THEIR BROTHERS' KEEPER: GLOBAL BUYERS AND THE LEGAL DUTY TO PROTECT SUPPLIERS' EMPLOYEES

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The perception of a race to the bottom in international sourcing has lead to calls for worldwide standards to improve health, safety, and wage conditions among Global South workers. With the state's retreat and immature international regimes, the primary regulatory response has been private codes of conduct which buyers impose on foreign suppliers. This represents a sociological shift with buyers assuming a paternalistic role over the factories' workers. When this role combines with poor code enforcement, the buyer may be at legal risk under U.S. law. Workers could claim that the buyer's code and related policies create a duty to ensure supplier compliance. When workers are then damaged by a code violation, they might sue the buyer. Our Article considers the argument's viability using standard tort and contract claims. The legal analysis is informed by interviews of buyers and suppliers, and surveys of workers. The feasibility of each claim varies but all are colorable, posing risk for buyers and potential for foreign workers. The risk and potential are enhanced by American jurisprudence's historical broadening of legal duties and the persistent evolution of global human rights principles.

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I. INTRODUCTION

Buyers' codes of conduct have, from inception, been a controversial and problematic response to foreign contractors' poor labor conditions. The monitoring and sanctioning of suppliers are limited where workplace abuses are most common—labor-intensive sectors such as apparel. Even flagship buyers like Nike inspect a relatively small percentage of factories for violations. Inconsistent results from this "soft law" approach have been documented. Nonetheless, codes remain buyers' predominant response to workplace deficiencies in overseas factories. The discrepancy between a code's promises and results may create more than a public relations predicament for the buyer. The divergence might generate legal jeopardy with foreign workers claiming that the code system fashioned tort and contract duties requiring the buyer to ensure supplier compliance. Workers damaged by a code violation might then sue the buyer.

Though buyers' liability to foreign workers is receiving increased academic,[1] judicial,[2] and legislative[3] attention, the forensic risk from

1. *See* BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 158-64 (2005); JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY 198-242, 305 (2006); Gregory T. Euteneier, *Towards a Corporate "Law of Nations": Multinational Enterprises' Contributions to Customary International Law*, 82 TUL. L. REV. 757 (2007); Carol Glinski, *Self-Regulation of Transnational Corporations: Neither Meaningless in Law nor Voluntary*, *in* GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE VOLUME 2: CORPORATE GOVERNANCE, at 197, 197-220 (Sorcha MacLeod ed., 2006); Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential for the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203 (2004); Halina Ward, *Governing Multinationals: The Role of Foreign Direct Liability*, BRIEFING PAPER (Royal Inst. of Int'l Affairs, London), Feb. 2001; *see also* Joe Slawotsky, *International Product*

conventional tort and contract claims is relatively underdeveloped in corporate social responsibility literature. This Article chronicles the evolution of codes and the sociological shift in buyer-supplier relations, with buyers assuming roles historically allocated to employers, unions, and governments. We then analyze four claims arising from this shift in workplace governance: 1) the Good Samaritan doctrine; 2) the general contractor's tort duty to supervise independent contractors; 3) contract's third-party beneficiary doctrine; and 4) promissory estoppel.

We conclude that the claims hold legal risk for buyers and promise for foreign workers, particularly considering the historical broadening of duties in American law[4] and the evolution of

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Liability Claims Under the Alien Tort Claims Act, 16 TUL. J. INT'L & COMP. L. 157, 174-87 (2007).

2. *See* Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002); Doe v. Unocal Corp., Nos. BC 237980 & 237679 (Super. Ct. Cal. L.A. County June 7, 2002), earthrights.org/files/Legal%20Docs/Unocal/PlaintiffMSARuling.pdf; SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW VOLUME 2: 2002-2004, at 209-11 (2006) (discussing the *Unocal* cases); Erin Geiger Smith, *Case Study:* Does I v. The Gap, Inc.*: Can a Sweatshop Suit Settlement Save Saipan?*, 23 REV. LITIG. 737, 743-63 (2004). A recent and ongoing case is *Doe v. Wal-Mart Stores, Inc.*, where foreign workers allege that Wal-Mart failed to enforce its code of conduct causing personal injury and economic damages. Doe v. Wal-Mart Stores, Inc., No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at *6 (C.D. Cal. Mar. 30, 2007). The trial court dismissed the claims, *id.* at *2-3, and the matter is before the Ninth Circuit Court of Appeals. The plaintiffs' initial appeal (Doe v. Wal-Mart Stores, Inc., No. 07-55560 (9th Cir. 2007)) was voluntarily dismissed because the trial court's decision was not a final order. The appeal was refiled. Doe v. Wal-Mart Stores, Inc., No. 08-55706 (9th Cir. 2008).

3. Several unsuccessful legislative proposals have sought to regulate transnational corporations' handling of overseas workers. The McKinney Bill would have governed American corporations' treatment of overseas workers including those "employed" through foreign subcontractors. Corporate Code of Conduct Act, H.R. 2782, 107th Cong. (2001). An Australian Corporate Code of Conduct, proposed to the Senate but never enacted, intended to establish environmental and workplace standards for Australian corporations or their related companies employing overseas workers. Corporate Code of Conduct Bill (Austl. 2000), http://www.austlii.edu.au/au/legis/cth/bill/ccocb20002002248. In Britain, the proposed Corporate Responsibility Bill extended directors' duties to the consideration of overseas social and environmental impacts. ZERK, *supra* note 1, at 164-71; *see also* Glinski, *supra* note 1, at 201-20 (discussing companies' potential liability under European Union advertising and sales laws for misleading statements about corporate social responsibility compliance).

4. "The common law of torts, including the concept of duty, must evolve in light of the changing conditions and circumstances of society." 70 TEX. JUR. 3D *Tort Liability* § 3 (2008); *see also* 86 C.J.S. *Torts* § 3 (2008). The development of contract law reveals a similar expansion:

> As contract and social theory evolved, recognition of social duty and societal interdependence crept into the jurisprudence of contracts. The modern neoclassical contract model imports community standards of decency

international human rights. The Article then summarizes the public policy implications in allowing these remedies. While primarily a legal analysis, our Article also draws on published buyer codes, buyer-supplier contracts, and our fieldwork with management and factory workers.

II. THE PROMISE AND FAILURE OF CODES OF CONDUCT

The genesis of global buyers' codes of conduct is well known. By the 1990s, many transnational buyers, particularly in labor-intensive industries like apparel and footwear, had divested ownership of their manufacturing base and boosted sourcing from contractors in the Global South.[5] Detached from concern over the factory's labor condition and environmental impact, buyers pressured suppliers for ever-cheaper products and quicker deliveries.[6] Dismal descriptions of foreign workplaces became notorious in Western media. For example, the following appeared in a 2000 *USA Today Magazine* article:

> Workers [in less developed countries] commonly report oppressive conditions that include no benefits, nonpayment of wages, forced overtime, sexual harassment, mandatory pregnancy testing, verbal and physical abuse, corporal punishment, and illegal firings, among other human [r]ights violations. Children can often be found toiling in factories with their parents . . . and performing tasks that are detrimental to their physical well-being and development. . . . Many workers report that they are not allowed breaks, even for food and water.[7]

This was not a surprising consequence from outsourcing production to the Global South. The local governments restrain regulatory power so as to compete for foreign direct investment. Indigenous courts and legal remedies are typically underdeveloped. Unions are often weak, captured by the state, or nonexistent. For example, Reebok responded to unionization at an Indian factory by

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> and fairness into contractual obligations. . . . Promissory estoppel is an illustrative example of how contract theory has evolved from a strict interpretation of the agreed-upon terms of the contract to one that encompasses moral and social norms of what is just and fair.

Abby Morrow Richardson, Note, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, 39 U. MICH. J.L. REFORM 119, 143-44 (2005) (footnotes omitted).

5. *See* Habibullah Khan & Shaidul Islam, *Outsourcing, Migration, and Brain Drain in the Global Economy: Issues and Evidence* 2-6 (U21 Global, Working Paper No. 004/2006, 2006), *available at* http://www.u21global.edu.sg/PartnerAdmin/ViewContent?module=DOCUMENTLIBRARY&oid=157296.

6. Victoria Louise Carty, Emerging Post-Industrial, Postmodern Trends and Implications for Social Change: A Case-Study of Nike Corporation (1999) (unpublished Ph.D. dissertation, University of New Mexico) (on file with University of New Mexico).

7. Heather White, *Disturbing Trends in Global Production*, USA TODAY, May 1, 2000 (Magazine), at 26-28.

closing it.[8] Developed countries, where buyers are headquartered, largely continue the Thatcher/Reagan legacy of minimum regulations and maximum markets, at least regarding domestic corporations' overseas business.[9] International government organizations and treaties have accomplished little.[10]

Foreign residents have used the Alien Tort Claims Act (ATCA)[11] to sue multinationals in U.S. courts. Enacted in 1789, it grants federal court jurisdiction for "any civil action by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States."[12] The simple text has spawned complex, varied, and unclear judicial constructions, but current interpretations seemingly do not support claims over workplace safety and compensation. Courts will likely continue to limit its application to extreme human rights abuses such as genocide, torture, forced labor, war crimes, and

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8. Bernard D'Mello, *Reebok and the Global Footwear Sweatshop*, MONTHLY REV., Feb. 2003, at 26, 38. One researcher described Vietnam's trade unions as "an arm of management, rather than represent[tative of] workers' interests." Hong-zen Wang, *Asian Transnational Corporations and Labor Rights: Vietnamese Trade Unions in Taiwan-invested Companies*, 56 J. BUS. ETHICS 43, 51 (2005). Apparel factory owners in Nicaragua once threatened a capital strike to extract government and union compliance. ROBERT J. S. ROSS, SLAVES TO FASHION: POVERTY AND ABUSE IN THE NEW SWEATSHOPS (2004). China's PRC leadership historically has not allowed the free association of workers outside state-run trade unions. Felicia Pullman, *Corporate Responsibility as China Strategy*, CHINA BUS. REV., Mar.-Apr. 2006, at 34.

9. *See* Bruce London & Robert J. S. Ross, *The Political Sociology of Foreign Direct Investment: Global Capitalism and Capital Mobility, 1965-1980*, 36 INT'L J. COMP. SOC. 198, 198 (1995).

10. The WTO's 1996 Singapore ministerial meeting rejected including labor standards in trade agreements. BENEDICTE BULL & DESMOND MCNEILL, DEVELOPMENT ISSUES IN GLOBAL GOVERNANCE: PUBLIC-PRIVATE PARTNERSHIPS AND MARKET MULTILATERALISM (2007); HEPPLE, *supra* note 1, at 130. The International Labor Organization (ILO) rejected express trade linkages for its Declaration of Fundamental Principles and Rights at Work. *Id.* at 61-62. Though the United States has sometimes conditioned bilateral trade agreements on labor standards, the bar and remedies are low. Typically they require that the trading partner enforce *domestic* labor laws, not international standards; permit sanctions only for *sustained* failures to enforce domestic laws *in a manner affecting trade*; and provide relatively small monetary penalties. *Id.* at 113-14. There are *voluntary* international codes such as the Organization for Economic Cooperation and Development for Multinational Enterprises (OECD) Guidelines on Corporate Responsibility; the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; the U.N.'s Global Compact; and the U.N.'s Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. *Id.* at 72, 78; United Nations Global Compact, http://www.globalcompact.org; *see also* U.N. Econ. & Soc. Council [ESCOR], Sub-Comm'n on Promotion & Prot. of Human Rights, *Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

11. 28 U.S.C § 1350 (2006).

12. *Id.*

perhaps somewhat less egregious acts such as mass rapes and multiple deaths not constituting genocide.[13]

Into this regulatory void stepped buyers who, by the end of the 1990s, had promulgated hundreds of codes of conduct for suppliers. Typically, a code governs child and forced labor, union rights, wages-benefits, health-safety, employee discipline, and environmental practices.[14] Codes have evolved into broad and complex directives, but for numerous reasons the system has produced less transformation than some hoped.

A priori, the parties' motives are suspect. Buyers and contractors are driven toward cheaper and quicker production. Auditing companies are incentivized to please the client-buyer. A buyer's commitment mostly turns on its brand's vulnerability to negative publicity, largely limiting committed buyers to those with high-profile consumer products.[15] Moreover, public shaming depends on often elusive information about factory operations, and, once public outcries fade, so may the buyer's reformation.[16] Consumers may also falter as a weakening economy redirects their focus to price and away from morality.

Compounding those constraints are limited mechanisms to reveal and punish suppliers' noncompliance. A recent review of 153

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13. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712-14, 720-21, 725-27, 729, 732 & n.20 (2004) (limiting the applicability of the ATCA); Joshua M. Chanin, *"The Regulatory Grass is Greener": A Comparative Analysis of the Alien Tort Claims Act and the European Union's Green Paper on Corporate Social Responsibility*, 12 IND. J. GLOBAL LEGAL STUD. 745, 754-58 (2005) (discussing causes of action under the ATCA). Notably, the plaintiffs in *Doe v. Wal-Mart Stores, Inc.* did not appeal the district court's dismissal of their ATCA claim. Appellants' Opening Brief at 4 n.1, Doe v. Wal-Mart Stores, Inc., No. 08-55706 (9th Cir. Oct. 6, 2008) [hereinafter Doe Plaintiffs' Appellate Brief].

14. *See, e.g.*, RANDY SHAW, RECLAIMING AMERICA: NIKE, CLEAN AIR, AND THE NEW NATIONAL ACTIVISM (1999); George H. Sage, *Justice Do It! The Nike Transnational Advocacy Network: Organization, Collective Actions, and Outcomes*, 16 SOC. SPORTS J. 206 (1999).

15. *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005); Debora L. Spar & Lane T. La Mure, *The Power of Activism: Assessing the Impact of NGOs on Global Business*, 45 CAL. MGMT. REV. 78 (2003).

16. In 2000, Liz Claiborne, Inc. was accused of sourcing products from a factory with poor working conditions. Anita Chan & Hong-zen Wang, Raising Labor Standards, Corporate Social Responsibility and Missing Links – Vietnam and China Compared (Draft) 3 n.4 (Mar. 21-22, 2003) (unpublished paper presented at the conference The Labor of Reform: Employment, Worker's Rights, and Labor Law in China, University of Michigan), www.global-standards.com/Resources/ChinaVietnam-ChanHongZen.doc. As pressure mounted from antisweatshop campaigns in the United States, the brand allowed an independent NGO to evaluate the factory. *Id.* The NGO later claimed that, because the American campaign subsided, nothing changed on the shop floor. *Id.*

codes found that only 25% had any sort of monitoring apparatus.[17] In a U.N. study of 246 codes, approximately 60% did not specify penalties for noncompliance and only about 10% provided independent external monitoring.[18] Nike, a leader in the field, has an annual inspection target of "25%-33% of the active factory base," and it uses independent third-party monitors for approximately 5% of its suppliers.[19] One Nike contractor revealed to us that there had been no third-party audit of its facilities for two years.[20] Several empirical studies and theoretical works have documented the limited effectiveness of codes.[21] A recent examination of 800 Nike suppliers

17. Rhys Jenkins, *The Political Economy of Codes of Conduct, in* CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY 13, 19-23 (Rhys Jenkins et al. eds., 2002); *see also* D. Eric Boyd, Robert E. Spekman, John Kamauff & Patricia Werhane, *Corporate Social Responsibility in Global Supply Chains: A Procedural Justice Perspective*, 40 LONG RANGE PLAN. 341, 345 (2007).

18. Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy, in* VOLUNTARY APPROACHES TO CORPORATE RESPONSIBILITY: READINGS AND RESOURCE GUIDE 1, 43-44 (2002).

19. Suk-Jun Lim & Joe Phillips, *Embedding CSR Values: The Global Footwear Industry's Evolving Governance Structure*, 81 J. BUS. ETHICS 143, 152 (2008).

20. Interview with Assistant Dir. of Corporate Responsibility, Changshin (Korean-owned footwear factory), in Vietnam (Jan. 2005).

21. *See Modern-Day Slavery: Spotlight on the 2006 "Trafficking in Persons Report," Forced Labor, and Sex Trafficking at the World Cup: Hearing Before the Subcomm. on Afr., Global Human Rights and Int'l Operations of the H. Comm. on Int'l Relations*, 109th Cong. 57 (2006) (statement of Charles Kerndghan, Director, Nat'l Labor Comm.), www.internationalrelations.house.gov/archives/109/28104.pdf (detailing the ongoing struggle of the Jordanian Government to "emerge as a model of fair labor standards, the rule of law and respect for human, women's and workers rights"); Stephanie Barrientos, Catherine Dolan & Anne Tallontire, *A Gendered Value Chain Approach to Codes of Conduct in African Horticulture*, 31 WORLD DEV. 1511, 1511 (2003) (discussing whether codes of conduct in African horticulture have the ability "to address the specific problems linked to informal and feminized employment"); Niklas Egels-Zandén & Peter Hyllman, *Evaluating Strategies for Negotiating Workers' Rights in Transnational Corporations: The Effects of Codes of Conduct and Global Agreements on Workplace Democracy*, 76 J. BUS. ETHICS 207, 207 (2007) (finding, based on a qualitative analysis of "Sri Lankan operations of a Swedish [transnational corporation]" and various interviews of union and nongovernmental organization officials, that global agreements are a superior approach to codes of conduct); Xiaomin Yu, *Impacts of Corporate Code of Conduct on Labor Standards: A Case Study of Reebok's Athletic Footwear Supplier Factory in China*, 81 J. BUS. ETHICS 513, 513 (2008) ("[E]mployee-elected trade union installed through codes . . . operated more like a 'company union' rather than . . . representing workers' interests."); TIM CONNOR & KELLY DENT, OXFAM INT'L, OFFSIDE! LABOR RIGHTS AND SPORTSWEAR PRODUCTION IN ASIA, Executive Summary (2006), www.oxfam.org/files/Offside.pdf ("Transnational corporations . . . in sportswear and other industries cannot, on their own, create the conditions where trade union rights are fully respected."); GRUPO DE MONITOREO INDEPENDIENTE DE EL SALVADOR, VERIFICATION OF COMPLIANCE WITH LABOR LAWS AND THE CODE OF CONDUCT OF LIZ CLAIBORNE, INC., IN THREE PLANTS OF A COMPANY IN EL SALVADOR (2001), http://www.nlcnet.org/admin/media/document/elsalvador/GMIES_report_0901.pdf (finding Liz Claiborne factories did not fully comply with

found that approximately 80% of workplace conditions had "remained the same or worsened." [22]

Discrepancies between a code's promise and results may render the buyer vulnerable to workers' tort and contract claims. Before analyzing these claims, we consider a recent evolution in workplace governance which underlies this vulnerability. We demonstrate the governance shift through theoretical works, code systems, buyer-supplier contracts, management interviews, and worker surveys.

III. REFORMATTING INDUSTRIAL RELATIONS

Buyers' code systems create a relationship with suppliers and their employees that alters the traditional social compact among labor, government, and capital found in developed countries. During the twentieth century, laborers gained rights to collectively organize and strike over pay, benefits, and jobsite conditions.[23] Government regulated workers' health-safety and wages-benefits, including providing administrative sanctions and court remedies.[24] Employers were to obey these laws and follow collectively-bargained agreements. The arrangement collapsed when capital mobility and free trade took production to the Global South where unions are nonexistent or ineffectual and governments weak or predisposed toward accommodating investors.[25] Reworking the compact for foreign operations, buyers have assumed union, government, and employer roles. They regulate suppliers' treatment of employees through codes (a government task) that they enforce (union, government, and employer's tasks). Scholars have noted this transition from multilateral to hierarchical workplace governance.

Adelle Blackett argues that codes "extend [a multinational corporation's] laws directly to workers along the global production

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Salvadoran codes of conduct); DUNCAN PRUETT, CLEAN CLOTHES CAMPAIGN, LOOKING FOR A QUICK FIX: HOW WEAK SOCIAL AUDITING IS KEEPING WORKERS IN SWEATSHOPS 16 (2005), http://www.cleanclothes.org/ftp/05-quick_fix.pdf ("Systematic problems at both the point of production and of consumption can only be successfully addressed through an industry-wide approach."); VERITÉ, EXCESSIVE OVERTIME IN CHINESE SUPPLIER FACTORIES: CAUSES, IMPACTS, AND RECOMMENDATIONS FOR ACTION (2004), http://www.verite.org/research/Excessive%20Overtime%20in%20Chinese%20Factories.pdf (recommending China ought to "[i]nvest in compliance with occupational safety and health standards").

22. Richard Locke, Thomas Kochan, Monica Romis & Fei Qin, *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers*, 146 INT'L LABOUR REV. 1, 31 (2007).

23. *See, e.g.*, National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (2006)) (granting the right to self-organize and the right to strike).

24. *See, e.g., id.* § 187 (providing workers who were injured as a result of an unfair labor practice with a right to sue and receive damages).

25. *See supra* notes 8-10 and accompanying text.

chain, disregarding and even undermining any existing local enforcement efforts."[26] Jill Esbenshade notes that in the apparel sector "a new form of labor relations is now developing . . . . Thus, the intense struggle of the early part of the century and the consensus of the middle part are being succeeded at century's end by a new paternalism in labor relations."[27] Esbenshade concludes that "[p]rivate monitoring is, in fact, a new form of paternalism in labor relations, one which plays into and reenacts the vulnerability, not the strength, of garment workers."[28]

John Gerard Ruggie, from an international relations perspective, notes "the apparent assumption by TNCs and global business associations of roles traditionally associated with public authorities[;] . . . in a growing number of issue areas 'firms are basically functioning like governments.'"[29] The movement toward "corporate paternalism" is revealed in buyers' code systems and our fieldwork.

A. Buyers' Code Systems

Our examples of code systems are from apparel (Levi's, Nike, Adidas, and two anonymous buyers), retail (Wal-Mart), and sports equipment (Mountain Equipment Co-op). All have a large, diversified supplier base in labor-intensive sectors prone to workplace abuses.

Modern buyers' codes follow a pattern: (1) child, prison, and forced labor, along with physical and mental punishment, are prohibited; (2) working hours are capped; (3) wages and benefits must comply with local law and prevailing industry practice; (4) workers' freedom of association is to be protected; and (5) health and safety standards must be met.[30] Though suppliers must follow local law, any higher code standard takes precedent. Violations can lead to

26. Adelle Blackett, *Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries*, *in* HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 121, 128 (John J. Kirton & Michael J. Trebilcock eds., 2004).

27. Jill Esbenshade, *The Social Accountability Contract: Private Monitoring from Los Angeles to the Global Apparel Industry*, 26 LAB. STUD. J. 98, 98-99 (2001).

28. *Id.* at 115.

29. John Gerard Ruggie, *Reconstituting the Global Public Domain: Issues, Actors, and Practices*, 10 EUR. J. INT'L REL. 499, 502-03 (2004) (quoting A. Claire Cutler, *Private International Regimes and Interfirm Cooperation*, *in* THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 23, 32-33 (Rodney Hall Bruce & Thomas J. Biersteker eds., 2002)).

30. *See, e.g.*, Levi Strauss & Co. Global Sourcing and Operating Guidelines, http://levistrauss.com/Downloads/GSOG.pdf.

suspension of business and, if sufficiently egregious, termination.[31] Code systems are typically part of the buyer-supplier contractual relationship.[32] Tables 1 and 2, summarizing our empirical work, disclose paternalistic elements in buyer language regarding code monitoring and remediation. The data are spread across four dimensions involving the relationship with suppliers and factory workers.

31. *See, e.g.*, Adidas Group Workplace Standards Enforcement Guidelines, http://adidas-group.com/en/sustainability/suppliers_and_workers/enforcing_compliance/default.asp (last visited Feb. 20, 2009).

32. We have identified at least five buyers that include the code in their supply contracts: Adidas, Mountain Equipment Co-op., Levi's, and two buyers that we are keeping anonymous. In *Doe v. Wal-Mart Stores, Inc.*, the buyer appeared to admit that the code was part of the supplier contract. Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint at 7, Doe v. Wal-Mart Stores, Inc., No. 05-CV-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102 (C.D. Cal. Mar. 30, 2007) [hereinafter Wal-Mart's Dismissal Motion].

Table 1: Buyer Code Systems (Apparel)

	Supplier Relations	Worker Relations	Code Monitoring & Training	Remediation
Adidas[33]	Adidas "works in partnership" with suppliers—"collaborative" efforts.	Code "guarantee[s] the ideals of [Adidas]" for factory workers. Adidas intends to give workers a voice; worker empowerment. Requires that rights are taught to workers; encourages peaceful worker advocacy. Worker hotline to report code violations. Sponsored a health-safety competition for Asia-Pacific workers to increase health awareness. Code posted in local language.	Goal to educate suppliers. Gives detailed instructions and practical examples for fair, healthy, and safe workplace conditions. Comprehensive written instructions. Adidas personnel act as advisors. Approves factory overtime. Registration program for factory safety officers. Working toward marketplace for health-safety officers. Organized factory competition on health-safety. Provides medical training sessions for factory personnel. Created supplier network for mutual assistance. Physical inspections by Adidas personnel or third parties.	Works with suppliers to address immediate problems. Long-term goal is capacity building among suppliers so that they can "take ownership" of compliance.
Levi's[34]	Suppliers are "business partners." Parties form "strong alliances."	Education of employees on workplace rights. Levi's hotline for workers to report violations or supplier retaliation. Workers interviewed during audits. Code posted in local language.	Levi's provides factory management training to locate and fix code violations. Guidebook on recognizing and remediating violations. Physical inspections by Levi's and third-party auditors.	All parties analyze problem and take steps to remediate. Buyer works on-site with supplier to remediate.

33. Adidas Group Supply Chain, http://adidas-group.com/en/sustainability/suppliers_and_workers/default.asp (last visited Feb. 20, 2009). Data are taken from the various categories listed on this Adidas Web site on corporate "citizenship" and from our interviews.

34. Levi Strauss & Co. Product Sourcing Practices, http://levistrauss.com/Citizenship/ProductSourcing.aspx (last visited Feb. 20, 2009).

Nike[35]	Suppliers are "partners" and "collectively address" violations.	Suppliers must train employees on workplace rights. Worker hotline to report code violations. Code posted in local language.	Nike tries to build supplier's capacities. Provides a compliance roadmap, technical support, and training. Organized a committee of factory representatives (Vietnam) which discusses compliance issues, and provides a newsletter to local management on social responsibility matters. Physical inspections by Nike.	Factory management attends Nike's audit meetings. Nike reviews supplier's compliance plan, monitors progress, and intervenes when remediation is too slow.

35. Lim & Phillips, *supra* note 19, at 149-52; Interview with Manager, Corporate Responsibility Compliance, Nike, in Ho Chi Minh City, Vietnam (May 14, 2007).

Table 2: Buyer Code Systems (Other)

	Supplier Relations	Worker Relations	Monitoring & Training	Remediation
Mountain Equipment Co-op (MEC)[36]	"Joint effort," "partnership." MEC seeks "deeper emotional" ties with suppliers. "Collaborative approach." Seeking "deeper" engagement with suppliers on code.	Workers' welfare a "big component" of code's purpose. MEC seeks manufacturing system that respects the workers. Seeks to improve the human condition in factories. Goal of empowering workers. Confidential hotline to report supplier infractions and learn about rights. In-depth interviews of current and former workers.	Suppliers depend on MEC's resources for code compliance. Help factory managers understand workers' rights and adopt more benign manufacturing processes. Physical inspection of factories.	MEC issues corrective action plans. MEC plans to hire technical experts to advise suppliers on remediation.
Wal-Mart[37]	Wal-Mart "coaches," "works together" with factory. "Accept[s] responsibility for the way. . . products are manufactured." "Goal is to fully integrate labor compliance . . . into all purchasing decisions."	Workers provided Wal-Mart 'hotline' to report supplier's labor violations. Workers interviewed during audits. Wal-Mart persuaded factories to rehire workers dismissed for attempting to form associations. Factory management signs and posts statement that it understands buyer's standards.	Wal-Mart trains suppliers in health, safety, and environmental matters. Physical inspection of factories.	Follow up to ensure supplier remedied violations. Building supplier's capacity.

36. Mountain Equipment Co-op Ethical Sourcing: What It Means To Us, http://mec.ca (follow "Sustainability" tab; then follow "Ethical Sourcing" tab on the left-hand tool bar) (last visited Feb. 20, 2009); Interview with Dir., Ethical Sourcing, Mountain Equip. Co-op, in H.K. (May 11, 2007) and Seoul, S. Korea (Jan. 2008).

37. WAL-MART STORES, INC., 2006 REPORT ON ETHICAL SOURCING 26 (2006), http://walmartfacts.com/reports/2006/ethical_standards/documents/2006ReportonEthicalSourcing.pdf.

Other examples of paternalism are scattered throughout our data set. Nike maintains physical offices in some factories to monitor code compliance (as well as quality control), and workers have gone there to discuss shop floor problems.[38] At the Vietnamese government's request, Nike helped train labor unions,[39] and, in at least one factory, Nike directly advised a union to survey workers on the union's role.[40] To address workplace abuse, a senior Adidas compliance officer provided factory workers her mobile phone number, and workers have directly called to complain about conditions.[41] Nike also directly receives worker complaints and follows up with factory management to ensure that they have been addressed.[42] Buyers, such as Nike and Adidas, are reducing the number of contractors and increasing orders with remaining factories in part to enhance leverage for enforcing code compliance.[43]

Levi's claims to have used its trade relationship with the Guatemalan government to foster more stringent labor laws.[44] This buyer also requires factories, such as those in Bangladesh, to continue paying underage workers while they attend school and provide full-time jobs when they reach legal working age.[45] "If there [i]s no room in the nearby public school, [Levi's] and the factories rent space and hire a teacher."[46] Levi's has worked with NGOs, factory management, workers, and governments to investigate and attempt to address NGO complaints, including the denial of workers' freedom of association.[47] Adidas has sweepingly pronounced that it "accept[s] responsibility for the way our products are manufactured

38. Interview with Vice President, Youngone (Korean-owned apparel factory), in Hanoi, Vietnam (May 14, 2007).

39. Interview with Manager, Corporate Responsibility Compliance, Nike, *supra* note 35.

40. Interview with Union Leader, Youngone (Korean-owned apparel factory), in Hanoi, Vietnam (May 2007).

41. Interview with Manager, Soc. & Envtl. Affairs, Adidas, in Ho Chi Minh City, Vietnam (May 17, 2007).

42. Interview with Manager, Corporate Responsibility Compliance, Nike, *supra* note 35.

43. Interview with Gen. Manager, Nike, in Ho Chi Minh City, Vietnam (Jan. 2005 & May 15, 2007); Interview with Manager, Soc. & Envtl. Affairs, Adidas, in H.K. (May 11, 2007).

44. Levi Strauss & Co. Product Sourcing Practices, Our Approach: The Government Level—Country Assessment, Trade/Labor Policy and Advocacy, http://levistrauss.com/citizenship/productsourcing/ourapproach/thegovernmentlevel.aspx (last visited Feb. 20, 2009).

45. Levi Strauss & Co., Case Study: Child Labor in Bangladesh, http://levistrauss.com/Downloads/CaseStudyBangladesh.pdf.

46. *Id.*

47. *See* KARL SCHOENBERGER, LEVI'S CHILDREN 218-20 (2001).

by our suppliers. By our actions we can—and should—improve the lives of workers who make our products."[48]

B. Factory Management, Unions, and Workers

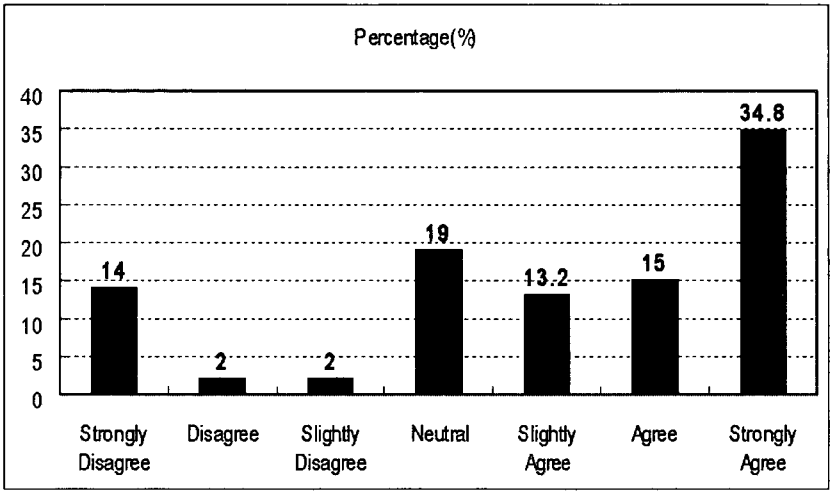
Our data from local management, union, and worker interviews provide a fuller picture. From 2005 to 2007, we interviewed management at two Taiwanese and two Korean subcontractors for Nike in Vietnam. These four are considered Nike's elite suppliers, with manufacturing facilities in China and Vietnam. During May 2007, we interviewed union representatives and conducted worker surveys at six apparel and backpack factories in Vietnam. These suppliers had 1,000 to 3,000 workers, with one exception of 11,500 workers. The suppliers' years in business varied from three to four years (foreign-owned) to twelve to sixty years (locally-owned).

The worker surveys revealed that employees are generally aware of the buyer's code and biased toward buyer responsibility. Asked whether they knew the buyer's code, 63% indicated they did (strongly agree, slightly agree, agree), including 34% who claimed to know the code very well.[49]

48. Adidas Group Vision and Governance, http://adidas-group.com/en/sustainability/mission_and_values/default.asp (last visited Feb. 20, 2009).

49. *See infra* p. 348 tbl.3.

Table 3: "I know the Buyer's Code of Conduct" (n= 887)



More than two-thirds of respondents (67.1%) either "agreed" or "strongly agreed" that code compliance resulted from the buyer's efforts, as opposed to the management's (53.2%) or union's (38.2%) efforts.[50]

Table 4: Workers' Opinion on Why the Code of Conduct Is Followed (%)

	Strongly disagree	Disagree	Slightly Disagree	Neutral	Slightly Agree	Agree	Strongly Agree
Buyer*	6.0	1.2	0.9	15.3	9.5	16.1	51.0
Management**	8.2	2.1	1.9	23.5	11.1	14.5	38.7
Union***	12.6	4.0	2.7	32.8	9.7	10.7	27.5

*The Code of Conduct is followed because of buyer's efforts (n=881).

**The Code of Conduct is followed because of management's efforts (n=876).

***The Code of Conduct is followed because of union's efforts (n=880).

Regression analysis indicates that more experienced workers believe that buyers largely control the subcontracting factories. Generally, the more informed the worker was about the code and factory products, the stronger her opinion that the buyer is

50. *See infra* p. 348 tbl.4. The percentages total more than 100% because many workers believe that compliance resulted from multiparty efforts.

responsible for code policing.[51] For example, if the worker knew the names of the buyers, she more likely thought that they were influencing the code of conduct.

Table 5: Workers' Knowledge and Opinion on Why the Code Is Followed (Dependent Variable)

Independent Variables	Unstandardized Coefficients		Standardized Coefficients	T	Sig.
	B	Std. Error			
IV-1. The buyer's Code is enforced at this company	.52	.029	.55	18.32	0.000
IV-2. I know the buyer's Code	.10	.027	.17	3.55	0.000
IV-3. I know the names of companies that buy the clothes we make	.05	.022	.06	2.18	0.029
(Constant)	2.215	.155		13.70	0.000

* R Square = .397 (IV-1) / .412 (IV-1, IV-2) / .414 (IV-1, IV-2, IV-3)

** Adjusted R Square = .396 (IV-1) / .411 (IV-1, IV-2) / .414 (IV-1, IV-2, IV-3)

One buyer's senior compliance officer in Vietnam confirmed these results, commenting that the workers "look at [the buyer] as protector of last resort."[52]

Data from union officials were largely consistent with these results. One felt that the code gives workers "some power."[53] Another confirmed that workers sometimes contact the buyer when their union cannot help.[54] However, a third officer believed that management would follow the code without buyer intervention.[55]

Factory managers were more ambiguous. Generally, they concurred on the need for buyer training and guidance,[56] with one

51. *See infra* p. 349 tbl.5.

52. Interview with Manager, Soc. & Envtl. Affairs, Adidas, *supra* note 41.

53. Interview with Union Leader, Youngone, *supra* note 40.

54. Interview with Union Deputy Chairperson, Pungkook Corp., in Ho Chi Minh City, Vietnam (May 17, 2007).

55. Interview with Union Leader, Minh Hoang Garment (Vietnamese-owned apparel factory), in Ho Chi Minh City, Vietnam (May 16, 2007).

56. *See id.*; Interview with Deputy Gen. Dir., Garco 10 (Vietnamese state-owned factory), in Hanoi, Vietnam (May 15, 2007); Interview with Vice President, Youngone, *supra* note 38.

describing the buyer relationship as a "partnership."[57] Some acknowledged that workers complain to the buyer about jobsite problems, such as late social insurance payments and inability to take time off.[58] Some felt that code failures were entirely the supplier's responsibility,[59] while another charged that the buyer sometimes forces the contractor to breach the code with demanding production schedules.[60] One contractor, expressing faith in its own code and motivations, considered the buyer unimportant in social responsibility matters and argued that workers felt the same.[61]

Our data are consistent with the work of Blackett, Esbenshade, and Ruggie.[62] Buyers are setting, monitoring, and enforcing standards in areas traditionally regulated by employers, governments, and unions, namely wages, hours, safety, discipline, and minimum age. They have recently moved into environmental regulation. Buyers send inspectors, punish violations, and teach, train, and coach their partners and allies. Buyers directly communicate with workers through hotlines and interviews, and sometimes state that they want to empower factory employees. Not surprisingly, workers seem to view buyers as allies, and this paternalistic role is largely recognized by unions and local management. We next consider how this sociological shift in workplace governance could place buyers in legal jeopardy.

IV. BUYERS' LEGAL RESPONSIBILITIES

We analyze four potential legal claims: (1) the Good Samaritan tort duty; (2) the general contractor's tort duty to reasonably supervise a subcontractor's workplace; (3) the third-party beneficiary contract claim; and (4) promissory estoppel. We consider each in the context of typical buyer-supplier relations and ask whether buyers have assumed a duty (torts) or made a promise (contracts) regarding the treatment of factory workers.

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57. Interview with Gen. Manager, Changshin (Korean-owned footwear factory), in Vietnam (Jan. 2005); *see* Interview with Dir. of Bus. & Dev., Changshin (Korean-owned footwear factory), in Vietnam (Jan. 2005).

58. Interview with CEO, Minh Hoang Garment (Vietnamese-owned apparel factory), in Ho Chi Min City, Vietnam (May 16, 2007); Interview with Dir., Dep't of SOE & HRM, Pungkook Corp., in Ho Chi Minh City, Vietnam (May 17, 2007); Interview with Production Manager, Pungkook Corp., in Ho Chi Minh City, Vietnam (May 17, 2007).

59. Interview with Production Manager, *supra* note 58.

60. Interview with Dir., Dep't of SOE & HRM, Pungkook Corp., *supra* note 58.

61. Interview with CEO, Protrade Garment (State-owned apparel factory), in Ho Chi Minh City, Vietnam (May 18, 2007).

62. *See* Blackett, *supra* note 26, at 128; Esbenshade, *supra* note 27, at 105; Ruggie, *supra* note 29, at 499-504.

A. *Tort Claims: Good Samaritan Duties*

Sections 42 and 43 of the Third Restatement of Torts[63] memorialize the long-standing Good Samaritan duties of care.[64] A stylized example is a passerby assisting an injured person. Though the passerby did not cause the injury and owes no duty to aid the casualty, once she begins to assist—becoming the Good Samaritan—she assumes a duty to exercise reasonable care in the service. By "tak[ing] charge and control of the situation, [the Good Samaritan] is regarded as entering voluntarily into a relation which is attenuated with responsibility."[65] Thus, a railroad that voluntarily places a flashing light at a crossing becomes legally obligated to maintain the light, though there was no original duty to install it.[66] Global South workers would argue that the buyer, having no initial obligation to ensure a healthy and safe workplace, assumed that duty with its code system. If the buyer then negligently enforces the code, causing the worker's physical injury, it could be liable.

Courts have frequently allowed section 42 and 43 claims to proceed against a defendant for failing to protect third-parties such as another company's employees.[67] These lawsuits included allegations that: (1) a parent corporation negligently conducted

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63. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 42-43 (Proposed Final Draft No. 1, 2005).

64. Sections 42 and 43 carry over without substantive change the Good Samaritan duties expressed in the Second Restatement of Torts sections 323 and 324A, respectively. RESTATMENT (SECOND) OF TORTS §§ 323-324A (1965). Courts have widely accepted these duties. *See* RESTATEMENT (THIRD) OF TORTS § 43 reporter's notes to cmt. c (Proposed Final Draft No. 1, 2005). Though cases we cite refer to sections 323 and 324A, we use the new designations throughout. *See also* 57A AM. JUR. 2D *Negligence* §§ 193-94 (2004). European legal scholars recently recommended harmonizing European tort law to include a Good Samaritan duty. EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW 89-90 (2005).

65. PROSSER & KEETON ON THE LAW OF TORTS § 53, at 378 (5th ed. 1984) [hereafter PROSSER & KEETON].

66. Osuna v. S. Pac. R.R., 641 S.W.2d 229, 230 (Tex. 1982).

67. *See* Andrew J. Natale, *Expansion of Parent Corporate Shareholder Liability Through the Good Samaritan Doctrine—A Parent Corporation's Duty to Provide a Safe Workplace for Employees of Its Subsidiary*, 57 U. CIN. L. REV. 717, 729-37 (1988); *see also* Ralph G. Wellington & Vance G. Camisa, *The Trade Association and Product Safety Standards: Of Good Samaritans and Liability*, 35 WAYNE L. REV. 37 (1988); Annette Crawley, Note, *Environmental Auditing and the "Good Samaritan" Doctrine: Implications for Parent Corporations*, 28 GA. L. REV. 223, 234-35 (1993); Kathryn Michele Glegg, Note, *Negligent Inspection: Texas Expressly Adopts the Restatement (Second) of Torts Section 324A in* Seay v. Travelers Indemnity Co., 41 SW. L.J. 1041 (1987); Kimberly J. Todd, Note, Snyder v. American Association of Blood Banks*: Expansion of Trade Association Liability—Does It Reach Medical Societies?*, 29 U. TOL. L. REV. 149 (1997); *see generally* 57A AM. JUR. 2D *Negligence* § 355 (2004).

safety inspections and remediation programs at its subsidiary;[68] (2) an insurance company negligently inspected workplaces for asbestos-related health effects;[69] (3) a chemical trade association negligently engaged in research and standard-setting for member industries;[70] and (4) a corporate parent negligently provided the subsidiary with chemical safety information and services.[71] The Fifth Circuit affirmed a jury verdict for a subsidiary's employees against a parent that conducted and oversaw safety inspections.[72] The Idaho Supreme Court permitted a lawsuit by miners against their union which had assumed duties to inspect the workplace and report safety problems.[73] Wisconsin's Supreme Court reversed the dismissal of plaintiffs' claims where the parent corporation conducted unannounced occupational health and safety audits at its subsidiary, offered recommendations for a safe workplace, and acted as an independent safety consultant.[74] An Illinois appellate court upheld a jury verdict against a franchisor where the franchisee's employees were victims of a robbery/murder and the franchisor had established a corporate division, manual, and inspections to address security problems.[75] That none of these cases involve a buyers-seller relationship may not be determinative. Good Samaritan liability turns more on the defendant's activities than the parties' legal relationship. Actionable activities often resemble buyers' code regimes—standards, consultations, inspections, audits, recommendations, and requirements.

A case where Global South workers did assert a Good Samaritan claim against an American buyer is *Rodriguez-Olvera v. Salant Corp.*[76] Salant produced clothes under brand licenses through a

68. Gaines v. Excel Indus., Inc., 667 F. Supp. 569, 570, 572-73 (M.D. Tenn. 1987).

69. Kohr v. Johns-Manville Corp., 534 F. Supp. 256, 257-59 (E.D. Pa. 1982).

70. Arnstein v. Mfg. Chemists Ass'n, 414 F. Supp. 12, 14-15 (E.D. Pa. 1976); King v. Nat'l Spa & Pool Inst., 570 So. 2d 612, 614-18 (Ala. 1990) (swimming pool design standards); FNS Mortgage Serv. Corp. v. Pac. Gen. Group, Inc., 29 Cal. Rptr. 2d 916, 920 (Cal. Ct. App. 1994) (nonprofit trade association inspecting pipe manufacturers); Meneely v. S.R. Smith, Inc., 5 P.3d 49, 56-57 (Wash. Ct. App. 2000) (diving board's risk).

71. Heinrich v. Goodyear Tire & Rubber Co., 532 F. Supp. 1348, 1351, 1354-56 (D. Md. 1982).

72. Johnson v. Abbe Eng'g Co., 749 F.2d 1131, 1132-34 (5th Cir. 1984).

73. Rawson v. United Steelworkers of Am., 726 P.2d 742, 745-50 (Idaho 1986), *cert. granted and judgment vacated on other grounds*, 482 U.S. 901 (1987).

74. Miller v. Bristol-Myers Co., 485 N.W.2d 31, 33-35, 39-41 (Wis. 1992).

75. Martin v. McDonald's Corp., 572 N.E.2d 1073, 1076-78 (Ill. App. Ct. 1991); *see also* Crawley, *supra* note 67, at 229-32 (discussing liability risk when a corporation's environmental audit leads its contractor to forego a detection and compliance program).

76. Rodriguez-Olvera v. Salant Corp., No. 97-07-14605-CV (365th Dist. Ct. of Maverick County, Tex. 1999) (on file with author). The authors thank the law firm of

contract manufacturing system that included a Mexican supplier.[77] The supplier's employees alleged that Salant had determined the transportation policy for the factory workers, purchased and sold a bus to the supplier, supervised the bus's maintenance, and chose and trained its driver.[78] After a bus accident where more than a dozen workers were killed, their families sued Salant in Texas state court under section 43. They contended that the buyer negligently rendered transportation services to the contractor for the employees' benefit.[79] While there was no appellate court ruling on the section 43 claim, the state district court allowed the issue to proceed to trial where Salant and its insurers settled for more than thirty million dollars.[80]

Other courts have taken contrary positions, for example, finding that unions[81] and trade associations[82] did not owe a duty of care to workers, at least under the case facts. The clearest rejection of the duty's application to a buyer is found in *Doe v. Wal-Mart Stores, Inc.*,[83] where Global South workers contend that the buyer's inadequate monitoring and policing of its code caused the workers' injuries.[84] The trial court granted Wal-Mart's Rule 12(b)(6) motion to dismiss and plaintiffs have appealed.[85] The judge, in a terse analysis, remarked that the workers cited no supporting cases and that allowing the claim would mean that "all businesses [would] . . . be

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Caddell & Chapman, P.C. for access to case archives. One of the authors was an attorney-of-record in this case and has personal knowledge of the factual allegations, legal arguments, and case results.

77. *Id.*

78. Plaintiffs' Sixth Amended Petition at 12-14, *Rodriguez-Olvera*, No. 97-07-14605-CV [hereinafter Rodriguez Petition] (on file with author).

79. *Id.* at 17-18.

80. The plaintiffs additionally alleged that Salant impliedly warranted the condition of the bus and negligently entrusted it to the supplier. Rodriguez Petition, *supra* note 78, at 18-20. Though Salant was a minority shareholder in the subcontractor, plaintiffs' claims did not rely on that ownership, but endorsed the companies' legal separation to avoid a workers' compensation defense.

81. *See, e.g.*, Bescoe v. Laborers' Union No. 334, 295 N.W.2d 892, 902 (Mich. Ct. App. 1980); Brooks v. N.J. Mfrs. Ins. Co., 405 A.2d 466, 468-74 (N.J. Super. Ct. App. Div. 1979).

82. *See, e.g.*, Bailey v. Edward Hines Lumber Co., 719 N.E.2d 178, 181-85 (Ill. App. Ct. 1999).

83. No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102 (C.D. Cal. Mar. 30, 2007), *appeal filed*, No. 08-55706 (9th Cir. 2008).

84. Plaintiffs' Opposition to Defendants' Motion to Dismiss First Amended Complaint at 5, 14-15, *Doe*, No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102 [hereinafter Doe Opposition].

85. *Doe*, 2007 U.S. Dist. LEXIS 98102, at *2-3.

responsible for the employment conditions for . . . all workers employed by their suppliers."[86]

The judge's opinion and the parties' briefs failed to address the numerous situations where courts have allowed workplace injury claims against third-parties. There is no a priori reason why those cases and sections 42 and 43 would not extend to buyer-supplier relations. The trial court may also have exaggerated the claim's implications. Rather than "all businesses" becoming responsible for their suppliers' workers, only those that assumed a duty of care would be potentially liable. Even then, liability should be limited to the specific duties assumed and triggered only when the defendant negligently carried out its assumed responsibilities.

To present colorable section 42 and 43 claims, workers face several hurdles. The buyer must have undertaken a service, *either gratuitously* or for a fee, to the workers[87] *or* to any another person for the workers' benefit.[88] In doing so, the buyer either knew or should have known that this "undertaking" would reduce the workers' risk of physical harm.[89] Assuming these conditions are met, sections 42 and 43 would require the buyer to perform the undertaking with reasonable care when:

- the failure to exercise reasonable care would increase the workers' risk of harm *"beyond that which existed without the undertaking"*[90]; *or*
- the worker *or* any other party (for example, the supplier) relied on the buyer to perform the undertaking with reasonable care;[91] *or*
- the buyer undertook a duty that another person (for example, the supplier) owed the worker.[92]

If the duty of reasonable care attaches, the defendant is liable for the plaintiff's physical injuries proximately resulting from the negligent performance of the undertaking.[93] Drawing on our data, we consider each element's viability.

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86. *Id.* at *15.

87. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 42 (Proposed Final Draft No. 1, 2005).

88. *Id.* § 43.

89. *Id.* § 42.

90. *Id.* §§ 42(a), 43(a) (emphasis added).

91. *Id.* §§ 42(b), 43(c).

92. *Id.* § 43(b).

93. *See id.* §§ 42-43.

1. Undertaking a Service that Reduces Risks

Establishing that the buyer undertook a service to the workers would not be difficult. The buyer patently knows or should know that its code system will improve workplace health-safety, reducing risks of physical harm. The goal is repeated throughout buyer Web sites, codes, and other pronouncements. Satisfying this element is made easier by the Third Restatement, which evaluates the undertaking from the perspective of those who might have reasonably relied on it.[94] Suppliers and their employees often view the buyer's code system as an effort to help workers. Moreover, the Restatement and some courts argue that the defendant need not intend to benefit the plaintiff, nor even know that the plaintiff or another party will rely on the undertaking. It is sufficient that the defendant knew or should have known that its undertaking would reduce the plaintiff's risk of harm.[95]

The genesis of codes probably precludes buyers from even attempting to deny a benefit to workers. Codes originated because of perceptions and evidence that suppliers were failing to ensure, among other things, a safe and fair jobsite. Several buyers have turned their code systems into a public relations bonanza.[96] To now claim that its code was created solely or chiefly to protect the brand or improve productivity is admitting that profit, not ethics, principally motivated the buyer.

Our conclusion is reinforced by the defendant's arguments in *Doe v. Wal-Mart Stores, Inc.*[97] Wal-Mart's dismissal motion does not claim that the code was designed for its benefit. Rather, the buyer asserts that Wal-Mart "and many other U.S. retailers encourage suppliers and suppliers' factories to improve working conditions for the factories' employees."[98]

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94. *Id.* § 42 cmt. g.

95. This is the Restatement's position. For example, if an insurer tells the insured that it will provide loss-prevention assistance, the insurer should know that it is acting to reduce risks regardless of its purpose. *Id.* §§ 42 cmt. d, 43 reporters' notes to cmt. h. Several courts adopt this view. *See* Miller v. Bristol-Myers Co., 485 N.W.2d 31, 39 (Wis. 1992). Other courts argue that the defendant must have intended to benefit the plaintiff, and some decisions require that this be the sole motivation. *See, e.g.*, Leroy v. Hartford Steam Boiler Inspection & Ins. Co., 695 F. Supp. 1120, 1127 (D. Kan. 1988). The Reporters view those cases as inconsistent with the Restatement's rejection of "purpose" as the criterion for determining if an undertaking occurred. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 43, reporters' note cmt. d (Proposed Final Draft No. 1, 2005). The service may be on behalf of a specific individual or class of persons. *Id.* §§ 42 cmt. d, 43 cmt. f.

96. *See* VOGEL, *supra* note 15, at 102-03.

97. No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102 (C.D. Cal. Mar. 30, 2007).

98. Wal-Mart's Dismissal Motion, *supra* note 32, at 5.

Clearing the next evidentiary hurdle will be more difficult. Plaintiffs must prove either (1) that the buyer's failure to reasonably perform the undertaking increased the workers' risk of harm above that existing *before the code's enactment, or* (2) that the buyer undertook a workplace duty originally owed the employees by another person, such as the supplier.

2. Increasing the Risk of Harm

The increased risk standard is sometimes misunderstood. Liability attaches only if the defendant's undertaking amplified the danger beyond that existing *prior to* the undertaking.[99] The Second Restatement of Torts illustrates:

> [A's] grocery store [has] an electric light hanging over one of the aisles . . . . A calls B Electric Company to repair it. [B's workman] repairs the light, but leaves the fixture so insecurely attached that it falls and injures C, a [store] customer. . . . B Company is [liable] to C.[100]

B increased the risk to C because its negligence rendered the fixture more dangerous than it was previously. If B had been hired to repair an already wobbly fixture and the repairs left it equally loose, there would be no increased risk of harm and, consequently, no liability even though B's repairs were negligent.[101] A Third Circuit decision trimly summarizes the criteria: "[the Restatement section applies] only when . . . the defendant's negligent performance . . . put[s] the plaintiff in a worse situation than if the defendant had never begun performance."[102]

The plaintiff's risk frequently is amplified because she or another party relied on the defendant's undertaking, foregoing alternative protections.[103] The Second Restatement provides an example:

> A Company employs B Company to inspect [its office] elevator. [B's employee] makes a negligent inspection and reports that the elevator is in good condition. Due to defects in the elevator, which a

99. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 42 cmt. f, 43 cmt. d (Proposed Final Draft No. 1, 2005).

100. RESTATEMENT (SECOND) OF TORTS § 324A illus. 1 (1965); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 43 cmt. d (Proposed Final Draft No. 1, 2005).

101. Alder v. Bayer Corp., 61 P.3d 1068, 1078 (Utah 2002).

102. Turbe v. Virgin Islands, 938 F.2d 427, 432 (3d Cir. 1991).

103. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 42 cmt. f ("[R]eliance is merely a specific manner of increasing the risk of harm."), 43 cmt. e, reporters' notes to cmt. e (Proposed Final Draft No. 1, 2005).

> proper inspection would have disclosed, the elevator falls and injuries C, [who is A's employee]. B is liable to C.[104]

Though the employer (A), not the employee (C), relied on the defendant's inspection, the defendant is liable for the injuries because the employer's reliance augmented the employee's risk of injury.[105] Partial reliance—a reduction in existing safety efforts—sometimes is held sufficient.[106]

Establishing that negligent code enforcement *enhanced* the workers' risk will be difficult because the jobsites were already dangerous and abusive when buyers began their efforts. There are, however, potential arguments. The worker may have had alternative means of protecting herself, but she instead depended on the buyer. In *Rodriguez-Olvera v. Salant Corp.*, the workers relied on the buyer's provision of a bus instead of using other transportation (for example, car pooling or public buses).[107] Because the bus was more dangerous, reliance on the buyer increased the risk of harm.

Perhaps a worker accepted her job relying on the buyer's code; absent it, she would have sought and found safer employment elsewhere. Our data indicate that employees understand and value the buyer's role in improving the jobsite.[108] Though this argument's credibility would be suspect where Global South workers intensely compete for industrial jobs, this is not a universal circumstance. Field research into Vietnam's athletic footwear sector revealed suppliers using various incentives to attract workers in limited labor pools.[109] Additionally, more than half the workers we surveyed said that "comfortable working conditions," not wages, were their primary reason for choosing a job.[110]

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104. RESTATEMENT (SECOND) OF TORTS § 324A cmt. e, illus. 4 (1965).

105. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 43 cmt. e (Proposed Final Draft No. 1, 2005).

106. Canipe v. Nat'l Loss Control Serv. Corp., 736 F.2d 1055, 1063-64 (5th Cir. 1984).

107. Rodriguez-Olvera v. Salant Corp., No. 97-07-14605-CV (365th Dist. Ct. of Maverick County, Tex. 1999) (on file with author). Because the case settled before verdict, the jury did not resolve the arguments.

108. *See supra* p. 348 tbls.3 & 4.

109. Interview with Assistant Dir. of Corporate Responsibility, Changshin, *supra* note 20; Interview with Dir. of Corporate Responsibility, Pou Chen (Taiwanese-owned footwear factory), in Vietnam (Jan. 2005).

110. *See infra* p. 358 tbl.6.

Table 6: What is the main reason that you decided to work for this company?

Reason	Frequency (n)	Valid Percent (%)
Comfortable working conditions	444	50.8%
Recommendation from a friend or family member	105	12.0%
Good corporate image	52	5.9%
Better benefits	39	4.5%
High wage	22	2.5%
Other reason	212	24.3%
Total	874	100%

The worker must additionally prove that the alternative job was likely safer, a conceivable situation where employers fight to attract industrial labor. One study found relatively high code compliance among athletic footwear suppliers within a region of labor scarcity.[111]

There are other plausible scenarios of worker reliance. An employee might rely on the buyer's code and inspections in assuming that a certain chemical or machine is safe. Without the presence of a reassuring buyer, the employee may have asked questions about the chemical's safety, refused to use it, or complained to union representatives or the government.

A worker may also establish liability if a third-party's reliance on the code system caused her injuries.[112] Many suppliers apparently rely on buyers' assistance in health and safety matters. Those we interviewed generally acknowledged the need for buyer support in achieving code compliance.[113] Buyers appear to invite this dependence with statements about training, monitoring, and guiding their supplier partners and allies.[114] The union could have relied on the buyer to monitor and ensure job safety. Our data indicate that unions are at least aware of the buyer's role in health and safety,[115] and the unions might have been more proactive absent the buyer's undertaking. Though traditionally weak by Western standards,

111. Lim & Phillips, *supra* note 19, at 149-50.

112. Johnson v. Abbe Eng'g, 749 F.2d 1131, 1133-34 (5th Cir. 1984) (affirming the jury verdict for subsidiary's employees who sued the parent corporation, where the subsidiary relied on the parent for accident prevention and safety training and followed its recommendations); Tillman v. Travelers Indem. Co., 506 F.2d 917, 921 (5th Cir. 1975) (holding that insurance company that agrees to inspect for jobsite hazards may be liable to injured employee if the employer "so relied on the insurer's undertaking that it neglected its own safety inspection program").

113. *See supra* notes 56-61 and accompanying text.

114. *See supra* pp. 343-45 tbls.1 & 2.

115. *See supra* notes 53-54 and accompanying text.

Global South unions have occasionally organized workers and effectively agitated for change. In Vietnam's footwear industry, they successfully threatened a strike to gain additional compensation for working during a holiday.[116]

The local government may depend on the buyer as a regulatory supplement. This argument mimics that in a California case where a trade association was potentially liable to consumers because local building officials had relied on the association's inspections of pipe manufacturers.[117] However, Global South governments seem an improbable alternative to an effective buyer code given their traditional reluctance to jeopardize foreign investment. A major brand operating in Vietnam told us that the Vietnamese government regarded corporate social responsibility as the buyer's job.[118]

The buyer's undertaking also conceivably diverted help from NGOs, IGOs, and media, all of which play increasing roles in code enforcement. A transnational anti-Nike network mobilized in the late 1990s, effectively putting pressure on the Clinton administration to convene the Apparel Industry Partnership (AIP), which included brands and NGOs.[119] The AIP successfully drafted industry agreements on permissible workplace conditions.[120] Still, situations seem rare where these actors would have remedied a particular jobsite danger had the buyer not promised to do so.[121]

Because the "increased risk-reliance" criterion will be difficult to satisfy, workers could seek a court ruling to lower the benchmark. The Second Restatement explicitly left this avenue open:

> [O]ne who has [begun] . . . performance of his undertaking, and cannot withdraw from it without leaving an unreasonable risk of serious harm to another, may be subject to liability *even though his conduct has induced no reliance and he has in no way increased the risk.* Clear authority is lacking, but it is possible that a court may

116. Interview with Union Leader, Changshin (Korean-owned footwear factory), in Vietnam (Jan. 2005); Interview with Union Leader, Feng Tey (Taiwanese-owned footwear factory), in Vietnam (Jan. 2005); Interview with Union Leader, Pou Chen (Taiwanese-owned footwear factory), in Vietnam (Jan. 2005); Interview with Union Leader, Tae Kwang (Korean-owned footwear factory), in Vietnam (Jan. 2005).

117. FNS Mortgage Serv. Corp. v. Pac. Gen. Groups Inc., 29 Cal. Rptr. 2d 916, 921 (Cal. Ct. App. 1994).

118. Interview with Manager, Corporate Responsibility Compliance, Nike, *supra* note 35.

119. Steven Greenhouse, *Voluntary Rules on Apparel Labor Prove Hard to Set*, N.Y. TIMES, Feb. 1, 1997, at A1.

120. Lim & Phillips, *supra* note 19, at 147.

121. The Doe plaintiffs contend that Wal-Mart's code regime "has effectively reduced public outrage over the conditions in its supplier factories. This has derailed efforts by independent groups to themselves monitor and remedy conditions . . . ." Doe Plaintiffs' Appellate Brief, *supra* note 13, at 9.

> hold that one who has thrown rope to a drowning man, pulled him half way to shore, and then unreasonably abandoned the effort and left him to drown, is liable *even though there were no other possible sources of aid, and the situation is made no worse than it was.*[122]

The Third Restatement repeated this flexibility, concluding that case law is somewhat mixed on whether an increased risk is necessary.[123] If workers can build on the Restatement's ambivalence and convince a court to evolve the law in their direction, chances for a successful claim improve considerably. Failing this, the idiosyncratic facts and access to evidence will determine the odds for sections 42 and 43(a), (c) claims. Section 43(b)'s alternative approach—that the buyer was performing a duty that another party owed the worker—may be more viable.

3. Carrying Out Another's Duty

An increased risk is unnecessary if liability is premised on the buyer undertaking another party's duty to the worker.[124] For example, when an employer hires a safety-inspection company to supplement its provision of a safe workplace, that company has partially assumed the employer's duty to the employees. Liability may attach regardless whether the company's undertaking increased the risk of harm.[125]

Section 43(b), like its sister provisions, has been applied to health and safety cases. The Vermont Supreme Court affirmed a section 43(b) jury verdict against a workers' compensation carrier that inspected the jobsite prior to the plaintiff's injury.[126] The insurer maintained a "Loss Prevention Department" with expertise in workplace safety, produced a "Progress Report" detailing the employer's accident record, and met with the employer to discuss risks, a corrective plan, and the status of past recommendations.[127] Though the insurance policy did not promise safety inspections, the jury was allowed to find that the defendant undertook to provide a safe workplace.[128] The Wisconsin Supreme Court held that a parent assumed the subsidiary's duty to supply a safe workplace by inspecting and then requiring construction of a chemical-handling

122. RESTATEMENT (SECOND) OF TORTS § 323 cmt. e (1965) (emphasis added); *see also id.* § 324A caveat 2.

123. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 42 cmt. f, cmt. f reporters' note, 43 cmt. e (Proposed Final Draft No. 1, 2005).

124. *See id.* § 43(b), cmts. c, g.

125. *See id.* § 43 cmt. g, illus. 2.

126. Derosia v. Liberty Mut. Ins. Co., 583 A.2d 881, 882-84 (Vt. 1990).

127. *Id.* at 882-85.

128. *Id.* at 885.

area.[129] The Second Circuit allowed an injured worker's section 43(b) lawsuit against the compensation carrier where evidence indicated that the insurer regularly inspected the jobsite and made specific safety recommendations; the employer relied on the advice; and the insurer advertised loss prevention expertise.[130]

As with other areas of Good Samaritan law, cases are mixed on the behavior needed to generate a duty.[131] Merely conducting inspections, reviewing findings, issuing recommendations, or generally communicating on health-safety matters are likely insufficient.[132] In our data, however, workers, suppliers, and, particularly, buyers describe a more intimate relationship. Buyers do not merely inspect and recommend, they command and punish. Long-term buyer goals include increasing leverage over contractors by consolidating the supply chain. They reach deeply into the shop floor, governing overtime, compensation, and health-safety. Even the simplest code typically demands that employers display it as a kind of employee bill of rights and protect the right to associate and present grievances. Some buyers go further with worker hotlines, one-to-one interviews, and employee education. Buyers occasionally speak of building the contractors' capacity to self-govern, implying joint governance.

The feasibility of a section 43(b) claim depends on whether the buyer need only supplement, rather than supplant, the suppliers' duty to workers. "Supplementation" is the Third Restatement's position.[133] Some courts agree; for example, the Fifth Circuit held that section 43(b) "comes into play [when] the party who owes the plaintiff a duty of care has delegated to the defendant any particular part of that duty."[134] Some courts require that the defendant

129. Miller v. Bristol-Myers Co., 485 N.W.2d 31, 40-41 (Wis. 1992).

130. Pratt v. Liberty Mut. Ins. Co., 952 F.2d 667, 670-71 (2d Cir. 1992). The Arkansas Supreme Court reached similar conclusions when an injured employee sued the insurer and its consulting firm which were hired by the employer to make safety inspections and recommendations. Wilson v. Rebsamen Ins., Inc., 957 S.W.2d 678, 681-83 (Ark. 1997).

131. *See* Muniz v. Nat'l Can Corp., 737 F.2d 145, 148-49 (1st Cir. 1984) (holding that the evidence did not establish a Good Samaritan duty even though the parent was concerned with safety conditions at a subsidiary and communicated on safety matters); Davis v. Liberty Mut. Ins. Co., 525 F.2d 1204, 1207-08 (5th Cir. 1976) (holding that there was no evidence that the employer delegated any part of its direct and primary duty to discover unsafe conditions although the employer occasionally requested that its compensation insurer assist plant inspections and make safety recommendations).

132. Crawley, *supra* note 67, at 234-36.

133. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 43 cmt. g (Proposed Final Draft No. 1, 2005).

134. Canipe v. Nat'l Loss Control Serv. Corp., 736 F.2d 1055, 1062-63 (5th Cir. 1984); *accord* Hill v. James Walker Mem'l Hosp., 407 F.2d 1036, 1041-42 (4th Cir.

completely assume the other's legal obligation,[135] an unlikely buyer-supplier scenario.

As a predicate to the section 43(b) claim, workers must establish that the supplier owed them a duty to maintain a safe and healthy jobsite. It is only then that the issue becomes whether the buyer at least partially assumed that obligation. While Global South regulatory systems are often immature, most countries require employers to provide a safe and healthy jobsite.

Cambodia's labor law illustrates this concept. Labor directives order the employer to make sure that the workplace is safe, healthy, and hygienic.[136] Noise and chemical exposure must be below specified levels, drinking water must be kept in clean containers, suitable workstation chairs must be provided, and reasonable temperature and adequate lighting must be maintained.[137] The employer is to avoid requiring workers to use physical force harmful to their health, and maximum weights are listed.[138] The employer is responsible (or must delegate responsibility) for preventing workplace accidents.[139] Another example is Vietnam's labor law.[140]

Because there is no increased risk requirement and we have not located a case snubbing section 43(b)'s application to codes of conduct, it appears a fertile source of buyer liability. The *Doe* plaintiffs and trial court seem to have ignored this duty.

4. The Jury's Role and Buyer's Disclaimer

Two more aspects of the Good Samaritan doctrine bear discussion—the roles of juries and disclaimers. Whether a buyer owes a tort duty to a worker is a legal decision for judges, and, though duties evolve, precedent allows reasonable predictions. If, however, the duty's *application* turns on contested facts, a less predictable jury will resolve the dispute.[141] Consequently, while

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1969); Derosia v. Liberty Mut. Ins. Co., 583 A.2d 881, 886 (Vt. 1990); *Miller*, 485 N.W.2d at 39-40; *see also* Crawley, *supra* note 67, at 265.

135. Heinrich v. Goodyear Tire & Rubber Co., 532 F. Supp. 1348, 1355 (D. Md. 1982); Patton v. Simone, 626 A.2d 844, 851 (Del. Super. Ct. 1992). *Gaines v. Excel Industries, Inc.*, 667 F. Supp. 569, 573 (M.D. Tenn. 1987), describes the section 43(b) standard somewhat differently, requiring that the defendant act "primarily in its own interest and not primarily for the benefit of either [the employer] or . . . employees."

136. LABOR LAW arts. 23, 228-30 (Cambodia).

137. *Id.* arts. 212, 229-30.

138. *Id.* art. 230.

139. *Id.* arts. 229-30, 250.

140. *See* LABOUR CODE ch. IX (Vietnam).

141. *See* Pratt v. Liberty Mut. Ins. Co., 952 F.2d 667, 671 (2d Cir. 1992); 57A AM. JUR. 2D *Negligence* §§ 17, 19-20 (2008) ("[Q]uestions relating to negligence are questions of fact for determination by the jury in all except the rarest and clearest

precedent has determined that a duty will arise only if the buyer undertakes a service to the worker or a related party, a jury would determine factual disputes involving the buyer's behavior, oral statements, and, sometimes, contractual intention. Similarly, while the increased risk criterion is a legal standard, whether the risk was increased (whether there was reliance) is a jury issue when facts are contested.

With disclaimers, the buyer might legally protect itself from section 42 and 43 claims. A disclaimer could state that the buyer is not undertaking any service to the supplier or worker and that the code regime is not intended to reduce workplace injuries. While *liability* disclaimers cannot bind workers who are not parties to the supply contract,[142] statements that the buyer was not rendering a service to the contractor or worker will affect the court's determination of whether there was an undertaking.[143] Disclaimers could legally preclude the worker, supplier, union, or other party from reasonably relying on the buyer's code.[144] For this argument to succeed, the disclaimer should be widely publicized to put noncontractual parties on notice.

The use of disclaimers remains to be seen. Our examination of one major buyer's supply contract, and numerous buyer Web sites, showed none. Even with a disclaimer, the buyer's other statements and conduct could establish that it undertook a service for the worker or supplier. The Vermont Supreme Court upheld admission of a compensation carrier's advertisements to determine if its course of conduct was an undertaking although no language to that effect was in the insurance contract.[145] Regardless, disclaimers may be an unpalatable public relations option for the buyer, undercutting its packaging of the code as worker protection.

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instances."); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 42 cmt. d (Proposed Final Draft No. 1, 2005).

142. *See* Morris v. McDonald's Corp., 650 N.E.2d 1219, 1221-23 (Ind. Ct. App. 1995) (holding that a plaintiff injured at McDonald's could sue McDonald's, despite exculpatory and indemnity clauses in the franchise contract, because the plaintiff was not a contract party); 3 J. D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 27:2 (2d ed. 2008) (stating that a disclaimer does not bar a negligence action by someone not in privity with the drafter of the disclaimer).

143. *See* Commercial Union Ins. Co. v. DeShazo, 845 So. 2d 766, 770-71 (Ala. 2002) (holding that because defendants' asbestos inspections were made for their benefit only, they owed no duty of care to plaintiffs).

144. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 42 cmt. d, g, 43 cmt. h (Proposed Final Draft No. 1, 2005); *see also* Smith v. Allandale Mut. Ins. Co., 303 N.W.2d 702, 716 & n.24 (Mich. 1981); 57A AM. JUR. 2D *Negligence* § 197 (2008).

145. Derosia v. Liberty Mut. Ins. Co., 583 A.2d 881, 888 (Vt. 1990).

B. Tort Claims: General Contractor Duties

A second relevant tort duty is the general contractor's occasional obligation to ensure the safety of its subcontractor's employees.[146] Courts typically reference the Second Restatement of Torts section 414: "One who entrusts work to an independent contractor, but *who retains the control of any part of the work*, is subject to liability for physical harm to others for whose safety the [general contractor] owes a duty to exercise reasonable care . . . ."[147] Though analogous to Good Samaritan claims, section 414 does not require that plaintiff demonstrate reliance on the defendant's conduct. To successfully prosecute this claim, the workers must prove that (1) the buyer-supplier relationship was akin to the link between general-independent contractors, and (2) the buyer, through its code regime, retained sufficient control over jobsite health and safety.

1. Buyers as General Contractors

The categories of "general" and "independent" contractors are legally vague. Courts typically grapple over whether the general is actually the employer, with attendant duties to the workers. Left unclear is the full range of relationships qualifying as general-independent contractors. The Second Restatement of Agency section 2 broadly defines an independent contractor as "a person who contracts with another [party] to do something for [the other party] but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."[148]

The term "independent contractor" is so underspecified that the Third Restatement of Agency has abandoned it.[149] Nonetheless, that vocabulary is widely used in section 414 cases and has been affixed to a manufacturer-distributor,[150] franchisor-franchisee,[151] and parent-subsidiary.[152] An Illinois appellate court applied the language to a restaurant buyer and its food supplier, though ultimately concluding

146. *See* Redinger v. Living, Inc., 689 S.W.2d 415, 418 (Tex. 1985).

147. RESTATEMENT (SECOND) OF TORTS § 414 (1965) (emphasis added).

148. RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958).

149. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. C (2006).

150. *See* Read v. Scott Fetzer Co., 990 S.W.2d 732 (Tex. 1998).

151. *See* Hoffnagle v. McDonald's Corp., 522 N.W.2d 808 (Iowa 1994). Though the court applied section 414 to this relationship, the general contractor's control was insufficient. *Id.* at 815.

152. *See* Morris v. Scotsman Indus., Inc., 106 S.W.3d 751, 753-56 (Tex. App. 2003) (holding that the parent company did not have a duty to subsidiary's employee because of insufficient control over subsidiary's safety program).

that the buyer had not retained sufficient control to trigger a section 414 duty.[153]

The buyer in *Doe v. Wal-Mart Stores, Inc.* argued that the category does not extend to buyers-suppliers, but Wal-Mart cited no authority[154] and the trial judge did not address the issue. Given the terms' imprecision and heterogeneous applications, a court could conceivably categorize buyers-suppliers—in apparel, footwear, and similar sectors—as general and independent contractors.

2. Retaining Control

Courts also have not clearly defined the control needed to impress a duty on general contractors.[155] Section 414 describes "control" as less than that exercised by an employer, but more than merely ordering work stoppages and starts, inspecting progress, receiving reports, prescribing alterations, and making recommendations that need not be followed.[156] The Restatement elaborates that, when the general contractor retains the power to "forbid [work] being done in a manner likely to be dangerous to himself or others," he may be liable.[157] Courts have similary held that the duty can arise when the general contractor maintains some control over the manner of doing the work.[158] Ultimately, there "must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."[159]

The California Supreme Court opined that the general contractor need not always actively direct the independent contractor or her employees. Omissions, such as failing to deliver on promised safety measures, may suffice.[160] The Texas Supreme Court stated that a duty of care may exist when the general contractor is aware that the independent contractor routinely ignores legal guidelines and company safety policies.[161] A Michigan appellate court affirmed a ruling that the general assumed a duty of care by placing a safety

153. *See* Lavazzi v. McDonald's Corp., 606 N.E.2d 845, 850-52 (Ill. App. Ct. 1992).

154. Wal-Mart's Dismissal Motion, *supra* note 32, at 16; Appellee's Answering Brief at 29, Doe v. Wal-Mart Stores, Inc., No. 08-55706 (9th Cir. Dec. 5, 2008).

155. *See* G. Grant Dixon, *General Contractors' Liability for Injury to Subcontractors' Workers: A Confusing Construct*, 93 ILL. B.J. 248, 248 (2005).

156. RESTATEMENT (SECOND) OF TORTS § 414 cmts. a, c (1965).

157. *Id.* § 414 cmt. a.

158. *See, e.g.*, Howarton v. Minn. Mining & Mfg., Inc., 133 S.W.3d 820, 824 (Tex. App. 2004) (noting that premise owner must "retain[] some control over the work of the independent contractor" in order for a duty to exist in Texas).

159. RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965); *see also* 41 AM. JUR. 2D *Independent Contractors* §§ 33-34 (2005).

160. Hooker v. Dep't of Transp., 38 P.3d 1081, 1089 n.3 (Cal. 2002).

161. Hoechst-Celanese Corp. v. Mendez, 967 S.W.2d 354, 357 (Tex. 1998); *accord* Arias v. MHI P'ship, Ltd., 978 S.W.2d 660, 665 (Tex. App. 1998).

inspector at the site.[162] Another verdict was affirmed against a general building contractor that knew about dangerous equipment and could have required the independent contractor to remedy it.[163]

Many cases, however, hold that the duty does not attach merely because the general has the right to inspect work, order changes, and ensure observance of safety precautions. Requiring the independent to follow safety laws and guidelines is often ruled inadequate;[164] the general must have also retained control over means, methods, and details of the contractor's work.[165] Thus, the Iowa Supreme Court concluded that a franchisor had not assumed a duty to protect the franchisee's employees from criminal acts, though it required adherence to a "system," manuals, and other guidelines.[166] Likewise, a Texas appellate court determined that requiring the subcontractor to use reasonable safety precautions, and comply with the general's safety measures and applicable laws, was not managing the "operative detail and method of . . . work."[167] An Illinois appellate court announced that a franchisor's right to terminate the contract or otherwise "call off the work" is insufficient control.[168] Other courts have allowed "safety" regulations to trigger a duty, but only to the extent they *increased* the risk or severity of injury.[169]

The Texas Supreme Court views the interplay between these two strands of cases as a sliding scale of duty:

> As more control is retained over how the subcontractor performs the details of its work, the parameters of the duty proportionally increase. For instance, requiring a subcontractor to abide by the general contractor's safety rules and regulations does not impose upon the latter an unqualified duty to ensure the safety of each employee of the subcontractor. . . .
>
> Yet, as the general contractor increases its authority over matters of safety, its duty to act with reasonable care similarly increases. . . . Conceivably, if all of the subcontractor's independence in the area of safety were usurped then . . . the general contractor would have to exercise reasonable care by . . .

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162. Signs v. Detroit Edison Co., 287 N.W.2d 292, 299-300 (Mich. Ct. App. 1979), *abrogated on other grounds*, Ormbsy v. Capital Welding, Inc., 684 N.W.2d 320 (Mich. 2004).

163. Summers v. Crown Constr. Co., 453 F.2d 998, 999-1000 (4th Cir. 1972).

164. Howarton v. Minn. Mining & Mfg., Inc. 133 S.W.3d 820, 827 (Tex. App. 2004).

165. *Id.* at 825; Bieruta v. Klein Creek Corp., 770 N.E.2d 1175, 1181-82 (Ill. App. Ct. 2002).

166. Hoffnagle v. McDonald's Corp., 522 N.W.2d 808, 814-15 (Iowa 1994).

167. Campbell v. Adventist Health Sys./Sunbelt, Inc., 946 S.W.2d 617, 623 (Tex. App. 1997).

168. Coty v. U.S. Slicing Mach. Co., 373 N.E.2d 1371, 1376 (Ill. App. Ct. 1978).

169. Koch Refining Co. v. Chapa, 11 S.W.3d 153, 156-57 (Tex. 1999); *Howarton*, 133 S.W.3d at 827; Arias v. MHI P'ship, Ltd., 978 S.W.2d 660, 663-65 (Tex. App. 1998).

> affirmatively promulgating rules which ameliorate unsafe practices or conditions of which it knew or should have known and which were within its control.[170]

Buyer liability will turn on where a jurisdiction's law is located in this patchwork of cases. For those that closely track section 414's language of requiring something more than mere inspections, reports, and recommendations, the buyer's requirements, backed by compliance penalties, may be sufficient control. This is accentuated by some buyers' direct contact with workers, permitting employees to bypass the subcontractor in reporting health-safety violations. Buyers educate workers on their rights, support their freedom of association, and require a grievance procedure. Our data indicate that a significant percentage of workers attribute code compliance at least partially to buyer efforts.

For courts demanding that the general contractor completely control the means, methods, and details of the independent contractor's work, usurping the independent contractor's role in safety matters, buyers' activities likely will be insufficient. We nowhere found a complete breakdown of supplier independence. However, even at this end of the spectrum, buyer liability is problematical. One contractor described buyers "intruding" into factory operations, including asking that specific personnel be promoted or removed.[171] One major apparel buyer conducts extensive audits that cover factory procedures and equipment.[172] Thus, while buyers do not directly supplant suppliers' health and safety policies, their technical advice, training, and specific guidelines may indirectly do so.

A final legal characteristic increases uncertainty over buyer liability. Courts will look to the parties' actual practice, as well as the contract, to determine whether the buyer retained sufficient control.[173] Evaluating this conduct is probably a jury issue.[174]

Personal injury damages are recoverable in a general contractor or Good Samaritan claim. Workers' injuries from chemical exposure, malfunctioning equipment, poor ventilation, excessive temperatures, and corporal discipline are in this category. For claims involving

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170. Lee Lewis Constr., Inc. v. Harrison, 64 S.W.3d 1, 7 (Tex. App. 1999), *aff'd*, 70 S.W.3d 778 (Tex. 2001).

171. Interview with anonymous CEO of footwear supplier, in Busan, S. Korea (June 24, 2008).

172. Interview with Dir., Ethical Sourcing, Mountain Equip. Co-op, *supra* note 36.

173. *See* Summers v. Crown Constr. Co., 453 F.2d 998, 999-1000 (4th Cir. 1972); *Howarton*, 133 S.W.3d at 826; *Arias*, 978 S.W.2d at 664-65.

174. *See* Ponder v. Morrison-Knudsen Co., 685 F. Supp. 1359, 1366 & n.4 (E.D. Tex. 1988); Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778, 783 (Tex. 2001).

wages and benefits, we consider the third-party beneficiary and promissory estoppel doctrines.

C. Contract Claims: Third-Party Beneficiaries

Third-party beneficiaries of an agreement are persons that the contract parties intended to benefit and who have a right to sue the party breaching the agreement.[175] A common illustration involves a parent purchasing life insurance for her children. The contract parties are the parent and insurance company; the children are third-party beneficiaries who can sue the insurance company for not funding the policy upon the parent's death.

Similarly, if workers are third-party beneficiaries of a buyer-supplier code contract, the workers might be able to sue the buyer for a contract breach. To be classified as third-party beneficiaries, workers must show that: (1) the code system constituted a buyer-supplier agreement; (2) the workers were intended beneficiaries of this agreement; and (3) the buyer breached the agreement, causing the workers economic damages.[176]

1. Contract Formation

Establishing that the code system was part of a buyer-supplier accord should be straightforward. We have located five buyers that include the code in their supplier contracts,[177] and Wal-Mart stated in *Doe* that its suppliers agree to comply with workplace standards.[178] We suggest that it is unlikely that buyers would demand code compliance and inspections, and retain the right to suspend or terminate the supplier relationship, unless those mechanisms were part of the contract.

2. The Worker as Beneficiary

To qualify as a beneficiary of the buyer-supplier contract, the workers need not have furnished consideration or *directly* received performance under the agreement.[179] The accord need not discharge any worker right, nor need the buyer-supplier discuss the agreement

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175. 16 AM. JUR. PROOF OF FACTS 2D *Intent of Contracting Parties to Benefit Third Person* § 55 (2008).

176. A recent article concluded that Wal-Mart's code probably does not constitute an agreement with its suppliers' *employees*. Katherine E. Kenny, *Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of Its Foreign Suppliers*, 27 NW. J. INT'L L. & BUS. 453 (2007). We, instead, evaluate whether the agreement between the buyer and *supplier*, not the supplier's employees, creates a contract claim for workers.

177. *See supra* note 32.

178. Wal-Mart's Dismissal Motion, *supra* note 32, at 8.

179. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. a (1981).

with workers.[180] However, the buyer-supplier must have unequivocally intended that the code benefit the workers.[181] Here, courts distinguish between intended and incidental beneficiaries—the former have standing to sue for a contract breach, the latter do not. Illustrations from the Second Restatement of Contracts section 302 help clarify the distinction:

> A, the operator of a chicken processing and fertilizer plant, contracts with B, a municipality, to use B's sewage system. With the purpose of preventing harm to landowners downstream from its system, B obtains from A a promise to remove specified types of waste from its deposits into the system. C, a downstream landowner, is an intended beneficiary under Subsection (1)(b).
>
> . . .
>
> A, a labor union, enters into a collective bargaining agreement with B, an employer, in which B promises not to discriminate against any employee because of his membership in A. All B's employees who are members of A are intended beneficiaries of the promise.
>
> . . .
>
> B contracts with A to erect an expensive building on A's land. [The value of] C's adjoining land would be enhanced . . . by the performance of the contract. C is an incidental [not an intended] beneficiary.[182]

The fuzzy line between intended and incidental beneficiaries is sometimes further clouded by court decisions. A New York appellate court held that an employee, injured on a freight elevator, was an intended beneficiary of an agreement between his employer and the elevator inspection company.[183] On the other hand, a Georgia appeals court held that a security company's contract with building management was not meant to legally benefit potential victims of crimes.[184] Under somewhat different facts, a Florida appellate court found that an employee was the intended beneficiary of his employer's contract with a security company.[185]

Because this is ultimately a matter of party intent,[186] local rules for contract construction are consequential. Conventions vary, but

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180. *Id.* § 302 cmt. c.

181. *Id.* § 302; *see, e.g.*, Bowhead Info. Tech. Servs., L.L.C. v. Catapult Tech., Ltd., 377 F. Supp. 2d 166, 171-72 (D.D.C. 2005).

182. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d, illus. 10, 14 & 16 (1981).

183. Abato v. Millar Elevator Serv. Co, 690 N.Y.S.2d 806, 806-07 (N.Y. App. Div. 1999).

184. Brown v. All-Tech Inv. Group, Inc., 595 S.E.2d 517, 524 (Ga. Ct. App. 2003).

185. Cooper v. IBI Sec. Serv. of Fla., Inc., 281 So. 2d 524, 526 (Fla. Dist. Ct. App. 1973).

186. 17A AM. JUR. PROOF OF FACTS 2D *Intent of Contracting Parties to Benefit Third Person* § 4 (2008).

intent is typically deduced from contractual language, circumstances surrounding the agreement's execution, the parties' situation, and their apparent purpose.[187] Even when the contract itself does not reveal an intention to benefit third-parties, courts may find intent in circumstances surrounding the agreement's execution or performance.[188] If intent is ambiguous, the dispute often becomes a factual issue for the jury.[189]

Circumstances surrounding the origination, development, and publication of buyers' codes indicate an intention to benefit workers. Buyers were reacting to exposés and public criticisms of labor abuses at factories. The language in their codes and related programs trumpet the importance of legal and fair policies for compensation, health, and safety. Suppliers seemingly endorse these goals by entering into the code contract and, at least ostensibly, adopting the buyer's arrangement. Several suppliers in Vietnam have gone beyond the code, enacting programs such as cataract surgery and micro-credit loans for workers.[190] Plausible reasons why suppliers would want to benefit workers include increased productivity, fewer workplace strikes and other disputes, and an improved image so that they can attract socially conscious buyers. This paternalistic theme was repeated in our buyer-supplier interviews.[191]

In *Chen v. Street Beat Sportswear, Inc.*, U.S. apparel buyers contracted with the Department of Labor to "promote [factories'] compliance" with wage and hour laws.[192] In the workers' suit against the buyers for allowing wage-hour violations, the federal district court concluded that "[b]ased on the language of the agreement itself, it is strikingly obvious that [its] entire purpose . . . is to ensure that employees of factories which contract with [the buyers] are paid

187. 17A AM. JUR. PROOF OF FACTS 2D *Intent of Contracting Parties to Benefit Third Person* §§ 1, 5 (2008); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 302 reporters' notes (1981).

188. *See* E.B. Roberts Constr. Co. v. Concrete Contractors, Inc., 704 P.2d 859, 865 & n.7 (Colo. 1985) ("[C]ircumstances surrounding the execution or performance of a contract can be sufficient alone, if substantial, to establish the existence of an intended beneficiary to the contract . . . ."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) ("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 . . . .").

189. *See* McDonald v. U.S. Die Casting & Dev. Co., 585 So. 2d 853, 855 (Ala. 1991).

190. Interview with Assistant Dir. of Corporate Responsibility, Changshin, *supra* note 20.

191. Interview with Gen. Manager, Nike, *supra* note 43; Interview with Dir. of Corporate Responsibility, Pou Chen, *supra* note 109; Interview with NOS Dir., Tae Kwang (Korean-owned footwear factory), in Vietnam (Jan. 2005).

192. 226 F. Supp. 2d 355, 363 (E.D.N.Y. 2002).

minimum wage and overtime, and that it was they who were directly intended to be benefited."[193]

Even if, as some critics contend, codes are little more than a public relations sop, solely for the buyer's benefit, the buyer may be reluctant to openly state this or to ask its supplier to do so. An admission in a high-profile case would undercut the public relations goal. Moreover, third-party status should not be defeated merely because the contract also advantages the buyer-supplier or they decided to benefit workers for selfish reasons.[194] A potential factual dispute over intent, normally a jury issue, at least renders this claim plausible.[195]

3. The Promisor's (Buyer's) Breach

Because a third-party beneficiary sues the contract's *promisor*, not promisee,[196] workers must locate a promise that the *buyer* breached, causing their damages. This barrier initially appears insurmountable because the supplier, not buyer, promises code compliance. For this reason, the trial judge in *Doe* dismissed the third-party beneficiary claims.[197] Two arguments might overcome this obstacle.

a. Buyer's Promises

The first attempts to establish that the buyer promised to *support* code observance, drawing on declarations that the buyer will advise, counsel, and monitor the contractor. Some buyers describe their supplier associations as "partnerships," "collaborations," "alliances," and "emotional" ties. Buyers often provide specific directives to effectuate the code, and they profess technical assistance and training. The buyer's monitoring alerts suppliers to legal and code violations. Mountain Equipment Co-op (MEC) told us that suppliers depend on MEC's expertise, and the suppliers we interviewed generally acknowledged at least partial reliance on buyer help.[198] The buyers' support conceivably includes a production

193. *Id.*

194. *See* Black & White Cabs of St. Louis, Inc. v. Smith, 370 S.W.2d 669, 675 (Mo. Ct. App. 1963); James Stewart & Co. v. Law, 233 S.W.2d 558, 561-62 (Tex. 1950).

195. *See* McDonald v. U.S. Die Casting & Dev. Co., 585 So. 2d 853, 855 (Ala. 1991); *see also* Hotel Employees & Rest. Employees Local 2 v. Vista Inn Mgmt. Co., 393 F. Supp. 2d 972, 987 (N.D. Cal. 2005).

196. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981).

197. Doe v. Wal-Mart Stores, Inc., No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at *8-12 (C.D. Cal. Mar. 30, 2007).

198. *See* Interview with Dir., Ethical Sourcing, Mountain Equip. Co-op, *supra* note 36.

schedule consistent with the contractor's ability to meet code obligations.

If these can be classified as promises, the plaintiffs' third-party beneficiary claim may fall into place: (1) the buyer promised to support the contractor's code compliance; (2) the buyer breached this promise through nonexistent or inadequate advice and monitoring, or with excessive production loads; (3) the breach at least partially caused the supplier's code failure; and (4) the code failure damaged the workers (the intended beneficiaries of the buyer's promises).[199]

A buyer's code-busting production demand may be a particularly fertile area for worker claims. One supplier recounted a situation that he considers common:

> When we have to meet a production schedule and the code is prohibiting us from meeting the target, the buyer often turns his head and pretends not to see. With tacit consent from the buyer, we will bring in outside workers, subcontract to another factory (whose labor standards we have no idea about), or ask our workers to do overtime that exceed the country labor law. These activities to meet a production schedule are considered "normal" in our industry.[200]

Citing buyers' "unreasonable" production demands, he thought that they should be accountable for code violations:

> Sometimes buyers put us in an impossible situation. When a certain item is selling well, buyers ask us to produce beyond our capacity. To fulfill the buyer's sudden demand surge, we ask our employees to work longer than the legal overtime. Unless the buyers are willing to compromise production, the factories cannot meet code standards.[201]

A third contractor simply stated that "buyers are not as accommodating on price as they should be given the code."[202] These interviews are consistent with research demonstrating the conflict between code compliance and the market pressure buyers sometimes place on suppliers.[203]

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199. The Doe plaintiffs are attempting a version of this argument. Doe Opposition, *supra* note 83, at 6-11; Doe Plaintiffs' Appellate Brief, *supra* note 13, at 23. They also suggest that a supplier might seek promises of monitoring and enforcement to ensure that buyers are similarly binding other suppliers. Doe Plaintiffs' Appellate Brief, *supra* note 13, at 23-24. This, however, reflects the supplier's competitive concerns for itself—an intent to benefit itself, not the workers.

200. Interview with anonymous CEO of footwear supplier, *supra* note 171.

201. *Id.*

202. Interview with Executive Dir., Youngone (Korean-owned apparel factory), in Hanoi, Vietnam (May 14, 2007).

203. According to Lim and Phillips, CSR compliance is related to the supply chain's governance structure. Lim & Phillips, *supra* note 19, at 143-44. An arms-length market model forces suppliers to focus on price and delivery as they compete for the buyer's business, rendering code observance secondary. *Id.* A collaborative

Because contracts require mutual consideration, workers must establish that the buyer received something in exchange for aiding code observance.[204] Perhaps the supplier's willingness to comply with the code, open factories to inspection, take remedial actions, and accept sanctioning suffice as consideration. The supplier may produce a better product because it follows the code. These benefits may instead be consideration solely for the buyer's agreement to continue business with the contractor. If so, the buyer received no additional consideration for a promise to support code compliance. Without clear contract language or cooperative supplier testimony, workers may find it difficult to prove that the buyer made a bargained commitment to assist. Demonstrating this commitment could be made easier with the general rule that contracts are strictly construed against the draftsman—here, the buyer.[205]

A different version of this argument, that third-party beneficiaries may sue the *promisee* for causing the promisor's breach, arises from a Kansas appellate court decision.[206] Apparently drawing on equity, the court held that it would be "an injustice to conclude that a promisee could gain an advantage by entering into a third-party beneficiary contract and then cause the breach."[207] Under this rationale, the buyer need not have made a promise to assist. Liability turns instead on the buyer (as promisee) causing the supplier's code breach simply by failing to assist or imposing a burdensome production schedule.

b. Buyer's Contractual Assumption of Duties

A second argument for satisfying the requirement of a buyer promise returns to the idea that buyers partially assume the supplier's obligation to workers.[208] This time, it is a contractual assumption: the buyer promises the supplier to assume, at least partially, duties owed workers, and the workers are third-party

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partnership, where the buyer gives select contractors secure product orders and other benefits, removes market disincentives and adds incentives for supplier compliance. *See id.*

204. *See generally* 17 AM. JUR. 2D *Contracts* §§ 19, 113, 117 (2004 & Supp. 2008) (detailing the elements of a contract including consideration).

205. *See* RESTATEMENT (SECOND) OF CONTRACTS § 226 cmt. a (1981). However, at least one treatise states that third-party contracts are construed in favor of the promisor, which would be the buyer. 17A AM. JUR. PROOF OF FACTS 2D *Intent of Contracting Parties to Benefit Third Person* § 1 (2008).

206. *See* Noel v. Pizza Hut, Inc., 805 P.2d 1244, 1251 (Kan. Ct. App. 1991) ("If . . . the promisee of the third-party agreement is responsible for the breach, jointly or alone, there is no legal theory that protects the promisee from liability for the breach.").

207. *Id.* at 1252.

208. *See supra* Part IV.A.3.

beneficiaries of the agreement. The Second Restatement of Contracts section 310 gives a somewhat off-point example: "A owes C $100. For consideration, B promises A to pay the debt. B breaks his contract. C can sue A and can also sue B and get judgment against each of them for $100, and can enforce either judgment until he has collected $100."[209]

Though a buyer may take on tort duties without consideration, a contractual assumption again requires that the buyer receive some benefit in return.[210] For example, in *Chen v. Street Beat Sportswear, Inc.*, where buyers agreed with the Department of Labor to monitor wage and hour compliance, the agreement was apparently part of a Department of Labor settlement with the buyers.[211]

4. Contract Disclaimers and Damages

The greatest impediment to contract claims may be the buyer-supplier's right to rescind third-party status unless workers: (1) have manifested their agreement to the promise, at the parties' request; (2) have sued on the promise, *or* (3) have materially changed their position in justifiable reliance on the promise.[212] Manifesting assent is an improbable scenario since, even if the buyer-suppliers view their agreement as benefiting workers, they will not treat it as a promise and seek the workers' concurrence. While suing on the promise is the easiest way for workers to prevent rescission, the procedure may become useless once buyers-suppliers recognize that they face liability in these situations. Disclaiming language could then become commonplace in their agreements, preempting lawsuits.

A reliance defense is plausible, as we demonstrated with the Good Samaritan duties, but once disclaimers appear in published codes, there can be no worker reliance. Currently, contracts and codes do not appear to have this qualifying language. The MEC contract does not, and we have never observed it elsewhere.[213] Instead, we have found language indicating that workers are intended beneficiaries in codes, buyer literature, and interviews.[214] Buyers may be reluctant to include a disclaimer because of a public relations backlash.

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209. RESTATEMENT (SECOND) OF CONTRACTS § 310 illus. 1 (1981); *see also* District of Columbia v. Campbell, 580 A.2d 1295, 1302-03 (D.C. Cir. 1990).

210. *See* 17 AM. JUR. 2D *Contracts* §§ 21, 113, 117 (2008).

211. 226 F. Supp. 2d 355, 357-58, 362 (E.D.N.Y. 2002). For this reason, the *Doe* trial judge distinguished *Chen*. Doe v. Wal-Mart Stores, Inc., No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at *12-13 (C.D. Cal. Mar. 30, 2007).

212. *See* RESTATEMENT (SECOND) OF CONTRACTS § 311(3) (1981); *see also* Olson v. Etheridge, 686 N.E.2d 563, 568-70 (Ill. 1997).

213. *See supra* p. 345 tbl.2 and note 36.

214. *See supra* pp. 343-45 tbls.1 & 2 and notes 33-37.

Damages from the buyer's breach of contract include the workers' economic losses, putting them in the same situation as if the buyer had kept its promise.[215] For example, if a buyer's failure to support code compliance caused a worker to be underpaid, the damages are the difference between the wages owed and paid. The computation need not be mathematically certain; an approximation is enough.[216]

Another contract remedy, specific performance, is typically ordered when damages are inadequate.[217] Regardless of its legal appropriateness, specific performance is a problematical remedy for workers. A U.S. court order enforcing labor standards in a foreign country would highlight the perception that American judges should not be resolving the dispute.

D. Contract Claims: Promissory Estoppel

To avoid the complexities of a third-party beneficiary claim, workers may attempt a promissory estoppel end-run. This is an equitable doctrine applied when contractual requirements, such as mutual consideration, are not met, but the promise should nevertheless be enforced to avoid an injustice.[218]

1. Estoppel Elements

The proof requirements are simple relative to other claims we have discussed. The defendant makes a promise that is not an enforceable contract, and the plaintiff relies on the promise by acting in a certain manner. When the defendant made the promise, she could foresee this reliance and, consequently, enforcement of the promise becomes necessary to avoid an injustice.[219]

Establishing this reliance implicates the same proof problems found with the reliance components of the Good Samaritan and third-party beneficiary claims. However, inasmuch as the goal here is to avoid an injustice, the standard for proving reliance, along with the promise's existence and scope, should be flexible.[220] Reliance by nonparties (for example, suppliers) could evidence that the plaintiff's reliance was reasonable.[221]

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215. *See* 22 AM. JUR. 2D *Damages* § 46 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 344(a) cmts. a, b (1981). A third-party beneficiary has the same damage claims as do the contract parties. 16 AM. JUR. PROOF OF FACTS 2d *Intent of Contracting Parties to Benefit Third Persons* § 1 (2008).

216. 22 AM. JUR. 2D *Damages* § 48 (2003).

217. RESTATEMENT (SECOND) OF CONTRACTS §§ 307, 359-60 (1981).

218. 28 AM. JUR. 2D *Estoppel and Waiver* § 55 (2000).

219. 4 WILLISTON ON CONTRACTS § 8:5 (4th ed. 1992) [hereinafter WILLISTON].

220. *Id.*

221. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. c (1981).

Our data and analysis suggest several buyer promises on which workers could foreseeably rely. These include promises of (1) no forced or excessive overtime, (2) the right to associate and present grievances without retaliation (the *Doe* plaintiffs allege that they were fired for union organizing),[222] and (3) time off for legal holidays. The buyer does not directly promise that the supplier will not mistreat the worker because, ultimately, that is in the supplier's discretion. The promise would be that the buyer will assist, monitor, and sanction the supplier in order to avoid this mistreatment. The buyer also arguably promises not to impose production pressures leading to code violations. If the buyer fails to keep those promises, and the worker establishes a causal link to her damages, a colorable claim may arise. If the promises were made to the supplier, then workers, drawing on a third-party beneficiary rationale, could claim that they were the intended beneficiaries who foreseeably relied on the buyer's representations.[223]

The injustice element is new to our discussion. Proving an injustice involves the promise's formality, the reasonableness of the reliance, and the injustice's "definite and substantial character."[224] These are typically fact issues for jury resolution.[225] While the standard is somewhat vague, it is conceivable that workers, who relied on buyer promises about wages, hours, or working conditions, could show an injustice if the promises were not kept. Compensation is particularly central to any worker's decision to take and remain in a job.

2. Estoppel Disclaimers and Damages

Once again, workers' most significant hurdle may be the buyer's use of disclaimers. If workers are told that there is no buyer promise—that they cannot rely on the buyer's support—there is no promissory estoppel. Based on our research, buyers are not making this disclaimer and may be inhibited from doing so because of public relations repercussions. It is at least awkward for a buyer to do this while promulgating a code, monitoring system, and enforcement regime, and pronouncing its concerns for worker treatment. The conflicting message to suppliers may undercut the code's effectiveness and create a jury issue over whether, despite a disclaimer, the buyer's behavior's demonstrated a promise.

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222. Doe v. Wal-Mart Stores, Inc., No. CV 05-7307 AG (MANx), 2007 U.S. Dist. LEXIS 98102, at *6 (C.D. Cal. Mar. 30, 2007).

223. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. c (1981). Promissory reliance by a third party is not recognized by every state. *See, e.g.*, 6 STRONG'S NORTH CAROLINA INDEX 4TH *Contracts* § 22 (2008).

224. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1981).

225. WILLISTON, *supra* note 219, § 8:5.

Promissory estoppel damages are not clearly and consistently described by courts.[226] Sometimes, breach of the promise is treated as a breach of contract, allowing conventional, expectation damages.[227] Other times, the remedy is limited to the loss which the plaintiff incurred relying on the promise.[228] One major treatise suggests that, because this is an equitable doctrine, courts should be flexible.[229]

The distinction may not matter for workers. For example, where the buyer breaks a promise to monitor and otherwise support wage laws, expectation damages are the difference between the legal wages and those paid by the supplier. Similarly, the plaintiff's loss in relying on the promise is the difference between the value of her work time and the wages paid.

V. CONCLUSIONS AND POLICY RAMIFICATIONS

There is a gap in the global governance of transnational corporations, one that governments, NGOs, IGOs, suppliers, workers, and international corporations recognize. Ruggie has alluded to this:

> Although it remains contested, the principle is taking hold that transnational firms, having created the new global economic space that is transforming how people live and work the world over, ought to be held accountable . . . to a broader community of stakeholders who are affected by their decisions and behavior.[230]

Expanding the rights of Global South workers to litigate in American courts would begin to fill the gap, just as the American legal system has supplemented government's oversight of consumer products, workplace safety, and the environment. Though proponents of corporate social responsibility may feel giddy about this prospect, caution is advisable.

Buyers may prefer to end code programs than be legally vulnerable. If the Good Samaritan knows that she could be sued for helping an injured brethren, she may just let him bleed. Though that seems improbable for buyers with public brands, the lawsuit threat might provide a publicly acceptable excuse to at least scale back. More likely, the better buyers will stay the course because their well-run programs could usually avoid negligence or breach of promise findings. Retreating buyers probably do not have effective code regimes and perhaps it is better that they are exposed. Better buyers

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226. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1199, 1202-03, 1246 (1998).

227. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981).

228. *Id.* §§ 344(b) cmts. a, b, 349; *see also* 22 AM. JUR. 2D *Damages* § 54 (2003).

229. C.C. Marvel, Annotation, *Promissory Estoppel*, 48 A.L.R.2d 1069, 1075-76 (1956).

230. Ruggie, *supra* note 29, at 512.

might welcome this flushing out of free riders who advertise a code without incurring enforcement costs.

American regulation of corporate behavior and workplace conditions in another country has imperialistic overtones. It may stunt local institutional development and could deter foreign direct investment.[231] There is, however, precedent. The Foreign Corrupt Practices Act (FCPA) renders U.S. companies liable for corrupt payments in a foreign country, including payments by foreign subsidiaries when authorized by the American parent.[232] The Comprehensive Anti-Apartheid Act imposed a code of conduct on employment practices by American companies operating in South Africa.[233] The Clinton administration's Apparel Industrial Partnership pushed clothing manufacturers toward higher health and safety standards in overseas factories.[234] The more issues become a global concern, the less they are seen as purely local matters.[235]

A negative backlash to the litigation might become a positive development, spurring more comprehensive, effective, and palatable solutions. Congress could remove the matter from the courts through an administrative regulation of workplace conditions at foreign suppliers. This, like the FCPA, would allow the federal government to seek civil or criminal penalties against American management rather than opening the door to massive, unpredictable private litigation. Buyers may be incentivized to seek a multilateral treaty covering workplace issues, much like the FCPA led American transnationals to advocate international measures to avoid a competitive disadvantage.[236]

Of course, the debate is bypassed if U.S. courts are unwilling to accommodate worker lawsuits. Our analysis demonstrates plausible claims, but there are junctures where a more restrictive view closes the door. There are procedural impediments—forum non conveniens, choice of law, international comity, and the political question doctrine. American law's progression is, however, largely based on

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231. Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 173 (2007).

232. 15 U.S.C. § 78dd-1 (2006).

233. 22 U.S.C. § 5034 (repealed 1994).

234. U.S. Department of Labor, Apparel Industry Partnership's Agreement (Apr. 14, 1997), http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/apparell.htm.

235. There also have been government attempts to impose extraterritorial health and safety codes. *See supra* note 3.

236. Logan Michael Breed, *Regulating Our 21st-Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1005, 1026-28 (2002).

changing socio-eco-politico conditions and standards.[237] The changes in workplace governance and increased concern over foreign labor conditions may trigger a new evolutionary branch.[238]

237. In *Rodriguez-Olvera v. Salant Corp.*, the defendant twice approached the Texas Supreme Court but failed to have the case dismissed on forum non conviens grounds. Orders Denying the Defendant's Petitions for Writ of Mandamus, *In re* Salant Corp., C.A. 99-0662 (Tex. July 13, 1999 and July 23, 1999) (on file with author).

238. *See* PROSSER & KEETON, *supra* note 65, at 357-59; Slawotsky, *supra* note 1.

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