NOTE

A THIRD-PARTY BENEFICIARY THEORY OF CORPORATE LIABILITY FOR LABOR VIOLATIONS IN INTERNATIONAL SUPPLY CHAINS

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Large multinational corporations ("MNCs") profit off their suppliers' maintenance of sweatshop conditions in developing countries. Although some companies have responded to reputational pressure by taking nominal steps to improve working conditions, such as enacting supplier codes of conduct, those efforts have not led to significant change. Because voluntary efforts have thus far been ineffective, victims have pursued domestic litigation against MNCs to compensate their losses and encourage future reform. In the recent case of Nestlé USA, Inc. v. Doe*, the U.S. Supreme Court cut off one popular avenue for such suits, the Alien Tort Statute, leaving plaintiffs with little ability to sue under federal law. State law tort claims, however, are a strong alternative. Plaintiffs can argue, and indeed have argued in one federal circuit court case, that MNCs have undertaken a duty of care to them as third-party beneficiaries of their supplier codes of conduct. This Note argues that plaintiffs making this claim should point to analogous cases in construction law, where courts have often found that design professionals overseeing a construction site have a duty of care towards their contractors' employees. In analyzing construction law cases, this Note draws out five factors that have influenced courts to find liability. Future plaintiffs suing for labor violations should use these factors to show that MNCs owed them a duty of care under their supplier codes of conduct and may therefore be held liable for labor rights violations in their international supply chains.*

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INTRODUCTION

Shiuli Begum was working as a sewing machine operator in Bangladesh when a massive crack appeared in the wall of the factory where she was employed.[1] An engineer called to the site that afternoon recommended that the building be immediately condemned, but managers ordered the employees to report back to work the following morning.[2] Shortly after the shift started on April 24, 2013, the Rana Plaza garment factory collapsed, trapping Ms. Begum under concrete for over sixteen hours until her neighbors helped pry her out with iron pipes.[3] Ms. Begum suffered damage to her hips and spinal column and was rendered infertile and unable to work.[4] She received "a bit of financial assistance from nonprofits" but nothing from the clothing brands for which she sewed.[5] In all, over 1,100 people died in the Rana Plaza factory collapse that day, and 2,500 more were injured.[6] However, victims of the 2013 collapse have yet to receive justice from the Bangladeshi court system—a court sentenced the factory's owner to three years in prison in 2017 for illegal

[1] Dana Thomas, Why Won't We Learn from the Survivors of the Rana Plaza Disaster?, N.Y. Times (Apr. 24, 2018), https://www.nytimes.com/2018/04/24/style/survivors-of-rana-plaza-disaster.html [https://perma.cc/D93X-LHE8].

[2] Id.

[3] Id.

[4] Id.

[5] Id.

[6] Rana Plaza: Bangladesh Jails Owner of Factory Building that Collapsed in 2013 for Corruption, ABC News (Aug. 29, 2017, 9:33 AM), https://www.abc.net.au/news/2017-08-29/rana-plaza-owner-of-collapsed-bangladesh-building-jailed/8854240 [https://perma.cc/U6ST-ZCW5].

earnings,[7] but resolution of the charges against eighteen others involved in factory management has met repeated delays.[8]

Several prominent American companies, including Walmart, J.C. Penney, and The Children's Place, have previously been linked to suppliers producing goods in Rana Plaza at the time of the disaster.[9] These companies, like many others, have achieved tremendous cost savings through their contracts with suppliers in developing countries, where labor costs and regulatory burdens are low. However, profiting off unsafe and unjust factory conditions has also made large multinational corporations ("MNCs") a popular target of domestic litigation aiming to secure compensation for victimized employees like Shiuli Begum.[10] There is a great deal at stake in the outcome of these lawsuits. Besides the normative argument that these corporations collect unjust profits, there is the practical reality that MNCs are currently in the best position to take responsibility for poor labor practices in their supply chains. As the Rana Plaza example illustrates, victimized workers in developing countries often cannot rely on their own court systems to hold direct offenders accountable, making suits against MNCs one of the only options for legal redress. MNCs also have greater incentives and more resources to bring about better treatment of workers because the companies are usually better known and more financially reliant on maintaining good reputations than their suppliers.[11]

Because the United States largely lacks other legal mechanisms to incentivize MNCs to perform supply chain due diligence,[12] there is a large

[7] Id.

[8] Rana Plaza Court Case Postponed in Bangladesh, Al Jazeera (Aug. 23, 2016), https://www.aljazeera.com/news/2016/8/23/rana-plaza-court-case-postponed-in-bangladesh [https://perma.cc/HB6Y-DMXN].

[9] Clare O'Connor, These Retailers Involved in Bangladesh Factory Disaster Have Yet to Compensate Victims, Forbes (Apr. 26, 2014, 5:29 PM), https://www.forbes.com/sites/clareoconnor/2014/04/26/these-retailers-involved-in-bangladesh-factory-disaster-have-yet-to-compensate-victims/?sh=489c7609211b [https://perma.cc/FS9L-2FEB].

[10] For an overview of cases using different legal strategies to sue MNCs for labor violations, see Ramona L. Lampley, Mitigating Risk, Eradicating Slavery, 68 Am. U. L. Rev. 1707 (2019).

[11] See Andrew Herman, Note, Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality, 52 Va. J. Int'l L. 445, 450 (2012) (describing how MNCs have adopted supplier codes of conduct in response to activist pressure).

[12] By contrast, some European countries have mandatory due diligence legislation. For example, the French and Dutch parliaments adopted legislation in 2017 that would require companies to investigate and report on human rights violations in their supply chains. Sharan Burrow, Eliminating Modern Slavery: Due Diligence and the Rule of Law, Bus. & Hum. Rts.

body of literature analyzing the potential for lawsuits to compensate victims and encourage reform. Much of this literature has focused on federal claims under the Alien Tort Statute ("ATS") and the Trafficking Victims Protection Reauthorization Act ("TVPRA"),[13] though the recent Supreme Court case *Nestlé USA, Inc. v. Doe* throws the former category's viability into question by holding that "general corporate activity" in the United States does not create a sufficient nexus to impose liability for aiding and abetting forced labor abroad.[14] Due to obstacles in bringing successful claims under federal law, a growing number of scholars have moved on to consider the viability of state tort and contract-based claims.[15]

This Note contributes to the existing literature on state tort law claims by suggesting a novel legal strategy through which plaintiffs could better plead the existence of a duty on the part of MNCs to monitor their suppliers, thus far an insurmountable barrier in the few attempted cases. In one U.S. Court of Appeals for the Ninth Circuit case, the plaintiffs argued that supplier codes of conduct, which many MNCs have imposed on the entities comprising their supply chain, can give rise to liability through third-party beneficiary theory.[16] This Note will extend that theory, arguing that the case was wrongly decided and that construction law can serve as a helpful model for plaintiffs going forward. There is a limited amount of scholarship on the potential applicability of common

Res. Ctr. (Aug. 8, 2017), https://www.business-humanrights.org/en/blog/eliminating-modern-slavery-due-diligence-and-the-rule-of-law/ [https://perma.cc/5LTK-4UVK].

[13] See, e.g., Jennifer M. Green, The Rule of Law at a Crossroad: Enforcing Corporate Responsibility in International Investment Through the Alien Tort Statute, 35 U. Pa. J. Int'l L. 1085, 1086, 1108–09 (2014); Lampley, supra note 10, at 1729–45; Debra Cohen Maryanov, Comment, Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain, 14 Lewis & Clark L. Rev. 397, 417–18 (2010); Laura Ezell, Note, Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations, 69 Vand. L. Rev. 499, 512–25 (2016); David Shea Bettwy, Drones, Private Military Companies and the Alien Tort Statute: The Looming Frontier of International Tort Liability, 47 Cal. W. Int'l L.J. 1 (2016).

[14] 141 S. Ct. 1931, 1937 (2021).

[15] See, e.g., Allie Robbins, Outsourcing Beneficiaries: Contract and Tort Strategies for Improving Conditions in the Global Garment Industry, 80 U. Pitt. L. Rev. 369, 372 (2018); Alexandra Reeve, Within Reach: A New Strategy for Regulating American Corporations That Commit Human Rights Abuses Abroad, 2008 Colum. Bus. L. Rev. 387, 388–90; Lampley, supra note 10, at 1708, 1750; Joe Phillips & Suk-Jun Lim, Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees, 61 Rutgers L. Rev. 333, 334–35 (2009); Maryanov, supra note 13, at 429–36.

[16] Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 683 (9th Cir. 2009).

law doctrines regarding general contractors in the construction context to MNCs in the supply chain context.[17] However, this Note is the first to closely analyze the doctrine of third-party beneficiary theory as applied to architects and engineers in construction law and use it as a model to distill factors that are applicable to the MNC context.

Part I begins with an explanation of how economic forces, reputational harms, and technological developments have converged to make supply chain management cheaper, easier, and more important for MNCs who rely on a geographically disparate supply chain. This Part also discusses the history of supplier codes of conduct, the principal method by which companies currently attempt to mitigate harms in their supply chain. Part II provides greater background on different litigation strategies to hold MNCs accountable for labor violations, beginning with federal claims and their limitations before examining state claims. After establishing the primary procedural requirements for foreign workers to bring a case in state court, Part III then explains how construction law cases using third-party beneficiary theory are closely analogous to supply chains. In construction law cases, courts have generally focused on five factors to guide their analysis of whether a design professional—such as an architect or engineer—owed a duty to contractors' employees. These factors include foreseeability, contract specificity, actual practice of supervision, ability to stop work, and actual knowledge of safety issues. Part IV applies those five factors to a current supplier code of conduct, providing a model for future plaintiffs to advocate a totality of the circumstances analysis based on those factors. This Part also addresses counterarguments. Finally, this Note concludes with a summary of how plaintiffs should approach third-party beneficiary claims in the future.

I. TRENDS IN SUPPLY CHAIN MANAGEMENT

Supply chains for modern goods and services are exceedingly complex and geographically disparate. While it was once more efficient for companies to produce as many inputs as possible in their own facilities, better information and communications technology, as well as more

[17] See Maryanov, supra note 13, at 431–32; Lampley, supra note 10, at 1713–14 (noting that worker-plaintiffs have unsuccessfully analogized themselves to independent contractors when trying to establish that they were owed a duty by employer-defendants); Phillips & Lim, supra note 15, at 364–65 (explaining the contemplated categorization of buyer-companies as "general contractors" owing a duty to "independent contractor" employees of suppliers in claims where the buyer allegedly "retained sufficient control over jobsite health and safety").

efficient transportation, have enabled companies in developed countries to profitably offshore a greater proportion of input production to developing countries, where labor costs and regulatory burdens are lower.[18] Although trends in supply chain compartmentalization are difficult to measure concretely, data from the Organisation for Economic Co-operation and Development ("OECD") show that the share of inputs that were imported into the United States from other countries nearly tripled from 1972 to 2000.[19] In complex manufacturing processes today, the supply chain from raw inputs to finished products can be greater than fifty tiers deep, making it extremely difficult for a company to identify all of the suppliers that contribute to its goods.[20] While first-tier and second-tier suppliers, with whom a company deals more directly, might be relatively easy to monitor, the sub-tier supply chain can quickly become a black box, even for companies that actively seek to manage their suppliers.[21] Given the time and expense associated with identifying and monitoring suppliers, it is unsurprising that MNCs have not generally made the effort unprompted.

However, incentives for companies to identify and monitor their suppliers have grown in recent years, with experts now telling businesses that the benefits of proactive supply chain management outweigh the costs.[22] One major reason for this new line of thinking is the chaos the COVID-19 pandemic wrought on supply chains, where shortages and disruptions made mainstream news headlines and harmed both the reputations and bottom lines of many companies.[23] One survey of 900

[18] Gene M. Grossman & Esteban Rossi-Hansberg, The Rise of Offshoring: It's Not Wine for Cloth Anymore, Econ. Pol'y. Symp. Fed. Rsrv. Bank of Kan. City 59, 63–64 (2006).

[19] Id. at 68.

[20] Galit A. Sarfaty, Shining Light on Global Supply Chains, 56 Harv. Int'l L.J. 419, 431 (2015) (quoting Steven B. Young, Alberto Fonseca & Goretty Dias, Principles for Responsible Metals Supply to Electronics, 6 Soc. Resp. J. 126, 131 (2010)) (referring to supply chains for electronic components).

[21] Id. at 431–32 (explaining how the sheer number of suppliers in a single chain makes it difficult to both identify them and conduct due diligence).

[22] See Willy C. Shih, Global Supply Chains in a Post-Pandemic World, Harv. Bus. Rev., Sept.–Oct. 2020, https://hbr.org/2020/09/global-supply-chains-in-a-post-pandemic-world [https://perma.cc/AW55-RVTY] (making the case for companies to map out their supply chains and assign risk levels to each supplier).

[23] See, e.g., Holly Ellyatt, Supply Chain Chaos is Already Hitting Global Growth. And It's About to get Worse, CNBC (Oct. 19, 2021, 3:18 PM), https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html [https://perma.cc/8VJD-VRDU]; Augusta Saraiva, The Pandemic's Supply Shocks Go Far Beyond Empty Store Shelves, Bloomberg (June 24, 2021, 7:00 AM), https://www.bloomberg.com/news/

procurement professionals at U.S. and European companies in the defense, financial, and technology sectors found that, on average, each company loses about $184 million in revenue to supply chain problems annually.[24] Furthermore, eighty-eight percent of the respondents said that visibility into their supply chains was more important than it had been two years prior.[25] And while the COVID-19-pandemic-related disruptions may eventually cease, experts are warning companies that supply chain disruptions from climate change are only likely to worsen in the near future.[26] Thus, the corporate drive toward enhanced real-time knowledge and monitoring of suppliers is unlikely to wane in the coming years.

As the costs of neglecting supply chain issues continue to mount, the costs of implementing programs to identify and monitor suppliers are decreasing. New technologies like artificial intelligence ("AI") and machine learning are making supply chain management easier. Some emerging companies claim to be able to map out corporate supply chains and assign risk levels to each supplier across a number of factors, including environmental, social, and governance ("ESG") issues.[27] While the accuracy of this technology is currently unknown, the emergence of new supply chain management companies stands for the proposition that high-tech monitoring is in demand and will likely improve in the near future. Established companies like IBM have also developed AI-driven products to improve supply chain visibility,[28] and some companies have developed sophisticated in-house supply chain management systems.[29] Overall, industry experts expect the supply chain management market to

newsletters/2021-06-24/supply-chain-latest-the-mounting-costs-of-covid-supply-shocks [https://perma.cc/Y9SG-9D5S].

[24] Interos, Interos Annual Global Supply Chain Report 2, 4 (2021), https://www.interos.ai/resources/global-supply-chain-report/ [https://perma.cc/XL87-C6ME].

[25] Id.

[26] See Kara Baskin, Supply Chain Resilience in the Era of Climate Change, MIT Sloan Sch. Mgmt. (Feb. 11, 2020), https://mitsloan.mit.edu/ideas-made-to-matter/supply-chain-resilience-era-climate-change [https://perma.cc/CB79-4CTT].

[27] See Why Interos, Interos, https://www.interos.ai/why-interos/ [https://web.archive.org/web/20220918115057/https://www.interos.ai/why-interos/] (last visited Sept. 18, 2022).

[28] Supply Chain Visibility Software and Solutions, IBM, https://www.ibm.com/supply-chain/visibility [https://perma.cc/TWL2-ZUPD] (last visited June 4, 2022).

[29] Apple, for example, was able to individually identify the suppliers that comprise ninety-seven percent of its production as early as 2012. Poornima Gupta, Apple Reveals Supply Chain, Details Conditions, Reuters (Jan. 13, 2012, 11:59 AM), https://www.reuters.com/article/us-apple-suppliers/apple-reveals-supply-chain-details-conditions-idUSTRE80C1KQ20120113 [https://perma.cc/7WPS-JFL7].

double by 2027, with the "development of industrial-grade digital technology" driving much of the growth.[30]

Increased social awareness of supply chain issues in recent decades means that companies adopting a laissez-faire attitude towards their suppliers also face significant reputational risk. While it is difficult to quantify the concrete effects of reputation on stock prices and other metrics of corporate financial success, the World Economic Forum has estimated that twenty-five percent of a company's market value derives from its reputation.[31] The importance of brand image was validated in the 1990s when exposé campaigns focused on conditions in the garment industry forced Levi Strauss to create the industry's first supplier code of conduct and to cut ties with some suppliers abroad.[32] Many other MNCs began proactively adopting supplier codes to stave off similar accusations.[33] Such codes vary from company to company, but they typically at least address "core labor issues like child and forced labor, health and safety in the workplace, and discrimination and harassment."[34] Today, supplier codes of conduct are the norm in the apparel industry,[35] and many other MNCs have them as well.[36]

In contrast to supply chain disruptions, however, MNCs have little internal incentive to monitor the outcomes of their ESG policies.

[30] Global Supply Chain Management Market (2020 to 2027), Bus. Wire (Aug. 13, 2020, 10:52 AM), https://www.businesswire.com/news/home/20200813005569/en/Global-Supply-Chain-Management-Market-2020-to-2027---by-Component-User-Type-and-Industry-Vertical---ResearchAndMarkets.com [https://perma.cc/C5MN-R3KX].

[31] Joan Warner, In Crisis, the Risks and Rewards Related to Reputation are Greater than Usual, Glob. Fin. Mag. (Dec. 7, 2020), https://www.gfmag.com/magazine/december-2020/company-brand-strength-reputation [https://perma.cc/7LMS-HRP3].

[32] Herman, supra note 11, at 449–50 (describing corporate policy change and supplier code adoption in response to a series of exposés about labor treatment).

[33] Id. at 450.

[34] Id.

[35] Id. (observing that it is now the norm for "brand-conscious" clothing companies to adopt codes of conduct).

[36] See, e.g., Google Supplier Code of Conduct, Google, https://about.google/supplier-code-of-conduct/ [https://perma.cc/9RN5-B459] (last visited June 4, 2022); Apple Supplier Code of Conduct, Apple, https://www.apple.com/supplier-responsibility/pdf/Apple-Supplier-Code-of-Conduct-and-Supplier-Responsibility-Standards.pdf [https://perma.cc/Z6Q7-8CKG] (last visited June 4, 2022); Supplier Code of Business Conduct, Coca-Cola Co., https://www.coca-colacompany.com/policies-and-practices/supplier-code-of-business-conduct [https://perma.cc/57XN-STJE] (last visited June 4, 2022); Conducting Business with CVS Health, CVS Health, https://cvssuppliers.com/sites/launch/files/2021-12/CVS%20Health%20Supplier%20Ethical%20Standards_May%202021.pdf [https://perma.cc/536L-CRSZ] (last visited June 4, 2022).

Designing an effective program of supplier audits and independent evaluation of factory conditions is often "costly to implement, challenging to evaluate, and difficult to sustain."[37] The voluntary adoption of supplier codes of conduct by MNCs is a step in the right direction, but without legal backing to ensure the provisions are met, "enforcement is left entirely to ethical consumers overseas."[38] Companies may therefore reap the public relations benefits of making an effort to clean up their supply chains, when in reality, supplier codes are privately seen as a "necessary evil and an inconvenient nuisance, which should be handled with minimum cost and as little effort as possible."[39] Because of this lack of enforcement by MNCs against delinquent suppliers, supplier codes of conduct have failed to bring about widespread improvements in working conditions in developing countries.[40] But MNCs who designed their supplier codes merely to placate the public might be surprised to find that, under traditional tort principles, these codes can have a very real legal effect.

II. THE LIMITS OF CURRENT LEGAL STRATEGIES FOR HOLDING MNCS ACCOUNTABLE

A. Federal Law Claims

Although holding MNCs liable for the poor labor practices of their suppliers may be the only route to recovery for workers, attempts to make such claims stick have been largely elusive thus far. Jurisdictional issues have presented hurdles for foreign citizens attempting to sue MNCs in U.S. federal court,[41] making the Alien Tort Statute ("ATS") a popular

[37] Ian Chipman, How to Improve Working Conditions in the Developing World, Stan. Grad. Sch. Bus. (Aug. 10, 2016), https://www.gsb.stanford.edu/insights/how-improve-working-conditions-developing-world [https://perma.cc/L8LP-TP2Z] (noting that tension exists between ethical sourcing and a company's bottom line and that corporate social responsibility programs are expensive to implement).

[38] Herman, supra note 11, at 446 (quoting Gay W. Seidman, Beyond the Boycott: Labor Rights, Human Rights, and Transnational Activism 41 (2007)).

[39] Mark B. Baker, Promises and Platitudes: Toward A New 21st Century Paradigm for Corporate Codes of Conduct?, 23 Conn. J. Int'l L. 123, 132 (2007) (quoting S. Prakash Sethi, Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations 84 (2003)).

[40] Herman, supra note 11, at 454, 458–60, 480.

[41] For example, a foundational principle of federal forum non conveniens doctrine is that "a foreign plaintiff's choice [of venue] deserves less deference" than a domestic plaintiff's. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981).

basis for lawsuits. Originally enacted in the Judiciary Act of 1789,[42] the ATS states simply: "The [federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[43] Thus, the statute appears to provide a jurisdictional mechanism by which foreign workers could sue MNCs in federal court for violations of international law. The scope of the ATS, including what substantive violations are covered, has been seriously contested over the years, but some early cases showed promise for the prospect of liability.[44]

But in a line of cases beginning in 2013, the Supreme Court reversed course and began restricting the application of the ATS,[45] culminating in the 2021 case of *Nestlé USA, Inc. v. Doe*.[46] In that case, the Court held that six Malian men who had been trafficked into Côte d'Ivoire as children to harvest cocoa could not sue Nestlé, which had provided training and equipment to the cocoa farms in exchange for exclusive purchasing contracts.[47] The Court based its holding on the fact that none of the alleged tortious conduct occurred in the United States and that the ATS requires plaintiffs to "allege more domestic conduct than general corporate activity" to apply extraterritorially.[48] By effectively divorcing the decision-making stages of corporate action occurring domestically from the eventual tortious results occurring internationally, *Nestlé* has all but shut the door on claims by foreign workers under the ATS.

A similar fate befell the Racketeer Influenced and Corrupt Organizations Act ("RICO"), another source of federal law that could have previously supported liability for MNCs. Past workers successfully

[42] Gwynne L. Skinner, Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in A New (Post-Kiobel) World, 46 Colum. Hum. Rts. L. Rev. 158, 159 n. 3 (2014) (citing the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77).

[43] 28 U.S.C. § 1350.

[44] See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 884–85 (2d Cir. 1980) (finding that official torture is prohibited); Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004) (cautioning courts not to find new causes of action under the ATS lightly but leaving open the possibility of expansion for norms of a sufficiently universal character).

[45] See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) ("And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018) ("Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.").

[46] 141 S. Ct. 1931, 1937 (2021).

[47] Id. at 1935–36.

[48] Id. at 1937.

made out a claim under RICO against The Gap by showing that the company acted as part of an enterprise with manufacturers to further illegal labor practices.[49] But in a 2016 case later cited in *Nestlé*, the Supreme Court largely foreclosed such claims based on injuries solely suffered abroad by holding that a private action under RICO does not overcome the presumption against extraterritorial application of U.S. law.[50]

The Trafficking Victims Protection Reauthorization Act ("TVPRA") presents another, more viable option for some victims to sue MNCs in U.S. courts. The original 2000 version of the law was only a criminal statute, but Congress added a civil cause of action to the 2003 reauthorization of the TVPA.[51] Five years later, Congress further strengthened the law by adding a liability provision for anyone that financially benefits from an association in knowing or reckless disregard of the fact that the other party is using trafficked labor.[52] This provision would easily capture the relationship between MNCs and their suppliers, although workers would still have to prove a mens rea of at least recklessness. While the financial benefit provision is thus far the clearest route to accountability for MNCs,[53] it only covers trafficked workers, leaving out voluntary workers like those at Rana Plaza who have been subjected to other forms of labor violations.[54]

[49] Robbins, supra note 15, at 378–79 (citing Does I v. Gap, Inc., No. CV-01-0031, 2002 WL 1000068, at *4 (D. N. Mar. I. May 10, 2002)).

[50] RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 346 (2016).

[51] Ezell, supra note 13, at 501–02 (citing 18 U.S.C. § 1595 (2012)).

[52] 18 U.S.C. § 1589(b).

[53] Although relatively few cases have been brought against plaintiffs' employers under the financial benefit provision to date, several have been successful. See, e.g., Aguirre v. Best Care Agency, Inc., 961 F. Supp. 2d 427, 461 (E.D.N.Y. 2013) (denying defendants' motion for judgment on the pleadings and citing other cases in which plaintiffs made out claims under the TVPRA).

[54] The 2008 reauthorization of the TVPA defines trafficked labor as that which has been procured:

> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

18 U.S.C. § 1589(a).

B. State Law Claims

For the many workers not covered by the TVPA, state law is another potential route to recovery.[55] Plaintiffs still face jurisdictional and procedural hurdles, but state law reaches "a broader scope of conduct" than the federal laws currently in effect.[56] Furthermore, the jurisdictional hurdles are less difficult to clear under state law than under either the ATS or RICO. This is because state law does not carry the same presumption against extraterritoriality that the Supreme Court has applied to federal law.[57] While plaintiffs in cases under the ATS and RICO must allege that an MNC actually participated in tortious activities domestically, the plaintiff's jurisdictional argument in a state case largely turns on whether it would be fair to apply state law to a foreign defendant. Thus, to file a successful claim under state law (or in federal court under diversity jurisdiction), plaintiffs must first demonstrate that the court has subject matter jurisdiction and personal jurisdiction over the defendant.[58] These requirements are generally unproblematic for common law tort claims against large corporations residing in multiple states.[59]

Assuming there is no defect in jurisdiction, the plaintiff must next defend against dismissal on forum non conveniens grounds, particularly if they are asserting diversity jurisdiction. It is important to note that, while about thirty states have forum non conveniens doctrines similar to the federal standard, some states have abolished the doctrine entirely.[60] The federal standard allows for dismissal when "another forum—usually in the host country—is more appropriate and convenient because the parties, witnesses, and evidence reside there."[61] Plaintiffs have several strong arguments against dismissal on these grounds. First, U.S.

[55] The plaintiffs in *Nestlé*, for example, originally raised state law claims of unjust enrichment alongside their claims under the ATS. Doe I v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1121 (C.D. Cal. 2010).

[56] Reeve, supra note 15, at 389.

[57] Instead, a state court will analyze whether its own law or the law of the foreign country should apply. See infra notes 65–71 and accompanying text.

[58] Reeve, supra note 15, at 400.

[59] Unlike federal courts, which have limited subject matter jurisdiction, state courts have general jurisdiction over all subjects not prohibited by law or the Constitution. See, e.g., 1 Wis. Pl. & Pr. Forms § 2:16 (5th ed.). Personal jurisdiction exists where the company is incorporated, has its headquarters, or has other significant contacts connected to the matter of litigation. Daimler AG v. Bauman, 571 U.S. 117, 137–38 (2014).

[60] Laurel E. Miller, Comment, Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions, 58 U. Chi. L. Rev. 1369, 1371 (1991).

[61] Skinner, supra note 42, at 203–04.

corporations are unlikely to be significantly burdened by litigation in their own country, where they have easy access to litigators and, likely, evidence such as supplier contracts and audit reports.[62] Second, plaintiffs could have a strong argument that "structural problems and lack of resources may make the court system of the host nation inadequate to handle the claim."[63] Finally, courts have shown great willingness to defer forum non conveniens issues when the plaintiffs face corruption or the threat of retribution in their home countries.[64]

A plaintiff who survives a motion to dismiss on forum non conveniens grounds will likely have his or her claim heard on the merits. But first, the court must choose between applying the law of the forum and the law of the host country.[65] If there is no conflict between the potentially applicable laws, or if the host country does not have any on-point law, the law of the forum state will typically be applied for purposes of ease and familiarity.[66] If there is a conflict, the Restatement (Second) Conflict of Laws has a presumption in personal injury cases in favor of the law of the place where the injury occurred, unless another state "has a more significant relationship" to the events.[67] There are four factors for courts to consider in determining which forum "has the most significant relationship to the occurrence and the parties."[68] These factors are "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."[69] Choice of law

[62] See Reeve, supra note 15, at 404.

[63] Id. at 401–02 (explaining that human rights cases often present instances where fair adjudication in an alternative forum is not available, especially when the government lacks the resources to effectively and predictably deliver justice).

[64] See *id.* at 401–03 for a collection of cases in which U.S. courts found themselves to be the appropriate forum for adjudicating claims by foreign plaintiffs. Cited cases include *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1143 (C.D. Cal. 2005) and *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 29 (D.D.C. 2005). Reeve also cites *Presbyterian Church of Sudan v. Talisman*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005). However, the relevant passage comes from an earlier version of the case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 336 (S.D.N.Y. 2003).

[65] See Reeve, supra note 15, at 407–08.

[66] Skinner, supra note 42, at 226 (describing courts' typical choice of laws between the host state and foreign law, which differs depending on whether a conflict exists between the two).

[67] Restatement (Second) of Conflict of Laws § 146 (Am. L. Inst. 1971).

[68] Id. § 145.

[69] Id. Other considerations for determining the appropriate legal regime are noted in *Restatement (Second) of Conflict of Laws* § 6 (Am. L. Inst. 1971).

issues have presented problems for some plaintiffs bringing state tort law claims in the past,[70] but other courts have concluded that a state has an interest in the "safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations" that conduct international business.[71] Relying on this language and the factors listed above, future plaintiffs should argue that MNCs primarily control their relationships with suppliers from the United States, and corporate decision making that results in torts committed abroad should be judged under the laws of the place from which those decisions emanate.

A plaintiff that clears these jurisdictional and procedural hurdles will move on to alleging negligence on the merits.[72] A common law negligence claim requires that suppliers' employees be owed a duty of care by the MNC, that the MNC breach its duty of care, and that the breach be the proximate cause of the injuries suffered.[73] In the few state law negligence claims that workers have filed, they have yet to successfully show that MNCs owe a duty of care to suppliers' employees. Historically, such claims would have been barred on the grounds that contractual privity between the parties was required in order to prove the existence of a duty of care.[74] Most jurisdictions have now abolished the privity requirement in certain circumstances, and other methods can now be used to prove the existence of a duty of care.[75] However, given the

[70] See Rahaman v. J.C. Penney Corp., No. N15C-07-174, 2016 WL 2616375, at *5–7 (Del. Super. Ct. May 4, 2016) (holding that, in line with a Delaware borrowing statute, the applicable statute of limitations was that of Bangladesh, which had already expired and therefore prevented plaintiffs from bringing a tort claim).

[71] Doe v. Exxon Mobil Corp., No. 01-1357, 2006 WL 516744, at *2 (D.D.C. 2006) (applying domestic law even though the underlying contact factors otherwise "tilt in favor of Indonesia").

[72] Other potential state law claims, such as unjust enrichment, exist but are unlikely to be successful. See Maryanov, supra note 13, at 432–36 (discussing the viability of third-party beneficiary breach of contract and unjust enrichment claims, then noting that unjust enrichment may be the least viable anti-sweatshop cause of action because of its preclusion by a valid MNC contract with suppliers that includes labor). There are also a variety of state law claims, including false advertising and violation of licensing agreements, that have been brought by non-worker parties with varying levels of success. See Robbins, supra note 15, at 378, 385–86, 392. This Note, however, focuses on claims for compensation by injured workers.

[73] See *Rahaman*, 2016 WL 2616375, at *8.

[74] See, e.g., Simpson v. Calivas, 650 A.2d 318, 321 (N.H. 1994) (explaining the traditional stance that privity of contract is required to prove the existence of a duty).

[75] See, e.g., Stuart M. Speiser, Charles F. Krause & Alfred W. Gans, 5 The American Law of Torts § 18:4, at 489–92 (1988) (discussing the abolishment of the privity requirement in the products liability context).

geographic distance and lack of a direct relationship between MNCs and the employees of their foreign suppliers, plaintiffs have an uphill battle to convince courts that a legal duty of protection extends through multiple layers of the supply chain. Yet, with supplier codes of conduct, that missing link has become much stronger.

In *Rahaman v. J.C. Penney Corp.*, the Superior Court of Delaware heard a case by victims of the Rana Plaza disaster against the U.S. companies that had been linked to suppliers producing goods in the building.[76] The court ultimately concluded that the one-year Bangladeshi statute of limitations barred the action and, alternatively, that the plaintiffs had not properly alleged negligence on the part of the MNCs.[77] The negligence claim was deficient because the plaintiffs could not show that the U.S. companies owed them a duty, although the court noted that the duty argument would have been stronger if the MNCs had voluntarily agreed to take on a safety supervision role in the factory.[78] The issue of supplier codes of conduct was not discussed in the case, but these contracts are exactly the sort of voluntary agreement that could give rise to tort responsibility.

This legal theory is referred to as third-party beneficiary liability, because it rests on the idea that contractual provisions clearly manifesting the intent of the contracting parties to benefit a third party can give the intended beneficiary a right to sue for breach.[79] Third-party beneficiary liability extends to tort as well, the idea being that contracting parties who have manifested an intent to benefit someone who would be foreseeably harmed by a breach cannot later claim they owed no duty.[80] As one treatise explains:

> Where one undertakes by contract to perform a certain service and is chargeable with the duty of performing the work in a reasonably proper

[76] *Rahaman*, 2016 WL 2616375, at *1.

[77] Id. at *7–10.

[78] Id. at *9 (noting that absent "asserting active control over the performance of the work, voluntarily taking responsibility for implementing safety measures, or retaining possessory control over the premises," even the MNCs' knowledge of the risks at Rana Plaza would not create a duty of care to Plaintiffs).

[79] See Restatement (Second) of Contracts § 302 (Am. L. Inst. 1981).

[80] One paradigmatic example of third-party beneficiary theory in the tort context is will preparation. Although a lawyer who prepares a will is only in privity of contract with their now-deceased client, it is commonly accepted that intended beneficiaries of the will are foreseeable plaintiffs that may sue if they are harmed by the lawyer's negligent preparation of the document. See, e.g., Simpson v. Calivas, 650 A.2d 318, 321 (N.H. 1994).

> and efficient manner, and injury occurs to a blameless person, the injured person has a right of action directly against the offending contractor which is not based on any contractual obligation but rather on the failure of such contractor to exercise due care in the performance of his assumed obligation.[81]

Applied in the supply chain context, workers can argue that the provisions regarding monitoring and supervision assumed by MNCs under supplier codes of conduct are clearly undertaken for their benefit, especially given that many supplier codes were enacted in response to specific scandals.[82] Plaintiffs can then claim under third-party beneficiary theory that those provisions give rise to a tort duty of reasonable care.

In fact, this exact theory was at the center of the plaintiffs' negligence claims in the 2007 case and later appeal of *Doe I v. Wal-Mart Stores, Inc*.[83] The plaintiffs in that case were factory workers from various countries who had been subjected to labor violations including physical abuse, lack of safety equipment, withheld wages, and denial of breaks.[84] Walmart's Standards for Suppliers at that time required suppliers to comply with local laws in regard to working conditions and provided that Walmart "will undertake affirmative measures, such as on-site inspection of production facilities, to implement and monitor said standards."[85] The Standards also gave Walmart the right to cancel orders or terminate contracts with suppliers who violated the provisions.[86] The plaintiffs alleged that, although Walmart held itself out through the Standards as protecting workers' rights, in actuality the company rarely inspected facilities for violations and sometimes ignored violations that it did find.[87]

The essence of the plaintiffs' negligence claim was that they were third-party beneficiaries of the contract between Walmart and their employers, which imposed obligations on Walmart to act for their

[81] 57 Am. Jur. 2d Negligence § 50, at 399 (1971).

[82] See Herman, supra note 11 (describing the spread of supplier codes of conduct, which began to be instituted by MNCs following accusations of forced labor and sweatshop factory conditions).

[83] No. CV 05-7307, 2007 WL 5975664, at *3 (C.D. Cal. Mar. 30, 2007); Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 680–82 (9th Cir. 2009).

[84] *Wal-Mart Stores*, 2007 WL 5975664, at *2.

[85] *Wal-Mart Stores*, 572 F.3d at 680 (reading plaintiffs' allegations as true).

[86] Id.

[87] Id.

protection.[88] In particular, the plaintiffs pointed to the provision stating that Walmart would undertake affirmative measures to ensure compliance with the Standards.[89] The Ninth Circuit, in affirming the district court, held that the third-party beneficiary theory failed because, although the contract provisions created a right of inspection and supervision, they did not create a duty for Walmart to do so.[90] As support for its reasoning, the court noted that, while the suppliers were subject to a variety of consequences for unlawful behavior, the contract did not contain any comparable negative consequences if Walmart failed to monitor.[91] Thus, the court concluded that the only legal duty to protect workers remained with their direct employer, who had taken on the bulk of the responsibility under the Standards.[92]

Although the Ninth Circuit dealt a blow to third-party beneficiary theory in *Wal-Mart*, the claim that supplier codes of conduct create a duty to workers has significantly more legal support than the court's cursory analysis would suggest. The opinion suffers from two major flaws. First, both the district court and the Ninth Circuit were overly concerned with the contractual formalities of the third-party beneficiary claim, particularly the fact that Walmart was in the position of promisee rather than promisor.[93] While this analysis would be appropriate for a breach of contract claim under third-party beneficiary theory,[94] it is unnecessarily formalistic in the tort context. As the D.C. Circuit has explained, "[w]hile in contract law, only one to whom the contract specifies that a duty be rendered will have a cause of action for its breach, in tort law, society, not the contract, specifies to whom the duty is owed, and this has traditionally been the foreseeable plaintiff."[95] Perhaps because of their formalistic

[88] Id. at 684 ("Plaintiffs' 'third-party beneficiary' negligence theory relies on the assumption that Wal-Mart owes Plaintiffs a duty under Wal-Mart's supply contracts.").

[89] Id. at 681.

[90] Id. at 681–82.

[91] Id. at 682.

[92] Id.

[93] Id.; see also Doe I v. Wal-Mart Stores, Inc., No. CV 05-7307, 2007 WL 5975664, at *3 (C.D. Cal. Mar. 30, 2007) (noting a third-party beneficiary "can enforce such a contract against the party that made the promise (the promisor) [but] cannot enforce the contract against the party that bargained for the promise (the promisee)").

[94] Claims for breach of contract by a third-party beneficiary are more strictly circumscribed and generally require a clear showing that the promisee intended for the third party to have a right of performance. See Restatement (Second) of Contracts § 302 (Am. L. Inst. 1981).

[95] Caldwell v. Bechtel, Inc., 631 F.2d 989, 998 (D.C. Cir. 1980) (reversing summary judgment in favor of a consultant engineering firm that was sued by a heavy equipment

approach, the district court and the Ninth Circuit also failed to engage in a close analysis of the language of the Standards and the facts surrounding Walmart's exercise of supervisory powers. Both courts briefly recited the facts giving rise to the action, but neither closely examined how those facts might bear on traditional tort considerations such as foreseeability, expertise, and who has the greatest ability to prevent harm.[96] These flaws open the door for courts in the future to come to a different result, guided by a well-developed and closely analogous body of caselaw.

III. CONSTRUCTION LAW AS A MODEL FOR NEGLIGENCE CLAIMS

Construction law has many pertinent similarities to buyer-supplier relationships, and workers on construction sites have successfully sued high-level managers in numerous cases across jurisdictions using the third-party beneficiary theory.[97] There are several reasons to consider construction law as a useful model for state law negligence claims against MNCs. First, construction projects involve multi-tier relationships between owners, design professionals such as engineers and architects,[98] contractors, and sub-contractors, much like modern supply chains. Those relationships are typically governed by elaborate contracts between the design professionals and owners which, similar to supplier codes of

operator injured during the course of their employment, notwithstanding the lack of contractual privity between the operator and the consultant).

[96] For a more robust discussion of these considerations in the context of a personal injury claim, see *id.* at 997–98.

[97] See infra note 108.

[98] This Note uses the terms engineer and architect interchangeably to refer to the design professional overseeing a construction project. Additionally, this Note has adopted a preference for citing to the foundational third-party beneficiary cases in each jurisdiction, largely for their more in-depth analysis of the facts and explanation of the rule. See infra note 108. These cases, however, remain good law and are cited to this day. See, e.g., Heichel v. Marriott Hotel Servs., No. 18-1981, 2019 U.S. Dist. LEXIS 85136, at *6 (E.D. Pa. May 20, 2019) (citing *Caldwell*, 631 F.2d at 998–99, for the proposition that an architect may owe a duty of care to those that enter the property, although finding that the plaintiffs here did not establish that duty); Hancock v. Mayor of Balt., No. 440, 2021 Md. App. LEXIS 879, at *44 (Md. Ct. Spec. App. Oct. 1, 2021); Cruz v. Lopez, 919 N.W.2d 479, 493–94 (Neb. 2018) (citing Cutlip v. Lucky Stores, Inc., 325 A.2d 432 (Md. Ct. Spec. App. 1974) for the potential for liability if the general contractor had control over the mechanism that caused injury, but holding that no such evidence supported this). See also a 1992 opinion from the Arkansas Attorney General stating that "an action may lie if injury results . . . depending upon the particular terms of the contract and, specifically, whether it created an obligation to third persons or the public in general." 1992 Ark. AG LEXIS 136, *6 (Ark. Att'y Gen. Apr. 9, 1992) (citing Hogan v. Hill, 318 S.W.2d 580 (Ark. 1958)).

conduct, require contractors to comply with safety provisions and often reserve rights of inspection and supervision for the design professionals overseeing work.

Besides the structural similarities in the business relationships at issue, construction law is helpful because legal peculiarities have ensured that there are a multitude of cases in which workers sue entities farther up the chain than their direct employers. In MNC cases, enforcement problems in foreign countries are often the reason employees do not sue the suppliers who directly employ them.[99] In construction cases, workers often sue design professionals because workers compensation laws require injured workers to release claims against their direct employers.[100] Thus, the construction field has produced a great deal of helpful analysis on the flow of duties through multiple entities and sub-entities. Additionally, the claims arising from construction accidents are often brought under a negligent-supervision theory for failure to ensure safe practices by contractors on the job site.[101] The content of those claims is quite similar to claims by foreign workers that MNCs have a duty to monitor suppliers to ensure compliance with labor laws and the provisions laid out in their supplier codes of conduct.[102]

Plaintiffs have at times noticed the similarities between construction law and supply chain issues, adding credence to the idea that the two contexts are legally comparable. At the district court level, the plaintiffs in *Doe I v. Wal-Mart Stores, Inc*., cited California cases on tort liability for defendants who had hired independent contractors.[103] However, these cases focused largely on the common law doctrines of peculiar risk and retained control,[104] making their utility in the MNC context less valuable.

[99] Reeve, supra note 15, at 402 ("[S]tructural problems and lack of resources may make the court system of the host nation inadequate to handle the claim.").

[100] See, e.g., *Cutlip*, 325 A.2d at 434.

[101] See, e.g., Associated Eng'rs, Inc. v. Job, 370 F.2d 633, 643 (8th Cir. 1966) (describing plaintiffs' allegations of negligent hiring and failure to implement safe practices).

[102] See, e.g., Rahaman v. J.C. Penney Corp., No. N15C-07-174, 2016 WL 2616375, at *7 (Del. Super. Ct. May 4, 2016) (describing plaintiffs' allegations of failure to monitor, failure to exercise oversight, and failure to implement adequate policies).

[103] No. CV 05-7307, 2007 WL 5975664, at *5 (C.D. Cal. Mar. 30, 2007).

[104] See Hooker v. Dep't of Transp., 38 P.3d 1081, 1082–83 (Cal. 2002) (holding that the principal of an independent contractor is not liable to an employee merely because they retained control of the contractor's operations but rather that their exercise of retained control must have "affirmatively contributed" to the employee's injuries); Browne v. Turner Constr. Co., 26 Cal. Rptr. 3d 433, 436–41, (Cal. Ct. App. 2005) (discussing the use of peculiar risk and retained control doctrines to establish duty in existing case law).

The plaintiffs in *Rahaman v. J.C. Penney Corp.* made a similar mistake.[105] The main problem with these theories is not their logical applicability to the MNC context; it is that when applied there, they are weaker arguments for the existence of a duty. Retained control is difficult to establish, because as compared to the construction context, MNCs do not generally have as much day-to-day involvement in the management of their suppliers as contractors do over subcontractors on the same construction project.[106] Likewise, courts have been skeptical of the idea that factory work involves inherently dangerous activity to the degree presented by heavy machinery and half-built structures on construction projects.[107]

By contrast, the approach that this Note advocates is to focus on construction cases where courts employed the third-party beneficiary theory, either implicitly or explicitly. Under this theory, many courts have found that engineers have a duty to act with reasonable care in ensuring safe premises for workers, even when faced with somewhat ambiguous contracts between owners and engineers.[108] Unlike the common law doctrines described above, third-party beneficiary theory relies more heavily on interpreting the contracts between the entities and what those contractual provisions reflect about their intentions. Thus, this theory is a better fit for the MNC context, because it entails finding rules of interpretation that are applicable to all contracts. In construction caselaw, interpretation has centered around a number of factors that have guided courts in deciding whether or not a particular contract conferred a duty on the architect to take reasonable precautions to protect workers on the site. The five most important and recurring factors include foreseeability, specificity of the contract, actual practice of supervision, ability to stop work, and actual knowledge of safety issues.

On foreseeability, courts have focused on the potential for danger if an architect negligently supervises the job site. In one Maryland case, an

[105] 2016 WL 2616375, at *8 (stating plaintiffs' argument that their status as independent contractors for defendants, coupled with the applicability of the peculiar risk doctrine to the risks of Rana Plaza created a duty of care, although no other special relationship existed).

[106] See Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 683–84 (9th Cir. 2009).

[107] See *Rahaman*, 2016 WL 2616375, at *9 (noting that the risk of injury from negligently constructed buildings is not peculiar to the garment industry).

[108] See, e.g., Associated Eng'rs, Inc. v. Job, 370 F.2d 633, 646–47 (8th Cir. 1966); Caldwell v. Bechtel, 631 F.2d 989, 997 (D.C. Cir. 1980); Ben M. Hogan Co. v. Nichols, 496 S.W.2d 404, 415 (Ark. 1973) (finding that contract provisions between the defendant and the Highway Department were relevant to the creation of a duty to contractors' employees); Cutlip v. Lucky Stores, Inc., 325 A.2d 432, 444 (Md. Ct. Spec. App. 1974).

employee of a structural steel subcontractor was killed when a portion of the building he was working on collapsed.[109] Although the court held that the architect had taken on specific supervisory responsibility that conferred a duty, the decision also stressed the foreseeability of harm to workers on negligently supervised construction sites, implying that the danger might even create a general duty to ensure safe premises.[110] In another case, a worker on a project to excavate subway tunnels repeatedly complained to his direct employer about dusty conditions that were causing him to experience respiratory problems, including coughing up blood.[111] The contractor refused to take steps to ameliorate the problem and even fired the plaintiff "on grounds of making frivolous safety complaints."[112] The D.C. Circuit held that it was foreseeable that injuries like those the plaintiff suffered would occur if the architect failed to ensure that contractors complied with relevant safety regulations.[113] Thus, the architect owed a duty of care, because in tort law a duty is owed to "the foreseeable plaintiff, in other words, one who might foreseeably be injured by defendant's conduct."[114]

This case is particularly noteworthy because it suggests that those in a supervisory position can be held responsible even when the contractor who is the plaintiff's direct employer willfully violates safety regulations, an issue that the Central District of California explicitly raised in *Wal-Mart*. In airing its skepticism over the plaintiffs' use of contractor cases, the court pointed out that "[p]laintiffs do not cite any cases where the negligence of the defendant involved the failure to control the intentional actions of another company in managing its workforce."[115] The *Caldwell v. Betchel* case is direct evidence to the contrary, illustrating that a defendant higher on the supply chain who does not affirmatively create unsafe conditions but merely fails to correct those conditions created by others can be liable for negligence.[116]

[109] *Cutlip*, 325 A.2d at 434.

[110] Id. at 444 (finding that the architect was well-positioned to appreciate the danger that could be posed by negligent construction of the premises, and thus he could be found to have breached a duty).

[111] *Caldwell*, 631 F.2d at 993–94.

[112] Id. at 994.

[113] Id. at 997 (noting specifically that the duty owed by defendant engineering firm to the plaintiff machine-operator was based in tort rather than contract law).

[114] Id. at 998.

[115] Doe I v. Wal-Mart Stores, Inc., No. CV 05-7307, 2007 WL 5975664, at *5 (C.D. Cal. Mar. 30, 2007).

[116] 631 F.2d 989, 997 (D.C. Cir. 1989).

A second factor that has played a role in determining whether safety provisions give rise to a duty to third parties is the specificity of the contract. As a matter of third-party beneficiary theory, the specificity of the contract is important for its illustration of the parties' intention that specific measures be taken for the protection of workers or bystanders. Greater specificity thus strengthens the claim that the contracting parties understood themselves to be undertaking a duty to third persons. For example, in one Arkansas case, the contract between the Highway Commission and the general contractor specified that trenches were not to be dug on both sides of the highway at once, and that "[a]ppropriate signs, lights and barricades shall be furnished and installed by the contractor to protect public traffic where trenches for widening are open alongside existing pavement."[117] The contractor was held liable when, having dug trenches on both sides of the road, a passing car swerved onto the shoulder to avoid a truck and the car flipped, killing one passenger and injuring the other.[118] While this case involved a suit by a member of the public against a contractor, rather than a suit by a worker against an architect, similar principles of third-party beneficiary status were at play, and the court concluded that the contract could form the basis of a tort claim by the car's passengers.[119]

By contrast, in a Sixth Circuit case applying Arkansas law, the court held that contractual provisions requiring the architectural firm "to act in a general supervisory capacity throughout the construction period" were not enough to convey a duty to third parties.[120] While the contract provided for the firm to conduct occasional inspections, it was not required to supervise the project on a day-to-day basis, and thus the

[117] Hogan v. Hill, 318 S.W.2d 580, 582 (Ark. 1958).

[118] Id. at 583–84.

[119] Id. at 584–85 (noting, while referencing the jury instructions, that the cited contract provisions were clearly adopted for the safety of the "traveling public").

[120] Baker v. Pidgeon Thomas Co., 422 F.2d 744, 746 (6th Cir. 1970). Several other courts have indicated unwillingness to find a duty in the absence of specific provisions to that effect. See Wheeler & Lewis v. Slifer, 577 P.2d 1092, 1093 (Colo. 1978) ("We however, believe the better rule is found in those jurisdictions which have refused to impose liability absent a clear assumption of duty."); Baumeister v. Automated Prods., Inc., 690 N.W.2d 1, 9 (Wis. 2004) ("[T]he architect's contract with the owner did not require the architect to specify procedures or to supervise the work of the contractor." (citing Vonasek v. Hirsch & Stevens, Inc., 221 N.W.2d 815, 820 (Wis. 1974))); Brown v. Gamble Constr. Co., 537 S.W.2d 685, 687 (Mo. Ct. App. 1976) ("[A]rchitects are under no duty to supervise construction unless they expressly agree to do so.").

contractual provisions were too tenuous for a finding of liability.[121] The Eighth Circuit has also stressed the importance of specificity in contract terms, especially in close cases. In one case involving South Dakota law where a live wire injured a worker, the court noted that specific contract terms prohibiting "any employee 'to perform any work upon energized [telephone] lines or upon poles carrying energized lines'" were "particularly pertinent" to a finding of negligent supervision.[122]

Besides foreseeability and contract specificity, another factor that courts look to for guidance is whether the architect or supervisor had an actual practice of undertaking safety responsibilities. Although actual practice is extraneous to the text of the contract, courts sometimes use it as a form of evidence as to what the contracting parties believed their obligations to be under the agreement. Thus, the Nebraska Supreme Court looked to the conduct of the supervising engineer to give context to a contract provision that required him "to protect the District's interest in safety, housekeeping, fire prevention, and operation of the running plant."[123] Despite the generality of the contract term, the engineer's actual practice was to conduct twice-daily safety inspections, to hold weekly safety meetings, and to raise complaints with contractors about unsafe conditions.[124] The engineer also held himself out to state labor inspectors as the appropriate contact for site safety inspections.[125] The court therefore concluded that the engineering firm had "assumed by written contract and by its conduct a substantial duty of safety . . . [and] should have recognized that duty as necessary for the protection of third persons."[126]

A fourth factor in determining duty, and perhaps the most often mentioned in the case law, is whether the architect's contract with the building owner contained provisions enabling the architect to stop work and demand that unsafe conditions be rectified. This factor has intuitive

[121] *Baker*, 422 F.2d at 746.

[122] Associated Eng'rs, Inc. v. Job, 370 F.2d 633, 644–45 (8th Cir. 1966).

[123] Simon v. Omaha Pub. Power Dist., 202 N.W.2d 157, 161 (Neb. 1972).

[124] Id. at 161–62.

[125] Id.

[126] Id. at 168. In another case, the Maryland Court of Special Appeals found that, where an architect declined to use the services of a structural engineer to supervise and report on building progress and instead inspected and reported on the work himself, he had undertaken additional supervisory responsibilities beyond those required by the contract. His conduct thus created a duty to a worker who was killed when the structure collapsed. Cutlip v. Lucky Stores, Inc., 325 A.2d 432, 444 (Md. Ct. Spec. App. 1974).

appeal because it suggests that the person with the greatest ability to correct safety violations has a corresponding duty to do so. As a matter of third-party beneficiary theory, the presence or absence of such an ability bears on the contracting parties' beliefs about whether responsibility for site safety largely remained with the contractors or was primarily vested in the design professional. Thus, in the absence of such provisions, courts have sometimes been reluctant to find that the architect had a duty to supervise the site.[127] Likewise, where architects did have the authority to stop work and rectify safety violations, courts have generally taken the position that the contracting parties intended the architect to be responsible for worker safety.[128]

These cases considering work stoppage authority bear directly on the Ninth Circuit's main reasoning in *Wal-Mart*, where the court found that "Wal–Mart reserved the right to inspect the suppliers, but did not adopt a duty to inspect them."[129] In fact, nearly all of the court's analysis turned on this distinction between a contractual right and a duty.[130] The cases cited above show that this distinction is not so easily drawn. While the ability to stop work is formulated as the architect's right, many courts have looked deeper into the underlying rationale of those provisions to infer a duty to do so when unsafe conditions are discovered. To be sure, the Ninth Circuit is not the only jurisdiction to take the view that a duty cannot be inferred from a right, no matter the reasoning. The Colorado Supreme Court has stated that "[construction cases inferring a duty] have disregarded fundamental contractual principles in attempting to parlay general inspection or supervision clauses which give the owner or architect a *right* to stop observed unsafe construction processes into a

[127] See, e.g., Baker v. Pidgeon Thomas Co., 422 F.2d 744, 746 (6th Cir. 1970) (noting that although the contract required the defendant to design and supervise the construction of the building, there was "no requirement that [the engineer] make safety inspections").

[128] See, e.g., Associated Eng'rs, Inc. v. Job, 370 F.2d 633, 645 (8th Cir. 1966) (noting that a work stoppage provision, among others, "imposes upon the engineer an obligation to do more than assure conformity to specifications"); Swarthout v. Beard, 190 N.W.2d 373, 376 (Mich. Ct. App. 1971), rev'd on other grounds, 202 N.W.2d 300, 304 (Mich. 1972) (drawing attention to the fact that the architect "had authority to stop the work and make the necessary correction"); Miller v. DeWitt, 226 N.E.2d 630, 641 (Ill. 1967) (superseded by statute) (noting that "the jury could have properly based their verdict on the failure of the architects to stop work"); Erhart v. Hummonds, 334 S.W.2d 869, 872 (Ark. 1960) (finding that work stoppage provision, among other things, could have properly led the jury to conclude defendant-architect was negligent).

[129] Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681–82 (9th Cir. 2009).

[130] Id. at 682.

duty."[131] But the existence of decisions to the contrary in several other jurisdictions sounds a positive note for claims by workers against MNCs.

The final factor that courts consider in determining whether architects owe a duty to workers is actual knowledge of safety issues. Like conduct, actual knowledge is not a factor rooted in the text of the architect's contract with the owner. Instead, courts seem to base this consideration on equitable reasoning that architects with actual knowledge of a violation, especially when they have the authority to stop work, are in the best position to prevent harm and thereby have a duty to do so.[132] Some courts have implied that actual knowledge merely bolsters a preexisting contractual obligation to supervise,[133] while others have taken a stricter view, implying that liability *only* arises when the architect has actual knowledge of a violation.[134] The current status of actual knowledge is thus slightly unclear in terms of its legal sufficiency for creating a duty, but it may be important for more practical reasons as well. In cases that survive a motion to dismiss, failure to act in the face of actual knowledge of a violation will look far worse to a jury than mere negligent supervision, putting the plaintiff in a stronger position for settlement negotiations.

IV. APPLICATION OF CONSTRUCTION LAW FACTORS TO SUPPLIER CODES OF CONDUCT

Future plaintiffs who wish to sue MNCs for labor violations in their supply chain should use the third-party beneficiary theory for claims other than human trafficking, for which the TVPRA is the clearest path to

[131] Wheeler & Lewis v. Slifer, 577 P.2d 1092, 1095 (Colo. 1978) (citation omitted).

[132] See *Swarthout*, 190 N.W.2d at 376 (finding that the worker-plaintiff made out a prima facie case of negligence against the architect, despite the lack of contractual privity, where the architect had knowledge of the "dangerous condition" and the "authority to stop the work and make the necessary correction" to avoid foreseeable injury).

[133] Simon v. Omaha Pub. Power Dist., 202 N.W.2d 157, 161–62, 168 (Neb. 1972) (discussing testimony from the construction superintendent illustrating that he knew about the problem of open holes on the job site).

[134] Hanna v. Huer, Johns, Neel, Rivers & Webb, 662 P.2d 243, 253–54 (Kan. 1983) ("We agree with plaintiffs' contentions that if [the engineers] had actual knowledge of unsafe practices they should have taken some action."), superseded by statute, An Act Concerning Workers' Compensation, Ch. 175, § (1)(f), 1985 Kan. Sess. Laws, as recognized in Edwards v. Anderson Eng'g, 166 P.3d 1047 (Kan. 2007). Although the holding in this case was eventually abrogated by amendments to the Kansas workers compensation statute, the court's reasoning is helpful to illustrate the importance that some judges have placed on knowledge to the creation of a tort duty.

success.[135] Unlike other state law claims, the third-party beneficiary theory in the MNC context has substantial legal support from the construction law field.[136] While courts deciding construction cases have not announced a specific test to govern whether design professionals are liable to workers, plaintiffs in MNC cases should use the reasoning and decisions discussed above to argue for a totality of the circumstances analysis that incorporates the five major factors in construction law cases. As an example of how a future case against Walmart might be argued, this Note will analyze Walmart's current Standards for Suppliers according to the construction law factors.[137]

Beginning with foreseeability, it is hard to conclude that Walmart could not have anticipated danger to its suppliers' employees if the terms of the Standards for Suppliers were not properly enforced. Like many other MNCs with supplier codes of conduct, Walmart has been embroiled in multiple scandals regarding its supply chain, including allegations of forced labor, unsafe factories, and underpaid workers.[138] Indeed, scandals of this nature tend to negate arguments that labor violations by suppliers are unforeseeable. This is particularly true given that the Standards for Suppliers contain guidance directed at the very issues where suppliers have been exposed as acting poorly. For example, the Standards specifically direct suppliers to comply with local laws in regard to wages and minimum working age,[139] and there would be no need for such

[135] See supra notes 51–54 and accompanying text.

[136] See supra note 72.

[137] See Standards for Suppliers, Walmart, https://corporate.walmart.com/media-library/document/standards-for-suppliers-english/_proxyDocument?id=0000015c-e70f-d3b4-a57e-ff4f3f510000 [https://perma.cc/EBH5-B8E3].

[138] See, e.g., Aaron Smith, Report Slams Walmart for 'Exploitative' Conditions in Asia Factories, CNN Bus. (June 1, 2016, 1:14 PM), https://money.cnn.com/2016/05/31/news/companies/walmart-gap-hm-garment-workers-asia/index.html [https://perma.cc/C3D2-AJ66] (noting reports of unsafe conditions from eighty Walmart factories in Asia, including allegations of persistent sexual harassment, low wages, punishment for union activity, and forced overtime in sweatshop conditions that led to mass fainting); Zoe Sullivan, Walmart's Food Suppliers at Odds with Store's Code of Ethics, Report Claims, Guardian (June 5, 2015, 11:37 AM), https://www.theguardian.com/business/2015/jun/05/walmart-food-suppliers-environment-human-rights-ethics [https://perma.cc/G3Q8-HRJ2] (reporting serious concerns with respect to Walmart's relationship to its food suppliers as to environmental and labor practices); Matthew Mosk, Wal-Mart Fires Supplier After Bangladesh Revelation, ABC News (May 15, 2013, 6:58 PM), https://abcnews.go.com/Blotter/wal-mart-fires-supplier-bangladesh-revelation/story?id=19188673 [https://perma.cc/Z7UX-53RA] (reporting Walmart's termination of a supplier connected to production in Rana Plaza after the collapse).

[139] Standards for Suppliers, supra note 137, at 9.

provisions if the company did not anticipate that suppliers might potentially fail to abide by those laws.

Closely related to this issue is the question of whether Walmart has actual knowledge of ongoing violations. MNCs like Walmart generally have a more arms-length relationship with their suppliers than do architects with contractors, since design professionals are typically heavily involved in the management of construction projects and are often stationed on-site where they can easily observe contractors and handle direct complaints by employees.[140] Being geographically removed might make the actual knowledge prong more difficult to decipher. When confronted with the poor labor practices of its suppliers, Walmart has previously taken the approach of plausible deniability. In 2013, reports connected Walmart to two major disasters caused by substandard factory conditions in Bangladesh.[141] In response, Walmart terminated its contracts with the two suppliers who had sourced from those factories but disclaimed any knowledge of their subcontracting practices.[142] Without additional information, it would be difficult for a plaintiff to convincingly contradict claims of this nature. However, technological developments in supply chain management will likely make records demonstrating actual knowledge more easily available, since software companies claim to be able to map out detailed supply chain relationships.[143] If Walmart adopted such technology and was aware that its suppliers were sourcing from risky factories in Bangladesh but failed to determine those subcontractors' compliance with the Standards for Suppliers, a court might find that Walmart had knowledge of the danger and failed to correct it.

Although supply chain management software might be one way to demonstrate actual knowledge, there are also more direct mechanisms arising from the Standards for Suppliers—namely, reporting procedures and inspection provisions. Walmart maintains an ethics hotline and email system for people to report violations of the Standards to its Ethics & Compliance department.[144] Plaintiffs with evidence that Walmart received and failed to act on credible complaints should argue that

[140] See, e.g., Simon v. Omaha Pub. Power Dist., 202 N.W.2d 157, 161–62 (Neb. 1972) (noting how the engineer inspected the site twice daily, held weekly safety meetings, and was very involved in the construction process).

[141] Mosk, supra note 138.

[142] Id. (reporting on Walmart's statements that both suppliers connected to the two disasters in Bangladesh had subcontracted work in those factories without Walmart's authorization).

[143] Why Interos, supra note 27.

[144] Standards for Suppliers, supra note 137, at 6, 16.

constitutes actual knowledge of violations, particularly if Walmart received multiple complaints regarding the same supplier. Likewise, plaintiffs could point to the inspection provisions, which give Walmart the right to audit and inspect suppliers, to show actual knowledge if the company failed to follow up on reports detailing deficiencies.[145] Both the reporting procedures and the inspection provisions make it possible for Walmart to know more information about its suppliers, which also places it in the position of potentially assuming greater liability. Indeed, Walmart's ESG Report from 2019 indicates that the company opened over 600 cases involving allegations of misconduct.[146] In the construction law cases, failure to address reports and remediate problems presents a major basis for finding that the architect had actual knowledge and, therefore, a duty to workers.[147]

The next factor for determining whether an MNC has a duty to monitor is the level of detail and specificity contained in its code of conduct. In construction law cases, courts have been more receptive to third-party beneficiary claims when the contract contained specific measures for the alleged duty-holder to take, such as not allowing workers onto energized wires[148] or ensuring that trenches would not be dug on both sides of the road at once.[149] Lack of a specific assumption of responsibility is also the major determining factor for jurisdictions hesitant to find third-party beneficiary liability in these contexts at all.[150] Thus, specific enforcement provisions in supplier codes of conduct may be the most important consideration in determining MNC liability. While Walmart's Standards for Suppliers contain numerous specific requirements that suppliers must adhere to, the provisions regarding enforcement are brief and general in scope: "Anyone who violates the Standards may be subject to consequences, up to and including termination of business with Walmart.

[145] Id. at 5.

[146] Walmart, 2019 Environmental, Social & Governance Report 88 (2019), https://corporate.walmart.com/media-library/document/2019-environmental-social-governance-report/_proxyDocument?id=0000016a-9485-d766-abfb-fd8d84300000 [https://perma.cc/E67K-JCYX].

[147] See Swarthout v. Beard, 190 N.W.2d 373, 376 (Mich. Ct. App. 1971), rev'd on other grounds, 202 N.W.2d 300, 304 (Mich. 1972); Simon v. Omaha Pub. Power Dist., 202 N.W.2d 157, 162, 168 (Neb. 1972).

[148] Associated Eng'rs, Inc. v. Job, 370 F.2d 633, 644–45 (8th Cir. 1966).

[149] Hogan v. Hill, 318 S.W.2d 580, 582 (Ark. 1958).

[150] See, e.g., Baumeister v. Automated Prods., Inc., 690 N.W.2d 1, 9 (Wis. 2004); Brown v. Gamble Constr. Co., 537 S.W.2d 685, 687 (Mo. Ct. App. 1976).

Walmart reserves the right to audit or inspect suppliers at any time to determine whether they are complying with these Standards."[151]

This provision is ambiguous for plaintiffs. Walmart would likely argue that the condition is simply reserving the right "to act in a general supervisory capacity," not an undertaking to perform specific supervisory functions.[152] If the inspection clauses were more specific, perhaps providing for a certain number of inspections per year or upon a triggering event (such as the receipt of a complaint), then plaintiffs would have a stronger argument that Walmart had promised to act in a supervisory capacity. Plaintiffs should, however, emphasize the specificity of the company's responsibilities to individuals who report violations: "If you report through the helpline, you will receive a case number and PIN to access your report. Walmart Ethics & Compliance will follow up on your concern, as appropriate, and an investigator may contact you."[153] Based on the nature of the complaint, the issue will be directed to the proper team, and "[i]f a problem is found, Ethics & Compliance will work with the business to resolve it."[154] Although Walmart has conditioned its follow-up on whether or not further inquiry to a complaint is "appropriate," plaintiffs should argue that this language is sufficiently specific to evince an understanding that the parties intended for Walmart to have a duty to address complaints to the proper team and respond when necessary.

This argument about the contracting parties' intentions can be bolstered by actual practice, which has proved to be an important factor in determining liability in construction law cases. As the Nebraska Supreme Court observed, "[t]he interpretation given a contract by the parties themselves while engaged in the performance of it is one of the best indications of the true intent of the contract."[155] Thus, if Walmart has a practice of responding to reported violations by providing means for the complainant to access their report and then following up on credible allegations, that would indicate that Walmart believes it is obligated to do so by the terms of the Standards for Suppliers. Similarly, although the

[151] Standards for Suppliers, supra note 137, at 5.

[152] Baker v. Pidgeon Thomas Co., 422 F.2d 744, 746 (6th Cir. 1970) (holding contract language surrounding an engineer's general supervisory role did not create an obligation to make "safety inspections").

[153] Standards for Suppliers, supra note 137, at 6.

[154] Id.

[155] Simon v. Omaha Pub. Power Dist., 202 N.W.2d 157, 168 (Neb. 1972).

language of the contract alone may not suggest that Walmart has undertaken a duty to inspect and monitor suppliers, an actual practice of regular audits might support the existence of that obligation. Walmart's then-vice president of Ethical Sourcing announced that the company audited over 9,000 factories in 2011 alone.[156] That number has only grown in recent years, undermining the idea that the company does not believe it has a responsibility to do so.[157]

Plaintiffs should also gather evidence on whether Walmart has actually terminated relationships with suppliers who failed to comply with the Standards. According to Walmart's reports, it has stopped doing business with more than thirty suppliers in response to violations since 2012.[158] Although this is a small number in comparison to the number of audits conducted annually, the fact that Walmart has reserved the right to end its contracts with suppliers who fail to meet the Standards is important, as it is analogous to the "work stoppage" provisions that courts in construction cases have often looked to as creating a duty. While not all courts have been willing to infer a duty from a right to stop work,[159] courts in several jurisdictions have reasoned that vesting an actor with the power to end unsafe working conditions entails a duty to do so if the need arises.[160] Supplier codes of conduct are premised on the principle that the threat of removing substantial business can force suppliers to comply, so the same reasoning of holding architects liable for failing to stop work in unsafe conditions should apply to MNCs that fail to end or suspend their contracts with suppliers that commit labor violations.

Overall, this analysis shows that future plaintiffs have a strong argument that Walmart's Standards for Suppliers give rise to a duty to workers. And while this Note has focused on Walmart to better illustrate the third-party beneficiary analysis that the Central District of California and the Ninth Circuit could have performed, the same principles apply to

[156] S. Prakash Sethi, The World of Wal-Mart, Carnegie Council for Ethics Int'l Affs.: Carnegie Ethics Online Monthly Column (May 8, 2013), https://www.carnegiecouncil.org/publications/ethics_online/0081 [https://perma.cc/WF4X-TNFS].

[157] See, e.g., Walmart, 2018 Global Responsibility Report Summary 31 (2018), https://corporate.walmart.com/media-library/document/2018-grr-summary/_proxyDocument?id=00000162-e4a5-db25-a97f-f7fd785a0001 [https://perma.cc/3EDD-WLUE] (noting over 13,000 audits conducted); 2019 Environmental, Social & Governance Report, supra note 146, at 88.

[158] 2019 Environmental, Social & Governance Report, supra note 146, at 88.

[159] See Wheeler & Lewis v. Slifer, 577 P.2d 1092, 1095 (Colo. 1978).

[160] See, e.g., Swarthout v. Beard, 190 N.W.2d 373, 376 (Mich. Ct. App. 1971), rev'd on other grounds, 202 N.W.2d 300, 304 (Mich. 1972); Associated Eng'rs, Inc. v. Job, 370 F.2d 633, 645 (8th Cir. 1966); Erhart v. Hummonds, 334 S.W.2d 869, 872 (Ark. 1960).

all supplier codes of conduct. Depending on the language of the code and the specific factual situation, workers suing other MNCs for ignoring or abetting the labor violations of their suppliers might have stronger or weaker claims when viewed through the lens of the five construction law factors.

Corporate defendants and other critics of this litigation theory will argue that construction law and supply chains are not perfect analogues, particularly in the closeness of the relationship between the different entities, which is stronger in construction cases. Corporate defendants might argue that, unlike architects, MNCs are removed from their foreign suppliers, making close supervision more difficult and expensive. Although this is an important difference between MNCs and engineers, the real question is whether it is material to the legal analysis underlying third-party beneficiary theory. Plaintiffs have a strong argument that it is not. Instead, the key question in third-party beneficiary cases is whether the contracting parties undertook a duty to a third person; it does not matter to this analysis whether it is onerous to fulfill. For example, the general contractor in *Hogan v. Hill* who promised the Highway Commission that there would not be trenches on both sides of the road at once could hardly escape liability later by claiming that the provision was expensive or inconvenient.[161] In the absence of a contract, the geographic removal of MNCs would likely be relevant to a duty analysis, but that ceases to be important once an MNC implements a supplier code.

Skeptics may also raise concerns in supply chain cases that MNCs will be incentivized to drop their supplier codes of conduct if the documents subject them to a serious threat of liability. Since the codes are voluntary enactments, there is nothing preventing companies from watering down the provisions, attempting to add legal disclaimers, or simply doing away with the codes entirely if they become too much of a legal threat. This is a real possibility, although given the supply chain management trends discussed in Part I, companies have more incentives now than ever to pay close attention to their suppliers. Particularly in brand-conscious industries like fashion, MNCs may well conclude that the reputational penalty of withdrawing their supplier codes of conduct would be greater than the risk of liability.[162] Ideally, however, the companies might

[161] 318 S.W.2d 580, 582 (Ark. 1958).

[162] Nike, for example, saw an eight percent decrease in sales from 1999 to 2000, when it faced accusations of child labor and sweatshop conditions in its overseas factories. The company's share price also dropped by about fifteen percent. Burhan Wazir, Nike Accused of

conclude that the cheapest and most effective mitigation mechanism would be to reduce their chances of being found in breach of their duty to suppliers' employees by stepping up their supervision efforts.

To the extent that companies do eliminate their supplier codes of conduct in response to litigation, it is not clear that would be entirely negative. First, MNCs would remain liable for the time period during which the agreements were effective, even if they choose to alter or abdicate them going forward. Second, the reason why there is such robust literature surrounding MNC liability[163] is that supplier codes of conduct have largely failed to bring about the desired changes to working conditions in developing countries.[164] Furthermore, there is strong evidence that businesses use industry self-regulation as leverage to stall impending government intervention.[165] Thus, a breakdown of voluntary efforts by MNCs to improve their supply chains might actually have the unintended effect of increasing pressure for more effective forms of government regulation.[166] Litigation may therefore serve as a method of "forcing the issue" that could result in positive change, even if its immediate consequences are to reduce voluntary company efforts.

Tolerating Sweatshops, Guardian (May 19, 2001, 7:29 PM), https://www.theguardian.com/world/2001/may/20/burhanwazir.theobserver [https://perma.cc/BVC6-X63T].

[163] See supra notes 13–15 and accompanying text.

[164] See supra notes 38–40 and accompanying text.

[165] See Lisa L. Sharma, Stephen P. Teret & Kelly D. Brownell, The Food Industry and Self-Regulation: Standards to Promote Success and to Avoid Public Health Failures, 100 Am. J. Pub. Health 240, 240 (2010); OECD Committee on Consumer Policy, Industry Self-Regulation: Role and Use in Supporting Consumer Interests 6 (2015), https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/CP(2014)4/FINAL&docLanguage=En [https://perma.cc/5PNA-7XBP].

[166] For example, one area in which the United States enacted federal supply chain due diligence legislation was in the Dodd-Frank Act's conflict minerals reporting provision, which required companies to investigate and report on the presence of certain precious metals sourced from the Democratic Republic of the Congo in their supply chains. The SEC announced that the law would no longer be enforced after 2017, but while in effect, the law successfully reduced violence and forced labor in the targeted regions. Annie Callaway, Demand the Supply: Ranking Consumer Electronics and Jewelry Retail Companies on Their Efforts to Develop Conflict-Free Minerals Supply Chains from Congo 8–9 (2017), https://enoughproject.org/wp-content/uploads/2017/11/DemandTheSupply_EnoughProject_2017Rankings_final.pdf [https://perma.cc/H43P-UE95]; Updated Statement on the Effect of the Court of Appeals Decision on the Conflict Minerals Rule, U.S. Sec. & Exch. Comm'n (Apr. 7, 2017), https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule [https://perma.cc/3X9E-2B4K].

CONCLUSION

Shiuli Begum—who suffered catastrophic injury in the 2013 Rana Plaza garment factory collapse—deserved safe working conditions while producing clothing for multinational corporations based in the United States. This is particularly true because these companies stated to Ms. Begum, the suppliers, and the world in their codes of conduct that they planned to look out for her safety. This Note showed how state law claims of negligent supervision against MNCs can require major companies to compensate workers injured by the poor labor practices of their suppliers. Economic conditions, reputational harms, and technological developments all suggest that MNCs will engage in more intensive information-gathering and monitoring of their supply chains in the future. Supplier codes of conduct represent one integral way that companies have responded to supply chain problems in the past, yet the bearing of these agreements on liability for MNCs has been little discussed. With the viability of federal claims by foreign workers in serious question after the Supreme Court's recent decision in *Nestlé*, state law claims may be the only way for plaintiffs to be heard in U.S. courts. While companies do not have a common law duty of reasonable care toward their suppliers' employees, third-party beneficiary theory creates such a duty where MNCs have undertaken contractual obligations for the benefit of those employees. A close analysis of supplier codes of conduct and the facts surrounding their implementation are key to this inquiry.

In construction law cases, which have many pertinent similarities to buyer-supplier relationships, courts have looked to several identifiable factors to determine whether a particular contract created a duty for an architect to monitor contractors' actions and ensure safe working conditions for the contractors' employees. Rather than requiring an explicit assumption of responsibility, these courts have analyzed the foreseeability of harm, the detail and specificity of supervisory provisions, the actual practice of the architect with regard to safety, whether the architect had the right to stop work and require unsafe conditions to be rectified, and the architect's actual knowledge of safety issues on the site. Those factors are easily translatable to supplier codes of conduct, and when applied to Walmart's Standards for Suppliers, suggest that plaintiffs who make those connections in the future have a strong possibility of success. Indeed, the door that *Nestlé USA, Inc.* appeared to close may yet remain open to victims of foreign labor abuses.