

THE LABOR LAWYER

A Journal of Ideas
and Developments
in Labor and Employment Law

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A Journal of Ideas
and Developments
in Labor and Employment Law

EDITOR

Professor Robert J. Rabin
Syracuse University College of Law
Syracuse, New York 13244-1030

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The Editor's Page

During my year of serving as *The Labor Lawyer's* Editor-In-Chief, I have had the invaluable opportunity of gaining insight and exposure into the engaging and passionate issues that create labor and employment law. Throughout this past year, I have also seen the publication go through somewhat of a metamorphosis with the encouragement of online subscription, a new design, the addition of a cumulative index from volumes past, and a new faculty coeditor. Each of these changes undoubtedly assures *The Labor Lawyer's* continued presence in the labor and employment law arena.

As a whole, Volume 20 touched on a number of hot button topics, ranging from the implications of noncompete agreements to farmworkers' unionization rights. Michael J. Garrison, author of the issue's first article, thoroughly analyzes the emerging question of whether an employee who refuses to sign a noncompete agreement has a valid wrongful discharge claim. The article points out that this problem directly concerns adverse policy perspectives from both employers and employees, namely freedom of employment, protection against unjust termination, and employers' interests and rights to protect business assets. Consequently, employees terminated for refusal to sign a noncompete agreement have had little success with wrongful discharge suits under the employment-at-will doctrine. The article provides a careful examination of *Maw v. Advanced Clinical Communications*, 846 A.2d 604 (N.J. 2004), and the implications that its majority and dissent have regarding noncompete agreements and resulting employee lawsuits.

John F. Fullerton III and Paul Salvatore provide an overview of the challenges involved for employers, unions, and labor lawyers alike when a company's existing bargaining units are altered due to corporate mergers, acquisitions, and reorganizations. The article describes a range of issues on this topic, such as the presence of multiemployer bargaining units, consolidated bargaining units, consolidation timing, and the effect of consolidation on already existing collective bargaining agreements. Overall, the authors reinforce the need for labor and employment law to adapt to shifting corporate structures.

The issue's third article, authored by Matthew W. Lampe and E. Michael Rossman, presents the growing trend of plaintiffs' attempts to combine FLSA and state law wage claims in one action. This article also provides an overview of relevant case law and discusses employer options in dealing with such suits, including complete avoidance.

Finally, Allison Kidd, winner of the 2004 Student Writing Competition, discusses union organizers' access to migrant labor camps, coupled with farmworkers' rights to associate with such organizers.

More specifically, the author considers the current problem of farmworkers' rights to organize and unionize in North Carolina—which has one of the largest farmworker populations in the nation—without fearing job loss or, worse yet, deportation. Included in the article is a case study of farmworkers' rights within the Mt. Olive Pickle Company, which refused negotiations with those North Carolina farmworkers who belonged to the Farm Labor Organizing Committee (FLOC).

This issue certainly covers timely topics and makes for interesting reading. I truly hope you enjoy it.

Acknowledgments

I want to thank the people who made the publication of this issue possible. First, I would like to thank my family and my fiancé for their constant love and support throughout my law school career. I also want to give special thanks to the three articles editors of *The Labor Lawyer*—Cathy Hanley, Michelle Perrin, and Sharon Lai. Without their hard work, diligence, and support, we would not have had such a successful year. I wish the three of them well in their future endeavors, as they will undoubtedly be successful. Further, I greatly appreciate the efforts of the associate editors, who are key components in the publication process. Finally, I would like to thank Professor Robert Rabin for all of his guidance, expertise, and patience over the past year. It has been a wonderful opportunity to work with him, and I have certainly learned a great deal about the publication process along the way. In closing, I wish the best to next year's staff, including our new faculty coadvisor and coeditor, Kathleen Dole.

Suzanne J. Halloran
Editor-in-Chief

**Correction for *The Labor Lawyer*,
Fall 2004, Volume 20, Number 2**

In the article entitled "The New FLSA Regulations Concerning Overtime Pay," the last sentence in the second paragraph on page 239 should read, "The regular rate is calculated by dividing the salary by the number of hours worked in the week."

Limiting the Protection for Employees from Compelled Noncompete Agreements Under State Whistleblower Laws: A Critical Analysis of *Maw v. Advanced Clinical Communications*

Michael J. Garrison*

In *Maw v. Advanced Clinical Communications, Inc.*,¹ the New Jersey Supreme Court held that an employee discharged for refusing to sign an unreasonable noncompete agreement could not bring an action against her employer under the state's whistleblower statute. An emerging issue in employment law is whether an employee discharged for refusing to sign a covenant not to compete has a viable wrongful discharge claim.² The issue implicates a range of competing policy interests, such as the employee's interest in employment mobility and in freedom from unfair dismissals; the employer's interest in protecting its business assets, including trade secrets and customer relationships; and society's interests in open competition and technological innovation.

Employees fired for refusing to sign an unreasonable noncompete agreement have brought wrongful discharge suits under the public policy exception to the employment-at-will doctrine, but they have had limited success. Supreme courts in Oregon, Vermont, and Wisconsin have held that an employee who was discharged for refusing to sign an unreasonable noncompete agreement has no claim for wrongful discharge under the public policy exception.³ Such wrongful discharge claims have only been recognized in California. Several California courts of appeal have permitted claims against employers by employees

*Mr. Garrison is a professor of Business Law in the College of Business Administration at North Dakota State University.

1. 846 A.2d 604 (N.J. 2004).

2. For a discussion of the issue, see Michael J. Garrison & Charles D. Stevens, *Sign This Agreement Not to Compete or You're Fired! Noncompete Agreements and the Public Policy Exception to Employment at Will*, 15 EMPLOYEE RESPS. & RTS. J. 103 (2003).

3. *Dymock v. Norwest Safety Protective Equip.*, 45 P.3d 114 (Or. 2002); *Madden v. Omega Optical, Inc.*, 683 A.2d 386 (Vt. 1996); *Tagte v. Chambers & Owens, Inc.*, 579 N.W.2d 217 (Wis. 1998).

who were fired for refusing to sign noncompete agreements.⁴ However, these lawsuits were brought under California's broad derivation of the public policy exception and based on the strong public policy against employee restrictive covenants in section 16600 of the California Business and Professions Code,⁵ the state's restrictive noncompete statute.

In *Maw*, the discharged employee relied on an alternative theory of liability, the New Jersey Conscientious Employee Protection Act (CEPA).⁶ CEPA, the state's whistleblower statute, protects an employee who refuses to participate in a practice or policy that the employee reasonably believes violates public policy. Although the employee also asserted a wrongful discharge claim under the common law public policy exception as established in the landmark case of *Pierce v. Ortho Pharmaceutical Corporation*,⁷ the statutory whistleblower action had the potential to greatly expand the protection accorded to employees under traditional noncompete law and to provide a legal avenue for employees to protect themselves from compelled noncompete agreements. However, in finding that the employee did not state a viable whistleblower cause of action, the *Maw* court foreclosed any protection under CEPA for employees fired for refusing to sign unenforceable noncompete agreements.

This article critically analyzes both the majority and dissenting opinions in the *Maw* case and discusses the policy and business implications of the decision. The first section of the article provides an overview of the law of employee noncompete agreements, particularly the application of the common law reasonableness approach in New Jersey. The second section discusses state and federal protection for whistleblowing activity. The third section examines the public policy exception in New Jersey under *Pierce* and the protection accorded whistleblowing activity under CEPA. The court of appeals and supreme court opinions in *Maw* are discussed in the fourth section of the paper. The final section provides a critical analysis of the supreme court's opinion, including a discussion of the managerial implications of the *Maw* decision.

I. Employee Noncompetes and New Jersey's *Solari/Whitmyer* Test

Traditionally, the common law disfavored covenants not to compete in the employment context.⁸ Such restrictive covenants stifle free trade and competition. Additionally, they harm employees by restraining

4. *D'Sa v. Playhut, Inc.*, 102 Cal. Rptr. 2d 495 (Cal. Ct. App. 2000); *Walia v. Aetna, Inc.*, 113 Cal. Rptr. 2d 737 (Cal. Ct. App. 2001).

5. CAL. BUS. & PROF. CODE § 16600 (West 2003).

6. N.J. STAT. ANN. § 34:19-1 to -8 (2003).

7. 417 A.2d 505 (N.J. 1980).

8. *E.g.*, *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1281 (Ariz. 1999). For the seminal discussion of employee noncompete agreements, see Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

them from pursuing alternative employment or business opportunities. On the other hand, covenants not to compete can serve legitimate interests of employers in the protection of trade secrets and customer relationships. Businesses have a legitimate interest in preventing unfair competition by former employees who may seek to improperly use proprietary business information or unfairly take advantage of customer loyalties.⁹ As a result of the conflicting interests implicated by employee noncompete agreements, the common law permitted such restrictive covenants only when they were necessary to further legitimate business interests and reasonable in terms of time, geographic area, and scope of employment opportunities restricted.¹⁰

This common law reasonableness approach to employee covenants not to compete has been adopted by most jurisdictions.¹¹ However, some states take a more restrictive approach to noncompete agreements either by statute or court decision.¹² California and North Dakota prohibit almost all employee noncompete agreements.¹³ Statutes in Colorado and Oklahoma place significant limits on the enforceability of such post-employment restraints.¹⁴ In Texas, court decisions restrict the enforceability of covenants not to compete in the employment context.¹⁵

In contrast, some states have permissive statutes under which employee noncompete agreements are subject to a less demanding standard of review than under the common law approach.¹⁶ The Florida statute is the most permissive.¹⁷ Under it, employee noncompete agreements are to be construed "in favor of providing reasonable protection

9. See Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: The "Afterthought" Agreement*, 60 S. CAL. L. REV. 1468, 1484–85 (1987).

10. See Serena L. Kafker, *Golden Handcuffs: Enforceability of Noncompetition Clauses in Professional Partnership Agreements of Accountants, Physicians and Attorneys*, 31 AM. BUS. L.J. 31, 33 (1993).

11. Michigan adopted the common law approach by statute. MICH. COMP. LAWS § 445.774a (2002).

12. *E.g.*, ALA. CODE § 8-1-1 (2002); CAL. BUS. & PROF. CODE § 16600 (West 2003); COLO. REV. STAT. § 8-2-113(2)(c) (2001); LA. REV. STAT. ANN. § 23:921 (West 2001); N.D. CENT. CODE § 9-08-06 (2002); OKLA. STAT. tit. 15 § 217 (2002); OR. REV. STAT. § 653.295(1) (2002); WIS. STAT. § 103.465 (2001).

13. CAL. BUS. & PROF. CODE § 16600 (West 2003); N.D. CENT. CODE § 9-08-06 (2002). The California courts have held that section 16600 prohibits almost any agreement that restricts an employee from working for a competitor or imposing a penalty for doing so. *Muggill v. Reuben H. Donnelley Corp.*, 42 Cal. Rptr. 147, 149 (Cal. 1965) (invalidating retirement plan clause terminating payments of retired employee for competing with company).

14. COLO. REV. STAT. § 8-2-113(2)(c) (2001); OKLA. STAT. ANN. tit. 15, § 219 (2001).

15. See *Light v. Centel Cellular Co.*, 883 S.W.2d 642 (Tex. 1994) (adopting restrictive test for enforceability of employee noncompete agreements).

16. *E.g.*, S.D. CODIFIED LAWS § 53-9-11 (Michie 2004). See *Am. Rim & Brake, Inc. v. Zoellner*, 382 N.W.2d 421 (S.D. 1986) (overbroad noncompete agreement permissible under statute without a showing of reasonableness).

17. FLA. STAT. ch. 542.335 (2004).

to all legitimate business interests” of the employer.¹⁸ Also, once the employer establishes a legitimate business interest served by the covenant, the burden shifts to the employee to demonstrate the unreasonableness of the agreement.¹⁹ Even in those jurisdictions that follow the common law approach, some jurisdictions take a more deferential approach to employee noncompete agreements, either in terms of the types of interests considered legitimate or the level of judicial scrutiny employed.²⁰

In New Jersey, the state’s highest court adopted a variation of the common law reasonableness approach in a series of decisions in the 1970s. The test was derived from a pair of cases: *Solari Industries v. Malady*²¹ and *Whitmyer Brothers, Inc. v. Doyle*.²²

A. *Solari Industries v. Malady*

In *Solari*, the court addressed the issue of whether an employee noncompete agreement was enforceable in part to the extent that it was reasonable. The case involved a covenant not to compete executed by a high-level sales employee (Malady) of a New Jersey company (Solari Industries).²³ The noncompete agreement that Malady signed prohibited him from soliciting former customers of Solari Industries and engaging in other competitive activities for one year.²⁴ However, it did not contain any express geographical limitation.²⁵ Malady commenced operations in direct competition with Solari Industries, and he contacted former customers of the company.²⁶ In Solari Industries’ suit to enforce the agreement, the lower court denied the company’s request for preliminary injunctive relief. The court applied established New Jersey law, which stated that an overbroad noncompete agreement was void *per se* and wholly unenforceable.²⁷

In a well-reasoned opinion, the New Jersey Supreme Court abandoned the “void *per se*” rule that was applied by the lower court. In the process of analyzing and resolving that issue, the court made a number of important pronouncements regarding the law of employee noncompete agreements in New Jersey. It established the basic framework under which the validity of restrictive covenants would be judged and the

18. *Id.* § 542.335(1)(h).

19. *Id.* § 542.335(1)(c).

20. Compare *Perry v. Moran*, 748 P.2d 224 (Wash. App. 1987), modified on other grounds, 766 P.2d 1096 (1989) (allowing noncompete protecting more than just customers with whom the employee had contacts), with *Polly v. Ray D. Hilderman & Co.*, 407 N.W.2d 751 (Neb. 1987) (noncompete valid only if it restricts former employee from soliciting customers with whom the employee had done business).

21. 264 A.2d 53 (N.J. 1970).

22. 274 A.2d 577 (N.J. 1971).

23. *Solari*, 264 A.2d at 54.

24. *Id.*

25. *Id.*

26. *Id.* at 54–55.

27. *Id.* at 55.

broad equitable powers of the courts to modify such agreements to render them enforceable.

First, the court recognized that the common law moved from the position that noncompete agreements were generally unenforceable to a more modern approach.²⁸ The modern approach enforces reasonable noncompete agreements. Consistent with that development, the court established a three-part test to judge the validity of an employee noncompete agreement: “[A covenant not to compete] will generally be found to be reasonable where it simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public.”²⁹

Second, the court rejected the “void *per se*” rule that was applied by the lower court.³⁰ It relied on both academic criticism of the rule and an increasing number of judicial decisions allowing reformation of overbroad restrictive covenants.³¹ The court noted that the harshness of the “void *per se*” rule was somewhat alleviated by the “blue pencil” doctrine, which allows courts to selectively enforce a noncompete agreement if a modification of its terms is grammatically possible.³² However, it believed that this rule “exalted formalities and rewarded artful draftmanships.”³³ Therefore, the court adopted the position that employee noncompete agreements were partially enforceable to the extent reasonable, and it granted to courts a broad equitable power to modify such agreements to render them enforceable.³⁴ The court’s only qualification was that the employer must have secured the agreement in “good faith,” since equitable relief should be denied to an employer who deliberately secures an oppressive covenant through the use of superior bargaining power.³⁵

Third, the court strongly suggested that Solari Industries was only entitled to limited injunctive relief restraining Malady from contacting those actual or prospective Solari customers with whom he had “substantial dealings” while employed there.³⁶ Also, Malady was not precluded from arguing at trial that the agreement was otherwise unreasonable because it imposed undue hardship, was injurious to the society, or was secured in bad faith.³⁷ Thus, the lower court needed to fashion a limited remedy to protect the interests of the employer that was no more extensive than necessary.

28. *Id.* at 56.

29. *Id.* at 56.

30. *Id.* at 61.

31. *Id.* at 56–57.

32. *Id.* at 59.

33. *Id.* at 60.

34. *Id.* at 61.

35. *Id.*

36. *Id.*

37. *Id.*

The *Solari* opinion was an important step in modernizing the law of employee noncompete agreements in New Jersey. Both the tone and the outcome of the opinion were quite favorable to the interests of employers. This pro-employer opinion was followed by the court's decision in *Whitmyer* in which it clearly signaled that employee noncompete agreements are subject to heightened judicial scrutiny and that there are "teeth" in the *Solari/Whitmyer* reasonableness formulation.

B. *Whitmyer Brothers, Inc. v. Doyle*

In *Whitmyer*, the court discussed the requirement that, to be enforceable, a noncompete agreement must serve an employer's legitimate interests. James Doyle worked for *Whitmyer Bros., Inc.*, as a general manager.³⁸ The company was primarily engaged in the sale and erection of highway guardrails and signs.³⁹ After Doyle lawfully terminated his employment with *Whitmyer* and formed a competing company, *Whitmyer* sued to enforce a noncompete agreement that Doyle had signed.⁴⁰ Under the covenant not to compete, Doyle agreed for a period of five years after employment not to be connected at all with a competing company in any state east of the Mississippi or in any other state in which *Whitmyer* had done business.⁴¹ *Whitmyer* contended that the agreement was necessary to protect the trade secrets in its bidding procedures.⁴² Doyle contended that all of the elements of the company's bidding procedures were well known in the industry and thus not proprietary.⁴³

The trial court granted a preliminary injunction without any determination as to the legitimacy of the purported trade secrets or any judgment as to the scope of the agreement and the hardship it may have imposed on the defendant.⁴⁴ The lower court took the "narrow view" that the key issue was the breach of the agreement by Doyle since preventing him from working for a competitor was the reason for the restrictive covenant.⁴⁵ In terms of the agreement's breadth, the court read *Solari* to leave that determination for trial, at which time the court could reform it to render it enforceable.⁴⁶

In *Whitmyer*, the court clarified the *Solari* opinion in a number of respects, rejecting the lower court's approach to the noncompete agreement. The court conceded that under *Solari* a noncompete agreement might be partially enforceable.⁴⁷ However, it also recognized that re-

38. *Whitmyer*, 274 A.2d at 578.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 578-79.

43. *Id.*

44. *Id.* at 579-580.

45. *Id.* at 580.

46. *Id.*

47. *Id.* at 580-81.

restrictive covenants in the employment context are not as freely enforceable as those in the sale of business situations because of “countervailing policy considerations.”⁴⁸ This suggested a more demanding review than the lower court’s.

On the issue of the legitimate interests of the employer, the court noted that employers have a legitimate interest in protecting trade secrets and preserving customer relationships.⁴⁹ However, “the employer has no legitimate interest in preventing competition as such,” contrary to part of the rationale of the lower court.⁵⁰ Moreover, the court recognized an established distinction between “matters of general knowledge” within an industry and confidential proprietary information.⁵¹ The employer has a legitimate interest in preventing the exploitation of confidential proprietary information by a former employee because such improper use of trade secrets in business is a form of unfair competition.⁵² On the other hand, an employer has no legitimate interest in preventing a former employee from using matters of general knowledge in the trade even if the former employee is engaged in competition.⁵³ Essentially, to allow a noncompete agreement in that situation would be to allow a naked restraint on competition.

The Court concluded that the trial court did not give sufficient weight to the “important limiting considerations governing the postemployment restrictive covenant.”⁵⁴ The mere fact that the employee breached the agreement was an insufficient basis for the issuance of a preliminary injunction. It was incumbent on the employer to demonstrate that “such restraint was necessary to protect its legitimate interests and that it would not impose undue hardship on the employee or injure the public.”⁵⁵ Although the employer claimed an interest in trade secrets related to its bidding procedures, “the doubtful nature of the employer’s claimed trade secrets” coupled with the denials by the former employee made it inappropriate to grant preliminary relief.⁵⁶

Whitmyer qualifies the pro-employer opinion in *Solari* by clearly placing the burden on the employer to demonstrate not only the need for any noncompete agreement but also the reasonableness of its terms. Also, it is clear that the “legitimate interest” part of the test is a threshold requirement: Without such a showing, even a reasonable covenant not to compete is unenforceable. In the employment context, noncompete agreements require “special circumstances” that make the re-

48. *Id.* at 581.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 582.

53. *Id.* at 582–83.

54. *Id.* at 583.

55. *Id.*

56. *Id.*

straint necessary to prevent “unfair competition.” Covenants not to compete cannot be used to simply prevent competition from a former employee who may have learned general skills or knowledge of the industry during his or her employment.

C. *Ingersoll-Rand Company v. Ciavatta*

The balanced approach of the New Jersey court under the *Solari/Whitmyer* test is demonstrated by the court’s subsequent opinion in *Ingersoll-Rand Company v. Ciavatta*.⁵⁷ In *Ingersoll-Rand*, the Court analyzed the enforceability of an employee invention “holdover” agreement, balancing the conflicting policy interests under the *Solari/Whitmyer* framework. Its opinion broadens the legitimate interests that may be protectible under an employee noncompete agreement, while maintaining rigorous scrutiny of any post-employment restraint.

Ciavatta was an engineer who worked for Ingersoll-Rand, which is a company engaged in the research, development, manufacture, and sale of heavy industrial products.⁵⁸ One of its products was a split-set friction stabilizer used in underground mining to prevent the collapse of mine roofs.⁵⁹ When Ciavatta worked for Ingersoll-Rand’s research division, he signed an invention holdover agreement, under which he agreed to assign to the company any invention he made within one year of his termination if the invention was conceived and attributable to his work for the company.⁶⁰ During his employment, he gained substantial knowledge of underground mining, read extensively about the field, and even submitted thirteen proposals to the company for mine stabilizing devices.⁶¹ Ingersoll-Rand pursued none of these suggestions.⁶² Several months after Ciavatta was fired, he conceived of a new roof-stabilizing device that was different from Ingersoll-Rand’s friction stabilizer.⁶³ He patented it and later began selling his invention.⁶⁴

Ingersoll-Rand sued Ciavatta claiming entitlement to the invention under the holdover agreement.⁶⁵ The trial court concluded that the *Solari/Whitmyer* test was not applicable to the holdover agreement and enforced it under a balancing-of-interests test.⁶⁶ The court concluded that the balance favored Ingersoll-Rand because Ciavatta’s knowledge of the industry and stabilizing devices was a result of his employment with Ingersoll-Rand, and his diverse engineering experience provided him with a number of alternative employment opportu-

57. 542 A.2d 879 (N.J. 1988).

58. *Id.* at 880.

59. *Id.* at 881.

60. *Id.* at 882.

61. *Id.*

62. *Id.*

63. *Id.* at 883.

64. *Id.* at 883–84.

65. *Id.* at 884.

66. *Id.* at 884–85.

nities.⁶⁷ The appeals court reversed and applied the *Solari / Whitmyer* test to the facts found by the lower court.⁶⁸ The appeals court concluded that Ciavatta did not use any of Ingersoll-Rand's trade secrets in creating the support device, and the agreement, if enforced, would impose an undue burden on him and be detrimental to public interest in the development of competing products.⁶⁹

The supreme court held that holdover agreements should be governed by the *Solari / Whitmyer* test.⁷⁰ It recognized that holdover agreements involve competing interests of employers, employees, and the public. The employee/inventor has an interest in enjoying the benefits of his or her own creative work, and "an inventor has the right to use the general skills and knowledge gained through the prior employment."⁷¹ The employer has a countervailing interest in protecting its trade secrets and sensitive research information from exploitation by former employees.⁷² Also, society has an interest in "both fostering ingenuity and innovation of the inventor and maintaining adequate protection and incentives to corporations to undertake long-range and extremely costly research and development programs."⁷³ The court noted that other courts subject holdover agreements to a reasonableness analysis that balances these competing interests; therefore, it adopted *Solari / Whitmyer* as the appropriate framework.⁷⁴

Next, the court addressed the issue of the legitimacy of an employer's interest in protecting information that does not rise to the level of a trade secret.⁷⁵ Here, it believed there was a need to protect information derived from the modern research and development environment. "Today, large corporations maintain at great expense modern research and development programs that involve synergistic processes. Such 'think tanks' require the free and open exchange of ideas among the members of a research staff using the employer's body of accumulated information and experiences. This creative process receives its impetus from the assimilation of an employer's advanced knowledge and a spontaneous interaction among colleagues, co-employees, and superiors."⁷⁶ Given the importance of that R&D environment, the court held that employers have a legitimate interest in protecting "highly specialized, current information not generally known in the industry, created and stimulated by the research environment furnished by the

67. *Id.*

68. *Id.* at 885.

69. *Id.*

70. *Id.* at 892.

71. *Id.* at 887.

72. *Id.* at 892.

73. *Id.*

74. *Id.* at 889, 892.

75. *Id.* at 893-94.

76. *Id.*

employer, to which the employee has been 'exposed' and 'enriched' solely due to his employment."⁷⁷ However, the court expected this interest to be narrowly construed. "The line between such information, trade secrets, and the general skills and knowledge of a highly sophisticated employer will be very difficult to draw, and the employer will have the burden to do so."⁷⁸

Consistent with the court's own admonition to narrowly construe this interest in sensitive, research-related information, it concluded that Ciavatta did not misappropriate such information in creating his invention.⁷⁹ Ciavatta was not hired as an engineer to invent new devices or to design improvements of the friction stabilizer. He was not part of a "think tank" division and therefore was not exposed to the type of information that the court deemed protectible under a holdover agreement.⁸⁰ Moreover, the information needed to invent his stabilizing device was generally part of the public domain, known throughout the industry.⁸¹ Thus, even though Ciavatta used general knowledge and skills that he acquired while working for Ingersoll-Rand, his invention was not the result of any research being undertaken by the company.⁸² Even if the holdover agreement was broad enough to cover his invention, enforcement of it would be unreasonable, given the lack of a protectible research interest in it.⁸³

As *Ingersoll-Rand* illustrates, New Jersey has embraced a flexible approach to the enforceability of employee noncompete agreements. The high court has been sensitive to an employer's right to protect proprietary information and business goodwill, but it has placed the burden squarely on the employer to justify both the need for any post-employment restraint and the reasonableness of its terms. Thus, former employees have ample grounds to challenge overbroad covenants not to compete in lawsuits to restrain their competitive activities. Whether an employee can refuse to sign such an agreement depends upon the state's whistleblower protections, discussed in the next two sections of the article.

II. Whistleblower Protection

Whistleblowers may have legal protection from dismissal or retaliation under federal and state statutes, as well as under the common

77. *Id.* at 894.

78. *Id.*

79. *Id.* at 895.

80. *Id.*

81. *Id.*

82. *Id.* at 896.

83. *Id.*

law of wrongful discharge.⁸⁴ Although there is no general federal whistleblower law protecting private sector employees,⁸⁵ private employees who report their employers' illegal activity receive some protection under specific statutory provisions prohibiting employers from retaliating against whistleblowers. For example, under the recently enacted Sarbanes-Oxley Act, employers are prohibited from firing or taking other adverse actions against employees for providing information to federal authorities of mail, wire, bank, or securities fraud.⁸⁶ Similar antiretaliation provisions exist under environmental laws, labor laws, and antidiscrimination statutes.⁸⁷

At the state level, private sector employees who "blow the whistle" may be protected under the common law public policy exception to the employment-at-will doctrine.⁸⁸ Most jurisdictions adopting the public policy exception have applied it to protect whistleblowing employees

84. For an extensive discussion of current state whistleblower laws, see Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 Am. Bus. L.J. 99 (2000).

85. Federal employees are protected under the Whistleblower Protection Act, 5 U.S.C. §§ 2302(b)(8), (b)(9) (2002).

86. 18 U.S.C. § 1514 (2002).

87. Callahan & Dworkin, *supra* note 84, at 100–05.

88. The "whistleblower" exception has been adopted in sixteen states without a general whistleblower statute: Arkansas, Idaho, Iowa, Kansas, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Mexico, Oklahoma, Rhode Island, South Dakota, Washington, West Virginia, and Wisconsin. *Sterling Drug, Inc. v. Oxford*, 743 S.W.2d 380 (Ark. 1988) (based on criminal statute prohibiting retaliation against witnesses and informants); *Crea v. FMC Corp.*, 16 P.3d 272 (Idaho 2000); *Teachout v. Forest City Commun. Sch. Dist.*, 584 N.W.2d 796 (Iowa 1998); *Palmer v. Brown*, 752 P.2d 685 (Kan. 1988); *Wholey v. Sears Roebuck*, 803 A.2d 482 (Md. 2002) (based on criminal statute prohibiting harming person in retaliation for being a witness); *Shea v. Emmanuel College*, 682 N.E.2d 1348 (Mass. 1997) (internal and external whistleblowing protected); *McArn v. Allied Bruce Terminix Co., Inc.*, 626 So. 2d 603 (Miss. 1993) (no general public policy exception recognized); *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932 (Mo. App. 1998); *Wiltzie v. Baby Grand Corp.*, 774 P.2d 432 (Nev. 1989) (only external whistleblowing protected); *Garrity v. Overland Sheepskin Co. of Taos*, 917 P.2d 1382 (N.M. 1996); *Barker v. State Ins. Fund*, 40 P.3d 463 (Okla. 2001) (internal and external whistleblowing protected); *Cummins v. EG & G Sealol, Inc.*, 690 F. Supp. 134 (D. R.I. 1988); *Dahl v. Combined Ins. Co.*, 621 N.W.2d 163 (S.D. 2001); *Bennett v. Hardy*, 784 P.2d 1258 (Wash. 1990); *Harless v. First Nat'l Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978); *Hausman v. St. Croix Care Ctr.*, 571 N.W.2d 393 (Wis. 1997) (limited whistleblower protection). Many states with a general whistleblower statute also recognize a common law whistleblower claim under the public policy exception to employment at will. *E.g.*, *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308 (Ohio 1997); *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528 (Tenn. 2002). The state of the law is unclear in four jurisdictions: Colorado, North Carolina, South Carolina, and Wyoming. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992) (dicta—whistleblowing part of public policy exception); *Garner v. Rentenbach Constructors Inc.*, 515 S.E.2d 438 (N.C. 1999) (narrow public policy exception recognized); *Ludwick v. This Minute of Carolina Inc.*, 337 S.E.2d 213 (S.C. 1985) (public policy exception recognized); *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211 (Wyo. 1994) (recognizing tort claim for breach of the implied covenant of good faith if a "special relationship" exists between employer and employee);

from retaliatory dismissals.⁸⁹ In *Palmateer v. International Harvester Company*,⁹⁰ an employee claimed that his termination was retaliation for reporting criminal acts of a coemployee and assisting the authorities in the criminal investigation and prosecution. Palmateer was not protected from discharge under any particular Illinois statute, but the court found that he stated a cause of action for wrongful discharge under the public policy exception. The court noted that there is no more fundamental public policy than the enforcement of the state's criminal laws and that public policy favors "citizen crime-fighters."⁹¹

The whistleblower exception is firmly entrenched in many jurisdictions. However, it has been rejected in others,⁹² particularly those states that refuse to recognize any judicially created exception to the long-standing employment-at-will doctrine.⁹³ Even in jurisdictions that recognize the public policy exception, the whistleblowing exception is not universally embraced. The Texas Supreme Court recently rejected whistleblower protection.⁹⁴ It reasoned that the public policy questions of whether and to what extent whistleblowing activity receives legal protection should be left to the legislature.⁹⁵

Most states, through general whistleblower laws or specific regulatory statutes, provide some protection from retaliatory action for private sector whistleblowers. Twenty-two states have some form of general whistleblowing law, which provides protection when an employee reports an employer's illegal activity or refuses to comply with an employer's demand that an illegal act be performed.⁹⁶ Some of the general

89. Callahan & Dworkin, *supra* note 84, at 106 (noting, however, that courts are conservative in their view of protected whistleblowing activity).

90. 421 N.E.2d 876, 877 (Ill. 1981).

91. *Id.* at 880.

92. The whistleblower exception has been rejected in eight jurisdictions without a general whistleblower statute: Alabama, Delaware, the District of Columbia, Georgia, Indiana, Texas, Utah, and Virginia. *Ex parte Michelin N. Am. Inc.*, 795 So. 2d 674 (Ala. 2001); *E.I. Dupont de Nemours v. Pressman*, 679 A.2d 436 (Del. 1996); *Thigpen v. Greenpeace, Inc.*, 657 A.2d 770 (D.C. 1995); *Eckhardt v. Yerkes Reg'l Primate Ctr.*, 561 S.E.2d 164 (Ga. Ct. App. 2002); *Coutee v. Lafayette Neighborhood Hous. Servs., Inc.*, 792 N.E.2d 907 (Ind. App. 2003); *Austin v. Healthtrust, Inc.*, 967 S.W.2d 400 (Tex. 1998); *Fox v. MCI Communications Corp.*, 931 P.2d 857 (Utah 1997) (termination of employee for reporting to company of statutory violations by coemployees does not implicate public policy); *Dray v. New Market Poultry Prods., Inc.*, 518 S.E.2d 312 (Va. 1999).

93. *E.g., Eckhardt*, 561 S.E.2d at 164.

94. *Austin*, 967 S.W.2d at 400. *See also Dray*, 518 S.E.2d at 312 (rejecting whistleblower exception).

95. *Austin*, 967 S.W.2d at 401-03.

96. Arizona, California, Connecticut, Florida, Hawaii, Illinois, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, and Vermont have such general whistleblower statutes. ARIZ. REV. STAT. ANN. § 23-1501 (West 2003); CAL. LAB. CODE § 1102.5 (West 2003); CONN. GEN. STAT. § 31-51m (2003); FLA. STAT. ANN. § 448.102 (West 2003); HAW. REV. STAT. § 378-62 (2003); ILL. ANN. STAT. ch. 740, para. 174/1-35 (Smith-Hurd 2003); KY. REV. STAT. ANN. § 61.102 (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 23:967 (West 2003); ME. REV. STAT. ANN. tit. 26, § 833 (West 2003);

whistleblowing statutes are quite broad, while others provide more limited protection.

Extensive protection is accorded whistleblowers in California, Florida, Hawaii, Louisiana, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Dakota, and Pennsylvania. These laws protect a broad range of whistleblowing activities, from disclosing wrongdoing to participating in enforcement proceedings. Many forms of retaliatory action by employers, including termination, are generally prohibited. Some laws protect employees who have a reasonable basis to believe a violation has been committed, even though no violation has in fact occurred, and many protect an employee who threatens to report or is “about to report” a violation. The statutes do not just protect those who have actually reported a violation. Finally, many statutes have provisions similar to the CEPA provision relied on by the plaintiff in *Maw* that protect an employee who objects to or refuses to participate in an employer practice or policy that is contrary to law or incompatible with public policy.

In contrast, some of the general whistleblowing laws are written quite narrowly or the protections under the statutes are subject to a number of limiting qualifications. Tennessee, for example, protects private sector employees from being “discharged or terminated” by an employer “solely” for refusing to “participate in” or “remain silent about” illegal activities.⁹⁷ The law provides a cause of action for those so discharged, and the recovery of attorney fees.⁹⁸ It also provides sanctions against employees bringing such a suit if it is frivolous or for an “improper purpose.”⁹⁹

Ohio’s law contains a number of substantive and procedural qualifications. In general, it applies only to criminal offenses that are either felonies or likely to cause “an imminent risk of physical harm . . . or a hazard to public health or safety.”¹⁰⁰ The employee must report the violation internally, including filing a written report, and give the employer an opportunity to correct it before reporting the matter to the appropriate authorities.¹⁰¹ Additionally, the employee must make a “reasonable and good faith effort to determine the accuracy of any in-

MICH. COMP. LAWS ANN. § 15.361–369 (West 2003); MINN. STAT. ANN. § 181.932 (West 2003); MONT. CODE ANN. § 39–2-904 (2003); NEB. REV. STAT. § 48–1114 (2003); N.H. REV. STAT. ANN. § 275-E:1–7 (2003); N.J. STAT. ANN. § 34:19–1 to –8 (West 2003); N.Y. LAB. LAW § 740 (McKinney 2003); N.D. CENT. CODE § 34–01–20 (2003); OHIO REV. CODE ANN. § 4113.52 (Anderson 2003); OR. REV. STAT. § 659A.230 (2003); PA. STAT. ANN. tit. 43, § 1421–28 (West 2003); TENN. CODE ANN. § 50–1-304 (2003); VT. STAT. ANN. tit. 21, § 231 (2003).

97. TENN. CODE ANN. § 50–1-304 (2003).

98. *Id.* § 50–1-304(d)(1), (2).

99. *Id.* § 50–1-304(f).

100. OHIO REV. CODE ANN. § 4113.52 (Anderson 2003).

101. *Id.* § 4113.52(A)(1)(a).

formation reported” or be lawfully subject to disciplinary action for failing to do so.¹⁰²

Courts also have read limitations into the statutes. For example, Minnesota protects an employee only if he or she blew the whistle for the purpose of exposing illegality. This requirement was first enunciated by the Minnesota Supreme Court in *Obst v. Microtron, Inc.*¹⁰³ In *Obst*, the court interpreted the language in the whistleblower statute that requires a “good faith” report of a violation or suspected violation of law. The Court held that the “good faith” requirement requires an assessment of not only the content of the report but also of the motivation or intent of the whistleblower.¹⁰⁴ To be protected, the report must be made “for the purpose of blowing the whistle, i.e., to expose an illegality.”¹⁰⁵ The *Obst* court concluded that the employee who was fired for reporting violations of a quality control plan to one of its company’s business customers did not have the requisite intent.¹⁰⁶ Since the customer was aware of the defects in goods supplied, the employee’s intent could not have been to expose any illegality.¹⁰⁷

Most states do not have a general whistleblowing law, but many states have statutes that protect employees from retaliation under specific regulatory laws. Thus, workers in certain occupations or professions may be protected from retaliatory discharge. For example, health care employees are often protected from retaliatory dismissals under state statutes designed to protect patients in nursing homes and other medical facilities.¹⁰⁸ Workers who file discrimination claims and workplace safety-related complaints are also protected under antiretaliation statutes in many states.¹⁰⁹

III. *Pierce* and the New Jersey Conscientious Employee Protection Act

A. *Pierce v. Ortho Pharmaceutical Corporation*

In *Pierce v. Ortho Pharmaceutical Corporation*,¹¹⁰ the New Jersey Supreme Court adopted the public policy exception to the employment-

102. *Id.* § 50–1-304(C). However, both the Tennessee and Ohio supreme courts have permitted common law wrongful discharge claims under the public policy exception for employees discharged for whistleblowing activity on the rationale that the statutory claims were not intended to be exclusive but rather cumulative. *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308 (Ohio 1997); *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528 (Tenn. 2002).

103. 614 N.W.2d 196 (Minn. 2000). *Accord Dahlberg v. Lutheran Soc. Servs. of N. Dakota*, 625 N.W.2d 241 (N.D. 2001).

104. *Obst*, 614 N.W.2d at 202.

105. *Id.*

106. *Id.* at 202–03.

107. *Id.*

108. *E.g.*, MASS. GEN. LAWS ch. 149, § 187 (2003) (health care providers’ protection from retaliatory action).

109. Callahan & Dworkin, *supra* note 84, at 107–14.

110. 417 A.2d 505 (N.J. 1980).

at-will doctrine. In doing so, the *Pierce* court addressed the protection for professional employees discharged for refusing to engage in conduct they deemed contrary to ethical standards. The court's opinion provides the policy justification for the public policy exception, and it defines the circumstances under which a professional whistleblower will be protected under that doctrine.

Dr. Grace Pierce, a medical doctor, was the Director of Medical Research/Therapeutics for Ortho Pharmaceutical Corporation, a company engaged in the development of therapeutic and reproductive drugs.¹¹¹ She was part of a team developing a drug called "loperamide" to be used in diarrhea treatment.¹¹² The drug contained a level of saccharin that Dr. Pierce considered potentially harmful.¹¹³ Therefore, she objected to the continuation of developmental work on the drug.¹¹⁴ She further opposed the filing of an investigational new drug application with the FDA because it was an essential step toward testing of the drug on human subjects.¹¹⁵ Her opposition was based on her understanding of the Hippocratic oath and its pledge that physicians "prescribe regimen for the good of [their] patients . . . [and] never do harm to anyone."¹¹⁶ However, the team made a decision to proceed with the application, apparently in response to a directive from the marketing division of the company.¹¹⁷ After Dr. Pierce was removed from her position as director, she resigned and later filed a wrongful discharge action claiming she was induced to resign based on her opposition to the drug's development.¹¹⁸ Summary judgment was granted for Ortho. The case was dismissed under the employment-at-will doctrine.¹¹⁹

The supreme court framed the issue in terms of "whether an employee at will has a cause of action against her employer to recover damages for the termination of her employment following her refusal to continue a project she viewed as medically unethical."¹²⁰ This issue required the court to determine (1) whether to adopt a public policy exception to the employment-at-will doctrine and (2) whether that exception protected Dr. Pierce from retaliatory discharge.¹²¹

In deciding whether to modify the traditional at-will rule, the *Pierce* court considered the changing nature of the employment relationship and the trend of judicial decisions adopting a public policy—

111. *Id.* at 506.

112. *Id.* at 506–07.

113. *Id.* at 507.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 507–08.

119. *Id.* at 508.

120. *Id.* at 506.

121. *Id.* at 506, 513.

based wrongful discharge claim.¹²² The court reasoned that a strict at-will rule was no longer consistent with the economy of the twentieth century, which is dominated by large corporate employers.¹²³ The court also believed that a rigid at-will rule was inconsistent with the need for stability in labor relations in the modern workplace.¹²⁴ In light of these socioeconomic environmental changes, both commentators and courts had recognized the need to modify the employment-at-will doctrine to prevent abusive discharges.¹²⁵ The court's analysis of recent decisions protecting employees, whether based on contract or tort theories, revealed a common trend of protecting workers who were discharged in violation of public policy.

In recognizing this exception to the employment-at-will doctrine, the court balanced the interests of the parties and society:

Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy. The public has an interest in employment stability and in discouraging frivolous lawsuits by dissatisfied employees.¹²⁶

The court reasoned that this delicate balance of interests has particular significance to professional employees who are bound not only to comply with the law, but also to abide by professional codes of conduct.¹²⁷

In balancing the respective interests, the court concluded that an employee has a wrongful discharge claim only when the termination is contrary to a "clear mandate of public policy," the sources of which included statutes, administrative regulations, and judicial decisions.¹²⁸ A professional code of conduct could contain such a clear mandate under certain circumstances, although the court reasoned that an ethical rule of a technical nature or one designed to address solely the interests of the profession would not be sufficient.¹²⁹

The court, applying these principles to the termination of Dr. Pierce, concluded that her discharge did not violate a clear mandate of public policy.¹³⁰ First, the court believed that the general Hippocratic oath regarding patient care could not have been violated by Dr. Pierce's participation in the company's decision to file the application.¹³¹ The

122. *Id.* at 509–11.

123. *Id.* at 509.

124. *Id.*

125. *Id.*

126. *Id.* at 511.

127. *Id.* at 511–12.

128. *Id.* at 512.

129. *Id.*

130. *Id.* at 513–14.

131. *Id.* at 513.

application had to be submitted and approved by the FDA *before* any human testing could occur.¹³² Since testing on humans could not have occurred without FDA approval, Dr. Pierce could not have harmed anyone by merely continuing work on the drug application.¹³³ Second, the court characterized the matter as a “difference in medical opinions” as to the safety of saccharin.¹³⁴ Dr. Pierce acknowledged that others in the profession, including her superiors at Ortho, were entitled to their medical opinions as to whether the use of saccharin was harmful.¹³⁵ The court believed that to adopt her position on a public policy violation would seriously impair a company’s ability to develop new drugs and “lead to disorder in drug research.”¹³⁶ It concluded that “[a]n employee does not have a right to continued employment when he or she refuses to conduct research simply because it would contravene his or her personal morals.”¹³⁷

Pierce adopts a broad conception of the public policy exception to the employment-at-will doctrine in terms of the public policy sources. Some courts limit public policy to statutory or constitutional enactments, but *Pierce* includes judicial decisions, administrative rules, and professional ethical standards. At the same time, the *Pierce* court was sensitive to the needs of business and attempted to strike a balance between the competing interests. By requiring a “clear mandate of public policy,” the court insists that the policy mandate be “clearly identified and firmly grounded.”¹³⁸ By necessitating a showing that an employee’s conduct implicates such a public policy mandate, the court protects employers from wrongful discharge claims by employees who have disagreements with their employers on matters that fall within management’s traditional business-related prerogatives. As with Dr. Pierce, employers can discharge professional employees who believe that company action violates their personal conceptions of right and wrong. On the other hand, when an employee refuses to participate in some action that clearly violates a legal rule or professional ethical standard for the protection of the public health or safety, the public policy exception will protect the employee from retaliatory actions.

B. *New Jersey’s Conscientious Employee Protection Act (CEPA)*

In 1986, New Jersey codified *Pierce* with the enactment of the Conscientious Employee Protection Act (CEPA). CEPA provides extensive protection against retaliatory action directed at employees engaged in

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 514.

137. *Id.*

138. *MacDougall v. Weichert*, 677 A.2d 162, 167 (N.J. 1996).

a broad range of whistleblowing activities. The relevant substantive section (section 3) is as follows:

3. An employer shall not take any retaliatory action against an employee because the employee does any of the following:
 - a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;
 - b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or
 - c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
 - (1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
 - (2) is fraudulent or criminal; or
 - (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.¹³⁹

Consistent with the breadth of the statute, the New Jersey Supreme Court liberally construed CEPA's provisions to further its remedial purpose of protecting employees who refuse to engage in illegal activity, or "blow the whistle" on employer illegality or corruption. In a series of opinions interpreting CEPA, the court broadened the scope of the statute in terms of public policy, the employer conduct prohibited by the law, and the justifications employees need to blow the whistle on their employers.

The court's opinion in *Mehlman v. Mobil Oil Corporation*¹⁴⁰ is illustrative of its liberal approach. The case involved an employee discharged by his employer for raising safety concerns about the sale of gasoline in a foreign country by a foreign subsidiary of the employer.¹⁴¹ It presented a number of important issues relating to CEPA, the primary issue being whether a "clear mandate of public policy" includes the laws and public policies of a foreign country.¹⁴² In resolving this extraterritorial reach

139. N.J. STAT. ANN. § 34:19-3 (West 2003).

140. 707 A.2d 1000 (N.J. 1998).

141. *Id.* at 1001.

142. *Id.*

issue, the court resolved several collateral issues, and it did so in a manner favorable to employees who brought actions under CEPA.

Dr. Myron Mehlman was a world-renowned toxicologist who worked for Mobil Oil Corporation and eventually became the manager of its Environmental Health and Science Laboratory.¹⁴³ Mehlman was in charge of toxicology testing for Mobil, a position that required him to provide advice to the company on business decisions and regulatory compliance and to represent Mobil's interests before government agencies, trade and scientific associations, and academia.¹⁴⁴ During a presentation before the managers of Mobil's Japanese subsidiary (MSKK), he was informed by a Japanese technical manager that the content of benzene, a toxic chemical used as an additive, in Mobil's gasoline sold in Japan exceeded 5 percent, a level considered dangerous to health.¹⁴⁵ Mehlman informed the managers of the subsidiary that the level of benzene had to be reduced.¹⁴⁶ Their response was that the refinery equipment was old, and it would require a massive investment to bring the refinery into compliance.¹⁴⁷

Dr. Mehlman intended to bring his concerns to senior management at Mobil, but upon his return from Japan, he was placed on "special assignment" pending an internal investigation of his alleged improper use of company resources.¹⁴⁸ He was later fired for these alleged irregularities, but in his suit under CEPA, the jury concluded that the company's stated reasons were pretextual.¹⁴⁹ At trial, Mehlman was awarded \$3.4 million in compensatory damages and \$3.5 million in punitive damages on his CEPA claim.¹⁵⁰ The verdict was set aside in part. The trial court concluded that Mehlman had not established a "clear mandate of public policy."¹⁵¹ However, it was reinstated by the appeals court, which found that the evidence "amply demonstrated" Mehlman's reasonable belief that Mobil committed a public policy violation.¹⁵²

Whether Mehlman had established a "clear mandate of public policy" under CEPA section 3c(3) was the critical issue on appeal.¹⁵³ Even

143. *Id.* at 1002.

144. *Id.*

145. *Id.* at 1003.

146. *Id.*

147. *Id.*

148. *Id.* at 1003–04.

149. *Id.* at 1004–05.

150. *Id.* at 1002.

151. *Id.*

152. *Id.*

153. Although the question had been submitted to the jury, the supreme court held that it was a question of law that should have been decided by the court. The reasonableness of the employee's belief that the employer's conduct violates public policy is a factual issue. Despite the error, the court considered it harmless in light of the "overwhelming evidence" that Mehlman's belief was objectively reasonable. *Id.* at 1012, 1016.

though no Japanese law or regulation set a maximum level of benzene in gasoline, the court nevertheless concluded that Mehlman had established a public policy mandate. In so finding, the court relied heavily on the guidelines of the Japanese Petroleum Association:

In view of the evidence that the Japanese Petroleum Association represented the oil industry's interests in its relationship with the Japanese government and that its members considered themselves obligated to comply with the Association's guideline, we are convinced that the Japanese Petroleum Association Guideline prohibiting the sale of gasoline with five percent or more benzene constituted a clear mandate of public policy. We reach that conclusion not merely because 'Mobil agreed to be bound by the Association's policies,' This specific guideline, which confirmed a broad scientific consensus undisputed by the record that gasoline with more than five percent benzene was hazardous to human health, reflected a commitment by the Japanese oil industry not to market a gasoline product acknowledged to be unsafe. As the trial testimony demonstrates, the practical effect of the guideline was essentially equivalent to the effect of governmental regulatory action.¹⁵⁴

Mobil also argued that an employee must have "in mind the existence of a specific mandate of public policy" at the time he or she objects to it.¹⁵⁵ The court rejected this narrow view of CEPA:

Specific knowledge of the precise source of public policy is not required. The object of CEPA is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare."¹⁵⁶

Finally, Mobil contended that CEPA does not reach out-of-state conduct unless it violates New Jersey public policy and harms New Jersey residents. The court recognized that the issue of whether a CEPA claim can be based on another jurisdiction's public policy was one of first impression. Nevertheless, it rejected this limited reading of the law:

The core value embodied in CEPA is that employees courageous enough to object to illegal, fraudulent or harmful activity by their employers in order to protect the public welfare deserve to be shielded from retaliation by their employers. We would not impute to the Legislature so parochial an objective as to protect New Jersey employees retaliated against for taking risks to protect only New Jersey citizens. In our view, the purposes of CEPA are no less served by recognizing a cause of action for a New Jersey employee whose employer retaliated against him or her for objecting to the violation of a clear man-

154. *Id.* at 1015.

155. *Id.*

156. *Id.* at 1015-16.

date of public policy that threatened to harm citizens of other states or countries. Under CEPA, the wrongful conduct is the employer's retaliatory action, and we decline to impose artificial geographical limits on the harm or illegality that the objecting employee sought to avoid.¹⁵⁷

Mehlman reflects the liberal interpretive approach generally employed toward CEPA by the New Jersey Supreme Court, an expansive reading that has protected whistleblowers in a number of controversial settings. For example, in *Higgins v. Pascack Valley Hospital*,¹⁵⁸ the court held that CEPA prohibits an employer from retaliating against an employee for blowing the whistle on a coemployee's illegal acts. Although the holding was based in part on the language of the statute, the court relied heavily on the law's purpose to provide "broad protection against employer retaliation."¹⁵⁹ It also relied on the risk to the public safety and health from wrongdoing in the workplace, and the practical dilemma facing an employee in determining whether a coemployee is acting alone or with the consent or knowledge of the employer.¹⁶⁰

Similarly, in *Estate of Roach v. TRW, Inc.*,¹⁶¹ the court rejected a limited reading of CEPA that would have required a whistleblower to demonstrate that the reported illegality "implicates the public interest." Even though *Pierce* and CEPA section 3c(3) require an activity, policy, or practice to be contrary to a "clear mandate of public policy," the court refused to engraft that language on other CEPA sections that relate to disclosing or refusing to participate in a "violation of law."¹⁶² In reaching this conclusion, the court again relied on the language of the statute in light of its primary purpose to protect conscientious employees from retaliation.¹⁶³

TRW also reaffirmed the well-established rule that a plaintiff need not prove that the employer's conduct is an "actual violation" of law or public policy.¹⁶⁴ Rather, the statute requires only that an employee "reasonably believe" that a violation has occurred.¹⁶⁵ However, the *TRW* court warned that the reasonable belief language might be fatal to a CEPA plaintiff's claim in the future:

For instance, if an employee were to complain about a co-employee who takes an extended lunch break or makes a personal telephone call to a spouse or friend, we would be hard pressed to conclude that the complaining employee could have "reasonably believed" that such

157. *Id.* at 1016–17.

158. 730 A.2d 327 (N.J. 1999).

159. *Id.* at 336.

160. *Id.*

161. 754 A.2d 544 (N.J. 2000).

162. *Id.* at 549–51.

163. *Id.* at 550–51.

164. *Id.* at 552.

165. *Id.*

minor infractions represented unlawful conduct as contemplated by CEPA. CEPA is intended to protect those employees whose disclosures fall sensibly within the statute; it is not intended to spawn litigation concerning the most trivial or benign employee complaints.¹⁶⁶

The question of what is necessary for a CEPA plaintiff to have a “reasonable belief” of an illegality was recently addressed in *Dzwonar v. McDevitt*.¹⁶⁷ Adopting the position formulated by the courts of appeal, the *Dzwonar* court held that CEPA plaintiffs must identify with specificity the statute or public policy violated and demonstrate how the employer’s conduct is connected to that specific law or policy. “[T]he trial court must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct. The trial court can and should enter judgment for a defendant when no such law or policy is forthcoming.”¹⁶⁸ In *Dzwonar*, the court set aside a jury verdict because the plaintiff’s belief that the defendant violated the antidiscrimination provisions of the Labor Management Reporting and Disclosure Act by not reading or distributing the minutes of its union meetings was not objectively reasonable.¹⁶⁹ The plaintiff failed to demonstrate a close relationship between the basis of her claims of wrongdoing (failure to read the minutes) and the specific statutory prescription (denial of rights to a union member accorded to others).¹⁷⁰

Despite the restrictive holding in *Dzwonar*, the court has generally read the provisions of CEPA in a broad, expansive manner. The court’s primary rationale has been to give effect to the underlying purpose of CEPA, which is to protect employees from wrongful, retaliatory action by employers. Only secondarily has it focused on the public interests implicated by the employer’s actions. The court’s general approach to CEPA has important implications for the issues raised in *Maw*, which relate specifically to the public and private interests affected by employee noncompete agreements.

IV. *Maw v. Advanced Clinical Communications*

Whether an employee who refuses to sign an unreasonable covenant not to compete has a viable claim under the whistleblower law was at issue in *Maw v. Advanced Clinical Communications, Inc.*¹⁷¹ Advanced Clinical Communications Inc. (ACCI) provides educational services to firms in the pharmaceutical and healthcare industries. It employs researchers and educators in those fields to teach in its educational seminars for health care professionals.¹⁷² Karol Maw was em-

166. *Id.*

167. 828 A.2d 893 (N.J. 2003).

168. *Id.* at 901.

169. *Id.* at 902–03.

170. *Id.*

171. 846 A.2d 604 (N.J. 2004).

172. 820 A.2d 105, 109 (N.J. Super. App. Div. 2003), *rev’d*, 846 A.2d 604 (N.J. 2004).

ployed by ACCI as a graphic designer from November 1, 1997, until March 15, 2001.¹⁷³ She primarily designed written and graphic materials used in ACCI's programs.¹⁷⁴ Her job required graphic design expertise, but knowledge of the pharmaceutical and healthcare industries was not essential.¹⁷⁵ Ms. Maw apparently had little, if any, knowledge of the content and technical aspects of the materials she helped produce.¹⁷⁶

In 2001, the company decided that all employees at the level of "coordinator" would be required to sign an employment contract.¹⁷⁷ The agreement contained nondisclosure and noncompete provisions.¹⁷⁸ The covenant not to compete precluded an employee from working for a competitor of ACCI or one of ACCI's customers for a period of two years after termination.¹⁷⁹ The restrictive covenant was not tied to trade secrets or customer relationships, and Ms. Maw apparently had no greater access to confidential information than clerical employees who were not required to sign employment contracts.¹⁸⁰

Employees were urged to secure "independent counsel" to review the terms of the agreement, and Ms. Maw consulted an attorney.¹⁸¹ She attempted to negotiate changes to the agreement, specifically a shorter noncompete period, but she was informed that ACCI's President would not permit any modifications to the agreement.¹⁸² When she refused to sign it, ACCI terminated her for "noncompliance" with the company policy requiring employment contracts.¹⁸³

Ms. Maw brought claims under CEPA and the *Pierce* rule, alleging that the agreement did not serve any legitimate interest of ACCI in protecting trade secrets or customer relationships because she did not have access to or knowledge of protected proprietary information.¹⁸⁴ Since ACCI had no legitimate protectible interest to justify the noncompete agreement, she contended that the sole purpose of the agreement was to stifle competition. It necessarily imposed an undue hardship on her ability to find suitable employment after leaving the company.¹⁸⁵

The trial court dismissed the lawsuit on a preliminary motion based on Ms. Maw's failure to state a claim for relief under CEPA.¹⁸⁶

173. *Id.* at 109.

174. *Id.* at 109–110.

175. *Id.* at 110.

176. *Id.*

177. *Id.*

178. *Id.* at 110–11.

179. *Id.* at 110.

180. *Id.* at 110–11.

181. *Id.* at 111.

182. *Id.*

183. *Id.*

184. *Id.* at 109.

185. *Id.* at 112.

186. *Id.* at 109, 111.

The trial court reasoned that she was an at-will employee who did not have the right to dictate the terms of the employment agreement.¹⁸⁷ More importantly, the court asserted that the reasonableness of the noncompete agreement could not be determined in advance of its breach.¹⁸⁸ The enforceability of the agreement could only be judged when Ms. Maw left the company and commenced competing employment, at which time the court would have a context in which to determine the reasonableness and validity of the post-employment restraint.

A. *The Court of Appeals Decision*

In a two-to-one decision, the court of appeals found that Ms. Maw had stated sufficient facts to establish a CEPA violation.¹⁸⁹ The court of appeals majority opinion addressed Ms. Maw's two primary contentions: (1) that the noncompete agreement did not serve any legitimate interests of ACCI and (2) that the scope of the agreement was unreasonably overbroad in terms of time and geographic scope.¹⁹⁰ To resolve these arguments, the court examined CEPA in light of the law of employee noncompetes in New Jersey.

Ms. Maw was relying on the language of the whistleblower act under section 3c(3), which protects an employee from a retaliatory discharge when the employee "[o]bjects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes . . . is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment." Thus, to establish her CEPA or *Pierce* claim, she initially had to identify a "clear mandate of public policy" that was implicated in her dismissal.¹⁹¹ Ms. Maw contended that the public policy source was the long-standing common law hostility to employee noncompete agreements.¹⁹² The majority noted that under *Solari/Whitmyer*, trade secrets and other proprietary information have been considered legitimate interests worthy of protection.¹⁹³ It further noted that general knowledge of an industry or skills learned on the job are not considered sufficient to justify a noncompete agreement.¹⁹⁴ Therefore, the court reasoned that without a legitimate interest to be served by a noncompete agreement, it cannot be enforced against an employee, regardless of the reasonableness of its terms.¹⁹⁵

187. *Id.* at 111.

188. *Id.* at 111–12.

189. *Id.* at 109.

190. *Id.* at 112.

191. The court noted that the statute and the common law *Pierce* doctrine allow a court to consider not only statutory sources of public policy but also court decisions, administrative regulations, and professional codes of conduct. *Id.*

192. *Id.*

193. *Id.* at 114.

194. *Id.*

195. *Id.*

Based on the plaintiff's allegations in her complaint, the court was of the opinion that ACCI did not have a legitimate interest to justify the noncompete agreement.¹⁹⁶ This was based on Ms. Maw's limited access to proprietary information and her lack of knowledge regarding the substantive content of the information she prepared.¹⁹⁷ Since there appeared to be no business interest served by the agreement, its purpose and effect would be to stifle competition, which is contrary to public policy.¹⁹⁸ The court thus concluded that Ms. Maw had alleged sufficient facts to get past the pleading stage on her claim of a CEPA violation.¹⁹⁹

The breadth of the noncompete agreement provided the court with an alternative basis to allow the case to proceed. Under the second and third parts of the *Solari/Whitmyer* test, the scope of a noncompete agreement is considered in connection with the hardship on the employee and the public interests affected by it. The court found that the temporal and geographic scope of the covenant not to compete might be unreasonable.²⁰⁰ The two-year time period coupled with the lack of a geographic limitation meant that Ms. Maw could not work for an ACCI competitor "anywhere in the world" for a relatively long period of time.²⁰¹ The justification for this was not apparent from the agreement or her position. Given the early stage of the lawsuit, the overbroad noncompete terms also provided enough of a factual basis to support the CEPA claim.

The majority recognized that the issue of whether an employee's refusal to sign a noncompete agreement can support a CEPA whistleblower claim or *Pierce* wrongful discharge claim was one of first impression in New Jersey.²⁰² Nevertheless, the court concluded that "New Jersey's strong prohibition against restraints of trade, and against unduly burdening employees" established the public policy basis for the claim.²⁰³ In that connection, it cited to *D'Sa v. Playhut*,²⁰⁴ one of the California Court of Appeals decisions recognizing a wrongful discharge claim for terminations of employees refusing to sign noncompete agreements, in support of its conclusion.²⁰⁵

The majority also rejected one of the employer's strongest policy arguments for not recognizing a wrongful discharge claim. That is, the reasonableness of a noncompete agreement is a fact intensive deter-

196. *Id.* at 115.

197. *Id.* at 114–15.

198. *Id.* at 115.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 116.

203. *Id.*

204. 102 Cal. Rptr. 2d 495 (Cal. Ct. App. 2000).

205. *Maw*, 820 A.2d at 116.

mination that cannot be made in the abstract, prior to an employee leaving a company and competing with it. The court refused to accept this argument because of the undue burden it would place on employees forced to sign noncompetes:

However, we find no reason to require an employee with a reasonable belief that a noncompete clause violates public policy to have to wait until she leaves her employment to have her rights adjudicated. Upon signing the Agreement, plaintiff would be burdened with the Agreement's restrictions should she decide to seek another job. She would have to limit her job search. For two years, she could not accept a job from any of defendant's competitors or customers. And where could she look for a job in her field? The Agreement has no geographic limitations. If she wants to continue to work in her chosen field, she will be "married" to her employer. Alternatively, she could ignore the restrictive covenant, and wait for defendant to sue her. Neither choice fosters New Jersey's public policy of prohibiting restraints of trade and encouraging competition. We see no purpose to require an employee to sign what may be a legally unenforceable noncompete clause, under the threat of discharge, and then wait to litigate the agreement should the employer seek to enforce it at a later date.²⁰⁶

Justice Cuff, in dissent, rejected the majority's conclusion that a CEPA violation could be pled under the facts of the case.²⁰⁷ The dissent's rationale was that the employee's interest in free mobility is primarily a private interest outside the scope of CEPA. A discharge for refusing to sign a noncompete agreement does not violate a "clear mandate of public policy."²⁰⁸

The dissent argued that noncompete agreements are designed to protect the private interests of employers, specifically trade secrets and customer relationships. They are not *per se* illegal or violative of public policy, and the public interests implicated by noncompete agreements are "the public's right to foster fair commercial practices, to protect employers from theft of trade secrets or other proprietary information, and to discourage anti-competitive business activities."²⁰⁹ The dissent did not believe any public interest was implicated by the firing of Ms. Maw. He argued that the underlying purpose of CEPA is to prevent retaliatory discharges only when there is a threat to the public health, safety, or welfare.²¹⁰ The CEPA requirement of a clear mandate of public policy is "designed to distinguish between legitimate [business] practices" and "illegitimate practices, policies and actions that are clearly recognized as incompatible with the public health, safety and welfare."²¹¹

Relying on CEPA's limiting principle that the alleged violation

206. *Id.*

207. *Id.* at 119 (Cuff, J., dissenting).

208. *Id.* at 122.

209. *Id.* at 119.

210. *Id.* at 120–21.

211. *Id.* at 122.

must pose a threat of “public harm,” the dissent would have concluded that Ms. Maw alleged only a private harm.²¹² In support, the dissent noted several decisions in which an employee’s dispute with an employer did not directly affect the public interest, including an employee’s dispute regarding the allocation of overtime pay among employees.²¹³

Here, the dispute is essentially a private dispute between an employer and an employee. The dispute involves an attempt by the employer to protect business relationships and information belonging not only to the employer but also to clients. The employee has not been asked to do anything illegal or unethical. Plaintiff’s complaint concerns a private harm rather than a public harm.²¹⁴

B. *The New Jersey Supreme Court Decision*

In a four-to-two split, the New Jersey Supreme Court reversed the decision of the court of appeals, holding that Ms. Maw did not state a whistleblowing claim under CEPA.²¹⁵ In large part, the Court adopted Judge Cuff’s rationale in the dissent, and it sought to further explain both its restrictive interpretive approach to CEPA and its conclusion that a firing for refusing to sign a noncompete agreement is not a public policy violation.

The majority noted that the crucial language under section 3c(3) was the phrase “clear mandate of public policy.”²¹⁶ Even though prior opinions had applied this section to other whistleblowing activities, the court considered the interpretation of the language to be one of first impression.²¹⁷ The court contrasted the provision with section 3c(1), a separate whistleblowing provision that is limited to statutes, rules, and regulations. It conceded that public policy under section 3c(3) was not so restricted, but it believed that section 3c(1) casts light on the meaning of section 3c(3).²¹⁸ A “clear mandate” suggests an “analog” to a statute or regulation in the sense that there should be a “high degree of public certitude in respect of acceptable versus unacceptable conduct.”²¹⁹ It conveys a “legislative preference for a readily discernable course of action that is recognized to be in the public interest.”²²⁰ “The legislative approach vis-à-vis a ‘clear’ mandate of public policy bespeaks a desire not to have CEPA actions devolve into arguments between employees and employers over what is, and is not, correct public pol-

212. *Id.*

213. *Id.* at 121.

214. *Id.* at 122.

215. 846 A.2d 604 (N.J. 2004). It also upheld the dismissal of the *Pierce* public policy claim.

216. *Id.* at 607.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

icy.”²²¹ Given this construction of the clear mandate language, the court accepted Justice Cuff’s position that CEPA’s claims must “implicate the public interest.”²²² It concluded that the “complained of activity must have public ramifications” and the dispute must be something more than a “private disagreement” between employer and employee.²²³

Under this restrictive interpretation of section 3c(3), Maw’s claim failed for two interrelated reasons: (1) it was essentially a private dispute and (2) the state’s policy regarding employee noncompete agreements was not a “clear mandate” of public policy. The court characterized Maw’s dispute as private by noting that she admitted her exposure to some confidential information and she did not object to the confidentiality part of the agreement. Thus, the court suggested her disagreement was simply over the breadth of the covenant not to compete. Moreover, the court noted that she argued about the effect of the agreement on “her ability” to find work in “her field” and that there was no business justification for requiring “her” to sign the noncompete agreement.²²⁴ The court concluded that to recognize such a private dispute as a basis for a CEPA violation would “dilute the statute’s salutary goals.”²²⁵

Perhaps recognizing the weaknesses in the public/private distinction, the court also found that there was not a “clear mandate” of public policy implicated by her firing. In support of this position, it relied heavily on *Solari*, characterizing the case as a “turning point” in the state’s approach to employee noncompete agreements.²²⁶ The court argued that the rejection of the void *per se* rule and the creation of the *Solari/Whitmyer* test allowing reasonable noncompete agreements indicated that there was no clear public policy that “disfavors such agreements.”²²⁷ Moreover, the nature of the balancing test under *Solari/Whitmyer* does not provide the type of clear guidance required by CEPA. “The *Solari/Whitmyer* test is a multi-part, fact-intensive inquiry. Not only must multiple interests of differing parties and entities be identified, but also, those interests must be gauged for reasonableness and legitimacy.”²²⁸

Finally, the court noted the widespread use of employee noncompete agreements, and it speculated that the business community was not abusing its power in requiring employees to sign covenants not to compete. Rather, the majority believed that employers had adapted to the *Solari/Whitmyer* test and the reasonableness requirements for noncompete agreements. Given this business environment, and the op-

221. *Id.*

222. *Id.* at 608.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 609.

228. *Id.*

tion an employee has to sign a noncompete agreement and contest it later when the company attempts to enforce it, the court saw no need to expand the traditional protection for employees under employee non-compete law. “What we decline to do . . . is to alter the traditional contract remedies available in restrictive-covenant litigation by recasting the dispute as a CEPA action.”²²⁹

The majority opinion prompted a strong dissent by Justice Zazzali. He took a historical perspective on the public policy interests underlying employee noncompete law. Zazzali noted that “for more than four hundred years Anglo-American jurisprudence has recognized the public-policy implications of non-compete agreements.”²³⁰ Citing to the seminal English case, *Mitchel v. Reynolds*,²³¹ the dissent noted that the law’s concern was not only with the effect of a noncompete agreement on the individual employee’s ability to provide for himself, but also with the detrimental effects such agreements have on free competition in the market. The public interest in protecting the consuming public was recognized in New Jersey case law as well, the dissent noting that the third factor in the *Solari/Whitmyer* test focuses on the injury to the public. As a result of the public interests involved, both the general common law and New Jersey law consistently presumed such agreements to be invalid as restraints of trade, the burden being on the employer to demonstrate the necessity for and reasonableness of the terms of the agreement.

Thus, the dissent would have found that “such repeated instruction by the judiciary amounts to a clear mandate that overly restrictive covenants in restraint of future employment are in violation of New Jersey public policy.”²³² Contrary to the majority’s view, *Solari* did not represent a “sea change” in employee noncompete law. Rather, it merely extended the concepts of reformation and severability to noncompete agreements, leaving in place the heavy burden on employers to justify a noncompete agreement because of the public policy concerns with such restraints of trade.

The dissent also rejected the argument made by the majority that the reasonableness of a covenant not to compete cannot be determined in advance of its breach and that traditional contract remedies should be sufficient to protect employees from unreasonable agreements. From the dissent’s perspective, the lack of a CEPA remedy means that “nothing prevents an employer from demanding that such an employee agree to the most unreasonably restrictive noncompete agreement” and that employers are free to “terminate with impunity” any employee who

229. *Id.*

230. *Id.* at 612 (Zazzali, J., joined by Long, J., dissenting).

231. 24 Eng. Rep. 347 (Q.B. 1711).

232. *Maw*, 876 A.2d at 614 (Zazzali, J., joined by Long, J., dissenting).

refuses to sign.²³³ Furthermore, the threat of litigation under a non-compete agreement has “obvious in terrorem effect[s]” on employee mobility.²³⁴ Thus, the dissent would have allowed the case to be resolved at the summary judgment stage since the existence of a public policy violation is a question of law under CEPA. At this stage, the burden would be on the employer, as it is in a post-termination suit, to establish the justification for and the reasonableness of the noncompete agreement.

V. Analysis and Implications

The majority’s focus on the lack of any public harm in firing an employee for refusing to sign an unreasonable noncompete agreement seems unpersuasive. Courts subject employee noncompete agreements to rigorous scrutiny not only because of the private harm to employees, but also because of the harm to the marketplace. Just as price fixing and other anticompetitive practices harm the public by limiting the amount of competition and consumer choice, employee noncompete agreements diminish the extent of competitive activities by former employees of a business as well. Former employees with experience in a particular industry are the most likely new entrants to the market. Thus, employee noncompete agreements can be particularly effective in forestalling new competitors. Moreover, employee noncompete law is concerned with the abuse of market power by employers (i.e., the use of unfair bargaining power to compel employees to sign noncompete agreements). Part of the rationale for strict judicial scrutiny is to prevent the use of that power to restrict free trade. Certainly, the direct effect of a noncompete agreement is on the employee who is deprived of the opportunity for professional advancement. However, the overall, aggregate effect of the use of employee noncompete agreements is on competition in the market and it is this “public harm” that necessitates the probing judicial review and oversight of such agreements.

One can make the argument that enforcing unreasonable noncompete agreements harms the marketplace, but compelling employees to sign restrictive covenants would not necessarily harm the public. Some courts accepted the contention that an employee incurs no costs in signing an unreasonable noncompete agreement since such an agreement is not legally enforceable.²³⁵ But this argument disregards the obvious negative consequences of agreeing to a covenant not to compete. Regardless of the enforceability of the restrictive covenant, a former employer may seek to enforce it, and defending the lawsuit will entail significant risk and expense to the former employee. Also, a noncom-

233. *Id.* at 615.

234. *Id.* at 616.

235. *E.g.*, *Madden v. Omega Optical*, 683 A.2d 386, 391 (Vt. 1996).

pete agreement may deter prospective employers, potential partners, and others from employing or going into business with the former employee. Suits for intentional interference with business relations have been brought against employers who hired former employees burdened by a covenant not to compete.²³⁶ Thus, the mere existence of a noncompete agreement will potentially have an adverse effect on the market, and thereby undermine the public policies underlying the law's strong disfavor of employee noncompete agreements.

The notion that there is a lack of clarity in terms of the public policy against overbroad employee noncompete agreements in New Jersey is equally unconvincing. A careful reading of *Solari*, *Whitmyer*, and *Ingersoll-Rand* suggests that New Jersey has not abandoned the long-standing common law view that post-employment restraints on competition are looked upon with disfavor and are presumptively invalid. Moreover, consistent with the court's prior readings of CEPA, the requirement of a "clear mandate," although a question of law for the court, is to be construed broadly to further the law's remedial purpose protecting conscientious employees. Arguably, if a *de facto* regulatory mandate in a foreign country that will impact only foreign nationals is sufficient to trigger a CEPA claim, a violation of a well established common law rule that will affect competition in the New Jersey marketplace should be sufficient to state such a claim. It is extremely difficult to square the *Maw* and *Mehlman* decisions in terms of the clarity of the public policy at stake.

The majority fails to fully appreciate or develop the strongest argument against recognition of a CEPA claim for an employee who refuses to sign a noncompete agreement. Employee noncompete agreements are not *per se* invalid under *Solari*. Rather, their validity depends upon the application of the three-part *Solari/Whitmyer* framework, a highly contextual test. Under this framework, it is difficult to determine whether a covenant not to compete is unenforceable in advance of its breach. Since an overbroad noncompete agreement may be partially enforceable to the extent that its scope is reasonable, the position can be taken that an employee who refuses to sign such an agreement cannot have a reasonable basis to believe that the proposed agreement is a violation of public policy.

Adoption of an approach based on the lack of a reasonable belief may have led to a different outcome in the case. Even though it is true that a covenant not to compete may be partially enforceable, any noncompete agreement must be supported by a legitimate interest in either protected proprietary information or customer relationships. If the employer cannot establish such an interest, then the agreement is not subject to partial enforcement under *Solari*. Thus, an employee who

236. See, e.g., *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356 (Minn. 1998).

does not have access to trade secret information or customer contacts can conceivably have a reasonable belief that any noncompete agreement required by the employer violates public policy.

The *Maw* court could have recognized a CEPA claim in such cases, limiting the CEPA holding to noncompete agreements that are unenforceable because of a lack of any legitimate protectible interest in trade secrets or customer relationships. In this way, the court would have allowed employers to require noncompete agreements when reasonably necessary to protect business assets while at the same time protecting employees from retaliatory terminations when they were fired for refusing to sign post-employment restraints that were patently unenforceable. Such a balanced approach to the issue would have been more consistent with *Solari / Whitmyer* and *Pierce / Mehlman*.

The advantage of the *Maw* court's approach to the CEPA issue is the certainty it provides state businesses. Employers can present employees with noncompete agreements on a "take it or leave it" basis, regardless of the terms of the restrictive covenants and without the risk of a wrongful discharge claim. Employees can be compelled to sign such agreements under a threat of termination and have no legal leverage in negotiating the terms of post-employment restraints. The downside to this approach is the potential for abuse by employers. This is particularly problematic because of the power of courts to reform an overbroad noncompete agreement under *Solari*, since employers may be tempted to "push the envelope" in terms of the breadth of employee noncompete agreements.

The combination of *Maw* and *Solari* also creates an incentive for employers to employ standardized and overbroad noncompete agreements, and impose them on employees regardless of the business need for them. Although the court speculated that employers were not abusing their superior bargaining power, it certainly could not point to the noncompete agreement that *Maw* was presented with as an example of this restrained business approach under *Solari* and *Whitmyer*. The covenant not to compete that this low-level employee was told to sign appeared both unnecessary, given her limited access to secrets of the firm, and unreasonable, in terms of time and geographic scope. Thus, a more balanced approach to the CEPA issue would discourage employers from requiring employees to sign patently unenforceable noncompete agreements while at the same time limiting their exposure under the whistleblower statute in cases where the enforceability question is subject to reasonable argument.

VI. Conclusion

By rejecting the CEPA claim based on the lack of a clear public policy violation, *Maw* foreclosed this whistleblower theory of liability for employees fired for refusing to sign noncompete agreements. As the

case was the first to address the protection accorded such employees under state whistleblower laws, it is likely to have significant precedential impact. Whether the decision and approach in *Maw* will be adopted by other states will most likely depend on the breadth of their whistleblower statutes and the strength of their public policy regarding employee noncompete agreements. Many state whistleblower laws are as broad as CEPA and include provisions prohibiting employers from retaliating against employees who object to illegal practices or policies. In some states, the public policy against employee noncompete agreements is much stronger than in New Jersey, and this public policy is based on statutory restrictions that either prohibit or restrict such post-employment restraints. Thus, where the mandate of public policy is much clearer than in New Jersey, it is possible that the courts will not follow *Maw* and provide protection for employees under state whistleblower laws or under the public policy exception to the employment-at-will doctrine.

From a managerial perspective, *Maw* suggests care in the use of noncompete agreements, even though the employer ultimately prevailed in the litigation. Part of the company's legal problem stemmed from its insistence that all employees at a given level in the organization sign a noncompete agreement. This arbitrary approach is obviously inconsistent with the legal requirement necessary to show the business justification for a noncompete agreement (*i.e.*, to prevent unfair competition from former employees using protected business assets). Any corporate policy on the utilization of employee noncompete agreements should be based on the needs of the business in the protection of customer goodwill and proprietary business information. Restrictive covenants should be required only for those employees who could potentially exploit these business assets. Nondisclosure and confidentiality agreements can be utilized with other employees whose exposure to business information and customers is minimal.

A second managerial error was the use of a "one size fits all" noncompete agreement. The breadth of a covenant not to compete in terms of time, area, and scope depends in large measure on what is reasonably necessary to protect a company's trade secrets and goodwill. To some extent, companies need to calibrate the terms of noncompete agreements to the peculiar circumstances of individual employees. A two-year agreement without a geographical limitation, as in *Maw*, may have been appropriate for a high-level managerial person in the company who had either extensive knowledge of sensitive business information or contacts with customers. With a lower-level employee such as *Maw*, who apparently had limited or no access to proprietary business information, such an agreement would appear to be legally unreasonable. Therefore, when she sought to negotiate the terms of the agreement, management should have been more flexible. She may have

signed a more limited restraint, which would have been sufficient to protect the company's limited interests. By insisting that all employees sign the same agreement, the company precipitated a totally unnecessary personnel dispute and brought on a lawsuit for wrongful discharge.

Maw is a case study of some common mistakes that businesses make when they employ noncompete agreements. Although the opinion allows employers to force employees to sign covenants not to compete under a threat of discharge, negotiated agreements with reasonable post-employment restrictions are desirable from a legal and managerial perspective. It is natural for businesses in an information-based economy, in which trade secrets and other intangible intellectual property rights are of paramount importance, to resort to noncompete agreements as one means of protecting their valuable business assets. Selective use of carefully drafted employee noncompete agreements, coupled with the use of nondisclosure agreements, should provide firms the protection they need for these assets. Companies need to recognize that courts look with suspicion at overbroad post-employment restraints on competition and will invalidate such restraints if they serve no legitimate business purposes or contain unreasonable restrictions. Clearly, there are business costs and risks when noncompete agreements are not carefully employed or drafted.

Bargaining Unit Consolidations: One Union or Two?

John F. Fullerton III and Paul Salvatore*

I. Introduction

As the global economy expands, twenty-first century employers continue to restructure, reorganize, and acquire in a general attempt to be more efficient and competitive organizations. Thus, labor lawyers are often asked by their clients what should be done with existing bargaining units that must adapt to the company's changing structure. This question arises when a unionized company acquires another similar company whose employees are represented by a different union. The same situation also arises within a single company when the jurisdictional lines between separate bargaining units are blurred due to operational or geographic reorganization, or technological advances. When worlds—or bargaining units—collide, will it be “peaceful coexistence,” “all for one and one for all,” or “to the victor go the spoils?”

This article examines both existing and undeveloped areas of bargaining unit consolidations law and the panoply of complex legal issues that force employers and unions to answer a difficult question: one union or two? After discussing the basic legal framework, the article examines the framework's application when two unions are involved. The article also examines specific situations that arise, including when one or both of the employee groups involved are part of multiemployer bargaining units, the differences between sufficiently and insufficiently consolidated bargaining units, the timing of a consolidation, and the impact of a consolidation on existing collective bargaining agreements.

II. The Basic Legal Framework

To begin, consider the following scenario: the merger of a unionized workforce with a nonunion workforce. In a situation where two separate groups of employees are combined because of an employer's decision to consolidate operations, and *one* of the groups is represented by a union (but there is no significant relocation of bargaining unit work

*Mr. Fullerton is a senior associate at Proskauer Rose LLP in New York City and an adjunct professor at Pace University School of Law in White Plains, New York. Mr. Salvatore is a partner at Proskauer Rose LLP. They represent employers in all facets of labor and employment law. The authors wish to thank Julie Sitler, a former Proskauer associate, for her significant contributions to this article.

to other facilities), the “accretion” doctrine applies.¹ Under the accretion doctrine, “an employer may incorporate a small group of employees into an already existing collective bargaining unit without holding elections, so long as the added employees (1) do not constitute a separate bargaining unit, and (2) do not outnumber the employees who belong to the existing unit.”²

An accretion determination depends on the following factors: (i) the “community of interest” shared by employees in two or more groups; (ii) the relative size of the group to be accreted to the existing bargaining unit; (iii) whether the group to be accreted was in existence at the time of recognition of the bargaining unit; (iv) whether the existing unit is the result of prior accretions; (v) the views of the employees to be accreted; and (vi) an independent determination of whether the group to be accreted constitutes and can survive as an appropriate unit on its own.³ The National Labor Relations Board (Board) broadly stated that “[t]he determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria.”⁴

Thus, a collective bargaining agreement neither compels nor prevents an accretion. Instead, accretion is determined by application of the National Labor Relations Act (Act).⁵ Procedurally, an accretion is generally accomplished by filing a “unit clarification” or “UC” petition with the Board.⁶ Either an employer or a union may file a UC petition.⁷ The Board Region where the petition is filed holds a fact-finding hearing, and based on the evidence presented, the Regional Director determines whether there is a sufficient “community of interest” between employees such that a group of unrepresented employees should be accreted into an existing bargaining unit.⁸

Establishing a “community of interest” between previously separate employees after an acquisition or restructuring is critical to the accretion analysis. As suggested by factor (vi), if the potentially accreted group continues as a separate bargaining unit, that fact “is itself

1. “When new employees are added to the staff of a company, and their work is clearly integrated with that of employees in an existing unit, the Board may simply add the new workers to that unit. This is known as the doctrine of accretion.” 4 KHEEL, LABOR LAW § 14.03[5], at 14–68 (1995).

2. SEIU Local 144 v. NLRB, 9 F.3d 218, 223, 144 L.R.R.M. (BNA) 2617 (2d Cir. 1993).

3. Renaissance Ctr. P’ship, 239 N.L.R.B. 1247, 1248, 100 L.R.R.M. (BNA) 1121 (1979).

4. Marion Power Shovel Co., 230 N.L.R.B. 576, 577, 95 L.R.R.M. (BNA) 1339 (1977).

5. IAM District Lodge 190 v. NLRB, 759 F.2d 1477, 1478–79, 119 L.R.R.M. (BNA) 2488 (9th Cir. 1985).

6. Tree of Life, Inc., 336 N.L.R.B. 872, 874, 168 L.R.R.M. (BNA) 1281 (2001); Armco Steel Co., 312 N.L.R.B. 257, 259, 144 L.R.R.M. (BNA) 1111 (1993).

7. 29 C.F.R. § 101.17 (2005).

8. 29 C.F.R. § 101.18 (2005); Safeway Stores, Inc., 256 N.L.R.B. 918, 918, 107 L.R.R.M. (BNA) 1338 (1981).

sufficient to mandate a refusal to accrete those employees to an already-existing unit.”⁹ In determining whether the unionized employees share a “community of interest” with the group of nonunion employees, the Board examines (i) geographic proximity; (ii) similarity of skills and functions; (iii) similarity of employment conditions; (iv) centralization of the employer’s administration; (v) managerial and supervisory control; (vi) interchange between the employees; (vii) functional integration of the employer; and (viii) bargaining history.¹⁰

If a community of interest is established, and the two employee groups clearly lost their separate identities and existence as separate appropriate units, the next element in the analysis is an examination of the relative numbers of employees between the surviving bargaining unit and the potentially accreted group. Significantly, “[t]he Board has followed a restrictive policy in finding accretion because it forecloses the employees’ basic right to select their bargaining representative.”¹¹ Thus, the employees in the existing bargaining unit must outnumber the potentially accreted nonunion employees.

In *Renaissance Center Partnership*, for example, a partnership owned and managed a commercial development in downtown Detroit that included office towers, stores, restaurants, and the Detroit Plaza Hotel.¹² The partnership employed fifty-nine union-represented security guards.¹³ The hotel, which existed as a separate legal entity, employed sixty-seven nonunion security guards.¹⁴ When the partnership and the hotel decided that it would be more efficient to maintain a single security force, the two guard groups were consolidated into a single force employed by the partnership.¹⁵ The union filed a UC petition to have the former hotel guards included in its bargaining unit, and the employer filed its own petition (known as an RM petition) claiming that a question concerning representation existed (otherwise known as a QCR), meaning that the union’s status as representative of certain employees is uncertain.¹⁶ Such petitions, if granted, result in a secret ballot election among employees, where they choose whether

9. *IAM District Lodge 190*, 759 F.2d at 1478–79, enforcing *Towne Ford Sales*, 270 N.L.R.B. 311, 116 L.R.R.M. (BNA) 1066 (1984).

10. *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473, 120 L.R.R.M. (BNA) 2589 (2d Cir. 1985); *Safeway Stores, Inc.*, 276 N.L.R.B. 944, 949, 120 L.R.R.M. (BNA) 1186 (1985); *Gould, Inc.*, 263 N.L.R.B. 442, 445, 111 L.R.R.M. (BNA) 1033 (1982), enforced, 610 F.2d 316 (5th Cir. 1980); *Great Atl. & Pac. Tea Co.*, 140 N.L.R.B. 1011, 1021, 52 L.R.R.M. (BNA) 1155 (1963).

11. *Safeway Stores, Inc.*, 276 N.L.R.B. at 948 (quoting *Towne Ford Sales*, 270 N.L.R.B. at 311); *Melbet Jewelry Co.*, 180 N.L.R.B. 107, 110, 73 L.R.R.M. (BNA) 1264 (1969).

12. *Renaissance Ctr. P’ship*, 239 N.L.R.B. at 1247.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

or not to be represented by the union, rather than having that decision made for them by virtue of their smaller numbers.¹⁷

The Board agreed that the certified bargaining unit was no longer appropriate, but it rejected the Regional Director's accretion analysis and held that an election was necessary.¹⁸ Although the two security forces were previously distinguishable and separately employed, after consolidation they were indistinguishable and employed by the same entity.¹⁹ This fact alone satisfied nearly all the accretion analysis "community of interest" standards. However, because the number of employees that the union sought to add to the certified unit exceeded the existing number, the Board held that an accretion finding improperly disenfranchised a preexisting group of employees formerly employed by a different entity without providing them an opportunity to express their desires regarding representation.²⁰ If the numbers were reversed in that case, however, the nonunion employees likely would have been accreted into the existing unit.

III. The More Difficult Case: Two Different Unions in Play

A more difficult case is presented when different unions represent both groups of employees. When two unionized units are consolidated, the same "community of interest" analysis applies, even where different unions represent the units, and each asserts contractual claims to representation.²¹ Unless, however, the number of employees in one unionized bargaining unit is "sufficiently predominant to remove the question concerning overall representation," rather than permitting one unit to accrete the other, an election is typically necessary to protect the employees' rights to choose one union over the other.²² This is a higher standard than in the situation of a nonunion employee group being accreted into a unionized bargaining unit where a slight majority is sufficient.²³

For example, in *Martin Marietta Chemicals*, the employer owned a limestone facility where 159 employees were represented by the Steelworkers Union.²⁴ When the employer purchased a nearby lime-

17. *Id.* at 1248.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See, e.g.*, *A.C. Pavement Striping Co.*, 296 N.L.R.B. 206, 210, 132 L.R.R.M. (BNA) 1113 (1989).

22. *Martin Marietta Chem.*, 270 N.L.R.B. 821, 822, 116 L.R.R.M. (BNA) 1150 (1984); *Boston Gas Co.*, 221 N.L.R.B. 628, 91 L.R.R.M. (BNA) 1034 (1975).

23. *See Cent. Soya Co.*, 281 N.L.R.B. 1308, 1309-10, 124 L.R.R.M. (BNA) 1026 (1986) (citing *Western-Davis Co.* 236 N.L.R.B. 1224, 98 L.R.R.M. (BNA) 1461 (1978)), *aff'd*, 867 F.2d 1245 (10th Cir. 1988); *see also Special Mach. & Eng'g, Inc.*, 282 N.L.R.B. 1410, 1410, 124 L.R.R.M. (BNA) 1219 (1987).

24. *Martin Marietta Chem.*, 270 N.L.R.B. at 821.

stone facility where ninety-three employees were represented by the Cement Workers Union, the employer merged the two groups into a single operation.²⁵ Both unions protested the merger and contended that the separate units were viable and should remain intact.²⁶ The Board disagreed, however, and held that the employer created a “new operation” because the operation was physically consolidated under common management and administration, with centralized labor relations and an interchange of employees.²⁷ Both groups of employees performed similar functions under common terms and conditions of employment for the same employer.²⁸ Because neither group of employees was sufficiently predominant to remove the question concerning overall representation—notwithstanding the clear sixty-six employee majority held by the Steelworkers—the Board did not apply the accretion doctrine; instead, the Board decided that a QCR existed and ordered an election.²⁹

Similarly, in *Boston Gas Company*, the employer acquired two companies, “Lynn” and “Mystic Valley,” which had different unions representing their employees.³⁰ After Boston Gas merged, the thirty-eight Mystic Valley employees, who were represented by the Steelworkers, with the Lynn facilities (where thirty-four employees were represented by the Utility Workers union), the employer filed both an RM and a UC petition.³¹ The Board held that the employer successfully created a new operation because the functions of the merged customer inquiry center, and the employees performing those functions, were “totally commingled and fully integrated.”³² However, because “neither group of affected employees [was] sufficiently predominant to remove any real question as to the overall choice of a representative,” the Board ordered an election.³³

In *U.S. West Communications, Inc.*, the employer filed a UC petition after consolidating three formerly separate Pacific Bell telephone companies.³⁴ It sought to accrete the 500 employees represented by the Order of Repeatermen and Toll Testerboardmen (ORTT) from the former company into a multistate unit of 35,000 employees represented by the Communication Workers of America (CWA).³⁵ The Board affirmed the regional director’s finding that the employer’s consolidation

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 822.

29. *Id.*

30. *Boston Gas Co.*, 221 N.L.R.B. at 628.

31. *Id.* at 621 n.5.

32. *Id.* at 628–29.

33. *Id.*

34. *U.S. W. Communications, Inc.*, 310 N.L.R.B. 854, 143 L.R.R.M. (BNA) 1328 (1993).

35. *Id.* at 854.

and technological changes eliminated the separate identity of the employees represented by ORTT.³⁶ Therefore, the employees represented by ORTT were accreted into the CWA's bargaining unit without an election because the latter was "overwhelmingly" predominant.³⁷

A review of cases in which the Board was willing to accrete one unionized bargaining unit into another reveals that the relative numbers of employees has typically been fairly pronounced, as they were in *U.S. West Communications*.³⁸ In *Metropolitan Teletronics Corporation*, for example, the employer owned two plants, one in New York, where employees were represented by Local 140, United Furniture Workers, and the other in Union City, New Jersey, where Production Workers Union Local 148 represented employees.³⁹ Because of economic problems, foreclosure proceedings were commenced against the New York facility, which ultimately closed.⁴⁰ The employer then acquired a plant in Jersey City, New Jersey, and moved its Union City operation there.⁴¹ The new plant had twenty-six former Union City employees, thirteen new hires, and two Local 140 employees (the other twenty-four Local 140 employees had been laid off).⁴² The employer recognized Local 148 as the employees' bargaining representative at the Jersey City plant.⁴³

Local 140 filed a charge under section 8(a)(5) of the Act alleging that the employer failed to bargain in good faith over the effects of closing the New York facility and unlawfully recognized Local 148 instead of Local 140.⁴⁴ The Board found in favor of Local 140 on the notice and bargaining issue.⁴⁵ However, it found that the employer did not unlawfully recognize Local 148 because 63 percent of the workforce were former Union City (Local 148) employees, whereas only 5 percent were former New York (Local 140) employees.⁴⁶

Thus, in these cases, the "predominance" was more than tenfold.⁴⁷ As seen in the next section, however, more recently, an employee ratio of six to one was found sufficiently predominant for the smaller unit to be accreted into the larger unit without an election.⁴⁸

36. *Id.* at 855.

37. *Id.*

38. *Id.* at 854.

39. *Metro. Teletronics Corp.*, 279 N.L.R.B. 957, 122 L.R.R.M. (BNA) 1107 (1986), *aff'd*, 819 F.2d 1130 (2d Cir. 1987).

40. *Id.* at 957.

41. *Id.*

42. *Id.* at 958.

43. *Id.*

44. *Id.* at 958-60.

45. *Id.* at 959-60.

46. *Id.* at 958-60.

47. *Id.* at 958-60 (accreting two employees into unit of thirty-nine); *U.S. W. Communications, Inc.*, 310 N.L.R.B. at 854 (accreting 500 employees into unit of 35,000).

48. *See Schindler Elevator Corp.*, No. 29-UC-503 (July 18, 2002).

A union that finds itself outnumbered in such circumstances is not without potential recourse. When the employer or the union representing the larger unit files a UC petition to obtain a determination that the smaller unit of employees represented by a different union should be accreted into a larger unit without an election, the union representing the smaller contingent is able to preserve its right to seek a determination that an election is necessary by filing its own petition for an election (known as an RC petition).⁴⁹ In such circumstances, the “contract bar” doctrine, which would normally protect a union from such a petition during the first three years of its collective bargaining agreement, does not apply as long as the employer does not engage in a “mere relocation of operation” but rather creates a new operation by combining the two subsidiaries.⁵⁰ “[A] contract does not bar an election if changes have occurred in the nature as distinguished from the size of the operations between the execution of the contract and the filing of the petition, involving (1) a merger of two or more operations resulting in creation of an entirely new operation with major personnel changes.”⁵¹ Thus, in this situation, the union can seek an election rather than an accretion, arguing that there is insufficient predominance. Of course, because it remains the smaller union, it would likely have an uphill battle if an election is ordered; but nevertheless, the union would at least have the opportunity to campaign and convince employees to select it rather than losing its representative status through an accretion.

Further, if the employer simply announces that the smaller unit is being accreted into the larger bargaining unit without filing a UC petition, the smaller could also file unfair labor practice charges under section 8(a)(5) claiming an unlawful withdrawal of recognition. The accretion issue would then be litigated as a defense to the unfair labor practice charge. The risk associated with unilateral action of this nature is an adverse finding against the employer if sufficient predominance is not found. This leads to Board-imposed remedies for any unilateral changes in terms and conditions of employment for the putatively accreted employees.

49. See *Gen. Extrusion Co.*, 121 N.L.R.B. 1165, 1167–68, 42 L.R.R.M. (BNA) (1958).

50. *Id.* at 1167–68.

51. *Id.* at 1167; see also *Boston Gas Co.*, 221 N.L.R.B. at 629 (holding that because “Employer’s customer inquiry center at 90 Exchange Street is a ‘new operation’ designed to carry out the Employer’s customer relations in these newly acquired areas, and that, accordingly, the Utility Workers contract is not a bar to an election”); *Massachusetts Elec. Co.*, 248 N.L.R.B. 155, 157, 103 L.R.R.M. (BNA) 1404 (1980) (holding that there was no contract bar because after a merger of different companies with different unions that resulted in none of the unions having an “overwhelming majority,” there was a question concerning representation of the new operation).

IV. Who Counts in the Case of a Multiemployer Bargaining Unit?

When the employees in the existing unit to be clarified are part of a multiemployer bargaining unit, the question arises whether to include only the employees of that one employer or all the employees in the multiemployer unit in the tally. Such inclusion could mean counting employees at many other employers as well. The Board held that in order to determine whether the relative size of that existing unit is “sufficiently predominant” over the number of employees to be accreted to remove any question concerning representation, the membership of the *entire* multiemployer bargaining unit is examined relative to the employees to be accreted.⁵²

In *Schindler Elevator Corporation*, for example, rival unions representing elevator mechanics (Local 1, I.U.E.C., and Local 3, I.B.E.W.) were in place at two separate elevator companies owned by the same corporate parent.⁵³ The mechanics at both companies were members of different multiemployer bargaining units.⁵⁴ When the organization decided to have one subsidiary acquire the other and consolidate workforces, Schindler Elevator Corp., the surviving subsidiary, recognized Local 1 as representative of all the mechanics rather than Local 3, which had represented mechanics at the smaller, acquired subsidiary.⁵⁵ Schindler then filed a UC petition to have the former Local 3 members included in the multiemployer bargaining unit represented by Local 1.⁵⁶

The regional director, citing *Pergament United Sales, Inc.*,⁵⁷ noted that “the case law is clear that the entire multi-employer bargaining unit must be considered in assessing a possible accretion.”⁵⁸ In *Pergament United Sales, Inc.*, no exception was taken from an administrative law judge’s decision that counted and compared employees in the entire multiemployer bargaining unit against employees of one employer to be accreted into that unit.⁵⁹ Similarly, in *U.S. W. Communications Inc.*, discussed above, the Board, in finding sufficient predominance, counted and compared *all* members of the employer’s fourteen-state multifacility CWA bargaining unit to the ORTT employees to be accreted who

52. See *Schindler Elevator Corp.*, 29-UC-503, *review denied*, slip. op. (N.L.R.B. October 11, 2002). The authors represented Schindler Elevator Corporation in that case. The decision is on file with the authors.

53. *Schindler Elevator Corp.*, slip op. at 2–3.

54. *Id.*

55. *Id.* at 7.

56. *Id.* at 1–2.

57. *Pergament United Sales, Inc.*, 296 N.L.R.B. 333, 345, 132 L.R.R.M. (BNA) 1124 (1989), *enforced*, *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 L.R.R.M. (BNA) 3222 (2d Cir. 1990).

58. *Schindler Elevator Corp.*, slip op. at 16 n.10.

59. *Pergament United Sales, Inc.*, 296 N.L.R.B. at 345.

worked in just three of those states.⁶⁰ *U.S. W. Communications* provides additional persuasive authority because the Board has long treated multiplant and multiemployer bargaining units similarly in representation cases.⁶¹

Thus, consistent with these decisions, the regional director in *Schindler Elevator Corporation* compared the approximately 1,200-member Local 1 multiemployer unit, of whom approximately 400 members worked for Schindler, to the approximately 200 former Local 3 members who had been hired by Schindler as part of the acquisition, and found that the resulting six to one employee ratio constituted sufficient predominance by Local 1 over the former Local 3 members.⁶²

Thus, when determining whether employees have been accreted into a multiemployer unit, the unit cannot be dissected into a count of employees at an individual employer when determining whether a question concerning representation exists. This principle is consistent with the Board's treatment of multiemployer bargaining units in other contexts, where it has held, for example, that (i) a decertification election will only be ordered for a unit coextensive with an existing multiemployer unit⁶³ and (ii) employers whose employees are members of a multiemployer bargaining unit may not withdraw recognition from the union based on a lack of majority support for the union among the employees of that one employer.⁶⁴

V. There Must Be a True Consolidation and Integration of the Bargaining Units

Significantly, if a community of interest does *not* exist, and the units are deemed inappropriate for either an accretion *or* an election, an employer may have an obligation to continue to recognize and bargain with both unions (absent a showing of loss of majority status within one of the units). In *Matlack, Inc.*,⁶⁵ for example, the Board found that when a unionized employer acquired a unionized facility, the two units should not be accreted because the unit the employer sought to accrete did not lose its separate identity. Rather, the Board

60. *U.S. W. Communications, Inc.*, 310 N.L.R.B. at 345.

61. *NLRB v. Am. Printers & Lithographers*, 820 F.2d 878, 886 n.6, 125 L.R.R.M. (BNA) 2593 (7th Cir. 1987) (citing *Los Angeles Statler Hilton Hotel*, 129 N.L.R.B. 1349, 1351, 47 L.R.R.M. (BNA) 1194 (1961)).

62. *Schindler Elevator Corp.*, slip. op. at 1-3.

63. *See, e.g., Mo's West*, 283 N.L.R.B. 130, 124 L.R.R.M. (BNA) 1279 (1987); *Young's Market Co.*, 265 N.L.R.B. 687, 111 L.R.R.M. (BNA) 1677 (1982).

64. *See, e.g., Tile, Terrazzo & Marble Contractors Ass'n of Atlanta*, 287 N.L.R.B. 769, 770, 130 L.R.R.M. (BNA) 1106 (1987), *enforced*, 935 F.2d 1249, 138 L.R.R.M. (BNA) 2007 (11th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992); *Joseph J. Callier*, 243 N.L.R.B. 1114, 1118, 102 L.R.R.M. (BNA) 1008 (1979), *enforced in relevant part*, 630 F.2d 595, 105 L.R.R.M. (BNA) 2510 (8th Cir. 1980).

65. *Matlack, Inc.*, 278 N.L.R.B. 246, 251-52, 121 L.R.R.M. (BNA) 1183 (1986).

found that there was a mere change in ownership without any essential change in working conditions.⁶⁶

In *Innovative Communications Corporation*, the employer (ICC) owned multiple subsidiaries, including VitelCo, VitalCom, Vital Cellular, St. Croix Cable, and St. Thomas/St. John Cable TV.⁶⁷ VitelCo, where employees were represented by the Steelworkers Union, decided to merge and consolidate the job functions of the other subsidiaries into VitelCo, but there was not a technical corporate merger.⁶⁸ Employees at the other subsidiaries were not represented by any union.⁶⁹ VitelCo commenced negotiations with the Steelworkers over the effects of the merger.⁷⁰

Toward the end of the negotiations, a rival union, Our Virgin Island Labor Union (OVILU), requested an election to represent St. Croix Cable's employees.⁷¹ The Steelworkers requested that it also be placed on the ballot.⁷² OVILU won the election.⁷³ Nevertheless, VitelCo shortly thereafter signed a collective bargaining agreement recognizing the Steelworkers as the exclusive bargaining representative of employees at St. Croix Cable.⁷⁴

OVILU filed unfair labor practice charges claiming that VitelCo violated the Act by recognizing the Steelworkers as the exclusive representative of employees at St. Croix Cable, by extending the Steelworkers contract to those employees, and by unilaterally changing the employees' terms and conditions of employment.⁷⁵ In its defense, VitelCo argued that the employees of St. Croix Cable had been accreted into the Steelworkers' bargaining unit as a result of the merger.⁷⁶

The Board affirmed the administrative law judge's conclusion that there had been no accretion because the evidence established that VitelCo and St. Croix Cable employees continued to be "located in separate facilities, performing different job functions, and that they would continue to perform those separate job functions in separate facilities for quite some time."⁷⁷ The Board based its holding, in part, on the fact

66. See also *Innovative Communications Corp.*, 333 N.L.R.B. No. 86, 169 L.R.R.M. (BNA) 1261 (March 23, 2001) (finding no consolidation and an ongoing duty to recognize two different unions); *Mac Towing, Inc.*, 262 N.L.R.B. 1331, 1334, 110 L.R.R.M. (BNA) 1537 (1982) (same).

67. *Innovative Communications Corp.*, 333 N.L.R.B. No. 86.

68. *Id.* No. 24-CA-8472, slip. op. at 4.

69. *Id.*

70. *Id.*

71. *Id.* at 5.

72. *Id.*

73. *Id.*

74. *Id.* at 5-6.

75. *Id.* at 4-7.

76. *Id.* at 6.

77. *Id.*

that almost a year after the merger, VitelCo and St. Croix Cable still operated out of different facilities.⁷⁸

In *Mac Towing, Inc.*, a parent company owned three separate subsidiaries.⁷⁹ Employees at each subsidiary were represented in a single bargaining unit by the Seafarers International Union (SIU).⁸⁰ When the parent company purchased another subsidiary, Mac Towing, whose employees were represented by the Inland Riverman's Association, the SIU filed a UC petition seeking to have the Mac Towing employees accreted into its existing bargaining unit.⁸¹ The Board rejected the SIU's petition, however, finding that there had not been an accretion because there had been no "interchange of vessels or employees with" the other subsidiaries.⁸²

As these cases demonstrate, the employees to be accreted must be truly integrated into the predominant bargaining unit such that they lose any and all separate identity. Otherwise, the attempted accretion will fail.

VI. If the Bargaining Units Are Not Sufficiently Consolidated, the Employer Will Likely Acquire the Obligations of a Successor

If the accretion fails in a case involving a merger or acquisition—in other words, if the two bargaining units are *not* sufficiently consolidated as a consequence of the merger or acquisition, such that the employees of the smaller unit can still exist as an appropriate bargaining unit in their own right—that gives a union representing those employees an argument that the purchaser assumes an obligation to continue to recognize and bargain with that union. Whether the purchaser is required to bargain with the union of the acquired company depends on whether the purchaser is a legal "successor."⁸³ There is a rebuttable presumption that employees of the predecessor continue to support their former union, but a successor employer may lawfully withdraw recognition if it can prove that the union, in fact, does not represent a majority of unit employees.⁸⁴

The successorship analysis can be reduced to a two-part test in which the Board seeks to determine whether there is continuity in the employing enterprise *and* continuity in the workforce. The Board ex-

78. *Id.* at 5–6.

79. *Mac Towing, Inc.*, 262 N.L.R.B. at 1331.

80. *Id.*

81. *Id.* at 1334.

82. *Id.*

83. *M.V. Transp.*, 337 N.L.R.B. No. 770, 771, 170 L.R.R.M. (BNA) 1233 (2002).

84. *Id.* at 771; *see also* *Levitz Furniture Co.*, 333 N.L.R.B. No. 105 (Mar. 29, 2001) (holding that an employer may withdraw recognition "only where the union has actually lost the support of the majority of the bargaining unit members").

amines the following factors in determining whether there is continuity of the employing enterprise: (i) substantial continuity of the same business operations; (ii) use of the same plant, machinery, equipment, and methods of production; (iii) the same or substantially the same workforce; (iv) the same jobs existing under the same working conditions; (v) the same supervisors; and (vi) the same product manufactured or service offered.⁸⁵ This test relies on the totality of the circumstances and the factors are viewed from the perspective of the employees (*i.e.*, whether an employee reasonably expects that his/her union representation would continue after the sale).⁸⁶

In determining whether there has been continuity in the workforce, the Board will look at whether the purchaser has hired a “substantial and representative complement” within the unit, a majority of whom are the seller’s unit employees.⁸⁷ In making this determination, the Board will attempt to establish whether, at the time of the union’s request for bargaining: (i) the job classifications for the operations were filled or substantially filled; (ii) the operation was in normal or substantially normal production; (iii) the size of the complement; (iv) the time expected to elapse before a substantially larger complement will be hired; and (v) the relative certainty of the expected expansion.⁸⁸

Different principles apply depending upon whether the transaction is structured as an asset sale or a stock purchase. If the transaction is structured as a stock purchase, the law is clear that the employer’s obligations to the existing union inherited in the purchase continue.⁸⁹ “The Board has recognized that a stock transfer is ‘the continuing existence of a legal entity, albeit under new ownership.’”⁹⁰ “The Board has also held that ‘the mere change of stock ownership does not absolve a continuing corporation of responsibility under the Act.’”⁹¹ In general, the rule is that a purchaser of stock must both bargain with the union and adopt the existing labor agreement.⁹² This analysis applies to a hostile takeover as well as the negotiated sale.⁹³ Thus, absent a consolidation of the bargaining units, a stock purchase would give a union

85. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 125 L.R.R.M. (BNA) 2441 (1987).

86. *Id.* at 27–28.

87. *Id.* at 27.

88. *Id.* at 49; *Premium Foods, Inc.*, 260 N.L.R.B. 708, 109 L.R.R.M. (BNA) 1328 (1982), *enforced*, 709 F.2d 623, 628, 113 L.R.R.M. (BNA) 3261 (9th Cir. 1983).

89. *Rockwood Energy & Mineral Corp.*, 299 N.L.R.B. 1136, 1139, 135 L.R.R.M. (BNA) 1282 (1990).

90. *Id.* at 1139 (quoting *Hendricks-Miller Typographic Co.*, 240 N.L.R.B. 1082, 1083 n.4 (1979)), *enforced*, 942 F.2d 169, 137 L.R.R.M. (BNA) 3008 (3d Cir. 1991).

91. *Id.* (quoting *Miller Trucking Servs.*, 176 N.L.R.B. 556, 71 L.R.R.M. (BNA) 1277 (1969), *enforced in relevant part*, 445 F.2d 927, 77 L.R.R.M. (BNA) 2964 (10th Cir. 1971)).

92. *See W. Boot & Shoe, Inc.*, 205 N.L.R.B. 999, 84 L.R.R.M. (BNA) 1140 (1973); *Topinka’s Country House, Inc.*, 235 N.L.R.B. 72, 98 L.R.R.M. (BNA) 1298 (1978), *enforced*, 624 F.2d 770, 105 L.R.R.M. (BNA) 3419 (6th Cir. 1980).

93. *Id.*

representing a smaller unit—even a much smaller unit—a claim for continued recognition *and* application of its collective bargaining agreement to its existing members.

On the other hand, the general rule is that a purchaser of the assets of a business is *not* required by law to adopt the seller's contract with a union.⁹⁴ If the Board finds that the sale of assets was merely a sham transaction, however, undertaken so that the seller can avoid its collective bargaining agreement with the union, it may find that the purchaser is actually an *alter ego* of the seller who is bound by that seller's collective bargaining agreement.⁹⁵ In addition, the Board has displayed a willingness to treat an asset acquisition where both companies were approximately the same size as "akin" to a stock transfer even in the absence of an actual transfer of stock. The Board does so where one company is subsumed within a surviving company, which merely amends its articles of incorporation and changes its name, while operations remain essentially the same after the transfer of ownership.⁹⁶ This inclination again highlights that the employer must make sufficient changes in the operations as the result of the acquisition that the new, consolidated unit will constitute a "new operation."

Notably, if the surviving employer is found to be a successor, although it will be required to recognize and bargain with the union representing acquired employees, the employer may be permitted to set new wage rates, hours, and other terms and conditions of employment and negotiate its own collective bargaining agreement.⁹⁷ If a purchaser desires to make changes in terms or conditions of employment upon taking over the operation, the purchaser should set the terms and announce them to employees prior to the takeover. Employment should only be offered at the new terms. A formal announcement and hiring process will increase the purchaser's ability to withstand a challenge over the new terms and conditions of employment.⁹⁸

94. I.W.G., Inc., 322 N.L.R.B. No. 12, 153 L.R.R.M. (BNA) 1209 (1996).

95. See, e.g., Fugazy Cont'l Corp., 265 N.L.R.B. 1301, 112 L.R.R.M. (BNA) 1203 (1982), *enforced*, 725 F.2d 1416, 115 L.R.R.M. (BNA) 2571 (D.C. Cir. 1984); Artcraft Ornamental Iron Co., 271 N.L.R.B. 829, 117 L.R.R.M. (BNA) 1230 (1984) (to determine whether corporations are alter egos, the Board examines whether they share substantially identical (i) management, (ii) business purposes, (iii) operation, (iv) equipment, (v) customers, (vi) supervision, and (vii) ownership); I.W.G., Inc., 322 N.L.R.B. No. 12 (the Board also examines whether, but does not require a showing that, "the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act") (quoting Watt Elec. Co., 273 N.L.R.B. 655, 658, 118 L.R.R.M. (BNA) 1352 (1984)).

96. Children's Hosp. of San Francisco, 312 N.L.R.B. 920, 144 L.R.R.M. (BNA) 1189 (1993), *enforced sub nom.* California Pac. Med. Ctr., 87 F.3d 304, 152 L.R.R.M. (BNA) 2593 (9th Cir. 1996).

97. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 294–95, 80 L.R.R.M. (BNA) 2225 (1972).

98. See, e.g., Spruce Up Corp., 209 N.L.R.B. 194, 85 L.R.R.M. (BNA) 1426 (1974), *enforced*, 529 F.2d 516, 90 L.R.R.M. (BNA) 2525 (4th Cir. 1975).

Significantly, a purchaser may lose the right to set initial terms and conditions of employment if it is “perfectly clear” that it will be a successor by making known that it plans to retain all of the seller’s employees.⁹⁹ In *Canteen Company*, for example, the Board held that an employer had violated the Act when, after making it clear to the union that it would retain the employees, it then told employees that they would be working at a reduced rate of pay.¹⁰⁰

VII. The Timing of a Unit Clarification Petition

Although an employer who accretes a group of employees into an existing bargaining unit may choose to sit back and wait for the adversely affected union to file an unfair labor practice, the proactive course is to file a UC petition. UC petitions generally are not entertained by the Board when a party seeks to clarify a bargaining unit during the term of a collective bargaining agreement, although certain exceptions exist.¹⁰¹ One such exception applies when the petition is filed with respect to a group of new employees who were not employees when the collective bargaining agreement at issue was executed.¹⁰² Thus, in a merger or acquisition, provided that the two employers were not single or joint employers, or alter egos, the former employees of the acquired entity are new employees to the purchaser because they did not exist as employees of that company at the time its collective bargaining agreement with the union was executed.¹⁰³

At first blush, waiting until the collective bargaining agreement expires may seem to be a way to circumvent any possibility that the Board would dismiss the midterm UC petition, but it actually creates greater problems. The change in business operations that accompanies the acquisition and influx of newly hired employees whose status is disputed is precisely what compels the Board’s willingness to entertain

99. See *Burns Int’l Sec. Servs.*, 406 U.S. at 294–95; *Spruce Up Corp.*, 209 N.L.R.B. at 195.

100. *Canteen Co.*, 317 N.L.R.B. 1052, 149 L.R.R.M. (BNA) 1233 (1995), *enforced*, 103 F.3d 1355, 154 L.R.R.M. (BNA) 2065 (7th Cir. 1997); see also *Hilton’s Envtl., Inc.*, 320 N.L.R.B. 437, 152 L.R.R.M. (BNA) 1263 (1995).

101. *Baltimore Sun Co.*, 296 N.L.R.B. 1023, 1024, 132 L.R.R.M. (BNA) 1210 (1989) (a case in which a midterm UC petition was found to be *timely* because it met an exception to the general rule).

102. See, e.g., *Gould, Inc.*, 263 N.L.R.B. 442, 445, 111 L.R.R.M. (BNA) 1033 (1982).

103. See also *Parker Jewish Geriatric Inst.*, 304 N.L.R.B. 153, 154, 138 L.R.R.M. (BNA) 1061 (1991) (ruling on merits of midterm UC petition where the parties did not agree whether certain employees previously covered under a different contract were part of the overall bargaining unit or covered by agreement between the union and multiemployer association); *Super Valu Stores, Inc.*, 283 N.L.R.B. 134, 135, 124 L.R.R.M. (BNA) 1294 (1987) (ruling on merits of midterm UC petition where parties did not agree whether employees at new facility were included in current bargaining unit); *Crown Cork & Seal Co.*, 203 N.L.R.B. 171, 172, 83 L.R.R.M. (BNA) 1088 (1973) (ruling on merits of midterm UC petition in case involving the unit placement of employees working on a new production line in one of two existing bargaining units).

a UC petition in the middle of the term of a collective bargaining agreement, which it otherwise generally will not do.¹⁰⁴ Further—and more importantly—the Board appears dubious of an employer that “merges” two corporate entities, maintains separation of the workforces for a time, and *then* tries to accomplish an accretion.¹⁰⁵ If the employees to be accreted can exist and have existed as a separate appropriate bargaining unit for a period of time prior to expiration of the contract, this will weigh against an accretion finding when the employer files the UC post-expiration.¹⁰⁶ In short, the accretion issues should be dealt with by the parties and by the Board immediately when an operational change or acquisition calls into question the continuing viability of separate bargaining units.

VIII. The Collective Bargaining Agreement Terminates Upon Accretion of the Unit

Sometimes the union that is ousted by the consolidation and accretion—understandably unhappy with the turn of events—will claim that because its collective bargaining agreement does not expire for several months or years, the acquiring company is required to maintain the employees as part of its bargaining unit. This would include all existing terms and conditions of employment for the duration of the contract. It is well settled, however, that a contractual duration clause does not carry with it an obligation that a company remain in business (or in any particular line of business) or continue the employment of the bargaining unit members.¹⁰⁷ Thus, the mere existence of a collective bargaining agreement cannot prevent a midterm accretion. As noted above, accretion is a question of statutory application, not of contractual interpretation.

Instead, once the former employees represented by the ousted union are hired by the acquiring company and accreted into the substantially predominant bargaining unit, all obligations under the smaller union’s collective bargaining agreement become null, void, and unenforceable.

104. See *Northwest Publ’n, Inc.*, 200 N.L.R.B. 105, 81 L.R.R.M. (BNA) 1448 (1972); *Wallace-Murray Corp.*, 192 N.L.R.B. 1090, 78 L.R.R.M. (BNA) 1046 (1971).

105. *Brooklyn Hosp. Ctr.*, 309 N.L.R.B. 1163, 1182, 143 L.R.R.M. (BNA) 1094 (1992), *enforced*, 9 F.3d 218, 144 L.R.R.M. (BNA) 2617 (2d Cir. 1993).

106. *Id.* at 1163.

107. *United Rubber, Cork, Linoleum & Plastic Workers v. Great Am. Indus., Inc.*, 479 F. Supp. 216, 234 (S.D.N.Y. 1979) (citing *Fraser v. Magic Chef-Food Giant Markets, Inc.*, 324 F.2d 853, 856 (6th Cir. 1963) (“A collective bargaining agreement . . . does not create an employer-employee relationship and does not guarantee the continuance of one.”); see also *Wien Air Alaska, Inc. v. Bachner*, 865 F.2d 1106, 1112 (9th Cir. 1989) (“It is well established that a collective bargaining agreement cannot bind an employer to continue in business.”); *Hill v. Ralph’s Grocery Co.*, 896 F. Supp. 1492, 1495, 150 L.R.R.M. (BNA) 2106 (C.D. Ca. 1995) (“The Term of Agreement Clause . . . simply means that as long as an employer-employee relationship exists, the rights and obligations of the parties are governed by the contract.”).

Many cases recognize that a union's collective bargaining agreement terminates, even midterm, if the union is decertified.¹⁰⁸ The same principle applies in a situation in which a union loses its representational status as the result of an accretion to another bargaining unit, rather than through a decertification election. As one popular treatise observes:

The Board and the Courts have made clear that no union other than the duly recognized or certified bargaining representative retains any rights under a collective bargaining contract. [] Once a union that is signatory to a contract is decertified or otherwise loses its status as collective bargaining representative, it retains no rights under that contract. [] This feature of the collective bargaining relationship, which elevates the statutory right to choose a representative over the stability of contract, underscores that the collective bargaining agreement is *sui generis*.¹⁰⁹

This is a fairly obvious outgrowth of the principle of exclusive representation. As the Supreme Court has stated, the obligation to recognize and deal with the lawful representative of a bargaining unit imposes "the negative duty to treat with no other."¹¹⁰

Indeed, there is no way as a matter of law that a company can continue to recognize the smaller union and continue to apply that union's collective bargaining agreement once the company consolidates the once separate bargaining units, which it is lawfully entitled to do upon its acquisition of another company. In *McGuire v. Humble Oil & Refining Company*, for example, the court dismissed a lawsuit brought under section 301 of the Labor Management Relations Act to compel arbitration over alleged breaches of a collective bargaining agreement between a seller and the seller's union by the purchaser employer.¹¹¹ The purchaser filed a UC petition after the seller's union filed the com-

108. See also *United Paperworkers Int'l Union, Local 14 v. Int'l Paper*, Civ. No. 93-279, 1994 U.S. Dist. LEXIS 20002, at *4-*5 (D. Me. Dec. 1, 1994) (once union decertified, employer relieved of all obligations to withhold union dues or contribute to union trust funds); *Sheet Metal Workers Int'l Ass'n, Local No. 162 v. Jason Mfg., Inc.*, 900 F.2d 1392, 1400 (9th Cir. 1990) (holding that union's CBA void upon decertification by NLRB, but rejecting employer's argument that arbitration award issued thereunder after decertification petition filed was void ab initio); *Retail Clerks Int'l Ass'n v. Montgomery Ward & Co.*, 316 F.2d 754, 757 (7th Cir. 1963) (holding that CBA no longer enforceable after union decertified, because "[a]n implied condition of the contracts was the continuance of [the union's] status as such certified representative"); *Modine Mfg. Co. v. Grand Lodge Int'l Ass'n of Machinists*, 216 F.2d 326, 329 (6th Cir. 1954) (where another union was certified after election as representative of same bargaining unit, "[t]he provisions as to IAM and the payment of dues became inoperative as soon as IAM ceased to be the bargaining representative . . . The recognition clause of the agreement of 1948 became inoperative when IAM ceased to be the certified representative of the employees").

109. *The Developing Labor Law 752* (Patrick Hardin ed., 3d ed., 1995) (emphasis added) (internal citations omitted).

110. *NLRB v. Jones & McLaughlin Steel Corp.*, 301 U.S. 1, 44, 1 L.R.R.M. (BNA) 703 (1937).

111. *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352, 357-58 (2d Cir.), cert. denied, 384 U.S. 988 (1966).

plaint, and the Board granted the petition, declaring that the purchaser's union was the exclusive bargaining representative of the employees in question, who had been accreted into the larger bargaining unit.¹¹² Therefore, the court concluded that "the consequences that flow from [the larger union's] exclusive bargaining representation of all the Humble employees are decisive of the case."¹¹³ One such consequence was that the court could not compel the company to arbitrate contractual grievances with a union that had lost its exclusive representative status through the Board's earlier decision that the employees in question had been accreted into a different bargaining unit.¹¹⁴

One issue of first impression that has not been ruled upon by the Board in any published decision is whether the collective bargaining agreement and the employer's obligations thereunder terminate on the date the Board issues a UC decision or at some earlier point, such as the actual closing date of a merger or acquisition between two companies. We believe that logically there can be only one answer: The union's rights under the contract must terminate at the earlier date when the consolidation is actually consummated, not when the Board process—the ultimate length of which will be uncertain—subsequently concludes with the issuance of a decision. This is because, in the consolidation and accretion context, there are two unions simultaneously claiming that their contracts apply, unlike the decertification context where there is no rival union who has any representational claim on the employees until after one union is decertified.

The smaller unit's collective bargaining agreement must terminate as of the date of the consolidation to (i) maintain consistency between the different procedural avenues for accomplishing an accretion and (ii) avoid a situation where the employer is accruing liability while waiting for an ultimately favorable UC decision from the Board. For example, if a union files an unfair labor practice charge claiming that the employer unlawfully withdrew recognition, the Board, in applying the consolidation principles discussed above, would determine whether the employer had lawfully withdrawn recognition from the union representing the smaller unit on the day it merged the two em-

112. *Id.* at 356.

113. *Id.* at 357.

114. *Id.* at 357–58; *see also* *Kenin v. Warner Bros. Pictures, Inc.*, 188 F. Supp. 690, 695–96 (S.D.N.Y. 1960) (collecting case law regarding principles of exclusive representation, in a case where AFM attempted to assert a contract claim against Warner Brothers after its CBA had expired and it had been superceded by the Musicians Guild); *see also* *Printing Specialties & Paper Prods. Union No. 447 v. Pride Papers Aaronson Bros. Paper Corp.*, 445 F.2d 361, 363–64 (2d Cir. 1971) (affirming dismissal of section 301 suit where two companies with separate unions consolidated operations, no unionized employees of the smaller company were hired by the new company, and, thus, the new company was not a successor); *Am. Fed'n of Gov't Employees, Local 1164*, 6 F.L.R.A. No. 60 (July 30, 1981) (holding that union's rights as exclusive bargaining representative were terminated once its bargaining unit was consolidated with another).

ployee groups and recognized the union representing the larger unit as representative of all the employees in the consolidated unit.¹¹⁵

Similarly, there is no reason that the Board cannot or should not determine that the accretion of the former employees occurred as of the effective date of any acquisition or merger, just as it would in an unfair labor practice proceeding in which the employer's defense would be that employees of the smaller unit were accreted into the larger unit on that date. Indeed, as noted above, the Board has refused to find that an accretion has occurred where an employer acquired another and intentionally preserved the separate employee groups for some period of time, and then subsequently attempted to recognize the union that represented one group as representing the other group through an accretion.¹¹⁶ Thus, under Board law, an employer is compelled to commence the integration and consolidation of the previously separate bargaining units immediately, rather than waiting until the expiration of the collective bargaining agreement.

Further, under well-established labor law principles of exclusivity, an employer cannot recognize two different unions as representative of employees within a single, appropriate bargaining unit.¹¹⁷ Therefore, an employer is entitled to recognize the union that represents a substantially predominant majority of the consolidated bargaining unit from the moment of consolidation.¹¹⁸ Of course, the employer must be correct in its position that there *is* a substantially predominant majority, bearing in mind that six to one is the closest ratio thus far approved by the Board. But if the Board subsequently approves, our view is that the accretion should be treated for all purposes as having occurred on the first day after the merger or acquisition. This should be so even if the process takes a few weeks or even months to complete, provided the employer has been actively engaged in the consolidation process and it results in a Board-approved accretion at some point.

Otherwise, the employer is trapped in an untenable position. If it continues to recognize and apply the smaller unit's collective bargaining agreement, it will avoid any liability under that contract but in all likelihood doom the accretion. On the other hand, if it ceases to apply the smaller unit's contract on the day after the acquisition, it may incur liability between that date and the date the Board issues a decision. In that instance, because the UC petition can be subject to numerous delays in scheduling or in the decision making process, the employer would accrue liability even though it had so thoroughly prepared for

115. See *Metro. Teletronics Corp.*, 279 N.L.R.B. at 960.

116. *Brooklyn Hosp. Ctr.*, 309 N.L.R.B. at 1183-85 (finding employer violated section 8(a)(2)).

117. See *Jones & McLaughlin Steel Corp.*, 301 U.S. at 44.

118. *Id.* (the obligation to recognize and deal with the lawful representative of a bargaining unit imposes "the negative duty to treat with no other").

the acquisition and consolidation of bargaining units that they were perfectly integrated from day one.

Such perfect integration from day one is difficult to accomplish, particularly in a larger organization, but the alternatives are even less appealing. Using the date of the Board's UC decision as the date on which the collective bargaining agreement terminates exposes the employer to unfair contractual liability when it has every right to consolidate separate bargaining units to meet changing business needs. Moreover, trying to ascertain some trigger point during the process of consolidation and integration when the accretion is "complete"—somewhere between "day one" and the Board's subsequent decision—not only fails to completely remove the problem of undeserved employer liability but in most cases would be extremely difficult to pinpoint realistically as a factual matter. The only logical alternative, provided the process of integration commenced immediately and an accretion is ultimately approved by the Board, is a rule that the collective bargaining agreement governing the accreted employees terminates on the first day after the merger or acquisition.

IX. Conclusion

Corporate mergers, acquisitions, and reorganizations present a host of challenges for employers, unions, and labor lawyers. The consolidation of previously separate bargaining units is particularly interesting because, rather than dealing with the more typical issue of whether a union continues to represent employees, it focuses on *which* union's stake in the company will survive. On one level, consolidation of separate units does not raise the same legal concerns that arise when a successor employer sheds (or attempts to shed) its bargaining obligations, and formerly represented employees are left without representation.

However, the absence of an employer attempting to "go nonunion" does not render the repercussions of a consolidation of separately represented bargaining units any less critical. This is true for the employer that carefully seeks to determine the legal obligations it inherits as the result of its business decisions; this is also true for the union that must accommodate an influx of new bargaining unit members, not all of whom may be pleased to be switching unions; and it is certainly true for the union that may lose its representational status. Nevertheless, labor law must strive to keep up with the changing corporate world. With respect to bargaining unit consolidations, while certain issues remain undetermined, the law, thus far, has succeeded in maintaining a balanced approach to this issue.

Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action

Matthew W. Lampe and
E. Michael Rossman*

Employer pay practices are governed by the Fair Labor Standards Act (FLSA or Act) and, in many jurisdictions, state statutes and / or common law theories. Collective actions under the FLSA may offer plaintiffs some significant advantages over state-law claims, but the FLSA also contains limitations that generally serve to contain the scope of an employer's liability. Increasingly, therefore, plaintiffs are attempting "dual-filed wage actions," in which they assert both FLSA collective action and state-law class action claims. Such actions offer plaintiffs the possibility of capturing the FLSA's benefits while at the same time circumventing its limitations. However, dual-filed actions also present employers with procedural arguments for defeating plaintiffs' claims that would not otherwise exist. In some respects, then, plaintiffs' dual-filing strategy could actually work to the advantage of the employer.

I. Introduction

It has been widely reported in legal publications that large-scale FLSA¹ actions represent the "claim du jour" for the plaintiffs' bar.² Between 2000 and 2003, the number of multiplaintiff FLSA cases seeking the recovery of unpaid overtime or minimum wages rose by 70 percent.³ By way of comparison, the number of employment discrimination class actions filed in 2003 was 8 percent *lower* than in 2000.⁴

This spike in FLSA claims does not suggest that plaintiffs' counsel are content with all aspects of the Act. Notably displeasing to the plaintiffs' bar is the fact that FLSA claims may not proceed as class actions under Federal Rule of Civil Procedure 23 (hereinafter FRCP) (or anal-

*Mr. Lampe is a partner and Mr. Rossman is an associate in the Labor and Employment division of Jones Day's office in Columbus, Ohio. The arguments set forth in this article are the personal views of the authors.

1. See 29 U.S.C. § 201 *et seq.*

2. As *Overtime Lawsuits Renew FLSA Debate, Attorneys Advise Learning the Wage Law*, Daily Lab. Rep. (BNA) (June 25, 2002).

3. See *Wage Hour Collective Actions Jumped 70 Percent Since 2000, Analysis Shows*, Daily Lab. Rep. (BNA) (Mar. 26, 2004).

4. See *id.*

ogous state provisions when pending in state court).⁵ Instead, the Act's section 216(b) provides that "similarly situated" plaintiffs may institute a "collective action."⁶ While collective actions are somewhat similar to class actions, they are not representative proceedings. Generally, when a court certifies an FRCP 23 class in a wage case, all persons falling within the class definition are bound by the outcome of the case unless they affirmatively "opt out."⁷ Thus, a damage award in an FRCP 23 class action may be based on amounts due to all named plaintiffs *and* absent class members. There are no absent class members, however, in a section 216(b) action. A person is not party to a section 216(b) case unless he or she affirmatively "opts in" to the action by filing a consent form with the court in which the action is pending.⁸ If a person does not file a consent form, he or she cannot "be bound by or . . . benefit from the judgment in the case."⁹

Section 216(b)'s opt-in requirement is the product of a careful, reasoned, and long-standing decision by Congress. Reacting to the Supreme Court's 1946 decision in *Anderson v. Mt. Clemens Pottery Co.*,¹⁰ whose construction of the FLSA raised the specter of "virtually unlimited liability"¹¹ for employers, Congress limited the scope of the FLSA through the enactment of the 1947 Portal to Portal Act.¹² The Portal to Portal Act sought to "prevent large group [FLSA] actions, with their vast allegations of liability, from being brought on behalf of employees

5. See, e.g., *McClain v. Leona's Pizzeria, Inc.*, 222 F.R.D. 574, 577-78 (N.D. Ill. 2004) ("The FLSA's opt-in provision directly contrasts with Rule 23's opt-out scheme and demonstrates Congress's intent to ensure that parties with wage and hour claims under the FLSA take affirmative steps to become members of a class seeking redress of those claims in federal court.")

6. See 29 U.S.C. § 216(b) ("An action to recover [unpaid overtime] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."). Note that the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (ADEA), incorporates section 216(b) procedures, and FLSA courts have looked to ADEA cases for guidance in interpreting section 216(b). While this paper primarily focuses on and cites to FLSA cases, it makes occasional reference to ADEA cases.

7. See FED. R. CIV. P. 23(c)(3); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003).

8. See 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.")

9. *Cameron-Grant*, 347 F.3d at 1249 (quoting *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975)).

10. 328 U.S. 680 (1946). In its relevant section, *Mt. Clemens* unexpectedly held that an employer was responsible for paying an employee from "portal-to-portal"—i.e., from the moment he arrived at work until the time he left, including the time it took to get to and from the time clock to his actual job site. See *Sperling v. Hoffman-La Roche, Inc.*, 24 F.3d 463, 469 (3d Cir. 1994) (citing *Mt. Clemens*, 328 U.S. at 690-92).

11. *Sperling*, 24 F.3d at 469.

12. See Portal to Portal Act of 1947, pt. IV, § 6, 61 Stat. 84, 87, 88 (1947); see generally *Cameron-Grant*, 347 F.3d at 1248.

who had no real involvement in, or knowledge of, the lawsuit.”¹³ Among other things,¹⁴ it added section 216(b)’s opt-in language.¹⁵ The remarks of Senator Donnell reflect Congress’ aims:

Obviously, Mr. President, this is a wholesome provision, for it is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary person behind him, and then later [on] have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit.

So we have provided, as I say, that no employee shall be made a party plaintiff to any such action unless he gives his consent in writing and unless such consent is filed in the court in which the action is brought.

Certainly there is no injustice in that, for if a man wants to join in the suit, why should he not give his consent in writing, and why should not that consent be filed in court?¹⁶

In short, Congress designed section 216(b)’s opt-in language to “prohibit what precisely is advanced under [FRCP] 23—a representative plaintiff filing an action that potentially may generate liability in favor of uninvolved class members.”¹⁷

Section 216(b)’s opt-in mechanism tends to limit the size of FLSA classes and, consequently, an employer’s exposure to damages in a given case. Commentators generally find that, in FLSA collective actions, the opt-in rate—i.e., the percentage of persons falling within the definition of the putative class who file consents to join the action—is typically between 15 and 30 percent, although the rate may be higher

13. *Arrington v. Nat’l Broad. Co.*, 531 F. Supp. 498, 501 (D. D.C. 1982) (internal footnotes omitted); see also *United Food & Commercial Workers Union v. Albertson’s, Inc.*, 207 F.3d 1193, 1201 (10th Cir. 2000) (noting that *Arrington’s* interpretation of the legislative history of the Portal to Portal Act “has since been embraced by all courts”); *Cameron-Grant*, 347 F.3d at 1248 (same).

14. The Portal to Portal Act also abolished claims relating to payment for certain preliminary and postliminary work, and it added a strict statute of limitations for claims under the Act. See 29 U.S.C. §§ 252(a)(1) & 256; see generally THE FAIR LABOR STANDARDS ACT 16–23 (Ellen C. Kearns ed. 1999). In addition, it added language to section 216(b) providing that only “employees”—and thus *not* unions—were proper parties to FLSA actions. 29 U.S.C. § 216(b); *Cameron-Grant*, 347 F.3d at 1247. This latter amendment halted the “very decidedly unwholesome champertous” practice of unions and other third parties filing FLSA claims on behalf of unknowing and uninvolved employees or former employees. *Arrington*, 531 F. Supp. at 501 (quoting 93 Cong. Rec. 4371 (Remarks of Sen. Donnell)).

15. See *Arrington* at 501–02 (noting that the opt-in requirement “seek[s] to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party’s action in filing suit”).

16. *Id.* at 502 (quoting 93 Cong. Rec. 2182 (Remarks of Sen. Donnell)).

17. *Cameron-Grant*, 347 F.3d at 1248.

in union-backed FLSA cases.¹⁸ As a result, some plaintiffs' counsel shun the FLSA altogether in favor of analogous state statutes or state common law claims.¹⁹ Rule 23 (or similar state provisions) governs class actions under such state theories, and, as such, they avoid section 216(b)'s opt-in limitation.²⁰ State-law wage claims also may offer the possibility of a longer statute of limitations than section 216(b) and (in some states) greater remedies.²¹ Further, a plaintiff wishing to avoid federal court and the application of the Federal Rules of Civil Procedure may prefer the state law route.²²

From a plaintiff's perspective, though, section 216(b) has advantages that are unavailable under FRCP 23. For instance, section 216(b) offers the possibility of liquidated damages and attorneys fees, which may not be available under some states' laws.²³ Thus, in some cases, the FLSA offers greater remedies than state wage law. Additionally, it may be easier for a plaintiff to obtain certification of a section 216(b) collective action than FRCP 23 class action. Some courts hold that the standards for class certification under FRCP 23 are higher than those in section 216(b).²⁴ Thus, while a state-law claim may offer the possibility of a larger class and therefore larger aggregate damages (and also higher attorneys' fees), it also increases the risk that a class will not be certified and that a handful of plaintiffs with low-dollar individual actions will be forced to proceed alone.²⁵

18. See, e.g., *Attorneys Explore for Surge in Wage and Hour Lawsuits, Offer Strategies*, Daily Lab. Rep. (BNA) (Dec. 12, 2002); *Attorneys Discuss Strategies for Bringing and Defending FLSA Collective Action Lawsuits*, Daily Lab. Rep. (BNA) (Aug. 13, 2002) (hereinafter *Strategies*). Some reported cases, however, have found significantly lower opt-in rates. See, e.g., *Thiebies v. Wal-Mart Stores, Inc.*, 2002 WL 479840 at *3 (D. Or. Jan. 9, 2002) (finding a 2.7 percent opt-in rate).

19. See Noah A. Finkel, *State Wage-and-Hour Class Actions: The Real Wave of "FLSA" Litigation?* 7 EMP. RIGHTS & POL'Y J. 159, 160–62 (2003); see also 29 U.S.C. § 218(a) (stating that "[n]o provision of [the FLSA] shall excuse noncompliance with any . . . State law"); but see *Sorensen v. CHT Corp.*, 2004 WL 442638 at *5–*7 (N.D. Ill. Mar. 10, 2004) (holding that plaintiffs' state-law unjust enrichment claim, which centered on allegations that defendant had misapplied FLSA tip credit regulations, was preempted because it was "based on the same factual assertions as their FLSA claims" and was therefore "merely duplicative").

20. See Finkel, *supra* note 19, at 161–62.

21. See *id.* at 180–82.

22. See, e.g., John Conyers Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 504–06 (2003) (arguing that classes are more likely to be certified under state-law analogues to Rule 23); cf. *infra* at note 72 to 91 and accompanying text (discussing removal of FLSA claims).

23. See 29 U.S.C. § 216(b); Finkel, *supra* note 19, at 181–82.

24. See *infra* notes 45 to 50 and accompanying text.

25. See, e.g., *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592, 598–604 (E.D. La. 2002) (denying FRCP 23 class certification in state-law claim alleging that that defendant forced employees to work off-the-clock); *Wal-Mart v. Lopez*, 93 S.W.3d 548, 554–62 (Tex. App. 2002) (reversing grant of class certification in similar Texas-law action); *Petty v. Wal-Mart Stores, Inc.*, 773 N.E.2d 576, 578–82 (Ohio Ct. App. 2002) (affirming denial of class certification in Ohio-law action), *not accepted for review*, 772 N.E.2d 1203 (Ohio 2002).

Furthermore, in order to ensure that potential FLSA opt-ins are aware of a pending claim and have an effective opportunity to opt in, section 216(b) courts are authorized under certain circumstances to facilitate the mailing of notices to potential plaintiffs at an early point in FLSA cases, well before the court makes a conclusive determination as to the propriety of a collective action.²⁶ Such early-stage, court-facilitated notice—typically unavailable in FRCP 23 actions—is a tremendous advantage for plaintiffs. For instance, it reduces their transaction costs. Assuming that persons subsequently opt in to the case, notice serves as a low-cost vehicle to identify persons who are likely to have case-related information and who are motivated to work with plaintiffs’ counsel as witnesses.²⁷ Notice also can create settlement pressure early in the action, before plaintiffs’ counsel expends significant resources, because it signals the potential expansion of the case and the need for significant and expensive classwide discovery.²⁸ Since some courts’ threshold for granting notice is low—some courts grant notice based on nothing more than the allegations contained in a well-pled complaint²⁹—notice may leverage significant settlements even in marginal cases.³⁰

Given these considerations, plaintiffs are increasingly attempting to combine FLSA claims and state-law wage claims in a single action.³¹ In such dual-filed wage actions, plaintiffs seek FRCP 23 certification of a state-law opt-out class *and* section 216(b) certification of a similarly defined FLSA opt-in class. Under this approach, application of FRCP 23 to the state claim serves as a vehicle to avoid the FLSA’s opt-in requirement, since all persons falling within the FRCP 23 class definition (which typically mirrors the potential-plaintiff pool in the section 216(b) claim) will be swept into the case if class certification is granted.³² At the same time, application of section 216(b) to the FLSA claim provides

26. See *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170–72 (1989).

27. See, e.g., *Zhao v. Benihana, Inc.*, 6 Wage & Hour Cas. 2d (BNA) 1881 (S.D.N.Y. May 7, 2001) (“I note that one of the policy reasons underlying early class notice is that ‘the experiences of other employees may well be probative of the existence *vel non*’ of an unlawful practice, ‘thereby affecting the merits of the plaintiff’s own claims.’”) (quoting *Frank v. Capital Cities Comms., Inc.*, 88 F.R.D. 674, 676 (S.D.N.Y. 1981)).

28. See *Strategies*, *supra* note 18.

29. See *infra* notes 60 to 62 and accompanying text.

30. Additionally, certification of a nationwide action may be easier to achieve under the FLSA than under state law. See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763, 765 (7th Cir. 2003) (denying nationwide class certification largely because “different rules of law govern different members of the class”); see also Finkel, *supra* note 19, at 180 (discussing this argument); Rory Ryan, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 501 (2002) (same); but see *In re Farmers Ins. Exch. Claims Representatives Overtime Pay Litig.*, 300 F. Supp. 2d 1020, 1027 (D. Or. 2003) (proceeding under the laws of several states per agreement of the parties).

31. See *Strategies*, *supra* note 18.

32. See *id.* (quoting a plaintiffs’ attorney calling an FRCP 23 class “‘a nice way to wrap around’ the opt-in process to get to the extra plaintiffs who fall through the cracks”).

something of a hedge against the possibility that FRCP 23 certification will be denied, and it preserves the possibility of early notice. Indeed, the settlement leverage that plaintiffs gain through section 216(b) notice dramatically increases if the possibility of a large FRCP 23 class is also looming.³³

Employers, however, have several procedural options for responding to plaintiffs' dual-filing strategy. In particular, if the case was filed in state court, the employer may remove it to federal court. In federal court, the employer may attack the court's jurisdiction over the state-law claim. Finally, the employer may argue that the existence of the plaintiffs' section 216(b) claim effectively precludes certification of an FRCP 23 class. Particularly because of this latter argument, defendants actually may be better positioned in dual-filed actions than they would be if plaintiffs elected to proceed solely under state law.

II. Overview of FRCP 23 and Section 216(b) Certification Procedures

Most courts hold that section 216(b) collective actions, like FRCP 23 class actions, may proceed only if the court "certifies" a proposed class.³⁴ The certification procedures under section 216(b) and FRCP 23, however, are quite different.

A. *FRCP 23 Certification*

FRCP 23 sets forth a two-pronged certification procedure.³⁵ Under this procedure, plaintiffs who are seeking class certification must first meet the FRCP 23(a) prerequisites, which include:

- (1) "Numerosity"—that the class is so numerous that joinder of all members of the class is impractical;
- (2) "Commonality"—that there are questions of law or fact common to the class;
- (3) "Typicality"—that the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) "Adequacy"—that the representative parties will fairly and adequately protect the interests of the class.³⁶

Next, plaintiffs must show that the putative class meets the requirements of FRCP 23(b)(1), (b)(2), or (b)(3).³⁷ In state-law wage ac-

33. *See id.*

34. *But see* *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 84, n.1 (S.D.N.Y. 2001) (holding that "neither the Federal Rules nor the FLSA requires that a motion for certification be made in a section 216(b) action").

35. Where class claims are pending in state courts, state civil procedural rules apply. Most states have class action rules similar to FRCP 23, although there are differences. *See, e.g.,* Ryan, *supra* note 30, at 469 n.3 (detailing state-law analogues to the FRCP 23).

36. *See* FED. R. CIV. P. 23(a).

37. *See* FED. R. CIV. P. 23(b).

tions, however, FRCP 23(b)(3) is typically the plaintiffs' only real option.³⁸ Here, plaintiffs must demonstrate "Predominance" (that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members") and "Superiority" (that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy").³⁹ Relevant considerations for the court include:

- (1) The interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (2) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (3) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (4) The difficulties likely to be encountered in the management of the class.⁴⁰

State-law wage plaintiffs have been met with varying levels of success in seeking FRCP 23(b)(3) certification. Although some recent courts found that state-law wage plaintiffs have met the requirements of FRCP 23(a) and 23(b)(3),⁴¹ others denied certification where (1) the individual claims of the class representatives failed on either procedural or substantive grounds;⁴² (2) the contours of the proposed class would

38. See Finkel, *supra* note 19, at 167–68. State-law wage claims are typically not certifiable under FRCP 23(b)(1) or (b)(2) because, among other things, they are claims for damages and rarely involve a limited fund. Rule 23(b)(1)(A) is unavailable in cases seeking compensatory damages. See, e.g., *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1542 (11th Cir. 1987) (citing cases); *Petrolito v. Arrow Fin. Servs., LLC*, — F.R.D. —, 2004 WL 515761 at *8 (D. Conn. Mar. 5, 2004). FRCP 23(b)(1)(B)'s application is typically limited to instances in which the defendant would be unable to satisfy multiple individual damage awards. See *Petrolito*, 2004 WL 515761 at *8. Likewise, FRCP 23(b)(2) "was never intended to cover cases . . . where the primary claim is for damages . . ." *Ansoumana*, 201 F.R.D. at 88 (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968)). In particular, courts have overwhelmingly rejected application of FRCP 23(b)(2) to state-law wage claims, even where plaintiffs have added requests for injunctive relief to their claims for back wages. See, e.g., *Vengurlekar v. Silverline Techs., Ltd.*, 220 F.R.D. 222, 227–28, 2003 WL 22801757 at *4 (S.D.N.Y. Nov. 23, 2003); *O'Brien v. Encotech Constr. Servs., Inc.*, 203 F.R.D. 346, 351 (N.D. Ill. 2001); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, 2000 WL 1774091 at *6 (N.D. Ill. Dec. 1, 2000); *Ansoumana*, 201 F.R.D. at 87; cf. *Bolanos v. Norwegian Cruise Lines, Ltd.*, 212 F.R.D. 144, 146–47 (S.D.N.Y. 2002) (rejecting Rule 23(b)(2) certification of overtime claim under the federal Seaman's Wage Act); *Saur v. Snappy Apple Farms*, 203 F.R.D. 281, 286 (W.D. Mich. 2001) (rejecting Rule 23(b)(2) certification of wage claim under the federal Migrant and Seasonal Agricultural Worker Protection Act).

39. FED. R. CIV. P. 23(b)(3).

40. See *id.*

41. See, e.g., *Ansoumana*, 201 F.R.D. at 81, 85–89.

42. See *Hammond v. Lowe's Home Ctrs., Inc.*, 2004 WL 957844 at *2–*3 (D. Kan. Mar. 17, 2004) (denying certification because the named plaintiffs' claims were pre-empted, holding that "[w]ithout individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class"); *Killian v. McCullough*, 873 F. Supp. 938, 945 (E.D. Pa. 1995) (holding that plain-

require the court to apply the substantive laws of several states to reach a final determination on the merits;⁴³ or (3) the court determined that plaintiffs' claims would require inherently individualized proof and were subject to inherently individualized defenses.⁴⁴

B. *Section 216(b) Certification*

Most courts hold that the certification standards in section 216(b) cases are less exacting than those in FRCP 23⁴⁵ actions in that section 216(b) plaintiffs need *not* demonstrate numerosity, commonality, typicality, adequacy of representation, predominance and superiority in order to obtain the right to proceed on a class basis.⁴⁶ Instead, section 216(b) certification generally centers on the question of whether named and opt-in plaintiffs are "similarly situated."⁴⁷ The Act itself does not define this term, however, and neither the Supreme Court nor the courts of appeals have provided much guidance.⁴⁸ Consequently,

tiffs failed to meet FRCP 23(b)(3)'s adequacy requirement, noting that "it is obvious, given our ruling on the summary judgment motion, that the named plaintiffs cannot adequately pursue the remedies that are available to the members of the putative class").

43. See *Vengurlekar*, 220 F.R.D. 232 (noting that "[c]ourts have refused to certify nationwide class actions where the substantive law of multiple states must be applied" and holding that, because different laws covered different class members in the present case, the "cohesiveness between plaintiffs and class members needed to justify class certification is glaringly absent") (internal quotes omitted); *Killean*, 873 F. Supp. at 945 (holding that named plaintiffs, who were not subject to Pennsylvania wage laws, were "decidedly different from those members of the class who were based in Pennsylvania").

44. See *Mike v. Safeco Ins. Co.*, 223 F.R.D. 50, 52–54, 2004 WL 1774833 at *3–*4 (D. Conn. Aug. 5, 2004) (holding that class action treatment was inappropriate because individualized inquiries would be necessary to determine class membership in state-law exemption case where the named plaintiff alleged that his actual duties varied from those listed on his job description but "failed to identify any basis, such as a . . . company policy carving out a subclass of non-exempt employees," for the court to identify other employees who were similarly situated to him); *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592, 596 (E.D. La. 2002) (denying certification of proposed class of up to 100,000 current and former Louisiana Wal-Mart employees in case alleging that the company forced employee to work off-the-clock and through rest and meal breaks, finding that the plaintiffs' claims would require individualized proof and be subject to individualized defenses); *Mateo v. M/S Kiso*, 805 F. Supp. 761, 774 (N.D. Cal. 1991) (holding that commonality did not exist in an admiralty case centering on allegedly unpaid wages, holding that "plaintiffs' wage and fraud claims arise from a complex course of conduct involving multiple defendants and a series of different alleged promises and misrepresentations").

45. For FRCP 23 certification standards, see *supra* notes 35 to 44 and accompanying text.

46. See, e.g., *Theissen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103–05 (10th Cir. 2001) (but noting that a minority of courts have applied either Rule 23 or "spurious" class action standards in section 216(b) cases).

47. 29 U.S.C. § 216(b) (1996).

48. See *Pfohl v. Farmers Ins. Group*, 2004 WL 554834 at *2 (C.D. Cal. Mar. 1, 2004) (noting that "the Ninth Circuit has not defined" the term "similarly situated"); *Mike v. Safeco Ins. Co.*, 274 F. Supp. 2d 216, 220 n. 6 (D. Conn. 2003) ("There is no decision by the Court of Appeals for the Second Circuit regarding the proper procedure for determining whether appropriate circumstances exist to allow a plaintiff to proceed [with] a [§ 216(b)] collective action."); *Goldman v. RadioShack Corp.*, 2003 WL 21250571 at *6 (E.D. Pa. Apr. 16, 2003) (noting the "absence of Third Circuit or Supreme Court guid-

although the issues involved are generally narrower, the law surrounding section 216(b) certification is currently less developed than the law relating to FRCP 23.

Left mostly to their own devices, district courts have developed different approaches for tackling “similarly situated” questions.⁴⁹ The majority approach applies a two-tiered methodology.⁵⁰ Here, courts make a preliminary determination of whether the plaintiffs are similarly situated early in the litigation when ruling upon plaintiffs’ request that the court facilitate notice of the action to potential opt-ins (the “preliminary certification” or “notice-stage” determination).⁵¹ Then, after discovery has been completed or at least sufficiently progressed, the court revisits the issue (making a “merits-stage” determination).⁵²

1. The Court’s Notice Stage Determination

The Supreme Court has held that district courts have discretion to issue notice of section 216(b) actions to potential plaintiffs but that this discretion may be exercised only “in appropriate cases.”⁵³ In determining whether notice should issue, a number of courts have looked to whether the named plaintiffs have made some rudimentary showing that others are likely to have similar claims, and, if so, whether these claims will be amenable to group adjudication. One articulation of this

ance”); *Champneys v. Ferguson Enters., Inc.*, 2003 WL 1562219 at *5 (S.D. Ind. Mar. 11, 2003) (noting that “[t]he Seventh Circuit has not specifically addressed the standard to be used in determining whether potential plaintiffs are similarly situated”); *Pritchard v. Dent Wizard Int’l Corp.*, 210 F.R.D. 591, 595 (S.D. Ohio 2002) (“The United States Court of Appeals for the Sixth Circuit has not addressed this issue.”) (internal citations and quotations omitted); *Bernard v. Household Int’l, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va. 2002) (noting that “the Fourth Circuit has not ruled on the matter”); *Kane v. Gage Merch. Servs., Inc.*, 138 F. Supp. 2d 212, 214 (D. Mass. 2001) (noting that “the First Circuit Court of Appeals has not yet addressed the issue”); *McNeil v. Dist. of Columbia*, 1999 WL 571004 at *2 (D.D.C. Aug. 5, 1999) (noting that the D.C. Circuit “has not addressed this precise issue”); *cf. Theissen*, 267 F.3d at 1101–05 (declining to choose among the various standards); *Hipp v. Liberty Nat’l Life Ins.*, 252 F.3d 1208, 1216–19 (11th Cir. 2001) (finding that “[n]othing in our circuit precedent . . . requires district courts to utilize [a particular] approach”); *Montoya v. Rescue Indus., Inc.*, 1999 WL 240247 at *1–*2 (10th Cir. Apr. 20, 1999) (reversing district court’s decertification of section 216(b) class in an exemption case, noting that plaintiffs had “submitted evidence supporting [their] allegations” that other employees had been compensated in a similar manner to the named plaintiffs but not detailing general procedures for analyzing “similarly situated” claims in FLSA actions); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213–16 (5th Cir. 1995) (finding it “unnecessary to decide which . . . of the competing methodologies should be employed in making [a section 216(b)] class certification decision”).

49. *See e.g., Theissen*, 267 F.3d at 1101–05 (detailing approaches, concluding “there is little difference” between them).

50. *See, e.g., Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 264 (D. Conn. 2002).

51. *See id.*

52. *See id.* at 264–65.

53. *Sperling v. Hoffman-La Roche Inc.*, 493 U.S. 165, 170 (1989); *see also Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265, 1270 (M.D. Ala. 2004) (holding that “[w]ithout such a requirement, it is doubtful that § 216(b) would further the interests of judicial economy, and it would undoubtedly present a ready opportunity for abuse”).

standard requires the named plaintiffs to make a preliminary showing that they and potential opt-ins were subject to the same basic FLSA violation—that is, that they were all “victims of a common policy or plan that violated the law.”⁵⁴ Some courts hold that this burden⁵⁵ may be satisfied solely on the basis of “substantial allegations” of a unifying element to the claims.⁵⁶ The majority position requires plaintiffs to put forth at least some factual evidence to support their notice request.⁵⁷

54. *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d 101, 104 (S.D.N.Y. 2003) (citing *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997)). Not all courts have agreed with this articulation. See *Davis v. Charon Pokphand (USA), Inc.*, 303 F. Supp. 2d 1272, 1278 (M.D. Ala. 2004) (providing a general overview of notice-stage approaches adopted by various courts). Courts within the Eleventh Circuit not only require the demonstration of a unifying element to the claims but also a showing that other persons actually (as opposed to potentially) desire to opt in. See *Davis*, 303 F. Supp. 2d at 1277 (rejecting notice where plaintiffs failed to make such a showing); *Mackenzie v. Kindred Hosps. East, L.L.C.*, 276 F. Supp. 2d 1211, 1220 (M.D. Fla. 2003) (same). Other courts have advocated a more wide-ranging, multifactor approach even at the notice stage. See, e.g., *Lawrence v. City of Philadelphia*, 2004 WL 945139 at *1 (E.D. Pa. Apr. 29, 2004) (considering whether (i) all plaintiffs worked in the same corporate department, division, and location; (ii) they all advanced similar claims; and (iii) they sought substantially the same form of relief); *Mielke v. Laidlaw Transit, Inc.*, 313 F. Supp. 2d 759, 760–65 (N.D. Ill. 2004) (considering whether (i) the plaintiffs share similar factual and legal employment settings, (ii) the various affirmative defenses available to the defendant would have to be applied on an individual basis, and (iii) there are fairness and procedural concerns); *Smith v. Tradesmen, Int'l, Inc.*, 289 F. Supp. 2d 1369, 1371 (S.D. Fla. 2003) (noting factors such as (i) whether class members held the same job title; (ii) whether they worked at the same location; (iii) whether the alleged FLSA violations occurred during the same time period; (iv) whether class members were subjected to the same policies and practices; (v) whether common policies and practices were implemented in the same manner by the same decision maker; and (vi) the extent to which the claimed violations are similar). On the other hand, some courts have suggested that even in the absence of a common policy or plan uniting the claims in the case, notice and conditional certification can be granted “when it will promote judicial economy.” *Mielke*, 313 F. Supp. 2d at 763 (citing *Marsh v. Butler County Sch. Sys.*, 242 F. Supp. 2d 1086, 1092 (M.D. Ala. 2003)).

55. See, e.g., *Holt*, 333 F. Supp. 2d at 1270 (holding that the “plaintiff bears the burden” on a motion for court-facilitated notice); *Morisky v. Public Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 496 (D.N.J. 2000) (holding that “Plaintiffs bear the burden of showing that they are similarly situated to the remainder of the proposed class”).

56. See, e.g., *Goldman*, 2003 WL 21250571 at *7 (granting notice and holding that the court would only consider “whether the plaintiff and the proposed representative class members allegedly suffered from the same scheme” in a case alleging that employees had been misclassified as exempt; refusing to “delve into a fact-specific similarly situated inquiry” as to whether the named plaintiff’s job duties differed from others who held the same job title); *Jarivase v. Rand Corp.*, 212 F.R.D. 1, 4–5 (D.D.C. 2002) (holding that plaintiffs were “entitled to pursue their . . . claim as a collective action under § 216(b)” because “plaintiffs have limited the description of the employees that they seek to represent such that the collective action involves only similarly situated employees”); *Felix de Asencio v. Tyson Foods, Inc.*, 130 F. Supp. 2d 660, 662 (E.D. Pa. 2001) (holding that notice-stage courts require “nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan” and granting notice on the basis of complaint allegations and “broad averments” in named plaintiffs’ declarations), *rev'd on other grounds*, 342 F.3d 301 (3d Cir. 2003).

57. See *Smith v. Severign Bancorp, Inc.*, 2003 WL 22701017 at *2–*3 (E.D. Pa. Nov. 13, 2003) (finding the allegations-only standard “render[ed] preliminary certification automatic, as long as the Complaint contains the magic words ‘Other employees similarly

Courts applying the majority position, however, have varied as to the precise scope of the plaintiffs' burden. Some of these courts have granted court-facilitated notice either on the basis of affidavits demonstrating personal knowledge that the employer's allegedly impermissible policy applied to opt-ins or some admission from the employer that the challenged policy existed and affected multiple employees.⁵⁸ Further, some courts have been reluctant to permit an inquiry into the merits of the case at the notice stage, even when the plaintiffs' evidence appears lacking.⁵⁹

Other courts hold that this "lenient" approach applies only if plaintiffs file a motion for court-supervised notice "at early stages in the litigation," before they have "had time to conduct discovery and marshal evidence."⁶⁰ Such courts have held that where a plaintiff files a

situated" and concluding that it represented "an inefficient and overbroad application of the opt-in system, and at worst it places a substantial and expensive burden on a defendant to provide the names and addresses of thousands of employees who would clearly be established as outside the class if the plaintiff were to conduct even minimal class-related discovery"); *see also* *Flores v. Lifeway Foods, Inc.*, 9 Wage & Hour Cas. 2d (BNA) 148 (N.D. Ill. Oct. 30, 2003) (requiring a "modest factual showing"); *Gjurovich*, 282 F. Supp. 2d at 104 (requiring "a modest factual showing"); *Horne v. United Servs. Auto. Ass'n*, 279 F. Supp. 2d 1231 (M.D. Ala. 2003) (requiring "some rudimentary showing of commonality"); *Bernard v. Household Int'l, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va. 2002) (requiring "some factual evidence"); *Sheffield v. Orius Corp.*, 211 F.R.D. 411 (D. Or. 2002) (requiring "sufficient evidence to establish that the putative class members were affected by a uniform plan or scheme"); *Briggs v. United States*, 54 Fed. Cl. 205 (2002) (requiring a modest factual showing).

58. *See, e.g., Gjurovich*, 282 F. Supp. 2d at 104 (granting notice to all management employees, relying on named plaintiff's affidavit, which "identified by name a number of other current or former . . . employees who held the same or similar positions as Plaintiff . . . and who may not have received overtime compensation"); *Downer v. Franklin County*, 2003 WL 22319418 at *1-*2 (N.D.N.Y. July 31, 2003) (granting notice on the basis of complaint allegations and defendant's admission that its practices were "mandated by the agencies of the State of New York"); *Taillon v. Kohler Rental Power, Inc.*, 2003 WL 2006593 at *2-*3 (N.D. Ill. Apr. 29, 2003) (granting companywide notice to all Project Manager IIs in a case alleging that these employees had been misclassified as exempt where "[p]laintiff has adequately alleged and Defendant has conceded that Defendant has a common plan of not paying overtime wages to Project Manager IIs"); *Kane v. Gage Merch. Servs., Inc.*, 138 F. Supp. 2d 212, 213-15 (D. Mass. 2001) (granting notice to defendant's crew coordinators, who had allegedly been misclassified as exempt, where plaintiff alleged that a manager informed him that the defendant did not pay these employees overtime and defendant submitted a manager's affidavit containing a similar admission).

59. *See, e.g., Perez v. RadioShack Corp.*, 2003 WL 21372467 (N.D. Ill. June 13, 2003) (granting notice but expressing serious doubts that plaintiffs could succeed "on a completely developed record"); *Gjurovich*, 282 F. Supp. 2d at 105 (holding, in an exemption case, that whether plaintiff's position was actually exempt "is not an issue when deciding whether to authorize notice in an FLSA action").

60. *Davis v. Charoen Pokphand (USA), Inc.*, 303 F. Supp. 2d 1272, 1277 (M.D. Ala. 2004) (holding that the rationale for the "lenient" standard "disappears . . . once plaintiffs have had an opportunity to conduct discovery with respect to defendant's policies and procedures"); *but compare* *Harrington v. Educ. Mgmt. Corp.*, 2002 WL 1009463 at *3 (S.D.N.Y. May 17, 2002) ("While the defendants argue that additional discovery may be useful prior to a determination of whether to grant an opt-in notice, courts have held otherwise."), *and Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 262 (S.D.N.Y. 1997) ("Nor

motion for court-facilitated notice following a period of certification-related discovery, the reviewing court should apply a “more rigorous review” to the motion and should consider the similarly situated question in light of all evidence gathered by the parties to date.⁶¹ Moreover, such courts have held that an inquiry into the merits of the case is appropriate at the notice stage, at least to the extent necessary to determine whether the case will turn on common inquiries or individualized determinations.⁶²

In all events, defendants in a number of recent cases have either defeated preliminary certification altogether or at least limited the scope of the named plaintiffs’ proposed notice. Successful defendants argued, in appropriate settings, that (1) plaintiffs produced no factual evidence in support of certification;⁶³ (2) plaintiffs failed to articulate specific policies or practices allegedly unifying their claims and the claims of potential opt-ins;⁶⁴ (3) plaintiffs failed to present evidence

must this court wait for defendant to complete its discovery before authorizing class notice.”), *with* *Smith v. Tradesmen Int’l, Inc.*, 289 F. Supp. 2d 1369, 1371 (S.D. Fla. 2003) (finding that “an insufficient amount of discovery has taken place to enable it to make an informed decision on the issue of whether similarly situated employees exist”).

61. *See, e.g., Davis*, 303 F. Supp. 2d at 1276 (applying “a more rigorous standard”); *White v. Osmose, Inc.*, 204 F. Supp. 2d 1309, 1313 n.2 (M.D. Ala. 2002) (holding that it would “carefully consider the submissions of the parties with respect to the class allegations, rather than merely relying on the handful of affidavits that support [plaintiff’s] position”); *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 497–98 (D.N.J. 2000) (applying “a stricter standard”).

62. *See, e.g., Holt*, 333 F. Supp. 2d at 1274 (denying notice in an exemption case, holding that while the court would not “weigh[] evidence” at the notice stage, it would examine whether plaintiffs’ claim “would ultimately turn on evidence related to day-to-day tasks”); *Mike v. Safeco Ins. Co.*, 274 F. Supp. 2d 216, 220 (D. Conn. 2003) (holding that a plaintiff seeking notice must demonstrate “that questions common to a potential group of plaintiffs would predominate determination of the merits in the case”).

63. *See Smith*, 2003 WL 22701017 at *1–*3 (denying without prejudice plaintiff’s motion for notice due to complete lack of evidence, but noting the “extremely lenient standard” applied for notice-stage certification and inviting plaintiff to refile their motion later in the discovery process); *Flores*, 9 Wage & Hour Cas. 2d (BNA) at 148 (rejecting plaintiffs request that the court send notice to “all persons employed [by defendant] on an hourly basis within the last three years” stating that “[i]t is the opinion of the Court that a demonstration of [defendant’s] payment practice concerning two out of fifty employees (four percent of Defendant’s workforce) does not rise to the level of a common policy or plan by [defendant] that violated the FLSA.”).

64. *See, e.g., Pfohl v. Farmers Ins. Group*, 2004 WL 554834 at *9 (C.D. Cal. Mar. 1, 2004) (rejecting attempt to certify class based upon vague allegation that defendant’s “plan” was to not pay overtime to a diverse group of employees); *Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 944–46 (W.D. Ark. 2003) (denying plaintiff’s request to send nationwide notice of the action to all salaried Wal-Mart employees below the officer level in a case alleging that Wal-Mart had misclassified salaried employees as exempt, rejecting plaintiff’s contention that all such employees were similarly situated “simply because they claim violations of the law against the same employer”); *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 412–14 (D. Or. 2002) (denying notice to all present and former employees in a case where plaintiffs alleged that “defendant exercised a policy and practice of failing to pay overtime and compensating workers at rates below the federal minimum wage,” holding that “[p]utative class members must share more than a common allegation that they were denied overtime pay or paid below the minimum wage”); *Briggs*

showing that the alleged policies or practices at issue applied to potential opt-ins;⁶⁵ (4) the claims at issue in the litigation would require inherently individualized factual inquiries for their ultimate resolution,⁶⁶ or (5) notice simply was not necessary.⁶⁷

v. United States, 54 Fed. Cl. 205, 207 (2002) (rejecting notice to a nationwide class of Bureau employees, holding that plaintiffs had “identified no evidence of a common plan or scheme that led to the denial of overtime payments”); *Ray v. Motel 6 Operating, Ltd. P’ship*, 1996 WL 938231 (D. Minn. March 18, 1996) (rejecting notice to nationwide class of assistant managers, noting the “countless differences between the [putative] plaintiffs” and concluding that “if an illegal scheme exists at all, it is implemented on a decentralized level”).

65. See, e.g., *Pfohl*, 2004 WL 554834 at *8–*9 (rejecting notice in an exemption case where, among other things, defendant produced evidence that members of the proposed class performed varying job duties and plaintiff “offered no details of what the individuals in the putative collective action actually did on the job”); *Levinson v. Primedia, Inc.*, 2003 WL 22533428 at *1 (S.D.N.Y. Nov. 6, 2003) (rejecting notice, concluding that named plaintiffs failed to support their request “with a factual showing that extended beyond their own circumstances”); *Horne v. United Servs. Auto. Ass’n*, 279 F. Supp. 2d 1231, 1235–36 (E.D. Va. 2002) (rejecting notice after finding that plaintiff failed to present evidence that anyone other than his manager—who supervised only plaintiff—engaged in the allegedly impermissible policy at issue); *Bernard v. Household Int’l, Inc.*, 231 F. Supp. 2d 433, 436 (E.D. Va. 2002) (limiting consideration to certain employees in Virginia because plaintiffs presented no “first-hand knowledge” that the “problems alleged . . . exist” at locations outside of that state); *Clark v. Dollar General Corp.*, 2001 WL 878887 at *4 (M.D. Tenn. May 23, 2001) (limiting notice to certain company districts, holding that evidence relating to violations in seven of the company’s 4,800 stores would not support nationwide notice); *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516 (D. Md. 2000) (limiting notice to hourly employees at one of defendant’s facilities, noting that notwithstanding evidence of corporate policies allegedly contributing to off-the-clock work, plaintiffs submitted no evidence that management was aware of any off-the-clock work outside of the facility at which named plaintiffs worked); *H&R Block, Ltd. v. Housden*, 186 F.R.D. 399, 400 (E.D. Tex. 1999) (rejecting notice request where named plaintiffs’ affidavits contained only “unsupported factual assertions” indicating that “they believe other workers were discriminated against in similar ways”); *Baum v. Shoney’s, Inc.*, 5 Wage & Hour Cas. 2d (BNA) 127 (M.D. Fla. 1998) (rejecting request for companywide notice because plaintiffs provided “no evidence, other than general statements within their own affidavits, that FLSA violations have occurred to employees at restaurants outside Orange County”).

66. See, e.g., *Basco v. Wal-Mart Stores, Inc.*, 2004 WL 1497709 at *6–*7 (E.D. La. July 2, 2004) (rejecting plaintiff’s contention that “a corporate policy to keep employee wage costs low” justified “the creation of a class of all Wal-Mart employees that have not been properly paid overtime in the last three years” where it was “obvious” that “this ‘policy’ and its effects are neither homogeneous nor lend themselves to collective inquiry”); *Lawrence v. City of Philadelphia*, 2004 WL 945139 at *2 (E.D. Pa. Apr. 29, 2004) (dismissing plaintiffs’ off-the-clock claims, holding that “[t]he circumstances of those individual claims potentially vary too widely to conclude that . . . the Plaintiffs are similarly situated”); *Mike*, 274 F. Supp. 2d at 219–21 (denying notice in case alleging that insurance adjusters had been misclassified as exempt, each plaintiff would need to “present specific evidence of his or her daily tasks” since plaintiff argued that while the relevant job descriptions called for the performance of exempt and nonexempt duties, in practice, his primary duty was nonexempt work); *Clausman v. Nortel Networks, Inc.*, 2003 WL 2134065 at *4 (S.D. Ind. May 1, 2003) (denying notice in case challenging employer’s application of the Act’s outside sales exemption, holding that resolution of plaintiffs’ claim would require the court to “make a fact-intensive inquiry into each potential plaintiff’s employment situation”).

67. See, e.g., *Mackenzie v. Kindred Hosps. East, L.L.C.*, 276 F. Supp. 2d 1211, 1220 (M.D. Fla. 2003) (denying notice where plaintiff “failed to present evidence of any individual’s interest in joining this lawsuit”); *Bernard*, 231 F. Supp. 2d at 435–36 (denying

2. The Court's Merits-Stage Determination

Relatively few courts have made post-notice stage determinations under section 216(b). Among those courts, a number have held that merits-stage inquiries occur around the time discovery closes and that they are “precipitated by a motion for ‘decertification’ by the defendant.”⁶⁸ Courts typically apply a higher standard of proof at the merits stage than at the notice stage, making a “factual finding on the ‘similarly situated’ issue, based on the record produced through discovery.”⁶⁹

Although plaintiffs must put forth significant evidence of a common policy or other factor allegedly uniting the claims of the proposed class at the merits stage, courts also tend to consider additional factors. *Moss v. Crawford & Co.* is typical in its consideration of “(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [the] defendant which appear to be individual to each plaintiff; and (3) fairness and procedural considerations.”⁷⁰

For most courts, the bottom line is whether resolution of plaintiffs’ claims will require a plaintiff-by-plaintiff analysis, or whether the claims may be resolved with common evidence. Here, courts have reached differing conclusions.⁷¹

notice to potential opt-ins where “defendants [had] already provided names and addresses” of such individuals and “[p]laintiffs have had ample opportunity to reach the[m]”); *Watts v. Marion County*, 1995 WL 264189 at *1 (D. Or. May 1, 1995) (exercising court’s discretion not to “intervene” in the notice process, concluding that plaintiff “brought forth no problems in reaching potential class members”); *Roman v. Korson*, 152 F.R.D. 101, 111–12 (E.D. Mich. 1993) (concluding that the court would not “waste its time” on notice since the claims of potential opt-ins appeared patently time-barred).

68. *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 264 (D. Conn. 2002) (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995)).

69. *Id.*

70. *Moss v. Crawford & Co.*, 201 F.R.D. 398, 409–10 (W.D. Pa. 2000); *see also Pfohl*, 2004 WL 554834 at *2 (listing similar merits-stage considerations); *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 627 (D. Col. 2002) (similar); *cf. Scott*, 210 F.R.D. at 264–66 (centering largely on defendant’s contention that the nature of plaintiffs’ claims would require inherently individualized proof but not specifically articulating factors).

71. *Compare Basco*, 2004 WL 1497709 at *6–*7 (finding certification unwarranted under second-stage standards where the court determined that managers reacted differently to the alleged policy at issue and “Wal-Mart’s potential defenses to any alleged FLSA overtime violations require highly individualized evidence”); *and Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F. Supp. 2d 493, 498–99 (D.N.J. 2000) (applying second-stage standards and refusing to certify class consisting of employees with “different jobs and different job responsibilities who believe that they have been improperly classified as exempt and denied overtime wages,” holding that “the scope of the class is dependent upon the heart of this case—which employees are properly classified as exempt” and that “litigating this case as a collective action would be anything but efficient” because “the exempt status of potentially hundreds of employees would need to be determined on a job-by-job, or more likely, an employee-by-employee basis”); *and Reeves v. Alliant Techsystems, Inc.*, 77 F. Supp. 2d 242, 246–50 (D.R.I. 1999) (applying second-stage certification standards following a bench trial in a case alleging that plaintiffs’ exempt status was lost due to employer’s policy of making disciplinary salary deductions, dismissing all opt-ins who did not work at named plaintiffs’ location and under named plaintiffs’ su-

III. Procedural Responses to Dual Federal and State Wage Claims

As previously noted, employers have at least three procedural options for responding to dual-filed wage claims that, in general, would not be available had the plaintiffs elected to proceed solely under state law. These opt-ins include (1) removal of the action (assuming that it was filed in state court); (2) attacking the federal court's supplemental jurisdiction over the state claims; and (3) using the existence of the FLSA claim to formulate an attack on FRCP 23 certification of the state claim.

A. Removal

Conventional wisdom suggests that where removal of a state-filed claim is an option, defendants prefer federal court.⁷² In this regard, some commentators have suggested that defendants are more likely to avoid class certification in federal court than they are in state court.⁷³ Whatever the merits of this position, removal of state-law-only wage claims often is not possible.⁷⁴ The situation changes, however, where

pervisors where the court found that the disciplinary practice at issue was unique to named plaintiffs' supervisors); *and* *Bayles v. Am. Med. Response of Colorado, Inc.*, 950 F. Supp. 1053, 1066–67 (D. Col. 1996) (applying second-stage standards and refusing to certify class, finding that “this case is fraught with questions requiring distinct proof as to individual plaintiffs”); *with* *Bradford v. Bed Bath & Beyond*, 184 F. Supp. 2d 1342, 1346–51 (N.D. Ga. 2002) (rejecting the defendant's motion to decertify companywide class of “department managers” in a misclassification case where the evidence demonstrated that “[p]laintiff's job duties, while not identical, were very similar” and where there was little indication of store-to-store variation; the court rejected defendant's contention that exemption issues posed administrative difficulties for the case “[s]ince the Court has determined that Plaintiffs' job duties were substantially similar”; the court noted that, in any event, to the extent that differences in job duties existed among types of department managers, the court could create subclasses); *and* *Scott*, 210 F.R.D. at 264–66 (rejecting contention that fact-specific nature of the FLSA's exemption analysis required decertification where the court concluded that “plaintiffs have established that their claims may be supported by generalized proof” since the record “suggests that the actual job duties of the plaintiffs are quite similar”); *and* *Moss*, 201 F.R.D. at 410–11 (rejecting decertification motion in an exemption case, noting that although several groups of employees were proceeding together in a single action, the evidence demonstrated that within each group, job duties did not substantially differ).

72. “Generally, he who occupies the field of battle first and awaits his enemy is at ease; he who comes later to the scene and rushes into the fight is weary. . . . And therefore those skilled in war bring the enemy to the field of battle and are not brought there by him.” SUN TZU, *THE ART OF WAR* 96 (Samuel B. Griffith trans. 1963).

73. See Conyers, *supra* note 22 at 504–06.

74. Such claims can sometimes be removed on diversity grounds. In actions with an “amount in controversy” exceeding \$75,000, federal law provides that removal is permitted if the matter “is between . . . citizens of different states.” See 28 U.S.C. §§ 1332(a) (2005), 1441 (2005). Here, however, courts look to the citizenship of all defendants and all named plaintiffs, see 13B WRIGHT, MILLER & COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3606 (2d ed. 2004), and, in considering the amount in controversy, generally require that at least one named plaintiff's claim individually exceed \$75,000, see 7A WRIGHT, MILLER & KANE, *FEDERAL PRACTICE & PROCEDURE* 2d § 1756 (2004). These can be significant hurdles in multiplaintiff wage cases, where at least some plaintiffs are

plaintiffs add a section 216(b) claim to a putative state-law class action.⁷⁵

In 2003, the Supreme Court confirmed that FLSA claims are removable. Prior to the Supreme Court's 2003 decision in *Breuer v. Jim's Concrete of Brevard, Inc.*,⁷⁶ there was a split among the courts of appeals as to whether the language of section 216(b) barred removal. The federal removal statute⁷⁷ provides that any federal claim brought in state court can be removed unless "otherwise expressly provided by Act of Congress."⁷⁸ In a 1947 decision, *Johnson v. Butler Bros.*,⁷⁹ the Eighth Circuit concluded that section 216(b) contains such an express prohibition. Specifically, *Johnson* determined that section 216(b)'s rule that FLSA actions "may be maintained against any employer . . . in any Federal or State court" conferred an untrammelled right on employees to determine the appropriate forum for a claim under the Act.⁸⁰

In 1996, the First Circuit's *Cosme Nieves v. Deshler* decision disagreed, concluding that section 216(b)'s "may be maintained" provision was not "an express provision barring the exercise of the right of removal."⁸¹ In June 2002, the Eleventh Circuit's *Breuer* decision⁸² followed *Cosme Nieves*, and, on appeal, the Supreme Court agreed with the Eleventh Circuit's ruling. The Supreme Court stated that "[n]othing on the face of 29 U.S.C. § 216(b) looks like an express prohibition of removal, there being no mention of removal, let alone of prohibition."⁸³ At most, the Court found, section 216(b)'s language is ambiguous and therefore insufficient to prevent removal under section 1441(a).⁸⁴ The Court underscored its point by listing several "examples of indisputable prohibitions of removal in a number of other statutes," all of which used clear and unmistakable language not found in section 216(b).⁸⁵

At minimum, then, a defendant has the option of removing the FLSA component of a dual-filed wage claim. Whether the entire action

often residents of the same state as the employer and plaintiffs' individual claims can be relatively small. But for some class-action cases where the aggregate amount in controversy exceeds \$5,000,000, the recently enacted Class Action Fairness Act of 2005 will expand removability. This act provides—subject to certain exceptions—that federal courts may exercise jurisdiction over such state-law class action suits if any class member is a citizen of a state different from that of any defendant.

75. Plaintiffs may, of course, attempt to file a dual wage action in federal court, making the removal issue moot.

76. 58 U.S. 691, 699 (2003).

77. See 28 U.S.C. § 1441(a).

78. See 28 U.S.C. § 1331 (providing federal question jurisdiction over claims "arising under the Constitution, laws or treaties of the United States").

79. 162 F.2d 87 (8th Cir. 1947).

80. See *id.* at 89–90.

81. 786 F.2d 445, 451 (1st Cir. 1986).

82. *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002).

83. *Breuer*, 538 U.S. at 694–95.

84. *Id.* at 695–96.

85. *Id.*

may be removed is a more open question. The supplemental jurisdiction doctrine provides that where a claim is properly before a federal court, the court also may decide “all other claims that are so related to claims . . . within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”⁸⁶ Nevertheless, as discussed in more detail below, one recent case⁸⁷ has held that in dual-filed wage cases, a court’s supplemental jurisdiction extends only to plaintiffs who have opted in to the FLSA claim, and others have declined altogether to exercise jurisdiction over the state-law claims.⁸⁸ A court applying these rationales could accept jurisdiction over the FLSA claim (as it must) but decline jurisdiction over the state-law claim.⁸⁹ Further—and even where a court accepts jurisdiction over an entire dual-filed action—plaintiffs who strongly prefer state court could seek to drop their state-law claims from the removed action and refile them in state court.⁹⁰ Thus, in considering whether or not removal of a dual-filed wage claim is advisable, a defendant should at least consider the risk that removal may lead to two-forum litigation.

Similarly, a plaintiff who is intent on litigating *only* in state court may attempt to avoid removal by dropping the *FLSA* claim. To the extent that the existence of the FLSA claim provides a compelling argument against certification of the state-law class,⁹¹ being relegated to state court, facing solely a putative FRCP 23 class action could actually be the worst-case scenario for defendants. Defendants should also consider this risk in deciding whether to attempt removal of a dual-filed wage claim.

B. *Jurisdictional Attacks on the State Claim*

Once in federal court—either because plaintiff originally filed suit there or following removal—some defendants who face dual-filed wage actions have sought to sever the FLSA component from the state law component by challenging the court’s jurisdiction over the state claim.⁹² Defendants attempt to do so in two ways: (1) attack the court’s ability to exercise jurisdiction over individuals who do not opt in to the FLSA claim and (2) appeal to the court’s discretion not to exercise supplemental jurisdiction.

86. 28 U.S.C. § 1367(a); *see also* *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (holding that where a claim shares a “common nucleus of operative fact” with a claim over which a court has original jurisdiction, the court may exercise jurisdiction).

87. *See Bartelston v. Winnebago Indus., Inc.*, 219 F.R.D. 629, 636–38 (N.D. Iowa 2003) (discussed *infra* at notes 93 to 97 and accompanying text).

88. *See infra* notes 92 to 116 and accompanying text.

89. *See Bartelston*, 219 F.D.R. at 637 n.4.

90. *See id.*

91. *See infra* notes 117 to 132 and accompanying text.

92. “When he is united, divide him.” SUN TZU, *supra* note 72, at 69.

1. Federal Jurisdiction over Absent Class Members

*Bartelston v. Winnebago Indus., Inc.*⁹³ recently took the position that, in dual-filed wage claims, a federal court may exercise supplemental jurisdiction over the state-law wage claim only with regard to members of the putative state class who opt in to the FLSA claim. The *Bartelston* plaintiffs originally asserted only an FLSA collective action. Following the issuance of notice to approximately 500 potential plaintiffs, twenty opted in. Evidently not satisfied with this low participation rate, plaintiffs sought to amend the complaint to add a state-law wage class action claim. A magistrate permitted the amendment, but the district court reversed in part. Specifically, the court concluded that:

[T]his case involves a state-law class action claim, which can be in federal court only on the basis of supplemental jurisdiction. . . . As [8th Circuit precedent] makes clear, the claims of the individual members of a permissive class are distinct cases and controversies; each must separately support federal jurisdiction. Thus, only state claim class members who have also asserted a federal claim are properly in federal court. Here, that limitation on supplemental jurisdiction means that only [state-law] class members who have also asserted a FLSA claim in this action are properly in federal court; supplemental jurisdiction cannot extend to [state-law] class members who have no FLSA claim. Therefore . . . leave to amend to assert [a state-law] class claim can be granted only to the twenty-one plaintiffs already asserting FLSA claims, because the court's supplemental jurisdiction extends no further.⁹⁴

Bartelston thus may provide defendants with an option for potentially limiting the size of a state-law class in a dual-filed wage case.⁹⁵

Again, however, a *Bartelston*-type argument also creates the risk of “two separate lawsuits, one in federal court and one in state court on essentially the same question.”⁹⁶ Indeed, the *Bartelston* court detailed several possible plaintiff responses to its decision, including (1) acceptance (*i.e.*, letting the case proceed in federal court solely with respect to those who had opted in); (2) named plaintiffs’ refile of the state claims in state court; and (3) plaintiffs’ attorney finding new named plaintiffs to refile the state claims.⁹⁷ Defendants must, once again, assess this risk in determining whether it is worth it to make a *Bartelston*-type jurisdictional argument.

93. 219 F.R.D. 629 (N.D. Iowa 2003).

94. *Id.* (internal citations and quotations omitted); *see also* Fielder v. Credit Acceptance Corp., 188 F.3d 1031, 1033, 1036–37 (8th Cir. 1999).

95. *See also* Lindsay v. Gov’t Employees Ins. Co., — F. Supp. 2d —, 2004 WL 3093817 at *2 (D.D.C. Dec. 23, 2004) (“This Court agrees with those courts that have declined to extend jurisdiction to an opt-out state law class where federal jurisdiction stems only from an opt-in FLSA claim.”).

96. *Bartelston*, 219 F.R.D. at 637 n.4.

97. *See id.*

2. Court's Discretion in Exercising Supplemental Jurisdiction

A federal court's exercise of supplemental jurisdiction is not mandatory. Federal law spells out several circumstances in which it is appropriate for a court to decline supplemental jurisdiction, including:

- (1) Where the state claim raises a novel or complex issue of state law;
- (2) Where the state claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
- (3) Where the district court has dismissed all claims over which it has original jurisdiction; or
- (4) Where there are exceptional circumstances or other compelling reasons for declining jurisdiction.⁹⁸

Increasingly, federal courts in dual-filed wage actions appear receptive to arguments that they should decline supplemental jurisdiction over the case's state-law claim because it "substantially predominates" over the section 216(b) claim that creates the court's original jurisdiction.⁹⁹

For instance, in *De Asencio v. Tyson Foods, Inc.*,¹⁰⁰ plaintiffs sought to proceed under both the FLSA and state law, alleging that the defendant improperly failed to compensate them for certain pre- and post-shift activities. Following conditional certification and notice to putative opt-ins under section 216(b), approximately 500 out of 3,400 prospective class members opted in to the FLSA claim. After the opt-in period closed, plaintiffs sought to certify a 4,100-person FRCP 23 opt-out class on their state-law claims.¹⁰¹ The district court held that it was appropriate to exercise supplemental jurisdiction over such a class, but the Third Circuit reversed and remanded.¹⁰²

In doing so, the Third Circuit first concluded that the state claims, unlike the FLSA claim, would require proof of an "implied contract between Tyson and its employees."¹⁰³ Therefore, the state claim would require substantial "additional testimony and proof . . . beyond that required for the FLSA action."¹⁰⁴ Second, the Third Circuit found that the disparity in the size of the two classes, in and of itself, "may constitute substantial predomination by the state . . . action."¹⁰⁵ Finally, the Third Circuit noted that the state claim involved "novel and com-

98. See 28 U.S.C. § 1367(c)(1)–(4).

99. See generally Finkel, *supra* note 19, at 177–79.

100. 342 F.3d 301 (3d Cir. 2003).

101. See *id.* at 304–05.

102. See *id.* at 313.

103. *Id.* at 309.

104. *Id.* at 310.

105. *Id.*

plex issues of state law” not present in the federal action.¹⁰⁶ Under these circumstances, exercising supplemental jurisdiction would render the FLSA claim little more than “an appendage to the state action,” and therefore the court concluded that supplemental jurisdiction was inappropriate.¹⁰⁷

Underlying *De Asencio* was the court’s recognition of “Congress’s express preference for [FLSA] opt-in actions” and fears that plaintiffs were seeking to permit a “federal tail . . . to wag what is in substance a state dog.”¹⁰⁸ Echoing this theme, recent district court decisions have reached similar results even where differences between the FLSA and substantive state wage laws were less of a concern.¹⁰⁹ For instance, in *Jackson v. City of San Antonio*,¹¹⁰ plaintiffs alleged that the defendant had failed to pay them overtime in violation of the FLSA and a similar Texas statute. Upon plaintiffs’ motion, the court granted conditional certification under section 216(b), but it declined to exercise jurisdiction over the Texas state-law claim.¹¹¹ The court held that “the propriety of [its] jurisdiction over the pendent plaintiffs who did not opt-out of the state claim but failed to opt-in to the FLSA claim is murky In addition, the simultaneous management of the two [classes would be] unwieldy”¹¹² Further, the court noted the fact that certifying a FRCP 23 class would cause the number of plaintiffs in the matter to jump from an expected few hundred to several thousand. “This reality would flaunt the Congressional intention that FLSA claims proceed as an opt-in scheme. The Court finds that this fact alone favors remand of the state claims.”¹¹³

Other decisions have reached conclusions similar to *Jackson*.¹¹⁴ Again, however, dismissals under *De Asencio*, *Jackson*, and other cases

106. *Id.* at 311.

107. *Id.*

108. *Id.* at 310–11.

109. *But see* *Chaves v. IBP, Inc.*, 2002 WL 31662302 at *1–*2 (E.D. Wash. Oct. 28, 2002); *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81, 94–96 (S.D.N.Y. 2001); *Brzychnalski v. Unesco, Inc.*, 35 F. Supp. 2d 351, 353–54 (S.D.N.Y. 1999); *see also* *Belbis v. County of Cook*, 2002 WL 31600048 (N.D. Ill. Nov. 18, 2002) (granting certification without addressing jurisdictional issues); *Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281 (W.D. Mich. 2001) (similar result in case involving FLSA claim and federal Migrant and Seasonal Agricultural Worker Protection Act Claim); *Ramirez v. NutraSweet Co.*, 1996 WL 529413 (N.D. Ill. Sept. 11, 1996) (similar to *Belbis*).

110. 220 F.R.D. 55 (W.D. Tex. Dec. 3, 2003).

111. *Id.* at 60.

112. *Id.* at 59.

113. *Id.* at 60.

114. *See* *McClain v. Leona’s Pizzeria, Inc.*, 222 F.R.D. 574, 577–78 (N.D. Ill. 2004) (“[W]hile Section 1367(a) allows parties to join their state claims to federal claims where appropriate, it does not contemplate a plaintiff using supplemental jurisdiction as a rake to drag as many members as possible into what would otherwise be a federal collective action.”); *Harper v. Yale Int’l Ins. Agency, Inc.*, 2004 WL 1080193 at *4–*6 (N.D. Ill. May 12, 2004) (decertifying state-law class filed in federal court and declining to exercise supplemental jurisdiction over the claims; holding that plaintiffs had “arguably sub-

are not on the merits, leaving plaintiffs free to refile their state claims in state court.¹¹⁵ As such, even where they are likely to succeed, *De Asencio*—type supplemental jurisdiction arguments are subject to the same multiforum litigation concerns noted above.¹¹⁶

C. Section 216(b) as Precluding FRCP 23 Certification

A third procedural counter to dual-filed wage actions uses plaintiffs' section 216(b) claim in an attempt to defeat FRCP 23 certification of the state-law claims.¹¹⁷ Specifically, this approach contends that the availability of section 216(b)'s opt-in procedures—and, where appropriate, the relatively low number of persons who actually opted in to plaintiffs' FLSA claim—preclude a finding of numerosity under FRCP 23(a)(1)¹¹⁸ or superiority under FRCP 23(b)(3)¹¹⁹ with regard to the state claim. This argument is not without its risks, largely because its success depends upon a certified section 216(b) collective action.¹²⁰ Yet, because it urges a determination that the named plaintiffs have failed

verted congressional intent" with their dual-filed action); *Hasken v. City of Louisville*, 213 F.R.D. 280 (W.D. Ky. 2003) (conditionally certifying FLSA class consisting of twenty opt-ins but refusing to exercise supplemental jurisdiction over 1,000 person state-law class, noting that to accept jurisdiction over the state class "would be akin to the minnow swallowing the whale"); *Rodriguez v. The Texan, Inc.*, 2001 WL 1829490 (N.D. Ill. Mar. 7, 2001) (expressing "serious reservations (really an understatement) as to conventional class action treatment" in dual-filed wage action, stating that the "powerful policy considerations that led Congress to . . . require the opt-in procedure" in section 216(b) actions would be "thwarted if a plaintiff were permitted to back door" unnamed parties into the action "through a vehicle of calling upon similar state statutes that lack such an opt-in procedure"); *Zelaya v. J.M. Macias, Inc.*, 999 F. Supp. 778 (E.D.N.C. 1998) (dismissing state-law wage claim in dual wage action because of possibility that not all Rule 23 putative plaintiffs would opt in to the FLSA action, noting that FLSA collective actions and state-law wage class actions are "not the type of claims expected to be tried in one proceeding, as they would involve different and distinct sets of plaintiffs" and that attempting to try such claims together would create both "constitutional issues" and "confusion" for the jury); *cf. Sorensen v. CHT Corp.*, 2004 WL 442638 at *12 (N.D. Ill. Mar. 10, 2004) (delaying ruling on class certification and calling for further briefing on *De Asencio* issue); *Ballaris v. Wacker Siltronic Corp.*, 2002 WL 926272 at *3 (D. Or. Feb. 7, 2002) (rejecting challenge to supplemental jurisdiction over state-law wage class where plaintiff indicated that "he will not seek to include people in the Rule 23 state law class who did not opt in to the FLSA collective action").

115. See generally Finkel, *supra* note 19 at 178.

116. See *supra* notes 96 and 97 and accompanying text.

117. See generally Finkel, *supra* note 19, at 167–74.

118. Again, FRCP 23(a)(1) requires that plaintiffs seeking class certification demonstrate, among other things, that "the class is so numerous that joinder of all members is impractical."

119. FRCP 23(b)(3) requires plaintiffs to demonstrate, among other things, that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

120. The denial of joinder under section 216(b), however, could likewise support an employer's opposition to FRCP 23 certification, but in a different way. As noted, many courts hold that the standards for FRCP 23 certification are more stringent than those detailed in section 216(b). See *supra* notes 45 to 50 and accompanying text. In such courts, if named plaintiffs cannot satisfy the requirements of section 216(b), they should not be able to satisfy FRCP 23 *a fortiori*.

to satisfy FRCP 23's prerequisites, as opposed to a decision to dismiss without prejudice or on supplemental jurisdiction grounds, its potential upside is significant. A decision that named plaintiffs have failed on the merits of an FRCP 23 bid may shield the employer, on issue preclusion grounds, from attempts by named plaintiffs to refile the putative state-law class claims in state court. Further, issue preclusion also could block the original case's absent putative class members from making similar attempts.¹²¹

1. Cases Rejecting FRCP 23 Certification

One of the lead cases in this area is *Thiebes v. Wal-Mart Stores, Inc.*¹²² In *Thiebes*, plaintiffs were hourly Wal-Mart employees, and their dual-filed action alleged that the company had a "policy and practice of not paying its workers overtime wages, encouraging or requiring its workers to work 'off the clock' and altering employee time records in order to reduce its obligation to pay overtime wages."¹²³ The pool of putative class members included up to 15,000 past and present hourly Wal-Mart workers in Oregon.¹²⁴

Early in the litigation, the court granted plaintiffs' motion for conditional certification of a statewide section 216(b) collective action.¹²⁵ After 425 individuals submitted opt-in notices, plaintiffs moved for FRCP 23 certification of the state wage claim. The court denied the motion. In particular, the court concluded that the plaintiffs failed to demonstrate that joinder was impractical with regard to the state claims and thus that they had not satisfied FRCP 23(a)(1)'s numerosity requirement. Specifically, the court held

Notwithstanding plaintiffs' argument that I should use a figure in excess of 15,000 individuals to apply [the numerosity test], I believe the appropriate figure on which to focus is the 425 individuals who decided to opt into the collective action. The fact that such a small percentage of the employees opted-in is telling (by plaintiffs' calculations, the percentage is 2.7%) and cautions against a finding that joinder is impracticable, especially in light of the fact that the notice of the FLSA collective action included a description of plaintiffs' theory of the case that is the same as their basis for liability under the state law claims. . . .¹²⁶

121. "For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill. Thus, what is of supreme importance in war is to attack the enemy's strategy. . . ." SUN TZU, *supra* note 72, at 77.

122. 2002 WL 479840 (D. Or. Jan. 9, 2002).

123. *Id.* at *1.

124. *See id.* at *3.

125. *See id.* at *1.

126. *Id.* at *3. *Thiebes* also found that superiority was lacking, although this holding centered on the nature of plaintiffs' off-the-clock claims rather than the response to the opt-in notices. Specifically, the court found that plaintiffs' claims were "inherently individualistic" and would thus likely require individualized proof. *Id.* Therefore, the court

*Muecke v. A-Reliable Auto Parts & Wreckers, Inc.*¹²⁷ reached similar results as *Theibes*. Instead of emphasizing numerosity, however, the *Muecke* court found that FRCP 23(b)(3) certification of a state-law wage class “founders on the requirement that plaintiffs show that ‘a class action is superior.’”¹²⁸ Specifically, the court found that “[b]ecause all of the companies’ present and former employees will have the chance to decide whether to opt-in to the [§ 216(b)] case, and because those who wish to do so will be before the Court, it makes no real sense to the Court to certify a class that will automatically include all of the employees unless they opt out.”¹²⁹

The reasoning of *Theibes*, *Muecke*, and similar cases appears to be gaining momentum in district courts,¹³⁰ but it is not universally accepted.¹³¹ Still, the holding and underlying logic of such cases provide employers with arguments opposing FRCP 23 certification that would not exist absent the FLSA opt-in class. In dual-filed actions, the section 216(b) opt-in procedure, when its prerequisites are satisfied, not only provides a simple, congressionally mandated mechanism by which persons can participate in wage cases, it also provides concrete data as to the number of persons who actually *want* to join a given action. In this setting, arguments that joinder is impractical, or that an FRCP 23

doubted that “economies of scale” would result from the use of the class action device. *Id.*

127. 2002 WL 1359411 (N.D. Ill. June 21, 2002).

128. *Id.* at *2.

129. *Id.*; see also *Luethold v. Destination Am., Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004) (holding that the section 216(b) opt-in alternative “undercuts all the [FRCP] 23(b)(3) superiority factors”); *Hasten v. City of Louisville*, 213 F.R.D. 280, 282–83 (W.D. Ky. 2003) (finding that a state-law wage-and-hour class action failed Rule 23(b)(3)’s superiority test because of supplemental jurisdiction concerns and because “a large number of the proposed class members are already involved in litigation on these issues” in Kentucky state court.)

130. See, e.g., *Bartelston v. Winnebago Indus., Inc.*, 219 F.R.D. 629, 637 (N.D. Iowa 2003) (limiting the state-law class strictly to those who had opted in to the FLSA class (as discussed *supra* at notes 93 to 97 and accompanying text), and then holding that “joinder [was] not only practicable, but [had] in essence already been accomplished, as only the twenty-one members of the FLSA ‘opt-in’ class could possibly be members of the FRCP 23 class on the [state-law] claim, in light of the limitations on the court’s supplemental jurisdiction”); *De la Fuente v. FMP Ipsen Heat Treating, Inc.*, 2002 WL 31819226 (N.D. Ill. Dec. 16, 2002) (following *Theibes* and delaying determination on Rule 23 certification motion on state wage claims, holding that waiting until after the section 216(b) opt-in period expired would avoid confusion among putative class members who would otherwise receive both an opt-in and opt-out notice and would “also provide a better idea whether joinder is impractical”).

131. See *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, 2004 WL 1459486 at *5–*6 (N.D. Ill. June 28, 2004); *Noble v. 93 University Place Corp.*, 224 F.R.D. 330, 341–42, 2004 WL 944543 at *7 (S.D.N.Y. May 3, 2004); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 267–68 (D. Conn. 2002); *Beltran-Beneitez v. Sea Safari, Ltd.*, 180 F. Supp. 2d 772, 774 (E.D.N.C. 2001); *O’Brien v. Encotech Constr. Servs., Inc.*, 203 F.R.D. 346, 352 (N.D. Ill. 2001); *Kelley v. SBC, Inc.*, 1998 WL 928302 (N.D. Cal. Nov. 13, 1998).

class extending beyond this self-defined group is a superior method of proceeding, are counterintuitive.

While plaintiffs' counsel may contend that the opt-in procedure and opt-in rates should be ignored in a FRCP 23 analysis because section 216(b) is inherently underinclusive, such arguments are plainly open to debate. For one thing, Congress long ago sanctioned the opt-in procedure as the appropriate vehicle for bringing group wage claims, specifically rejecting the idea of representative FLSA actions, "with their vast allegations of liability, from being brought on behalf of employees who had no real involvement in, or knowledge of, the lawsuit."¹³² By arguing that the opt-in procedure is unreliably underinclusive, plaintiffs do little more than ask a court to substitute its policy judgment for that of Congress. Furthermore, plaintiff arguments that center on the existence of a vast pool of willing plaintiffs untapped by section 216(b) are generally made in the absence of any specific evidence that there are persons who wish to join a particular action but have not done so.

2. Issue Preclusion and Class Certification

When a court denies FRCP 23 certification under a *Theibes*-type argument, an intriguing question for defendants is whether the decision will have preclusive effect, thus preventing other courts from certifying the same class that the first court rejected. Recently, there have been indications that this is the case. The doctrine of issue preclusion (collateral estoppel) holds that "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies."¹³³ Some commentators have doubted whether defendants can successfully invoke this doctrine, following a court's refusal to certify an FRCP 23 class, to bar would-be class representatives from asking a different court to certify the previously rejected class.¹³⁴ In particular, these commentators have questioned whether class certification decisions are sufficiently final to warrant preclusive effect.¹³⁵ They also have noted that the class definition (and, thus, certification inquiries) in later cases is often slightly different, and they have argued that there is no privity between named representatives and unnamed class members prior to certification.¹³⁶ Nevertheless, in its recent decision in *In re Bridgestone/Firestone, Inc. Tires Product Liability Liti-*

132. *Arrington v. Nat'l Broad. Co.*, 531 F. Supp. 498, 501 (D.D.C. 1982) (internal footnotes omitted).

133. See generally 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4416 (2d ed. 2004).

134. See, e.g., *id.* at § 4455 at 457–58; Rhonda Wasserman, *Dueling Class Actions*, 80 B.U.L. REV. 461, 484–87 (2000).

135. See *id.*

136. See *id.*

gation,¹³⁷ the Seventh Circuit has given defendants hope that plaintiffs may be precluded from taking “multiple bites” at the same certification “apple.”

The *Bridgestone/Firestone* litigation was not a dual-filed wage action, but rather arose out of products liability litigation relating to roll-over accidents involving certain SUVs. In 2002, the Seventh Circuit reversed a lower court’s certification of a nationwide class comprised of the “owners of more than sixty million tires and three million vehicles,” holding, among other things, that the class was unsuitable because “different rules of law govern different members of the class.”¹³⁸ Lawyers representing the plaintiffs then “decided to try again, in other courts.”¹³⁹ Plaintiffs filed at least five new nationwide class actions in various state courts. In one case, a court “certified a nationwide class on the day [the] complaint was filed, without awaiting a response from the defendants and without giving reasons.”¹⁴⁰

In 2003, concluding that “some lawyers have adopted a strategy of filing in as many courts as necessary until a nationwide class comes into being and persists,” the Seventh Circuit held that its prior decision precluded certification of a nationwide class.¹⁴¹ The court initially noted the patent unfairness of subjecting a defendant to multiple certification decisions in cases involving the same basic claims and the same basic putative class:

Relitigation can turn even an unlikely outcome into reality. Suppose that every state in the nation would as a matter of first principles deem inappropriate a nationwide class covering these claims and products. What this might mean in practice is something like “9 out of 10 judges in every state would rule against certifying a nationwide class” Although the 10% that see things otherwise are a distinct minority, one is bound to turn up if plaintiffs file enough suits—and, if one nationwide class is certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives.¹⁴²

The court then went on to reject class counsel’s arguments that “the legal system entitles them to the benefit of this heads-I-win, tails-you-lose situation.”¹⁴³ First, the court held that issue preclusion did not require final judgment, but only a decision “sufficiently firm to be accorded conclusive effect.”¹⁴⁴ The Seventh Circuit found that its prior certification ruling met this standard, particularly given the Supreme

137. 333 F.3d 763, 764 (7th Cir. 2003).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 766–67.

143. *Id.* at 767.

144. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1980)).

Court's subsequent denial of certiorari in the case.¹⁴⁵ "Having sought and obtained a decision on the master complaint, class counsel are in no position to treat the resolution as irrelevant and start anew."¹⁴⁶

Next, the Seventh Circuit rejected counsel's arguments that the "preclusive effect of a judgment rendered by a federal court depends on national rather than state law."¹⁴⁷ Federal law provided the rule of decision in the preclusion issue before the court, and it barred "state rules that undermine the finality of federal judgments."¹⁴⁸ In particular, the Seventh Circuit found that federal law does not allow "states to ignore federal interlocutory judgments as class counsel propose."¹⁴⁹

Finally, the Seventh Circuit rejected plaintiffs' argument that "the federal court lacks jurisdiction over state-court plaintiffs who did not participate in the federal proceeding." In other words, the court rejected the notion that its prior decision did not have preclusive effect with respect to absent class members.¹⁵⁰ The court held that certification decisions can have preclusive effect over absent class members if they "were adequately represented by class counsel."¹⁵¹ Where that requirement is met, "[n]o one is entitled to opt out of the certification" decision, one "necessarily made on a class-wide, all-or-none basis."¹⁵² Finding representation in the previous case adequate, the Seventh Circuit thus concluded that:

Every person included in the district court's class definition still has the right to proceed on his own. What such a person now lacks is the right to represent a national class similarly situated; that's the upshot of a fully contested litigation in which every potential class member was adequately represented.¹⁵³

The reach and limits of the *In Bridgestone/Firestone, Inc. Tires Product Liability Litigation* decision remain to be seen. Some of the more obvious questions about the case include whether the decision will gain acceptance outside of the Seventh Circuit and outside of the product liability context; if so, how similar must the class definitions,

145. See *Gustafson v. Bridgestone/Firestone, Inc.*, 537 U.S. 1105 (2003), *denying cert.*

146. *In re Bridgestone/Firestone*, 333 F.3d at 767.

147. *Id.*

148. *Id.*

149. *Id.* at 768. Note that in the *Bridgestone/Firestone* decision under discussion here, the Seventh Circuit ordered the district court to "issu[e] an injunction that prevents all members of the putative national classes [in the underlying case], and their lawyers, from again attempting to have nationwide classes certified over defendants' opposition with respect to the same claims." *Id.* at 769. The Seventh Circuit concluded that this order did not run afoul of the federal Anti-Injunction Act, 28 U.S.C. § 2283 (which generally prohibits federal courts from enjoining state litigation) because the ordered injunction merely "protect[ed] and effectuat[ed]" the earlier judgment. *Id.* at 766.

150. *Id.* at 767.

151. *Id.* at 768-69.

152. *Id.* at 769.

153. *Id.*

class certification procedures, and available remedies in succeeding cases be to trigger application of *Bridgestone/Firestone* theories; and how might the analysis change if the various cases at issue are pending at the same time and involve separate counsel.

Despite such questions, there are several reasons to suggest that *Bridgestone/Firestone* logic would translate into certification denials in the context of dual-filed wage actions. For one thing, the central concern of the *Bridgestone/Firestone* matter—that it is fundamentally unfair to subject defendants to repeated FRCP 23 decisions until certification is achieved—is no less applicable in the context of dual-filed wage claims. If anything, it has more resonance. The inherent tension between dual-filed wage actions and Congress' decision, reflected in the Portal to Portal Act, to prohibit representative FLSA actions is only exacerbated if plaintiffs are permitted to keep filing FRCP 23 complaints until they hit upon a court willing to certify the state class. If, as the Seventh Circuit suggested, a scheme to circumvent FRCP 23 smacks of bad faith, the situation is only worsened by the addition of a scheme to flaunt the will of Congress as expressed through section 216(b).

Furthermore, the facts underlying a *Theibes*-type finding on numerosity and superiority are not likely to change in subsequent actions, even if subsequent litigants do not assert FLSA claims. Again, the salient factual point in *Theibes* and similar decisions is that when a large group of individuals was offered the opportunity to opt in to a wage action, only a fraction of this group chose to do so. Since the claims of the opt-ins are subject to resolution in the first case, it is difficult to justify an assertion that a follow-on FRCP 23 action is the superior method of adjudicating the controversy. For this reason—as well as Congress' express preference for opt-in wage claims—the logic of the *Bridgestone/Firestone* matter would appear to translate well to the context of dual-filed wage claims.

IV. Conclusion

An employer's best strategy to combat dual-filed wage claims is to avoid them altogether. In this respect, employers should take steps to ensure that their pay practices are in full compliance with the FLSA and similar state laws. However, if an employer is faced with a dual-filed wage action, the employer has several options for responding to it. In the end, an employer may actually be able to use plaintiffs' dual-filing strategy to its own advantage.

Union Access to Migrant Farmworkers: The Mt. Olive Pickle Company, Cucumber Farmers, and Farmworkers*

Allison Kidd**

I. Introduction

*De colores, de colores se visten los campos en la primavera.
De colores, de colores son los pajarillos que vienen de afuera.
De colores, de colores es el arco iris que vemos lucir.
Y por eso los grandes amores de muchos colores me gustan a mi.*¹

“De Colores,” or “All the Colors,” is the anthem of César E. Chávez’s United Farmworkers of America.² The song is one of celebration.³ While California’s farmworkers recently sang to celebrate the passage of new worker protection legislation,⁴ farmworkers in other parts of the country, particularly in the southeastern states, have had few occasions for celebration.

Securing union organizers’ ability to access migrant labor camps and workers’ rights to associate with organizers can pave the way for impressive changes in farm labor conditions. Access is vital to the organizing effort; however, in states like North Carolina, union organizers have had very limited, if any, access to migrant labor camps.⁵ Few states have addressed the issue of union access to migrant labor camps directly, but existing case law and analogy to National Labor Relations Act litigation suggest that now is the time to formally recognize such

**The Labor Lawyer* 2004 Student Writing Competition Winner.

**Ms. Kidd is law clerk to the Honorable James P. Jones, Chief U.S. District Judge, Western District of Virginia.

1. County of Los Angeles Public Library, *De Colores* (2001), available at <http://www.colapublib.org/chavez/decolores.htm> (last visited Dec. 21, 2003). *De Colores* is a traditional Mexican Folk Song. In English, the lyrics are

Of colors, colors the fields in the spring get dressed.
Of colors, colors they are the pajarillos [small birds] that come from outside.
Of colors, colors it is the rainbow that we see shine.
And for that reason the great loves of many colors, they (the colors) please me.

Id.

2. *Id.*

3. *Id.*

4. See Mark Martin, *Farm Workers Get Boost from Davis*, SAN FRANCISCO CHRONICLE, Oct. 1, 2002, at A1.

5. See *infra* notes 147–58 and accompanying text.

rights. Until that happens, leading agricultural giants, following the example of North Carolina's Mt. Olive Pickle Company, are in a unique position to require that their growers and suppliers enforce access rights even under existing law. Corporate commitments of this type could dramatically improve working conditions, while protecting growers' interests in a timely harvest and orderly working environment.

A. *Farm Labor Conditions*

Today, life as a farmworker can resemble the sharecropping of days long past. Most farmworkers live below the poverty line.⁶ Three-quarters of the nation's farmworkers earn less than \$10,000 per year and half earn less than \$7,500.⁷ In addition to earning low wages, farmworkers face hazardous working conditions. The work on a farm is labor-intensive and marked by long hours in the fields.⁸ Workers are exposed to pesticides, have high accident and fatality rates, and lack basic amenities such as bathroom facilities and adequate drinking water in the fields.⁹ Injured farmworkers often lack any form of health care.¹⁰

These problems are even more acute in North Carolina than in most other states. North Carolina is home to the fifth largest number of farmworkers in the country¹¹ and "leads the nation in Hispanic 'guest workers' or seasonal farmworkers."¹² In addition, the state is the second-largest producer of pickling cucumbers in the United States.¹³ However, the working conditions do not reflect the value of farmwork-

6. Legal Aid of North Carolina, Farm Worker Unit, *Farm Workers, the Law, and North Carolina*, available at <http://www.legalaidnc.org/Programs/FWU/ncfarlegal.htm> (last visited Jan. 29, 2004) (hereinafter Legal Aid of North Carolina, *Farm Workers*).

7. *Id.*

8. *Id.*

9. Legal Aid of North Carolina, *Farm Workers*, *supra* note 6. See David Olson, *State Probes Complaints of Mexican Workers*, NEWS & OBSERVER (Raleigh), Jun. 27, 2002, at B4. See, e.g., *Palmer v. Jackson*, 2000 WL 1862631 (N.C. Ind. Com. Nov. 29, 2000) (describing a North Carolina farmworker's heatstroke resulting from lack of proper drinking water).

10. See LATINO HEALTH TASK FORCE & NORTH CAROLINA INSTITUTE OF MEDICINE, NC LATINO HEALTH 2003 128-29 (Feb. 2003), available at <http://www.nciom.org/projects/latino/latinopub/fullreport.pdf>.

11. Legal Aid of North Carolina, *Farm Workers*, *supra* note 6 (citing NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION, JOB SERVANT, Winter 2000).

12. Jeffrey S. Hampton, *Plan to Open New Hispanic Center Draws Criticism*, THE VIRGINIAN-PILOT, Mar. 23, 2003, at Y1 (quoting Matty Lazo-Chadderton, director of Hispanic-Latino Affairs for Sen. Basnight's office). North Carolina is host to over 12,000 migrant seasonal workers. Videotape: HELP WANTED: FARM WORKERS IN NORTH CAROLINA (Burning Tree Productions 2001) (hereinafter HELP WANTED). In addition, 10,000 of the nation's 45,000 guest workers labor in North Carolina. Olson, *supra* note 9. "Approximately half of the 10,000 H-2A workers in North Carolina harvest cucumbers processed by the Mt. Olive Pickle Company in Mount Olive, North Carolina." *Human Rights Watch, Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* § V (Aug. 2002), available at http://www.hrw.org/reports/2000/uslabor/USLBR008-07.htm#P791_193474.

13. Mt. Olive Pickle Company, Company Fact Sheet Regarding the FLOC Boycott (2002), available at <http://www.mtolivepickles.com/Company/FLOC005.html>.

ers' contribution to North Carolina's economy. Even though each North Carolina farmworker's labor contributes over \$12,000 in profits to the agricultural industry,¹⁴ some still earn less than minimum wage.¹⁵ Almost half of North Carolina's farmworkers cannot afford enough food for their own families and 15 percent are forced to cut the size of their children's meals or skip meals.¹⁶ Making farm labor even more difficult, the employer/employee relationship is marked by dependence, with the majority of North Carolina's migrant farmworkers living in employer-provided housing.¹⁷

In March 1999, an ongoing and heated debate began over the question of who bears responsibility for improving the conditions of farm work. That month, North Carolina's Mt. Olive Pickle Company¹⁸ declined to negotiate with thousands of North Carolina farmworker members of the Farm Labor Organizing Committee (FLOC),¹⁹ an AFL-CIO member labor organization that has organized migrant farmworkers since 1967.²⁰ For the next five and a half years, the company was the target of a boycott by the state's farmworkers, university students, churchgoers, and other concerned community members.²¹ The boycott

14. HELP WANTED, *supra* note 12.

15. See Legal Aid of North Carolina, Farm Worker Unit, *NC's Farm Workers, Cucumbers*, available at <http://www.legalaidnc.org/Programs/FWU/ncfarwkcukes.htm> (last visited Dec. 21, 2003). Pursuant to their September 2004 agreement, farmworkers employed by Mt. Olive's growers and suppliers are guaranteed \$8 an hour. Kristin Collins, *Union Seeks Workers' Trust*, NEWS & OBSERVER (Raleigh), Nov. 14, 2004.

16. Press Release, Wake Forest University, N.C. Latino Farm Workers Can't Afford Sufficient Food, Wake Forest Study Shows (Mar. 6, 2003), available at http://www.wfubmc.edu/news_sys/fullstory.php?articleid=3821.

17. Legal Aid of North Carolina, Farm Worker Unit, *Access to Services*, available at <http://www.legalaidnc.org/Programs/FWU/ncfaraccess.htm> (last visited Jan. 8, 2004) (hereinafter Legal Aid of North Carolina, *Access*). For an in-depth discussion of the poor quality of farmworker housing, see Sally A. Carter & Roger C. Rosenthal, *Migrant Farm Worker Housing: An American Tragedy, an American Challenge*, 30 CLEARINGHOUSE REV. 781, 781-98 (Dec. 1996).

18. Mt. Olive is the second best-selling brand of pickles in the nation and is the number one brand in the southeast. The company produces its pickles, relishes, and other products in Mt. Olive, North Carolina and purchases from North Carolina farmers one-third of the 100 million pounds of cucumbers it uses annually. Mt. Olive Pickle Company, *Our Company at a Glance* (2002), available at <http://www.mtolivepickles.com/Company.html> (last visited Jan. 8, 2004) (hereinafter Mt. Olive Pickle Co., *Company*).

19. See Farm Labor Organizing Committee, Farm Labor Organizing Committee (Jan. 1, 2002), available at <http://www.iupui.edu/~floc/> (hereinafter Farm Labor Org. Comm., FLOC). In the first two years of the boycott, 2,000 migrant workers in North Carolina signed union cards. Farm Labor Organizing Committee, The FLOC Organizing Campaign in North Carolina (Jan. 1, 2002), available at <http://www.iupui.edu/~floc/nc.htm>. Today, 3,700 union cards have been signed. Collins, *supra* note 15. Of course, farmworker unions must begin organizing again each season as farmworkers are mobile. See Alex Pulaski, *Farm Workers' Talks with Norpac Bog Down*, THE SUNDAY OREGONIAN, Sept. 1, 2002, at E1.

20. *The Power of Organizing Securing Farm Workers' Rights: An Interview with Baldemar Velasquez*, MULTINATIONAL MONITOR, May 1993, at 14.

21. *Id.* Though union activists' picketing of grocery stores ordinarily would have been an illegal secondary boycott, FLOC boycott participants were careful to make clear

focused attention on a prominent corporation in a highly nonunionized²² and important agricultural state.²³ On September 16, 2004, the boycott finally came to an end when FLOC and Mt. Olive entered into an agreement to end the boycott and FLOC and the North Carolina Growers' Association signed a historic collective bargaining agreement allowing the union to oversee the employment of 8,000 farmworkers on more than 1,000 farms.²⁴ The deal marked the largest unionization in North Carolina history²⁵ and made North Carolina farmworkers the first guest workers in the United States ever to win union representation and a contract.²⁶

Tension between farmworkers, farmers ("growers"), and the corporations that purchase farm products ("processors") is not unique to North Carolina, but the way the conflict is settled in North Carolina can set the stage for resolving conflicts in other parts of the country. Already, union organizers and academics have begun to suggest that agreements similar to the September 2004 FLOC agreement could be achieved in the tobacco industry in states like Tennessee, Kentucky, and Virginia; in the cucumber industry in Florida; and, eventually, even in the poultry, landscaping, and construction industries.²⁷ While Mt. Olive has been credited with bringing together farmworkers and growers,²⁸ one of the company's earliest, and most important, contributions was its decision to require signed Statements of Compliance from its North Carolina suppliers and growers beginning in the 2003 growing

they were boycotting the Mt. Olive line of products and not the grocery stores. Such activity is permitted under "*Tree Fruits.*" NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58, 55 L.R.R.M. (BNA) 2961 (1964). In the 1970s and 1980s, FLOC boycotted the Campbell Soup company for eight years, producing "landmark labor agreements with 28 tomato and cucumber farmers in Ohio and Michigan" and labor pacts with the Vlasic, Heinz, and Dean Foods companies. Alison Grant, *Pickle Boycott Coming to NE Ohio*, PLAIN DEALER (Cleveland), Feb. 14, 2003, at C1.

22. North Carolina has the lowest percentage of union workers in the nation. Analisa Nazareno, *Downturn Hurts the Unions Too*, SAN ANTONIO EXPRESS-NEWS, Feb. 15, 2003, at 4H.

23. The union reported that, as a result of its efforts, 119 Kroger supermarkets from Toledo to Wheeling, West Virginia, and one Wal-Mart pulled Mt. Olive products from their shelves. Leana Donofrio, *Kent State U. Students Protest Mt. Olive Pickles at Grocery Store*, UNIVERSITY WIRE, Apr. 7, 2003.

24. Mt. Olive Pickle Company, *Boycott of Mt. Olive Ends* (Sept. 16, 2004), available at <http://www.mtolivepickles.com/Company/Press013.html> (hereinafter Mt. Olive Pickle Co., *Boycott Ends*); Farm Labor Organizing Committee, *Precedent Setting Agreement Reached, Mt. Olive Pickle Boycott Over* (Sept. 16, 2004), available at http://www.floc.com/html/News_PR/press/0917mtolive.html (hereinafter Farm Labor Org. Comm., *Precedent*).

25. Estes Thompson, *Farmers, Labor and Mt. Olive Sign Union Deal*, CHARLOTTE OBSERVER, Sept. 17, 2004.

26. Farm Labor Org. Comm., *Precedent*, *supra* note 24.

27. Julie M. McKinnon, *FLOC Sets Its Sights on Future Fights*, THE BLADE (Toledo, OH), Oct. 3, 2004.

28. Collins, *supra* note 20.

season.²⁹ The Statements required the farmers working with Mt. Olive to “indicate that . . . [they we]re in compliance with all applicable federal and state laws governing farmworker employment. . . .”³⁰ This article encourages other companies to make similar commitments and posits that union access to migrant farmworkers is a necessary part of any grower’s or supplier’s promise to comply with all applicable laws.

B. *Organization*

In its first part, this article examines laws governing union access to private employers’ property. It looks first at National Labor Relations Act (NLRA) litigation that has defined the prevailing access standards and indicated how courts should balance employers’ property rights against employees’ right to free association. Because the NLRA does not cover farmworkers, this article next discusses the influence that NLRA case law has on the reasoning and standards state courts apply to the question of union access to migrant farmworkers. In its final part, this article examines the conflict between FLOC organizers and Mt. Olive to help frame the issues involved in the access debate. This article will show that access for union organizers is a necessary part of any growers’ or suppliers’ commitment to abide by all applicable laws.

II. Union Access to Private Employer Property

“Access or nonaccess to employees at the workplace is frequently a threshold concern in an organizing campaign.”³¹ In North Carolina, union access to migrant labor camps will help determine FLOC’s continued success in organizing the state’s farmworkers. Although farmworkers are excluded from the NLRA, case law related to the Act provides the most complete framework for thinking about union access issues. This framework has been influential on state and federal courts addressing the more narrow issue of union access to migrant labor camps.³²

A. *Union Access Rights Under the National Labor Relations Act*

Essentially, the rule of union access is one of balancing competing interests—employees’ section 7, 29 U.S.C. section 157, rights of self-

29. See Mt. Olive Pickle Company, Statements of Compliance, available at <http://www.mtolivepickles.com/Company/FLOC008.html> (last visited Feb. 16, 2005) (hereinafter Mt. Olive Pickle Co., Compliance); Press Release, Mt. Olive Pickle Company, Duke University Lifts Boycott (Aug. 29, 2002), available at <http://www.mtolivepickles.com/Company/Press003.html> (hereinafter Mt. Olive Pickle Co., Duke).

30. Mt. Olive Pickle Co., Duke, *supra* note 29.

31. THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT, ABA SECTION OF LABOR AND EMPLOYMENT LAW 96 (Patrick Hardin & John E. Higgins Jr. eds., 4th ed. 2001) (hereinafter Hardin & Higgins).

32. See *infra* Part IIB.

organization and employers' rights to maintain discipline at the workplace and exercise sovereignty over their own property.³³ While decisions on how to strike this balance have varied over time, the Supreme Court set the current standard in *Lechmere, Inc. v. NLRB*.³⁴

1. The Supreme Court's Interpretation of Union Access Rights

In *NLRB v. Babcock & Wilcox Company*, the Court first recognized an exception to the rule that no employer could be forced to allow union organizers access to the place of employment.³⁵ The Court decided that "the NLRA may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property."³⁶ The Board applied this exception using a multifactor balancing test weighing section 7 rights against private property rights and viewing any alternate means available to a union to access employees as "an 'especially significant' consideration."³⁷

In *Lechmere*, the Court applied *Babcock* for the first time since 1956, interpreting *Babcock's* method of analysis for access rights cases differently than had the Board.³⁸ The union in *Lechmere* tried contacting employees of a retail store in a strip mall through newspaper advertisements but, when that failed, placed leaflets on employees' cars³⁹ in defiance of a store rule prohibiting all solicitation on company property.⁴⁰ The NLRB applied the prevailing balancing test, finding that the employer violated section 8(a)(1), 29 U.S.C. section 158(a)(1), when it expelled the union from its property.⁴¹

The Supreme Court disagreed, setting a new standard for determining which employer activities "interfere" with a union's section 7 rights.⁴² The Court criticized the NLRB's failure to distinguish in its balancing between employee and nonemployee union activity, saying that the balancing test should be used only for employee activity.⁴³ Furthermore, it clarified that the Board's balancing test should be used

33. See generally *Hardin & Higgins, supra* note 31, at 97–117 (discussing early case law in this area).

34. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 1393 L.R.R.M. (BNA) 2225 (1992); *Hardin & Higgins, supra* note 31.

35. *Lechmere*, 502 U.S. at 532 (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112–13, 38 L.R.R.M. 2007 (1956)).

36. *Id.* (citing *Babcock*, 351 U.S. at 113).

37. See *id.* at 538; see also *Jean Country*, 291 N.L.R.B. 11, 14–15, 129 L.R.R.M. (BNA) 1201 (1988).

38. *Lechmere*, 502 U.S. at 538; see *Babcock*, 351 U.S. 105.

39. *Lechmere*, 502 U.S. at 529.

40. *Id.* at 530.

41. *Lechmere, Inc.*, 295 N.L.R.B. 92, 131 L.R.R.M. (BNA) 1480 (1989) (using the test from *Jean Country*, 291 N.L.R.B. at 19). The First Circuit affirmed the Board's ruling. *Lechmere, Inc. v. NLRB*, 914 F.2d 313, 135 L.R.R.M. (BNA) 2329 (1st Cir. 1990).

42. See *Lechmere*, 502 U.S. at 527–41.

43. *Id.* at 527.

only upon a threshold finding that “the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.”⁴⁴ In the absence of such a finding, an employer’s private property rights presumptively trump any union rights; therefore, nonemployee union organizers have no right to access an employer’s private property.⁴⁵

It is difficult for a union to make the threshold finding required by the Court.⁴⁶ As the Court explained, a union’s burden to prove lack of access is “‘a heavy one.’”⁴⁷ Union access is guaranteed only in cases where employees work at remote locations, such as logging camps⁴⁸ and cruise ships; are housed on the employer’s premises; or are at self-contained, and often seasonal, workplaces like fish canneries and resort hotels.⁴⁹ Whenever employees live off the employer’s property, “they are presumptively not ‘beyond the reach’” of the union.⁵⁰

If a union gains access to employer property under *Lechmere*, the employees have a presumptive right to speak with union representatives during nonworking time in nonworking areas.⁵¹ For example, the NLRB will allow an employer to impose a rule prohibiting solicitation during working hours because such a rule implies that solicitation will be allowed during nonworking hours.⁵² Even if a “no solicitation” rule is valid on its face, an employer’s discriminatory enforcement of that rule still constitutes an unfair labor practice.⁵³ Similarly, an employer’s decision to promulgate a “no solicitation” rule for the first time during labor organizing efforts may refute the validity of that rule on its face.⁵⁴

2. Exclusion of Agricultural Workers from NLRA Protections

Unfortunately, while Senator Robert Wagner, the author of the NLRA, included agricultural workers in the first version of the pro-

44. *Id.* at 539 (quoting *Babcock*, 351 U.S. at 113).

45. *See id.* at 533–34, 538.

46. *See id.* at 535.

47. *Id.* (quoting *Sears, Roebuck & Co. v. Carpenters Dist. Council*, 436 U.S. 180, 205, 98 L.R.R.M. 2282 (1978)).

48. *Id.* at 539. *See, e.g.*, *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 21 L.R.R.M. (BNA) 2707 (6th Cir. 1948) (invalidating the employer’s restrictions limiting union organizers’ access to the labor camp’s recreation hall to just one day a week).

49. *Hardin & Higgins, supra* note 31 at 99 (citing *Chugach Alaska Fisheries*, 295 N.L.R.B. 44 (1989); *NLRB v. S&H Grossinger’s Inc.*, 372 F.2d 26 (2d Cir. 1967)).

50. *Lechmere*, 502 U.S. at 540 (citing *Babcock*, 351 U.S. at 113).

51. *See Westinghouse Elec. Corp.*, 240 N.L.R.B. 905, 100 L.R.R.M. (BNA) 1391 (1979), *aff’d*, 612 F.2d 1072, 103 L.R.R.M. (BNA) 2171 (8th Cir. 1979).

52. *See Our Way Inc.*, 268 N.L.R.B. 394, 115 L.R.R.M. (BNA) 1009 (1983).

53. The 6th Circuit defined “discrimination” as “favoring one union over another, or allowing employer-related information while barring similar union-related information.” *Albertson’s, Inc. v. NLRB*, 301 F.3d 441, 451, 170 L.R.R.M. (BNA) 2769 (6th Cir. 1996).

54. *See, e.g.*, *Ward Mfg. Inc.*, 152 N.L.R.B. 1270, 59 L.R.R.M. (BNA) 1325 (1965).

posed Wagner Act, they were excluded in the final, 1935 version.⁵⁵ At the time of the exclusion, Representative Connery stated, “[w]e hope that the agricultural workers will be taken care of. . . . [T]here will be opportunity later, and I hope soon, to take care of agricultural workers.”⁵⁶ Sixty-nine years later, no one has fulfilled Representative Connery’s wishes, and agricultural workers continue to be excluded from the definition of “employees” under the NLRA.⁵⁷

The effects of the agricultural worker exclusion are extensive.⁵⁸ Predictably, the effect on workers is negative. The law does not protect farmworkers who join unions for the purpose of collective bargaining.⁵⁹ Growers have no obligation to bargain with a union representing their farmworkers.⁶⁰ A grower may fire a farmworker for union activity and may refuse to employ farmworkers associated with, or even sympathetic to, unions.⁶¹ Less predictably, the agricultural workers’ exclusion has negative effects on growers. They are not protected from secondary boycotts or “recognition” picketing and are deprived of an additional means of enforcing “no strike” agreements with farmworkers.⁶² A union could picket those who do business with the grower, picket the grower as a way of preventing the farmworkers from entering the fields, or call for a strike at any time and for any reason.⁶³

Agricultural workers are not currently forbidden from engaging in collective bargaining.⁶⁴ Likewise, while growers have no duty to bargain under sections 8(a)(5) and 8(b) of the NLRA, they may choose to do so.⁶⁵ Gaining access to farmworkers is the first step toward encouraging agricultural growers and processors to engage in collective bargaining, a process that ultimately could benefit both.

B. *Union Access Rights for Farmworkers Under State and Federal Law*

“In many states . . . [,]” like North Carolina, “the farmworkers’ right to receive visitors in a migrant labor camp is not firmly estab-

55. See Representative Thompson, House of Representatives, Coverage of Agricultural Employees Under the National Labor Relations Act, 90th Cong., 2d Sess., Report No. 1274 to accompany H.R. 16014 (1968), 2.

56. *Id.*

57. See 29 U.S.C. § 152(3) (1998); *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996).

58. Thompson, *supra* note 55 at 3.

59. *Id.*

60. *Id.*

61. *Id.* The “Migrant and Seasonal Agricultural Worker Protection Act (AWPA) should prohibit employers from retaliating or discriminating against workers for their union membership, labor organizing or similar activities to protect workers’ interests.” Farm Worker Justice Fund, Inc., *A Vision for the Future of Policy on Farm Workers*, available at <http://www.fwjjustice.org/end.htm> (last visited Feb. 16, 2005). However, guest workers under the H-2A program are excluded from AWPA. See *id.*

62. Thompson, *supra* note 55 at 3.

63. See *id.* at 3–4.

64. See *Dist. 50 United Mine Workers of America*, 142 N.L.R.B. 930, 53 L.R.R.M. 1178 (1963).

65. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349, 42 L.R.R.M. 2034 (1958).

lished.⁶⁶ North Carolina courts have not addressed the issue of union access to migrant farmworker camps directly, nor has the state enacted an agricultural labor relations act. When eventually faced with the issue, North Carolina courts are likely to consider other jurisdictions' approaches to the access question. A number of federal courts and the states of California, Florida, Maryland, Michigan, New Jersey, New York, and Washington⁶⁷ all recognize migrant farmworkers' rights to receive visitors, including union organizers.⁶⁸ However, the theory on which jurisdictions base this right varies.⁶⁹ Most decisions grant union organizers access to migrant labor camps on either a property law or constitutional rights theory.⁷⁰ The property law jurisdictions find that, as tenants, migrant farmworkers "enjoy the rights of free ingress and egress."⁷¹ Constitutional law jurisdictions, including most of the federal courts that have addressed the issue, base union access on the rights of free speech and association.⁷² Still other courts have observed a public policy rationale for allowing union access to migrant labor camps.⁷³ As one federal court summarized,

Whether the court regards the question of access to migrant labor camps as one of constitutional law, the rights surrounding the ownership of real property or the rights of tenants in relation to their landlord, the law compels a single conclusion. The fundamental underlying principle is simply that real property ownership does not vest the owner with dominion over the lives of those people living on his property.⁷⁴

1. Union Access Rights Grounded in Property Law

Under the older common law, those who receive free housing are not tenants with property rights, but instead are servants.⁷⁵ However, common law eventually tempered this view with the maxim *sic utere tuo ut alienum non laedas*, meaning that one should use his property so as not to injure the rights of others.⁷⁶ That maxim laid the ground-

66. Cynthia G. Schneider, *Farm worker Law Developments 1995–96*, 30 CLEARING-HOUSE REV. 1168, 1177 (Mar.–Apr. 1997).

67. California has an Agricultural Labor Relations Act, in many ways more union-oriented than the National Labor Relations Act, which governs access and organizing issues in the state. "In addition to very liberal on-site access to workers, unions [in California] are entitled to a list of employees to facilitate its efforts to petition the Agricultural Labor Board for a representation election." Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?* 48 EMORY L.J. 489, 531 (Spring 1999).

68. See 67 OP. ATT'Y GEN. MD. 64 (1982).

69. See *id.*

70. See *id.*

71. *Id.* at n.4.

72. *Id.*

73. See *State v. Shack*, 58 N.J. 297, 77 L.R.R.M. (BNA) 2408 (N.J. Sup. Ct. 1971).

74. *Folgueras v. Hassle*, 331 F. Supp. 615, 625 (S.D. Mich. 1971).

75. Schneider, *supra* note 66 at 1177.

76. *Shack*, 58 N.J. at 305.

work for tort and property law recognizing that “necessity, private or public, may justify entry upon the lands of another.”⁷⁷

Today, courts increasingly recognize farmworkers who receive housing as tenants and not as servants.⁷⁸ As tenants, farmworkers have all the rights of tenants in traditional landlord–tenant relationships, including the right to receive visitors and invite others onto the premises.⁷⁹ Even when farmworkers do not pay for their housing directly, it usually is considered part of their compensation and does not disqualify them from receiving “tenant” status.⁸⁰

In what may be the most famous case using the property law approach to union access, the New Jersey Supreme Court balanced the interests of a farmworker–tenant and grower–landlord in a manner that seems, in some respects, to have anticipated *Lechmere*.⁸¹ In *State v. Shack*,⁸² a grower pursued trespass charges against a legal services attorney and a representative of a non–profit farmworker health care organization after they demanded to see farmworkers outside the presence of the grower.⁸³ The court explained that the lack of alternate forms of communication with migrant farmworkers living on growers’ property was key to its decision allowing access.⁸⁴ Unlike *Lechmere*, however, the court did not restrict its balancing to the property rights of the grower and statutory rights of the employee.⁸⁵ In *State v. Shack*, the court recognized and balanced the property interests of both parties.⁸⁶

Other states, including New York and Michigan, approach the issue of union access in a similar way.⁸⁷ Former New York Attorney General Robert Abrams issued an advisory opinion on the right of access to migrant labor camps, suggesting that farmworkers are entitled to receive visitors during nonworking hours “without any interference

77. *Id.*

78. For example, the Washington Supreme Court held that when farmworkers pay \$2.75 per day to live at the farmer’s camp, they are tenants. *State v. Fox*, 82 Wa. 2d 289, 291, 83 L.R.R.M. (BNA) 3053 (Wash. 1973).

79. See *Folgueras*, 331 F. Supp. at 625; *Shack*, 58 N.J. at 307.

80. See *Folgueras*, 331 F. Supp. at 624; *Maine v. DeCoster*, 653 A.2d 891, 894 (Me. 1995).

81. See *Shack*, 58 N.J. at 306. This decision is most famous for its public policy rationale supporting union access, discussed *infra* Part II.B.3.

82. 58 N.J. at 297.

83. *Id.* at 299–300.

84. “Since the migrant workers are outside the mainstream of the communities in which they are housed and are unaware of their rights and opportunities and of the services available to them, they can be reached only by positive efforts tailored to that end.” *Id.* at 304.

85. *Id.* at 306.

86. *Id.*

87. See *Folgueras*, 331 F. Supp. at 624; Lori Nessel & Kevin Ryan, *Migrant Farm Workers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. J. 99, 128 (Dec. 1994) (citing former New York Attorney General Robert Abrams’ advisory opinion on the right of access to migrant labor camps).

from the growers.⁸⁸ In Michigan, the U.S. District Court for the Western District considered the case of a grower who repeatedly ejected visitors from his labor camps, including health care and emergency food assistance providers.⁸⁹ The grower maintained 220 migrant housing units and provided farmworkers transportation to and from the fields, health clinics, and town.⁹⁰ The court held that the farmworkers were tenants under Michigan law.⁹¹ “As tenants, the migrants are vested with the full rights of tenancy.”⁹² These include the rights “to invite and associate with guests of the tenant’s own choosing.”⁹³

2. Union Access Rights Derived from Constitutional Law

Some jurisdictions extend union access to farmworkers further than property law jurisdictions, basing access rights in the First and Fourteenth Amendments.⁹⁴ Approaching the union access issue as a question of constitutional law requires state action since the First Amendment is only applicable to the states through the Fourteenth Amendment.⁹⁵ Under the state action doctrine, “the Constitution applies if the government affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution.”⁹⁶ In order to prevail on constitutional claims, therefore, farmworkers must show that “the grower’s actions are attributable to the state.”⁹⁷ Most courts have found state action in two situations: first, when those seeking to enter the grower’s property are arrested for criminal trespass,⁹⁸ and second, when a labor camp resembles a “company town.”⁹⁹

A. JUDICIAL ENFORCEMENT EXCEPTION TO THE STATE ACTION DOCTRINE

Criminal trespass situations invoke the judicial enforcement exception to the state action doctrine, which was first recognized in *Shel-*

88. Nessel & Ryan, *supra* note 87.

89. *Folgueras*, 331 F. Supp. at 616–18.

90. *Id.* at 616–17.

91. *Id.* at 624.

92. *Id.*

93. *Id.* at 625 (citing *Denver v. Sharpless*, 191 Pa. Super. 554 (1960); *Brown v. Kisner*, 192 Miss. 746 (1942); and *Lott v. State*, 159 Miss. 484 (1931)).

94. See *United Farm Workers Union v. Mel Finerman Co.*, 364 F. Supp. 326, 84 L.R.R.M. (BNA) 2081 (D. Colo. 1973); *Franceschina v. Morgan*, 346 F. Supp. 833, 80 L.R.R.M. (BNA) 3470 (S.D. Ind. 1972); *Lee v. A. Duda & Sons, Inc.*, 310 So. 2d 391 (Fla. Dist. Ct. App. 1975); *Velez v. Amenta*, 370 F. Supp. 1250, 85 L.R.R.M. (BNA) 2758 (D. Conn. 1974).

95. Nessel & Ryan, *supra* note 87 at 127 (citing *Civil Rights Cases*, 109 U.S. 3 (1983)).

96. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 505 (Aspen Law & Business, 2002).

97. Nessel & Ryan, *supra* note 87 at 99 n.138.

98. Such situations are reminiscent of the facts in *Soldal v. Cook County*, 506 U.S. 56 (1992), in which the Supreme Court found state action where a private citizen owner of a mobile home park removed a tenant’s home with the assistance of sheriff’s deputies.

99. See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946); *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73, 84 L.R.R.M. (BNA) 2061 (5th Cir. 1973).

ley v. Kraemer.¹⁰⁰ The exception regards the “action of state courts and judicial officers in their official capacities” as state action.¹⁰¹ In *Bell v. Maryland*, the Supreme Court, in dictum, discussed whether state enforcement of criminal trespass laws is state action under this exception.¹⁰² The majority argued that state action is involved when the private property in question serves the public, as in the case of a restaurant.¹⁰³ The dissent disagreed, arguing that “mere judicial enforcement” of trespass statutes does not rise to the level of state action.¹⁰⁴ However, there is no definitive statement from the Court on this issue.¹⁰⁵

Farmworker advocates argue for a similar exception to the state action doctrine based solely on the fact that the state inspects and licenses migrant labor camps as required by guest worker H2-A regulations.¹⁰⁶ However, the Supreme Court rejected this argument, clearly stating, “[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. . . .”¹⁰⁷

B. PUBLIC FUNCTIONS EXCEPTION TO THE STATE ACTION DOCTRINE

In *Marsh v. Alabama*,¹⁰⁸ the Supreme Court first recognized the “public functions exception” to the state action doctrine, “which says that a private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government.”¹⁰⁹ In *Marsh*, Jehovah’s Witnesses were allowed access to a company-owned town to distribute literature.¹¹⁰ The Court adopted a test examining whether the company town in question is open to the public generally and whether it functions any differently than any other town.¹¹¹ Privately owned towns falling within the public functions exception must comply with the Constitution, as must municipi-

100. CHEMERINSKY, *supra* note 96, at 506 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

101. *Id.* (quoting *Shelley*, 334 U.S. at 14). The potentially broad reach of the exception makes it quite controversial. “If any decision by a state court represents state action, then ultimately all private actions must comply with the Constitution.” *Id.* at 507.

102. *Id.* at 507 (citing *Bell v. Maryland*, 378 U.S. 226 (1964)).

103. *Bell*, 378 U.S. at 259.

104. *Id.* at 332.

105. CHEMERINSKY, *supra* note 96 at 507.

106. “In general, government licensing or regulating is insufficient for a finding of state action, unless there is other government encouraging or facilitating of unconstitutional conduct.” *Id.* at 510–12 (discussing a line of cases on the issue).

107. *See Nessel & Ryan, supra* note 87, at 127 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974)). The *Jackson* court explained, “the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.” *Jackson*, 419 U.S. at 350.

108. 326 U.S. 501 (1946).

109. CHEMERINSKY, *supra* note 96 at 498–99.

110. *See Marsh*, 326 U.S. at 507.

111. *See id.* at 507–08.

palities.¹¹² The Court based this decision on the idea that “[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”¹¹³

The question whether migrant labor camps constituted “company towns” was repeatedly litigated after the *Marsh* decision,¹¹⁴ until *Hudgens v. National Labor Relations Board* eliminated the need for a separate “company town” analysis and explained that the NLRA section 7 balancing test governs.¹¹⁵ Today, *Lechmere* supplies the section 7 access rights test.¹¹⁶ Therefore, while proving that a labor camp is like a “company town” can help a union meet its threshold showing of lack of access, it is no longer necessary for a union to prove that a grower’s activities rise to the level of state action.¹¹⁷

3. Public Policy Rationale for Allowing Union Access

Regardless of whether courts approach the issue of union access to migrant labor camps as one of property or constitutional law, their decisions consistently contain public policy rationales for allowing such access. In *State v. Shack*, more famous for its public policy than its property law discussion,¹¹⁸ the court considered the “concerns facing migrant workers who live in extreme isolation” as part of its balancing test.¹¹⁹ The court explained,

Property rights serve human values. . . . Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will

112. *See id.* at 508.

113. *Id.* at 506.

114. *See, e.g.*, *Petersen v. Talisman Sugar Corp.*, 478 F.2d 73, 82, 84 L.R.R.M. (BNA) 2061 (5th Cir. 1973) (holding the migrant labor camp in question was sufficiently like the company town in *Marsh* because it serviced 1,000 farmworkers with residential areas, streets, a store, eating facilities, a post office, a chapel, fire protection, sewage, and garbage collection); *Velez v. Amenta*, 370 F. Supp. 1250, 1255, 85 L.R.R.M. (BNA) 2758 (D. Conn. 1974) (expanding the definition of “company town” by explaining, “[w]hether or not Camp Windsor qualifies as a ‘company town’ within the criteria established in *Marsh* [italics added] . . . [i]t is the living quarters for hundreds of free citizens of this country and, therefore, the premises are more ‘public’ than ‘private’”).

115. 424 U.S. 507, 521 (1976) (also overruling *Marsh*’s successor, *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 68 L.R.R.M. (BNA) 2209 (1968)).

116. *Lechmere*, 502 U.S. at 538.

117. *See id.* at 535.

118. *See, e.g.*, Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675 (1988) (describing the New Jersey court’s creation of a public policy exception to trespass law). A February 2005 search of the LEXIS system reveals that over 100 law review articles mention the New Jersey case, with most referencing the public policy discussion.

119. *Nessel & Ryan, supra* note 87 at 128.

deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity. . . . Here we are concerned with a highly disadvantaged segment of our society.¹²⁰

These public policy concerns are firmly rooted in fact. The best and, in many cases, only place union organizers can reach farmworkers is at labor camps.¹²¹ Most farmworkers remain at the camps during their nonworking hours, since language barriers, transportation difficulties, and general poverty discourage them from exploring the towns where they live.¹²²

Furthermore, the existence of numerous federal programs aimed at helping migrant farmworkers suggests the importance of allowing access to labor camps. The congressional intent of programs such as the Legal Services Corporation Act, the Wagner-Peyser Act, and the Migrant Health Act could not be accomplished if growers could insulate their farmworkers from outside contact.¹²³ Case law recognizes the importance of free access to the administration of federal goals, calling the question "one of considerable public significance."¹²⁴

Finally, the issue of access to migrant labor camps is an increasingly important civil rights question. The issue of farmworker conditions is now viewed as part of the growing Latino civil rights movement. "The next civil rights movement in the U.S. is going to have a brown face," explains FLOC president and founder Baldemar Velásquez.¹²⁵ Student and religious groups are more involved in farmworker advocacy than in most other labor disputes¹²⁶ and consumer involvement has a greater impact.¹²⁷ Similar to the civil rights movement of the 1960s, the current farmworker movement is bringing together people from radically different backgrounds, suggesting that *State v. Shack* in no way underestimated the importance of the issues at stake.¹²⁸

120. *Shack*, 58 N.J. at 303.

121. See *Franceschina*, 346 F. Supp. at 835.

122. *Id.*

123. Nessel & Ryan, *supra* note 87 at 126, n.135 (citing 42 U.S.C. §§ 2996, 2996f(a)(2)(c) (1988) (the Legal Services Corporation Act); 29 U.S.C. § 49b (1988) (the Wagner-Peyser Act); and 42 U.S.C. § 254b (1988) (the Migrant Health Act)).

124. *Mid-Hudson Legal Servs. v. G & U, Inc.*, 465 F. Supp. 261, 267 (S.D.N.Y. 1978).

125. Sandy Smith-Nonini, *Pick Fairness: The Farm Labor Organizing Committee's Drive to Unite N.C. Cucumber Workers*, 2 UPROOTING INJUSTICE 17 (July 1999) (citing Baldemar Velásquez, FLOC president and founder).

126. "Students and farm worker advocates have played a key role in the resurgence of agricultural laborers' hopes for lives of dignity and respect." Paul Ortiz, *From Slavery to Cesar Chavez and Beyond: Farm Worker Organizing in the United States*, in *THE HUMAN COST OF FOOD: FARM WORKERS' LIVES, LABOR, AND ADVOCACY* 269 (Charles D. Thompson Jr. & Melinda F. Wiggins eds., University of Texas Press 2002).

127. For example, a boycott led by students and community advocates is credited with breaking an eight-year standoff between Chateau Ste. Michelle in Washington state and a union. *Id.* at 269-71.

128. For example, the degree of community organizing between rural farmworkers and their urban supporters has been substantial. *Id.* at 271.

4. Growers' Limited Rights to Regulate Union Access

State and federal law suggest that growers eventually will have to allow union access to their labor camps. However, allowing such access will not destroy growers' control over their own property. Growers may still establish "reasonable rules or restrictions necessary to protect their legitimate business and security interests."¹²⁹ Some state officials and courts have offered guidance regarding what will constitute "reasonable" rules or restrictions, while maintaining the proper balance between grower and farmworker rights.¹³⁰ In some jurisdictions, such as the state of Maine, the legislature has specifically declared employees' rights, which helps growers determine the scope of their own rights.¹³¹

129. 67 OP. ATT'Y GEN. MD., *supra* note 68 at 13.

130. *Id.*; see *United Farm Workers Union v. Mel Finerman Co.*, 364 F. Supp. 326, 329, 84 L.R.R.M. (BNA) 2081 (D. Colo. 1973). Some courts have been very specific. For example, one outlined five acceptable conditions for a union's access to a labor camp:

1. The [union] shall designate in writing, those of its members (not to exceed 20 in number) who are to have access to the camp. . . .
2. Of the designated representatives, no more than 10 shall be permitted in the camp at any one time.
3. The designated representatives shall not enter or remain in the camp while the migrants are at work and in any event, they shall not enter or remain in the camp between the hours of 8:30 P.M. and 7:00 A.M.
4. Ordinarily, the Court would permit the designated representatives to have access to the facilities (bunkhouse, dining hall and bath and toilet facilities) upon invitation by any occupant. Because of the nature of the facilities which the Court has heretofore described, it is not feasible for plaintiff's designated representatives to carry on their organizing efforts within the facilities without invading the privacy of those migrants who have not invited the designated representative into the facilities. Therefore, the realities of the factual situation require that the designated representatives shall not enter any of the facilities to carry on their organizing efforts.
5. The designated representatives in their organizing efforts, shall not disturb the peace and quiet of the camp, engage in coercive conduct, use abusive, obscene, or threatening language or engage in any other unlawful conduct.

Id. at 329.

131. *Consol. Cigar Corp. v. Dep't of Pub. Health*, 372 Mass. 844, 844 (Mass. 1977). The applicable portions of Massachusetts law state:

1. *Definitions*
 - C. "Visitor" shall mean any individual[s] . . . seeking to enter a farm labor camp for the purpose of contacting or communicating with one or more workers.
2. *Reasonable Rights of Visitation*: Workers living in quarters apart from the living quarters of the operator shall be entitled to receive visitors outside of regular working hours.
 - ...
 - B. The limitation on hours in subsection A shall not apply to the organizations, their agents, employees or representatives listed herein:
 - (i) Federal, State, local or other governmental agencies, departments or boards;

In Maryland, the attorney general declared unreasonable regulations that “seriously restrict . . . the legal right of migrants to receive guests and to be visited by those who seek to serve them.”¹³² The state gives growers a right to “limit the frequency or duration of visits . . . [only] in the unlikely event that such restrictions are necessary to protect legitimate business or security needs.”¹³³ Legitimate needs include ensuring that crops are harvested and that business is run in a safe manner.¹³⁴ As the Florida attorney general explained, while a grower may not require that all visits be monitored, he may require visitors to identify themselves and generally state their purposes if the farmworker has not already informed him that the visitor is expected.¹³⁵ However, once the grower is aware that a visitor is expected, he may not question the farmworker about the specific nature or purpose of the visit.¹³⁶

III. Requiring Growers to Allow Union Access to Farmworkers

A. *Applying Union Access Law in North Carolina*

Though North Carolina courts have not directly addressed the issue of union access to migrant labor camps, they currently allow access based on a property law theory and may allow access on a constitutional law theory.¹³⁷ Meeting the first requirement of the property law ap-

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- (ii) Physicians, dentists, and other medical or para-medical personnel;
 - (iii) Priests, ministers, rabbis;
 - (iv) Agencies or organizations which are funded in whole or part by governmental funds;
 - (v) Recognized charitable and social agencies;
 - (vi) Members of the press [emphasis deleted].

C. A worker may terminate a visitation . . . [but] no operator may deny a visitor access to a worker prior to such communication. . . .

4. *Visitor Rights*

- A. In order for an individual . . . to be regarded as a visitor, it is *not* required:
 - (i) That the worker or workers initiate the request for the visit.
 - (ii) That the visitor secure approval of the farm labor camp operator.
- B. An operator may ask a visitor for reasonable identification *but shall not deny access on this basis* [emphasis added].

Id. at 848 n.4 (quoting 13 CODE OF MASS. REGS. 825–28 (1971)).

132. 67 OP. ATT’Y GEN. MD., *supra* note 68 at 13.

133. *Id.*

134. *Id.* at 13–14.

135. *Id.* at 14 (citing *Shack*, 58 N.J. at 306; 1978 OP. ATT’Y GEN. FLA. 1666 (Apr. 26, 1978)).

136. 67 OP. ATT’Y GEN. MD., *supra* note 68 at 14.

137. Although the Supreme Court recently refused to remedy a labor violation against an illegal immigrant, the Court suggests that those in the country legally do receive the protection of U.S. laws. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149, 169 L.R.R.M. (BNA) 2769 (2002). *See also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–92, 116 L.R.R.M. (BNA) 2857 (1984). “H-2A workers in the United States have a special status among migrant farm workers. They come to the United States openly and legally. They are covered by wage laws, workers’ compensation, and other standards.” Human Rights Watch, *supra* note 12.

proach, North Carolina law treats the farmworkers who live in grower provided housing not as employees, but as tenants.¹³⁸ As in *State v. Shack*, farmworker tenants in North Carolina have a right to possession and the covenant of quiet enjoyment.¹³⁹ These rights guarantee that farmworkers “may invite visitors at a reasonable hour for lawful purposes into the employer-provided dwelling or onto the adjacent grounds.”¹⁴⁰

Even if a farmworker has not invited union organizers, North Carolina law will infer that the visitor is an invitee when there is a “mutuality of interest” with the farmworker or when “there is mutual advantage to the parties.”¹⁴¹ This presumption has been applied to legal aid lawyers, “health care providers, educational and job training agencies, and religious organizations.”¹⁴² So long as mutuality of interests is present, “employers may not deny, delay, hinder, or interfere with visitors who are present at reasonable times . . .” and may not “demand that workers disclose information about a visit from an advocate or retaliate against a worker. . . .”¹⁴³ The North Carolina courts have been receptive to access claims based on a property rights theory.

While the North Carolina courts have not yet considered a constitutional theory of access, such an argument is possible. In a case reminiscent of *Lechmere*, the North Carolina Supreme Court denied a Vietnam War protestor’s right to solicit signatures on an antidraft petition in the parking lot of a large shopping mall.¹⁴⁴ The court cited the protestor’s “abusive” behavior of “accosting” shopping mall patrons as reason for denying access.¹⁴⁵ Though the court never explicitly stated as much, it seemed to imply that the court would protect the rights of those who peacefully protest in the public area,¹⁴⁶ a finding that would be consistent with *Lechmere*.

Furthermore, North Carolina migrant labor camps are likely to make a *Lechmere* threshold showing of no alternative access. The camps are like the “company towns” in *Marsh* and access to resident farm-

138. “As early as 1888, the North Carolina Supreme Court recognized that a landlord-tenant relationship exists between farm workers and farm owners who have provided housing to their employees.” Lori Elmer, *Farm Workers’ Rights to Visits by Legal Advocates and Other Providers*, Farm Worker Unit, Legal Services of North Carolina, available at <http://www.legalaidnc.org/Programs/FWU/Source%20Files/pdf%20files/access.pdf>. North Carolina’s attorney general, Roy Cooper, issued an opinion letter stating that migrant farm workers are tenants under North Carolina law. E-mail from Jennifer Lee, Attorney, Farm Worker Unit, Legal Aid of North Carolina, to Allison Kidd (Nov. 6, 2003) (on file with author).

139. *Id.*

140. *Id.*

141. *Id.*; *L. T. Pafford v. J. A. Jones Constr. Co.*, 217 N.C. 730, 735 (N.C. 1940).

142. Elmer, *supra* note 138.

143. *Id.*

144. *State v. Felmet*, 302 N.C. 173, 177 (N.C. 1981).

145. *Id.* at 178.

146. *See id.*

workers is not otherwise reasonably available to labor organizations like FLOC. The majority of North Carolina's migrant farmworkers live in labor camps located on growers' property.¹⁴⁷ "No Trespassing" signs often surround the camps,¹⁴⁸ which are located in "extremely remote, rural areas, which are far-removed from community centers."¹⁴⁹ "Typically, H-2A aliens have no access to telephones and postal service while residing in the labor camps."¹⁵⁰ Many farmworkers are further isolated by cultural and language barriers¹⁵¹ and often depend upon the grower for transportation and shop in the grower's store.¹⁵² Some workers are in the country illegally or depend upon a single grower to maintain their work visas and, ultimately, their ability to stay in the country.¹⁵³ Those workers "will put up with enormous amounts of abuse to maintain that relationship with the employer."¹⁵⁴

Prior to their September 2004 agreement, some growers who work for Mt. Olive denied FLOC access to North Carolina farmworkers.¹⁵⁵ FLOC organizer Vicente Rosales reported to Human Rights Watch,

he and two other FLOC representatives visited the farmworker camp of a North Carolina Growers' Association member employer. The employer was annoyed by our arrival . . . [and she] threatened . . . that if we did not leave, she would call the police, and she told us that we were on her property and that if we wanted to speak with her, we should call her beforehand so that she could be ready for us and that

147. Legal Aid of North Carolina, *Access*, *supra* note 17. For an in-depth discussion of the poor quality of farmworker housing, see Carter & Rosenthal, *supra* note 17, at 781-98.

148. *Id.* Farmer-provided housing options include "old farmhouses, trailers, and concrete and wooden barracks." Legal Aid of North Carolina, *Farm Worker Housing, available at* <http://www.legalaidnc.org/Programs/FWU/ncfarhousing.htm>. The conditions of such housing often are substandard, with overcrowding, faulty appliances, serious structural problems, and exposure to pesticides. While the Department of Labor is responsible for inspecting farmworker housing, it lacks the resources necessary to inspect the estimated 2,000 North Carolina labor camps before agriculture workers inhabit them. *Id.* "Ironically, because migrant housing is regulated by federal and state law, many . . . [farmers] provide no housing [at all] and, as a result, migrant workers set up shanty-camps" on the farmer's property. LeRoy & Hendricks, *supra* note 67, at 501.

149. The Legal Services Corporation, *The Erlenborn Commission Report*, 15 GEO. IMMIGR. L.J. 99, 123 (Fall 2000).

150. *Id.*

151. Legal Aid of North Carolina, *Farm Workers*, *supra* note 6.

152. *Id.*; Legal Aid of North Carolina, Migrant and Seasonal Agricultural Worker Protection Act, *available at* <http://www.legalaidnc.org/Programs/FWU/AWPA.htm>.

153. See Legal Aid of North Carolina, *Farm Workers*, *supra* note 6; Legal Aid of North Carolina, *Access*, *supra* note 17. One North Carolina farmworker reports that when he asked his employer for better working conditions, the farmer responded, "You're causing me a lot of problems. . . . If you continue to create lots of problems, you'll go back to Mexico." Olson, *supra* note 9.

154. HELP WANTED, *supra* note 12 (quoting Alice Tejada, Legal Services of North Carolina).

155. See Human Rights Watch, *supra* note 12.

she would also have to be present during the interviews with the workers.¹⁵⁶

Another growers' association member summoned two police officers to his camp when FLOC president and founder Baldemar Velásquez and three other FLOC organizers visited to speak with resident farmworkers.¹⁵⁷ The FLOC organizers were arrested when they refused to leave the labor camp.¹⁵⁸

The North Carolina Growers' Association (NCGA) strongly influences growers' reactions to union representative visits. The NCGA "is a trade association that aids its members in obtaining seasonal farm labor. . . ."¹⁵⁹ Growers pay annual dues to the association and, in return, the NCGA locates and arranges for the hiring of H2-A workers.¹⁶⁰ The NCGA also assists growers with the legal matters that can arise from hiring H2-A workers.¹⁶¹ The association claims that, in addition to "ensuring [g]rowers' initial compliance with the H2[-]A hiring requirements . . . [i]t continues to ensure that the workers hired are transported into the United States, housed, trained, supervised, paid, and transported out of the United States."¹⁶²

Until it signed the September 2004 FLOC agreement, denying union access to member labor camps appeared to be NCGA policy. Until 2001, the standard NCGA contract with H2-A farmworkers contained a clause restricting farmworkers' right of possession and the covenant of quiet enjoyment, stating that "[n]o tenancy in such housing is created; employer retains possession and control of the housing premises at all times. . . ."¹⁶³ The NCGA "Work Rules" stated that "the employer reserves the right to exclude any person(s) from visiting housing premises."¹⁶⁴ Although NCGA founder Stan Eury added a waiver provision giving farmworkers the ability "to exempt themselves from this tenancy condition . . . by filing a request of waiver in writing with the North Carolina Growers Association prior to inhabiting the housing facility and beginning work," few farmworkers were able to fully understand

156. *Id.*

157. *Id.*

158. *Id.*

159. U.S. Dep't of Labor v. N.C. Growers Ass'n, 2004 U.S. App. LEXIS 15850, at n.1 (4th Cir. 2004).

160. *Chao v. N.C. Growers Ass'n*, 280 F. Supp. 2d 500, 503 (W.D.N.C. 2003), *rev'd*, *N.C. Growers Ass'n*, 2004 U.S. App. LEXIS 15850.

161. *N.C. Growers Ass'n*, 2004 U.S. App. LEXIS 15850, at n.1.

162. *Chao*, 280 F. Supp. 2d at 504.

163. *Id.* The U.S. Department of Labor approved the NCGA's contract containing this clause and North Carolina police departments enforced it. *Id.* Jennifer Lee, an attorney with Legal Aid of North Carolina's Farm Worker Unit, reports that this language now has been removed from the contracts. Lee, *supra* note 138.

164. Lee, *supra* note 138.

the documents they signed.¹⁶⁵ The expectation that farmworkers not only would understand the documents they signed, but also understand and affirmatively assert their tenancy rights against those whose favor is necessary to stay in the country, ignored the reality of the H2-A program.

When H2-A workers arrived in North Carolina prior to the signing of the September 2004 FLOC agreement, the NCGA portrayed union organizers as “enemies.”¹⁶⁶ The association reportedly required workers to publicly throw away their Legal Services Corporation “Know Your Rights” booklets before they were allowed to receive the Growers’ Association’s “Understanding the Work Contract” booklet. The NCGA booklet warned

FLS [Farmworker Legal Services] has a hidden motive when they approach you. They say that they are your friends and they are concerned about your rights and well being, but in reality their motive is to destroy the program which brings you to North Carolina legally . . . FLS discourages the growers with excessive suits which are for the most part without merit. The history of FLS shows that the workers who have talked with them have harmed themselves. Don’t be fooled and allow them to take away your jobs.¹⁶⁷

Many of these policies may change now that the NCGA has signed a collective bargaining agreement with FLOC, especially considering the fact that the NCGA has agreed to appointing a representative at each to serve as a liaison with the union.¹⁶⁸ If the NCGA does not change its policies, the limits the NCGA has placed on union access, combined with the isolation and dependence of North Carolina farmworkers, suggest that North Carolina’s courts would enforce union access rights at migrant labor camps.

B. *Mt. Olive’s Role in Securing Union Access Rights*

During the boycott, Mt. Olive protested that it did not have the power to impose upon its growers the changes FLOC demanded¹⁶⁹ and argued that the company does not directly employ farmworkers.¹⁷⁰ Mt. Olive contracts with growers for the cucumbers it needs by proposing

165. *Id.*

166. *See id.*

167. *Id.*

168. *See* Farm Labor Org. Comm., Precedent, *supra* note 24.

169. *See* Mt. Olive Pickle Company, Position Statement on the Activities of the Farm Labor Organizing Committee (2002), available at <http://www.mtolivepickles.com/Company/FLOC001.html> (last visited Feb. 8, 2004) (hereinafter Mt. Olive Pickle Co., Position).

170. *See* Mt. Olive Pickle Co., Company, *supra* note 18. The authors of a 1968 report examining a proposal to include farm workers in the NLRA warned that growers would “delegate the harvesting of crops to a large labor contractor, and then argue that . . . [they] are not . . . employer[s] at all—that the striking employees can only picket at the downtown office of the labor contractor, not at the farms where the work is being done.” Thompson, *supra* note 55 at 6.

the prices it will pay for cucumbers several months before planting begins for the season.¹⁷¹ After the company has negotiated contracts with enough growers to meet its cucumber demand, the growers hire their own employees to plant and harvest the crops.¹⁷²

Despite its statement to the contrary, Mt. Olive exerts great influence over North Carolina growers. Mt. Olive began using this influence to initiate positive change in 2003, when it first required its North Carolina suppliers and growers to sign Statements of Compliance indicating that they are following all applicable federal and state laws.¹⁷³ Mt. Olive also made it clear that the Statements would be enforced, requiring suppliers and growers to notify it if any government agency investigated their employment practices and threatening “appropriate action regarding issues of non-compliance, including, but not limited to, cancellation . . .” of their contracts.¹⁷⁴ In 2004, Mt. Olive expanded its compliance statement program to include nonexclusive suppliers.¹⁷⁵

Even since signing the September 2004 agreement with FLOC,¹⁷⁶ Mt. Olive continues to require NCGA suppliers and growers to sign Statements of Compliance.¹⁷⁷ Although the Mt. Olive Statements do not specifically address union access to migrant labor camps,¹⁷⁸ a com-

171. Mt. Olive Pickle Company, Mt. Olive’s Response to the Tactics of the Farm Labor Organizing Committee (2002), at http://www.mtolivepickles.com/flash/well_floc_tactics.html (last visited Feb. 8, 2004).

172. *See id.* In what it called “a federal pickle case,” the U.S. Court of Appeals for the 7th Circuit described the hiring operations of one pickle farmer as follows:

The pickles are handpicked, usually from July through September, by migrant families from out of state. Sometimes the children, some under twelve years of age, work in some capacity in the fields alongside their parents. Many of the migrant families return each harvest season by arrangement with the defendants, but, each year, other migrant families often come for the first time from Florida, Texas and elsewhere looking for work. The defendants would inform the families, either orally or sometimes in writing, of the amount of compensation they were to receive. Compensation is set by the defendants at one-half of the proceeds the defendants realize on the sale of the pickles that the migrants harvest on a family basis. Toward the end of the harvest season, when the crop is less abundant and, therefore, less profitable, the defendants offer the migrants a bonus to encourage them to stay to complete the harvest, but some leave anyway.

U.S. Dep’t of Labor v. Lauritzen, 835 F.2d 1529, 1531–32 (7th Cir. 1987).

173. *See* Mt. Olive Pickle Co., Compliance, *supra* note 29.

174. Mt. Olive Pickle Company, Crop Supplier Statement of Compliance: 2004 Season (2004), available at <http://www.mtolivepickles.com/Company/FLOC008a.html> (last visited Feb. 22, 2005) (hereinafter Mt. Olive Pickle Co., Supplier).

175. Mt. Olive Pickle Co., Compliance, *supra* note 29.

176. In its September 2004 agreement with FLOC, Mt. Olive specifically agreed to allow FLOC to enter the territory of any supplier competing with those in the NCGA, including those outside North Carolina. McKinnon, *supra* note 27.

177. *See* Mt. Olive Pickle Co., Compliance, *supra* note 29.

178. Growers’ agreement states, “to the best of my knowledge, I am in compliance with all applicable federal and state farm employment rules and regulations including, but not limited to, those listed on the back of this form.” Mt. Olive Pickle Company, Grower Statement of Compliance: 2004 Season (2004), available at <http://www.mtolive>

pany spokesperson explains, “it is our general understanding that workers have the right to have visitors. We encourage our suppliers and their growers to not interfere with union representatives and advocates who visit workers in their camps. . . .”¹⁷⁹ North Carolina law suggests that growers must allow union organizers access to migrant labor camps,¹⁸⁰ therefore the Statements of Compliance should be amended to specifically include a provision granting unions access and setting reasonable standards to govern that access.

FLOC President Baldemar Velásquez opines, “[i]t’s the agricultural industry, not politicians, that will improve the deplorable conditions of immigrant laborers. . . . Mt. Olive Co.’s leadership position in the agricultural industry allows it to initiate positive changes. We know that once Mt. Olive Co. leads in this direction, other companies will follow.”¹⁸¹ Indeed, Mt. Olive’s decision to require Statements of Compliance is but one example of agricultural companies’ ability to initiate positive change—an example other companies should follow. In addition, the Mt. Olive model suggests a new strategy for union organizers who have not yet been successful at winning agreements like the one FLOC won in North Carolina—encouraging companies to require signed statements of compliance with a recognition of farmworkers’ associational rights.

IV. Conclusion

The Mt. Olive Pickle Company set a good example when it required suppliers and growers to “sign[] Statements of Compliance . . . indicat[ing] that . . . [they] are in compliance with all applicable federal and state laws governing farmworker employment. . . .”¹⁸² Mt. Olive and other similarly situated companies should demand that their suppliers and growers sign Statements of Compliance that specifically include a union access provision. The provision would recognize workers’ right to invite union representatives to labor camps and would define those representatives’ rights while at the camps. Guaranteed access to farmworkers is far less than what farmworker unions like FLOC demand and much more than most companies are willing to offer. However, an agreement on access is critical for compromise between the two, and

pickles.com/Company/FLOC008b.html (last visited Feb. 22, 2005) (emphasis added); Mt. Olive Pickle Company, Supplier, *supra* note 177 (emphasis added). See also Mt. Olive Pickle Company, United States and North Carolina Farm Regulations (2004), available at <http://www.mtolivepickles.com/Company/FLOC008d.html> (last visited Feb. 22, 2005) (listing the state and federal laws parties to the Statements of Compliance must follow).

179. E-mail from Lynn Williams, Community Relations, Mt. Olive Pickle Company, to Allison Kidd (Aug. 19, 2004) (on file with author).

180. See *supra* Part III.A.

181. Farm Labor Org. Comm., FLOC, *supra* note 19.

182. Mt. Olive Pickle Co., Compliance, *supra* note 29.

specifically appears to be a necessary part of the Mt. Olive promise to require its suppliers and growers to comply with federal and state law.

Federal and state courts have borrowed standards from established union access rules in the NLRA context to allow unions access to farmworker labor camps. While the courts differ in their rationales, the results usually are the same—allowing union access where farmworkers are isolated and the union has no other reasonable means of communicating with workers.¹⁸³ Strong public policy concerns support union access rights, ensuring that a grower's property interests do not tread upon the welfare and dignity of the farmworkers laboring on that property.¹⁸⁴

Whether supported by a property or constitutional rights theory or simple public policy, the courts should specifically recognize the rights of unions to access labor camps, particularly those inhabited by H2-A workers. North Carolina can be a model for resolving similar conflicts in other states. Until then, all companies like Mt. Olive should encourage and help enforce any agreement between growers and farmworkers granting unions, legal services providers, health care workers, and others access to labor camps. Admittedly, access alone is a small step; however, it is a vitally important one. It will not be until farmworkers have a right to organize and bargain with growers without fear of losing their jobs or being ejected from the country that they will have reason to sing "*de colores, de colores. . .*"¹⁸⁵

183. *See supra* Part II.B.

184. *See supra* Part II.B.3.

185. *See supra* note 1.