⁵ See SWEATFREE PURCHASING CONSORTIUM, MODEL SWEATFREE PROCUREMENT REQUEST FOR PROPOSAL LANGUAGE AND PROCESS 27 (2013) [hereinafter SWEATFREE PURCHASING CONSORTIUM].

¹⁰⁶ The Declaration focuses on freedom of association, collective bargaining, employment discrimination, and forced and child labor. See *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, INT'L LAB. ORG., <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> (last visited Oct. 8, 2018).

¹⁰⁷ SWEATFREE PURCHASING CONSORTIUM, *supra* note 105.

¹⁰⁸ *Members*, SWEATFREE PURCHASING CONSORTIUM, buysweatfree.org/members (last visited Oct. 8, 2018).

beginning of the procurement process, and directly into the contracts municipalities sign with vendors.¹⁰⁹ Section 6(c) of the SweatFree Purchasing Consortium SweatFree Model Policy reads as follows:

Conditions of Contract Performance

After the department awards a contract, it must include the following conditions to ensure that contractors comply with this policy. A contractor must:

- (1) Comply with, and ensure that its subcontractors and commodity suppliers comply with, the labor standards under section 5 unless the contractor has:
 - (a) Stated that the contractor or its subcontractors do not have the present capacity to comply; and
 - (b) Proposed a plan to achieve full compliance.
- (2) Implement the plan that the contractor proposes to continue or improve compliance with labor standards under section 5. The contractor must update this plan annually during the term of the contract.
- (3) Implement proposed wage increases as provided by section 6(b)(2).
- (4) Report the lowest wages earned and benefits received by workers at all factories used by the contractor or subcontractors as disclosed under section 6(a)(2). The bidder should collect this data prior to submitting a bid or at a time the department specifies. The contractor must report to the department any changes to worker benefits or wages in any factory in its supply chain.
- (5) Pay a fee of one percent of the total amount of the contract to implement this policy. If the value of the contract is not known at the time of award, the department may estimate an initial payment and subsequent installments.
- (6) Cooperate with any monitoring, investigation, or educational effort by the department or its designee. A contractor must also ensure that its subcontractors cooperate with any monitoring, investigation, or educational program. Cooperation includes:
 - (a) unrestricted access to all factories and workers; and
 - (b) access to all records concerning those factories and workers.
- (7) Not create any false records related to wages, benefits, or labor standard compliance.

¹⁰⁹ *Sweatfree Purchasing Guide*, SWEATFREE PURCHASING CONSORTIUM (May 2011), http://buysweatfree.org/files/guide_to_sweatfree_procurement.pdf (last visited Oct. 15, 2018).

(8) Purchase the product under terms, including prices and delivery dates, which support and enable production of the product in a manner that is consistent with the labor standards in section 5.¹¹⁰

Thus, by agreeing to supply products to the municipality, the vendor (which could include major clothing brands such as Nike and adidas America) directly promises to abide by the language of the code of conduct. Accordingly, unlike in *Doe v. Wal-Mart*,¹¹¹ the brands are the promisors in these contracts with respect to maintaining working conditions at the factory level.

Third-party beneficiary doctrine expressly permits individuals who are not parties to a contract to sue to uphold a promise within that contract.¹¹² According to the *Restatement (Second) of Contracts*, which was cited by the Ninth Circuit in *Doe v. Wal-Mart*,¹¹³ “[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”¹¹⁴

Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.¹¹⁵

In *Wal-Mart*, the court found that the workers were not third-party beneficiaries to the contract between the company and its supplier factories “because Wal-Mart was the promisee vis-a-vis the suppliers’ promises to follow the Standards.”¹¹⁶ Further, the court stated “Plaintiffs’ allegations [we]re insufficient to support the conclusion that Wal-Mart and the suppliers intended for Plaintiffs to have a right of

¹¹⁰ SWEATFREE PURCHASING CONSORTIUM, SWEATFREE MODEL POLICY 10–11 (2012).

¹¹¹ *Doe I v. Wal-Mart Stores*, 572 F.3d 677, 685 (9th Cir. 2009).

¹¹² RESTATEMENT (SECOND) OF CONTRACTS, 14 Intro. Note (AM. LAW INST. 1981).

¹¹³ *Id.* at 681 (citing RESTATEMENT (SECOND) OF CONTRACTS § 304 (AM. LAW INST. 1981)).

¹¹⁴ *Id.*

¹¹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. LAW INST. 1981).

¹¹⁶ *Wal-Mart*, 572 F.3d at 682.

performance against Wal-Mart under the supply contracts.”¹¹⁷ Thus, the workers in Wal-Mart were not third-party beneficiaries because the court decided Wal-Mart was not a promisor, but the suppliers’ promisee.¹¹⁸ The court found that the suppliers promised Wal-Mart they would follow the Standards.¹¹⁹ Casting Wal-Mart as the promisee rather than the promisor took the onus off of the corporation and placed it on parties lower in the supply chain, making the suppliers carry the burden of maintaining ethical practices and allowing Wal-Mart to abdicate their responsibility. The suppliers, however, did not have sufficient capital to abide by the Standards because the company pushed for lower prices and increased production.¹²⁰

Conversely, sweat-free procurement policies place the onus on multinational corporations that create and profit from economic conditions throughout the global garment industry. In this scenario, it is the brands that are the promisors, promising municipalities they will abide by the code of conduct and uphold the rights of workers in their contract factories. Thus, the Court’s reasoning in *Wal-Mart* would be inapplicable in a lawsuit brought by a group of workers claiming to be third-party beneficiaries to the contract between a municipality and a vendor, and the case could be clearly distinguished.

The intent of municipalities in adopting these procurement policies has been to reduce the amount of public money used to purchase products made in factories that exploit their workers, and thereby improve working conditions in supplier factories.¹²¹ The SweatFree Purchasing Consortium, which was established in 2010 to organize and help enforce sweat-free purchasing policies in various municipalities, states:

[w]hen governments purchase products made in conditions that violate international and national labor standards, taxpayers’ dollars inadvertently increase the downward pressure on labor standards and wages, accelerating a global race to the bottom which undermines job security and erodes wellbeing everywhere

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 30–31.

¹²¹ *Id.* at 31.

While intended to ensure that tax dollars are not spent on products made in sweatshop conditions, sweatfree procurement can also help improve working conditions, strengthen working families and their communities, and create a more secure world

As it grows, the market for decent working conditions will create more qualified vendors and better workplaces for increasing numbers of workers.¹²²

Upholding safe and healthy conditions for workers in downstream contract factories is directly specified as the purpose for these contracts; thus, the argument that workers are intended third-party beneficiaries is strong. If there were no concerns for workers in factories throughout the supply chain, there would be no need for sweatfree procurement agreements.

The same argument can be made for licensing agreements between colleges and universities and the brands that produce their logo items. Collegiate sports licensing encompasses nearly \$4 billion of retail revenue annually.¹²³ Close to 200 colleges and universities have affiliated with the Worker Rights Consortium (WRC), a not-for-profit organization that monitors factories worldwide that produce goods for colleges and universities.¹²⁴ Affiliated universities are required to adopt a code of conduct by which brands agree to abide when they enter into licensing or sponsorship agreements.¹²⁵ The WRC's model code of conduct includes provisions governing wages and benefits, working hours, overtime compensation, child labor,

¹²² *Vision*, SWEATFREE PURCHASING CONSORTIUM, <http://buysweatfree.org/about> (last visited Oct. 8, 2018).

¹²³ Darren Heitner, *Sports Licensing Soars to \$698 Million in Royalty Revenue*, FORBES (June 17, 2014), <https://www.forbes.com/sites/darrenheitner/2014/06/17/sports-licensing-soars-to-698-million-in-royalty-revenue/#48c7c16a756b>.

¹²⁴ *Our Mission*, WORKER RTS. CONSORTIUM, <https://www.workersrights.org/mission/> (last visited Oct. 8, 2018).

¹²⁵ *Id.* These licensing agreements did not come about by accident. Early activism by United Students Against Sweatshops centered on pressuring brands to adopt their own codes of conduct. Then, finding that there was no way to know whether the codes of conduct were being upheld, students organized for factory disclosure, demanding that brands disclose the factories in which their clothes were being made every quarter. Still finding enforcement difficult, students and universities founded the Worker Rights Consortium and began requiring that the brands themselves make promises to uphold the conditions laid out in their codes of conduct.

forced labor, health and safety, nondiscrimination, harassment or abuse, freedom of association and collective bargaining, and women's rights.¹²⁶

Just as municipalities adopted SweatFree's procurement policies with contract factory workers in mind, colleges and universities adopted licensing codes of conduct to protect and uphold the rights of workers who manufacture their logo apparel.¹²⁷ This specific concern for working conditions demonstrates universities intend to give workers the benefit of the promised performance, thus, rendering the workers themselves third-party beneficiaries to the licensing agreements. The workers, therefore, have a legal right to enforce the codes of conduct that are included in the licensing agreements. Once again, the promisors, the party promising to uphold the provisions of the codes of conduct, are the brands. Thus, similar to sweatfree procurement contracts, these contracts can be distinguished from *Doe v. Wal-Mart*.

These types of licensing and purchasing agreements provide contract factory workers with the most direct path to holding multinational corporations legally responsible for their working conditions. Greater access to U.S. courts makes it more likely workers will receive due process and a chance at justice. While this model leaves out large portions of the garment industry, where factories are not producing for colleges or municipalities that have such agreements,¹²⁸ it will nevertheless have an industry-wide impact. If more entities that do business with brands adopt codes of conduct and embed those codes in their purchasing contracts, the gap between factories covered by such agreements, and those that are not will be diminished. After these codes of conduct are adopted, more workers will be able to seek redress for violations of their rights. As brands are held legally accountable, and fear future litigation, they will begin to set a floor for working conditions in supplier factories which complies with the terms of these codes of conduct. Since factories that produce goods for universities and municipalities also produce goods for other brands and

¹²⁶ *Model Code*, WORKER RTS. CONSORTIUM, <https://www.workersrights.org/code-of-conduct/> (last visited Oct. 8, 2018).

¹²⁷ See, e.g., *Code of Conduct*, UNIV. OF WIS.-MADISON, <https://licensing.wisc.edu/code-of-conduct/> (last visited Oct. 8, 2018) ("This Code and its enforcement were implemented to ensure that manufacturers of UW emblematic products respect workers' rights.").

¹²⁸ There was no collegiate apparel being made in the Rana Plaza factory in Bangladesh, for example, and all litigation in U.S. courts to date have failed to hold multinational corporations accountable for their role in creating the conditions that led to the factory's collapse. See, e.g., Leon Kaye, *U.S. Court Dismisses Rana Plaza Lawsuit*, TRIPLE PUNDIT (May 9, 2016), <https://www.triplepundit.com/2016/05/u-s-court-dismisses-rana-plaza-lawsuit/>.

retailers, and production shifts rapidly from factory to factory, conditions throughout the garment industry will be improved.

Without these arrangements, brands will continue to be able to push for lower prices, resulting in factories that try to push workers to do more with less, without accountability or concern for legal liability. Since factories produce for multiple brands and retailers, and sourcing changes every few months, the effects will be felt far beyond the number of SweatFree-types of agreements currently in place. Anytime poor working conditions are uncovered in a factory that produces collegiate apparel subject to a licensing agreement, changing those working conditions alters production factory-wide. For example, when workers are then producing for a non-collegiate licensee, conditions will remain improved. Focusing litigation on the legal enforceability of SweatFree-type licensing and procurement agreements will have a positive impact on working conditions worldwide.

C. *Evidentiary Issues: The Need to Keep Up Public Pressure*

Before a lawsuit is filed, evidence of potential liability needs to be collected. Even when promising their goods are made in factories with just and lawful working conditions, the bottom line for brands is profit. As such, transparency is not a priority, and brands are not inclined to readily provide information that might lead to legal liability. It is therefore critical that community groups, student groups, and individual consumers continue to pressure brands to disclose information about where their goods are made and be forthcoming about problems enforcing standards in their supply chain.

Even when brands take positive action in one instance, it does not necessarily follow that they will be proactive throughout their supply chain. In the *PT Kizone* case, Nike alerted the Worker Rights Consortium the factory had shut down and had failed to pay workers the severance they were legally obligated to pay.¹²⁹ Nike also contributed funds relatively quickly.¹³⁰ Yet at the end of 2015, Nike adopted the position that it would no longer allow the Worker Rights Consortium into its contract factories to assess working conditions.¹³¹ This stance became a major impediment as the WRC began to conduct an investigation of the Hansae Vietnam factory in

¹²⁹ Memorandum from Scott Nova, Exec. Dir., Worker Rights Consortium to WRC Affiliate Colleges and Universities (June 10, 2011) (on file with the Worker Rights Consortium).

¹³⁰ *Id.*

¹³¹ Memorandum from Scott Nova, Exec. Dir., Worker Rights Consortium to Colleagues at Workers Rights Consortium (Dec. 7, 2015) (on file with the Worker Rights Consortium).

October 2016.¹³² Despite not having access to the factory, the WRC conducted offsite interviews of factory workers and uncovered numerous Nike code of conduct violations including:

- “Verbal harassment of workers by managerial personnel, including yelling, swearing, and profane insults;
- Degrading restrictions on workers’ use of the factory toilets and harassment of workers attempting to use these facilities;
- Other forms of harassment and abuse, including forbidding employees from yawning at work and subjecting them to disciplinary action when they do so;
- Denial of sick leave, even when ordered by a doctor;
- Forced overtime and the use of fraudulent consent forms to conceal this practice;
- Management domination of the factory’s labor union, including the installation of the factory’s senior human resources manager as the union’s president;
- Discriminatory dismissal of pregnant workers; and
- Management practices—including excessive production quotas, relentless pressure on workers to meet these quotas, and failure to maintain safe temperature levels in factory buildings—that results in numerous and ongoing incidents of workers collapsing unconscious at their work stations.”¹³³

Although Nike did eventually permit the WRC to access the factory, it did only so as a result of significant pressure, and did not commit to permitting factory access in the future.¹³⁴ Instead, Nike began informing universities that they must replace the WRC’s Code of Conduct with Nike’s own code of conduct or it would no longer do business with them.¹³⁵ In response to Nike’s position regarding factory access and ongoing violations at the Hansae factory and others worldwide, student activists took

¹³² WORKER RIGHTS CONSORTIUM, WORKER RIGHTS CONSORTIUM ASSESSMENT OF HANSAE VIETNAM CO., LTD. 1 (2016).

¹³³ *Id.* at 2.

¹³⁴ WORKER RIGHTS CONSORTIUM, WORKER RIGHTS CONSORTIUM ASSESSMENT OF HANSAE VIETNAM CO., LTD. (VIETNAM) FINDINGS, RECOMMENDATIONS, STATUS UPDATE 2, 5 (2016).

¹³⁵ See, e.g., Madison Ashley, *President DeGioia Addresses Nike Labor Disputes*, THE HOYA (Apr. 19, 2016), <http://www.thehoya.com/president-degioia-addresses-nike-labor-disputes/>.

action on dozens of campuses that have licensing agreements with Nike.¹³⁶ A number of universities and university systems cut their contracts with Nike or permitted them to expire.¹³⁷ In July 2017, protests against Nike were held in fourteen U.S. cities from New York to California, and in countries worldwide.¹³⁸ On August 30, 2017, more than a year after Nike first refused to permit the WRC to conduct a factory investigation, a new protocol was announced between Nike and the Worker Rights Consortium, providing access for WRC investigations to factories in which Nike goods were being produced.¹³⁹ That agreement would not have happened without courageous organizing by workers and sustained pressure by student activists urging their universities to hold Nike accountable for this change in process. As a result of this incident, new licensing agreements are beginning to directly address independent monitoring access to factories and demand that brands make affirmative promises in this regard.¹⁴⁰

Consequently, this type of public outcry will keep brands moving towards accountability and encourage universities and municipalities to bring litigation if necessary. Without sustained organizing, Nike's statement that it does not permit access to factories for independent monitoring would have been the last word, and it would feel no obligation to step in and fix problems or work with monitoring groups. Similarly, universities and municipalities would feel no responsibility to assess their licensing and purchasing contracts and hold brands responsible for their contractual promises. From a litigation standpoint, without activism and on-the-ground organizing to connect workers to worker organizations, there would be no mechanism through which to collect evidence of wrongdoing and no forward

¹³⁶ *A Global Call to Action Against Nike*, UNITED STUDENTS AGAINST SWEATSHOPS (June 25, 2017), <http://usas.org/gdaynike/>.

¹³⁷ *Nike: Just Cut It, Nike Public Cut List*, NIKE SWEAT SHOPS (May 25, 2017), <https://nikesweatshops.org/2017/05/25/nike-public-cut-list/>.

¹³⁸ UNITED STUDENTS AGAINST SWEATSHOPS, *supra* note 136.

¹³⁹ Sarah Larimer, *Georgetown, Nike Reach Pact on Worker Conditions*, WASH. POST (Aug. 20, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/08/30/georgetown-nike-reach-pact-on-worker-conditions/?utm_term=.adc76e9f3a6d.

¹⁴⁰ In November 2017, the University of Washington signed a groundbreaking new licensing agreement with Nike that specifically requires Nike to permit the WRC access to inspect its supplier factories. Additionally, it mandates that Nike pull orders from any factory where workplace violations are discovered and remediation does not occur. Katherine Long, *New UW Contract with Nike That Allows Inspections of Overseas Factories is First of Its Kind*, SEATTLE TIMES (Nov. 8, 2017), <https://www.seattletimes.com/seattle-news/education/new-uw-contract-with-nike-that-allows-inspections-of-overseas-factories-is-first-of-its-kind/>.

momentum toward improved working conditions. Thus, progress can only be made with continued organizing on factory floors and on campuses, in conjunction with litigation.

IV. GARMENT PRODUCTION AS A NON-DELEGABLE DUTY

Another approach that may provide workers with an avenue for redress in U.S. courts is traditional tort vicarious liability doctrine. Utilizing vicarious liability doctrine, advocates can reframe the role of subcontracting in the propagation of sweatshop conditions. Vicarious liability doctrine recognizes the need for multiple actor liability to promote public policy objectives.¹⁴¹ Both state and federal governments could pass legislation prohibiting brands from outsourcing their responsibility for upholding lawful working conditions throughout their garment industry supply chains; thus, creating far-reaching implications for both domestic and foreign garment workers.¹⁴²

Vicarious liability doctrine prohibits the contracting out of responsibility for specific categories of activity. *Restatement (Second) of Torts* Section 409 states “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.”¹⁴³ Twenty exceptions follow this general rule, falling into three categories, laid out in the comments to Section 409.

In general, the exceptions may be said to fall into three very broad categories:
1. Negligence of the employer in selecting, instructing, or supervising the contractor. 2. Non-delegable duties of the employer, arising out of some relation

¹⁴¹ Vicarious liability doctrine holds third parties responsible for the acts of someone with whom they share a legal relationship, usually an employer/employee or agent relationship. See, e.g., Ellen S. Pryor, *Peculiar Risk in American Tort Law*, 38 PEPP. L. REV. 393 (2011); *Vicarious Liability/Respondeat Superior*, JUSTIA, <https://www.justia.com/injury/negligence-theory/vicarious-liability-respondeat-superior/> (last visited Jan. 14, 2019).

¹⁴² A state could pass legislation, for example, that prohibits any corporation incorporated or doing business in that state from delegating its duty to uphold safe and lawful working conditions in garment factories, while the federal government could regulate companies importing garments into the United States or doing business across state lines.

¹⁴³ RESTATEMENT (SECOND) OF TORTS § 409 (AM. LAW INST. 1965).

toward the public or the particular plaintiff. 3. Work which is specially, peculiarly, or 'inherently' dangerous.¹⁴⁴

The first exception, negligent selection of an independent contractor, is perhaps the most directly applicable to the global garment industry. Section 411 Negligence in Selection of Contractor states:

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons.¹⁴⁵

The factories employed by major brands do not have sufficient resources to produce garments in a manner that comports with the brands' codes of conduct or corporate social responsibility codes. In a 1977 case where a general contractor hired a subcontracted paving company that had limited insurance coverage and marginal capitalization, the Third Circuit found that hiring a financially irresponsible contractor can be a basis for finding that a principal negligently selected a contractor and is therefore liable for their actions.¹⁴⁶ As a policy point, the court stated, "in this case, as in any case in which a financially irresponsible contractor is hired, the choice of the party to bear the loss falls between the developer and the victim."¹⁴⁷ The court found that "in such a situation, we believe the goals of New Jersey tort law . . . would impel a New Jersey court to hold that the failure to engage a properly solvent or adequately insured subcontractor is a violation of the duty to obtain a competent independent contractor."¹⁴⁸

In 1993, the Third Circuit declined to extend this precedent, finding that such a rule would make it more difficult for a start-up contractor to enter a market, and would impose difficult obligations on employers to research the finances of their

¹⁴⁴ *Id.* § 409 cmt. b.

¹⁴⁵ *Id.* § 411.

¹⁴⁶ *Becker v. Interstate Properties*, 569 F.2d 1203, 1211–13 (3d Cir. 1977).

¹⁴⁷ *Id.* at 1210.

¹⁴⁸ *Id.* at 1209.

contractors.¹⁴⁹ But the situation of brands in the global garment industry can be distinguished. Garment brands fully understand the financially precarious nature of their contract factories.¹⁵⁰ In fact, the low prices multinational corporations pay to the factories are responsible for this perilous situation.¹⁵¹ Brands cannot claim either ignorance of the problem, or inability to determine the financial situation of the factories.¹⁵² As discussed in Part I, the global garment industry is an oligopsony.¹⁵³ The slim profit margins on which garment factories operate, and their subsequent inability to pay living wages and uphold health and safety standards, are a direct result of the low prices brands pay factories to manufacture garments in their name.¹⁵⁴ Therefore, not only are brands selecting contractors they know do not have the resources to abide by their codes of conduct and local laws, but by paying low prices, brands are directly creating the conditions for which they now try to abdicate their responsibility.

The *Restatement* specifically contemplates holding principals accountable when their contractors fail to comply with health and safety standards.¹⁵⁵ While the second category of exceptions to the general rule that principals are not liable for the

¹⁴⁹ Robinson v. Jiffy Exec. Limousine Co., 4 F.3d 237, 242–43 (3d Cir. 1993).

¹⁵⁰ Raghuram, *supra* note 36.

¹⁵¹ *Id.*

¹⁵² This is true within the United States as well:

There are sound reasons to believe that third-party liability will also be a cost-effective means of deterrence of FLSA violations. As noted above, labor contractors are quite often judgment proof. Moreover, user firms, intermediaries such as food and garment distributors, and retailers can often detect downstream wage and hour violations quite cheaply. In many instances, after all, it's a matter of simple arithmetic: in a simple user firm/contractor relationship the user firm could often tell from the cost of the contract and the number of work hours necessary whether the contractor can comply with the Act. Parties purchasing goods produced further down a supply chain could easily develop algorithms calculating the minimum cost for particular goods or services—tomatoes, t-shirts, nightly cleaning of a square foot of office space—that would ensure minimum wage payment, building in reasonable assumptions about intermediaries' costs and profit levels.

Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELY J. EMP & LAB. L. 1, 36–37 (2010).

¹⁵³ See *infra* Part I.

¹⁵⁴ Raghuram, *supra* note 36.

¹⁵⁵ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 13 (AM. LAW INST. 2000).

conduct of independent contractors primarily focuses on work done in public places, Section 424, “Precautions Required by Statute or Regulation,” states:

[O]ne who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.¹⁵⁶

Violating health and safety standards has serious ramifications inside and outside of factory walls. In addition to directly impacting the health and safety of garment workers themselves, poor conditions impact individuals outside the factory as well. Workers often come into contact with toxic chemicals and inadvertently bring them into their homes, causing the air and water in surrounding communities to become polluted with those chemicals.¹⁵⁷ Further, low wages devastate communities because residents cannot afford to frequent other businesses. Workplace illness impacts entire families, as sick workers need to be cared for and are eventually unable to earn income.¹⁵⁸ In many places, there is no safety net available if a worker is injured or killed. Consequently, workers, their families, and entire communities are negatively impacted when brands fail to ensure minimal health, safety, and wage standards are met. Thus, the second exception to principal liability for the acts of independent contractors can be utilized as well.

With respect to the third category of exceptions, Sections 416, 426, and 427A of the *Restatement (Second) of Torts* embody the essence of inherently dangerous activities. They read as follows:

§ 416 Work Dangerous in Absence of Special Precautions: One who employs an independent contractor to do work which the employer should recognize as likely

¹⁵⁶ RESTATEMENT (SECOND) OF TORTS § 424 (AM. LAW INST. 1965).

¹⁵⁷ See, e.g., Kathleen Webber, *The Environmental and Human Cost of Making a Pair of Jeans*, ECOWATCH, <https://www.ecowatch.com/environmental-cost-jeans-2544519658.html> (Mar. 8, 2018); Danielle LaRose, *To Dye For: Textile Processing's Global Impact*, CARMEN BUSQUETS (Apr. 12, 2017), <https://www.carmenbusquets.com/journal/post/fashion-dye-pollution>.

¹⁵⁸ See, e.g., Anjali Kamat, *We Are Nothing but Machines to Them*, THE GRIND, <https://slate.com/business/2016/12/bangladeshs-apparel-factories-still-have-appalling-worker-conditions.html> (Dec. 15, 2016); Md Atiqur Rahman & Md Mahfuzar Rahman, *Sickness and Treatment: A Situation Analysis Among the Garments Workers*, ANWER KHAN MOD. MED. C.J., <https://www.banglajol.info/index.php/AKMMCI/article/view/13678> (2013).

to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.¹⁵⁹

§ 427 Negligence as to Danger Inherent in the Work: One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.¹⁶⁰

§ 427A Work Involving Abnormally Dangerous Activity: One who employs an independent contractor to do work which the employer knows or has reason to know to involve an abnormally dangerous activity, is subject to liability to the same extent as the contractor for physical harm to others caused by the activity.¹⁶¹

Given the vast body of evidence regarding working conditions in factories worldwide, and the number of cases of serious illness, injury, and death that befall factory workers, it can be credibly claimed that participation in the global garment industry is an inherently dangerous activity. Therefore, brands should not be permitted to outsource responsibility for upholding health and safety conditions in contract factories. Although most often people think of blasting, excavation, construction, and ownership of wild animals as inherently dangerous, it is also dangerous to work with toxic materials and heavy machinery in sweltering factories for long hours without proper safety equipment.¹⁶²

¹⁵⁹ *Id.* § 416.

¹⁶⁰ *Id.* § 427.

¹⁶¹ *Id.* § 427A.

¹⁶²

[T]he factory jobs carried dangerous risks. Serious injuries and disabilities were nearly double among those who took the factory jobs, rising to 7 percent from about 4 percent. This risk rose with every month they stayed. The people we interviewed told us about exposure to chemical fumes and repetitive stress injuries.

Christopher Blattman & Stefan Dercon, *Everything we Knew About Sweatshops Was Wrong*, N.Y. TIMES (Apr. 27, 2017), https://www.nytimes.com/2017/04/27/opinion/do-sweatshops-lift-workers-out-of-poverty.html?_r=0.

If legislatures do not want litigation to wind its way through the judicial process, they can take immediate action to codify garment production as an inherently dangerous activity. Implementation of statutes that acknowledge the inherent dangers involved in garment production would prevent brands from being able to claim lack of responsibility for what happens in the factories producing their goods, and would prohibit the outsourcing of the obligation to create safe work environments. Thus, if brands are forbidden from outsourcing the responsibility for abiding by local laws and upholding codes of conduct to contract factories, they will be doing so in line with the public policy goals and tort principles laid out in the *Restatement* and adopted by courts nationwide.¹⁶³ Such legislation would have a tremendous impact, as brands would no longer be able to hide behind their

¹⁶³ “The genesis of the doctrine of abnormally dangerous activity was a desire to attribute costs to those who benefit from introducing an extraordinary risk of harm into the community.” Laura Hunter Dietz et al., *Rationale*, 57A AM. JUR. (SECOND) NEGLIGENCE § 393, NAT’L LEGAL RES. GROUP (2018). “The Restatement Second Torts rule requires a case-by-case analysis of whether strict liability should be imposed. The abstract propensities or properties of the particular substance involved is not determinative, but rather the defendant’s activity as a whole must be analyzed.” *Id.* § 394.

The Second and Third Restatements’ use of the phrase ‘abnormally dangerous’ is not meant to connote disapproval. The characterization of the risk level as unusually high, while relevant to liability, is not intended to suggest these activities are forbidden or ill advised. . . . The claim of a plaintiff suing on an abnormally dangerous activity theory is not predicated on the violation of a right to be free of injury flowing from a certain kind of conduct by the defendant. It is the damage done . . . that grounds the claim.

John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 761–62 (2016).

Courts increasingly have recognized that public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health. Enterprises engaged in hazardous activities, not their potential victims, are in the best position to know of or learn about potential risks and to act to minimize those risks.

Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 292 (1987). “Loss spreading, fairness, and safety incentive considerations point to the application of strict liability to other types of activities that are hazardous and meet the commercial hazard criterion but which, in the past, have been insulated from strict liability.” *Id.* at 310. Loss spreading has also been used to classify something as an abnormally dangerous activity. “In my opinion, a good reason to apply these principles, which is not mentioned in the majority opinion, is that the commercial transporter can spread the loss among his customers—who benefit from this extrahazardous use of the highways.” *Siegler v. Kulghlman*, 81 Wash. 2d 448 (1973); *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203 (1976).

subcontracted factories and would be prohibited from delegating their responsibility for the conditions under which their clothes are made.

V. THE POSSIBILITY OF LABOR PROTECTIONS IN FREE TRADE AGREEMENTS

The impact of export processing zones and free trade agreements on the global garment industry cannot be ignored. Since the 1970s, export-processing zones (or free trade zones) have proliferated worldwide.¹⁶⁴ Free trade zones are centers of production that are subject to special rules outlined by free trade agreements.¹⁶⁵ Incentives for brands to produce goods in export processing zones (EPZs) generally include:

duty-free imports of raw and intermediate materials and capital goods for export production, streamlining of government red tape, allowing “one-stop” shopping for permits and investment applications, flexibility with labour laws, exemptions from national legislation in some zones, generous, long-term tax concessions, such as waivers of value added tax, above average communications and infrastructure (compared to elsewhere in the host country) [and] sometimes utility and rental subsidies.¹⁶⁶

Further,

governments also seek to attract foreign investors to EPZs by offering them a loose regulatory framework for social and employment rights. In many countries this framework may simply mirror legislation and practice in the rest of the economy. In others, labour standards are lower and employment rights weaker in the EPZs.¹⁶⁷

Sometimes export processing zones are exempt from labor regulations that exist in the rest of the country, while other times worker rights legislation is simply not

¹⁶⁴ SARAH PERMAN ET AL., INT’L CONFEDERATION OF FREE TRADE UNIONS, BEHIND THE BRAND NAMES: WORKING CONDITIONS AND LABOUR RIGHTS IN EXPORT PROCESSING ZONES 4 (2004).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 6.

¹⁶⁷ *Id.* at 7.

enforced in the EPZ.¹⁶⁸ Further, many union organizing efforts are restricted within export processing zones.¹⁶⁹

Free trade agreements have played an important role in shaping the global garment industry. Since the early 1990s, the United States has entered into more than a dozen free trade agreements.¹⁷⁰ While the language regarding the protection of workers' rights has become stronger over time, enforcement remains elusive.¹⁷¹ In the original North American Free Trade Agreement (NAFTA), which was implemented in 1993, labor issues were relegated to a side agreement requiring each country to uphold its own labor laws.¹⁷² The only provision of NAFTA that included economic sanctions as a potential remedy required demonstration of a "persistent pattern of failure . . . to effectively enforce [a country's] occupational safety and health, child labor or minimum wage technical standards, where that failure is trade-related and covered by mutually recognized labor laws."¹⁷³ In the bilateral U.S.-Jordan trade agreement in 2001, labor issues were part of the main trade agreement, but each country must simply "not fail to effectively enforce its labor laws . . . in a manner affecting trade."¹⁷⁴ "However, in an exchange of letters between the USTR Robert Zoellick and Jordanian Ambassador Marwan Muasher before Congress considered the implementing legislation in 2001, the governments reportedly agreed to resolve any potential disputes without resorting to trade sanctions."¹⁷⁵ "Seven trade agreements with 12 different countries (Chile, Singapore, Australia, Morocco, Bahrain, Oman, and the six CAFTA-DR countries) include only one enforceable labor provision: each country 'shall not fail to effectively enforce its labor laws . . . in a manner affecting trade between the Parties.'"¹⁷⁶

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ MARY JANE BOLLE, CONG. RES. SERV., RS22823, OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS 2 (2016).

¹⁷¹ Celeste Drake, *U.S. Trade Policy Fails Workers*, AFL-CIO (June 26, 2017), <https://aflcio.org/2017/6/26/us-trade-policy-fails-workers>.

¹⁷² BOLLE, *supra* note 170.

¹⁷³ *Id.* at 2–3.

¹⁷⁴ *Id.* at 3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

On May 10, 2007, the U.S. agreed to trade deals with Colombia, Peru, Panama, and South Korea.¹⁷⁷ These agreements included labor enforcement provisions, which required each country to uphold the International Labor Organization's Declaration on Fundamental Principles and Rights at Work and its Followup,¹⁷⁸ and prohibit countries from lowering their own labor standards.¹⁷⁹ Additionally, it placed limits on prosecutorial and enforcement discretion, which prohibited countries from defending their failure to enforce labor laws "on the basis of resource limitations or decisions to prioritize other enforcement issues."¹⁸⁰ Although the language of labor enforcement in trade agreements has become stronger over time, global working conditions have not improved as a result, and bringing sanctions based on labor violations has proven difficult.¹⁸¹

The 2018 renegotiation of NAFTA may serve as a bellwether for determining the possible enforcement of labor protections through free trade agreements. Labor rights issues are at the forefront of discussion during these negotiations, with Canada and the U.S. pushing Mexico to raise wages, and Canada urging the U.S. to eliminate right-to-work laws.¹⁸² The AFL-CIO has proposed adding a new labor chapter to NAFTA with more than twenty new recommendations.¹⁸³ The recommendations are as follows:

- a. To improve compliance and enforceability, include in the agreement explicit references to the eight core ILO Labor Conventions and others where appropriate;
- b. To protect workers, raise wages and level the playing field among NAFTA countries, require that Parties not waive or derogate from any of their labor laws—regardless of the sector in which the breach occurred;
- c. To level the playing field among NAFTA countries, define "acceptable conditions of work" to include such concepts as payment of all wages and benefits legally owed and compensation in cases of occupational injuries and illnesses;

¹⁷⁷ *Id.*

¹⁷⁸ BOLLE, *supra* note 170, at 3–4.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 3.

¹⁸¹ *See, e.g.,* Drake, *supra* note 171.

¹⁸² Ginger Adams Otis, *Canadian and American Unions Seek to Raise Wages in Mexico Amid NAFTA Talks*, N.Y. DAILY NEWS (Oct. 14, 2017, 8:49 PM), <http://www.nydailynews.com/news/world/canadian-u-s-unions-push-wage-hike-nafta-talks-article-1.3563306>.

¹⁸³ *Making NAFTA Work for Working People*, AFL-CIO 17 (June 12, 2017), <https://aflcio.org/statements/written-comments-how-make-nafta-work-working-people> (follow hyperlink; then click "Download" at bottom of screen) [hereinafter *Making NAFTA Work*].

- d. To increase compliance, include commitments aimed at ensuring effective labor inspections;
- e. To level the playing field among NAFTA countries, do not include any requirement that violations must be in a “manner affecting trade or investment between the parties,” or that violations must be “sustained or recurring,” both of which add unnecessary barriers to enforcement;
- f. To prevent worker exploitation, agree that workers should be paid a floor wage that provides a decent standard of living, and include provisions to prevent social dumping of goods made by workers paid less than floor wages or inadequate enforcement of workers’ rights;
- g. To prevent forced labor and the worst forms of child labor, prohibit trade in goods made with forced labor and the worst forms of child labor;
- h. To prevent a spiral to the bottom in wages and working conditions, ensure migrant workers receive the same rights and remedies as a country’s nationals;
- i. To prevent human trafficking and forced labor, establish enforceable rules for international labor recruiters and employers of foreign labor;
- j. To ensure timely enforcement and reduce unwarranted delays, establish clear, universal timelines for consideration of and action upon labor complaints;
- k. To help raise standards across the region, create an *independent* labor secretariat (not controlled by the Parties) to research emerging issues, report on best practices, provide technical assistance when necessary, investigate alleged violations, recommend remediation and, in the absence of remediation, bring cases to dispute settlement;
- l. To make enforcement more effective and to reduce the ability to delay or ignore labor complaints, require the Secretariat to pursue meritorious complaints until the defects have been remedied;
- m. To ensure comprehensive analysis of the effects of NAFTA on working people, establish a Wages and Standards Working Group to oversee the Secretariat, recommend remedial responses and policies to aid workers, families and communities negatively impacted by NAFTA, and provide recommendations for improving NAFTA and national laws in ways that benefit working families;
- n. To ensure that enforcement occurs, include enhanced enforcement tools, such as social dumping tariffs, additional duties for persistent labor violations, and private rights of action where the Secretariat or Parties refuse to enforce obligations;
- o. To level the playing field, allow unions to engage in transnational collective bargaining with employers that operate in two or more NAFTA countries; and
- p. To maximize the potential for wages in Mexico to rise, continue to pursue constitutional and legal reforms already begun in Mexico as of 2016.¹⁸⁴

¹⁸⁴ *Id.* at 17–18.

These recommendations are critical to raising wages and improving working conditions across North America, and ensuring that future trade agreements do not continue to further drive the race to the bottom.

Embedded at the bottom of the recommendations is a proposal for transnational collective bargaining.

The NAFTA must specifically allow workers in unions employed by a common employer in two or more NAFTA countries to jointly organize unions and negotiate binding collective agreements. As part of the NAFTA, employers with more than 500 total employees, with at least 50 employees in two or more NAFTA Parties, shall recognize and bargain with, if established, a supranational labor organization. Such organizations must have the opportunity to negotiate a binding enterprise-wide agreement, which individual workplace agreements could build upon, with greater specificity at the workplace level. Supranational labor organizations will also have the authority to engage in other concerted activities for the purpose of collective bargaining. In no case may such agreements authorize wages below the floor wage level for the region in which a workplace is located. Enforcement of such agreements would be subject to the national and subnational laws of the applicable jurisdiction.¹⁸⁵

This recommendation does not necessarily need approval within a free trade agreement in order to be implemented. If workers are able to stand in solidarity with one another transnationally, and organize for collective bargaining agreements on a company-wide basis, wages and working conditions could be improved for garment workers, regardless of where they live. This is the basis of the work done by the International Union League for Brand Responsibility, a coalition of labor unions from several countries¹⁸⁶ and is the only work that can truly ensure that workers' rights are respected.¹⁸⁷ Union organizing, and collective bargaining are essential to

¹⁸⁵ *Id.* at 43.

¹⁸⁶ “The International Union League for Brand Responsibility is a global organization of workers who make products for multinational brands, such as clothing, footwear and textiles. We workers and our unions are uniting to demand that the multinational brands take responsibility and guarantee living wages, safe factories, and stable jobs.” *We Are Workers Organizing Globally*, THE INT’L UNION LEAGUE FOR BRAND RESPONSIBILITY, www.union-league.org (last visited Oct. 8, 2018).

¹⁸⁷ Taking it a step further, in recognition of the importance that migrant workers play in global supply chains, Jennifer Gordon proposes transnational labor citizenship, “an opening up of the fortress of labor and of the nation-state to accommodate a constant flow of new migrants through a model that would tie

improving conditions in garment factories worldwide. The decline in independent unions internationally has led to an increase in inequality.¹⁸⁸ “Historically, unions have played an important role in the introduction of fundamental social and labor rights. Conversely, the weakening of unions can lead to less redistribution and higher net income inequality.”¹⁸⁹

Yet, even with strong organizing and collective bargaining, access to U.S. courts is a critical enforcement mechanism. The AFL-CIO’s NAFTA recommendations recognize this as well, and call for access to the domestic courts of any party for workers and unions to seek redress for violations of the trade agreement generally, and the labor chapter specifically.¹⁹⁰ Agreement to permit violations of NAFTA’s labor provisions to be handled in U.S. or Canadian courts would be a tremendous win for workers, as the systems of arbitration developed by NAFTA and other trade agreements have proven to be ineffective.¹⁹¹ Thus, advocates should continue to lobby and organize for stronger labor protections within free trade agreements.

CONCLUSION

The issue of how to ensure that workers’ rights are upheld in the global garment industry has plagued workers and activists since the beginning of garment factory production. Over the past two decades, activists on college campuses, leveraging the power of their universities as licensors, have spearheaded the most successful campaign to hold companies accountable for downstream working conditions. The most successful litigation will likely rest on this model as well. The Ninth Circuit may have quashed a number of arguments holding U.S. corporations liable for conditions in their supply chain, but the court’s analysis left open the possibility that licensing agreements can be the foundation for finally holding brands legally

immigration status to membership in organizations of transnational workers rather than to a particular employer.” Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 509 (2007).

¹⁸⁸ Florence Jaumotte & Carolina Osorio Buitron, *Power from the People*, FIN. & DEV., Mar. 2015, at 29, 30 (“We find strong evidence that lower unionization is associated with an increase in top income shares in advanced economies during the period 1980–2010.”).

¹⁸⁹ *Id.* at 31.

¹⁹⁰ *Making NAFTA Work*, *supra* note 183, at 40.

¹⁹¹ See, e.g., Barry LaSala, *NAFTA and Worker Rights: An Analysis of the Labor Side Accord after Five Years of Operation and Suggested Improvements*, THE LABOR LAWYER, 16 AM. BAR ASS’N (2001), <https://www.jstor.org/stable/40862742>; Garrett D. Brown, *Why NAFTA Failed and What’s Needed to Protect Workers’ Health and Safety in International Trade Treaties*, 15 NEW SOLUTIONS: A JOURNAL OF ENVIRONMENTAL AND OCCUPATIONAL HEALTH POLICY (2005).

accountable in U.S. courts. This type of litigation would be a tremendous victory for workers and the students who stand in solidarity with them.

Further, in order to be proactive, legislatures should extend liability for working conditions in garment factories directly to brands through the non-delegable duty exceptions to the vicarious liability doctrine, which generally disclaims principal liability for the actions of independent contractors. Doing so would be in line with existing exceptions. This would radically change the nature of the global garment industry by placing responsibility where it should rest: on the brands that create the environment that keeps wages low and working conditions inhumane.

Finally, free trade agreements must include stronger worker rights protections including provisions regarding transnational union organizing and worker access to U.S. courts for violations of the trade agreement's labor protections. Only through a multi-faceted approach of litigation and legislative strategies, combined with worker organizing efforts and public pressure on brands, will conditions improve worldwide. Worker advocates must continue to work for change on the factory floor, in courtrooms, in legislative bodies, in boardrooms, and beyond.