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SUCCESSOR CLAUSES: WHAT THEY ARE AND WHY EVERY UNION SHOULD HAVE ONE*

Thomas Benjamin Huggett

This agreement shall be binding upon the successors and the assignees of the parties hereto and no provision, terms or obligations herein contained shall be effected, modified, altered or changed in any respect whatsoever, by any change in the regular status, ownership or management of either party herein.¹

Collective bargaining is the process by which the representative of the employees (usually a union) and the employer establish the wages, hours, and conditions of employment in a unionized company.² When the union

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¹ First Place, John H. Fanning Labor Law Writing Competition, Columbus School of Law, The Catholic University of America, 1996.
⁴ The NLRA's centerpiece, collective bargaining, was the means by which Congress sought to promote labor stability and industrial peace. See id. § 151. The NLRA defines collective bargaining as follows:

'to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising there-
and the employer agree on any subject, the National Labor Relations Act (NLRA) requires the parties to sign a written agreement upon the request of either party. This agreement, commonly known as a collective bargaining agreement, is a legally enforceable contract. However, in the event of a sale, purchase of assets, merger, consolidation, or other transfer of an ongoing business that has an unexpired collective bargaining agreement, uncertainty may exist as to the buyer’s and seller’s respective obligations under the agreement.

Id. § 158(d).

In order to effectuate collective bargaining between employers and employees, the NLRA guarantees employees the right to join, or not to join, a labor organization that will represent them for purposes of collective bargaining. See id. § 157. A labor organization is any kind of group through which employees participate in dealing with employers concerning the terms and conditions of their employment. See id. § 152(5). In the United States, labor unions are unincorporated organizations that seek to represent employees in their dealings with management and almost always qualify as labor organizations, though not all labor organizations are unions. See R.H. Bouligny, Inc. v. USWA, 336 F.2d 160, 161-63 (4th Cir. 1964) (discussing labor unions as unincorporated associations), aff’d, 382 U.S. 145 (1965); G.H. Bass Caribbean, Inc., 306 N.L.R.B. 823, 824 (1992) (finding a union in violation of Department of Labor requirements was a labor organization so long as it met the NLRA’s criteria). Because the majority of labor organizations are unions, this Comment uses the terms union and unionized to refer to any labor organization or group of employees represented by a labor organization.

3. See 29 U.S.C. § 158(d) (1994). The written agreement on wages, hours, and conditions of employment is commonly known as a collective bargaining agreement. See Kelly, supra note 2, at 18.


5. Because the differences in the method of ownership transfer do not substantially affect the labor law interests of employers and employees, this Comment does not distinguish between the various changes in business ownership when a business continues operations at the same location. In general, the United States Supreme Court has not required different legal analyses for different types of ownership changes, at least where the employees continue to work for the purchaser, on the ground that a simpler, generally applicable labor policy will better protect the rights of employers and employees. See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973). But see Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees, 417 U.S. 249, 257 (1974) (distinguishing a merger from other changes in ownership because in a merger the background of state law determines the businesses’ rights and obligations and the businesses cease to exist as separate entities).

6. The NLRA does not specifically address the continuation of the employees’ choice of union representation or collective bargaining agreements when a business changes ownership. See 29 U.S.C. §§ 151-169 (1994). The federal common law determining when the purchaser of a business is required to recognize the union representing the predecessor’s employees is known as the “successorship doctrine.” See infra Part II.A. (explaining the successorship doctrine). See generally Seymour Swerdlow, Freedom of Contract in Labor
Successor Clauses

**Law:** Burns, H.K. Porter, and Section 8(d), 51 Tex. L. Rev. 1, 7-20 (1972) (discussing the various applications of the substantive labor law of bargaining obligations and unfair labor practices, as well as contracts, to purchasing employers). When there is an unexpired collective bargaining agreement, the successorship doctrine is often applied to determine the purchasing employer's obligations under the terms of the existing agreement. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40-41 (1987); Howard Johnson, 417 U.S. at 260-62 & n.9; see also Brian H. Redmond, Annotation, When is Subsequent Business Operation Bound By Existing Collective Bargaining Agreement Between Labor Union and Predecessor Employer, 88 A.L.R. Fed. 89 (1988 & Supp. 1996) (identifying successorship doctrine cases addressing purchasing of employer obligations under existing collective bargaining agreements). The common law basis of the legal principles, combined with the intensive factual nature of the determination, makes it difficult to state any generally applicable principle to guide the parties to the sale of business in determining their successor obligations. See Howard Johnson, 417 U.S. at 262 n.9 (“[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context.”).

Interestingly, federal and provincial statutory Canadian labor law ensures the “continuation of the bargaining and contractual rights” of employees “following the sale, lease, transfer, or other disposition of the employer’s business.” The Labor Relations Law of Canada 99-100 (Richard Martin Lyon et al. eds., 1977); see also Karin McCaskill, Purchase and Sale of a Business, Atlantic Employers' Counsel (Spring 1995) <http://fox.nsn.ca:80/-smshome/employers/p&sofbus.html> (describing Canadian statutory obligations upon the sale of a business). Thus there has been no need for successor clauses in Canada. Recently, however, Ontario repealed successor rights for government employees causing their unions to seek inclusion of successor clauses in their collective bargaining agreements. See Thomas Walkom, Civil Service Strike Perfect for Tories, Toronto Star, Feb. 8, 1996, at A23 (reporting on the repeal of government employee successor rights); Daniel Girard, It's a Deal: Workers Expected on Job Monday, Toronto Star, Mar. 30, 1996, at A1 (reporting the public employees union's strike failed to procure a successor clause with the government).

For articles addressing the enforcement of successor clauses from an academic viewpoint, see Jules I. Crystal & Richard J. Brodecki, Are Successors and Assigns Clauses Really Binding, 38 Lab. L.J. 547, 560-61 (1987) (concluding the language of a successor clause will determine the selling employer's obligations and the extent to which the purchaser continues to operate the business in the same manner will control the purchaser's obligations); Max Zimny, The Contractual Liability of Employers, Their Successors and Assigns, 10 Lab. L. 73, 89-90 (1994) (concluding freely negotiated successor clauses do not interfere with the free transfer of capital and should be enforced); Marion Crain-Mountney, Comment, The Unenforceable Successorship Clause: A Departure from National Labor Policy, 30 UCLA L. Rev. 1249, 1281 (1983) (concluding the courts improperly and selectively apply contract principles to deny enforceability of collective bargaining agreements with successor clauses, thereby depriving employees of property rights without due process of law); Jay D. Pimentel, Comment, Successorship Clauses in Collective Bargaining Agreements, 1979 BYU L. Rev. 99, 123 (concluding there are substantial obstacles to the enforcement of successor clauses); Celestine J. Richards, Note, The Efficacy of Successorship Clauses in Collective Bargaining Agreements, 79 Geo. L.J. 1549, 1580 (1991) (concluding although the effectiveness of successor clauses against purchasing employers is dependent upon application of the successorship doctrine, where a successor clause exists, there also should exist a rebuttable presumption that the collective bargaining agreement binds the purchaser); see also Wilbur Daniels & Seth Kupferberg, Sale of Assets, Mergers, and Acquisitions: A Union View, in Labor Law and Business Change: Theoretical and Transactional Perspectives 185-206 (Samuel Estreicher & Daniel G. Collins eds., 1988) (examining the obligations of selling employers); Marvin Dicker, Sale of Assets, Mergers, and Acquisitions: A Management View, in Labor Law and Business Change:
The successor clause, a contractual provision stipulating that the terms of the collective bargaining agreement will be binding upon any successor to the employer or union, may serve to alleviate some of this post-transfer uncertainty. Because the National Labor Relations Board (NLRB) has held that successor clauses are mandatory subjects of bargaining, a

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7. See Kelly, supra note 2, at 81; see also 2 Collective Bargaining Negot. & Cont. (BNA) § 70:181-83 (May 12, 1994) (setting forth the text of various forms of successor clauses); Union Contract Clauses (CCH) ¶ 51,803 (1954) (setting forth the text of 22 different successor clauses).

8. LeRoy Marceau, Drafting a Union Contract 89 (1965) (noting that where a collective bargaining agreement is silent there is doubt concerning successor obligations and urging that assumption of the agreement, by either a new union or employer, be expressly stated in a successor clause).


union or an employer can bargain to impasse over the inclusion of a successor clause.11

This Comment addresses the effectiveness of successor clauses in continuing the terms and conditions of employment when a business changes ownership.12 While the successor clause is instrumental in providing job security for a union’s members, collective bargaining over such clauses and their ultimate usefulness is a controversial and often fruitless endeavor. This Comment attempts to provide an overview of the collective bargaining process and the many factors that go into the creation and effectiveness of a successor clause.

First, to give the reader a sense of context, this Comment presents an overview of the reasons for and against inclusion of a successor clause, along with a review of bargaining over successor clauses. Next, this Comment reviews the Supreme Court’s successorship doctrine and its effect on the enforcement of successor clauses against purchasing employers. This Comment then demonstrates that the mere inclusion of a successor clause in a collective bargaining agreement is insufficient to bind a

11. See Conoco, 287 N.L.R.B. at 559. The NLRA mandates that unions and employers negotiate regarding “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). The Supreme Court has found that mandatory subjects of bargaining include any provision that regulates the relationship between the employer and the employees. See NLRB v. Borg-Warner Corp., 356 U.S. 342, 349-50 (1958); cf. Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178-79, 182 (1971) (holding that bargaining over third party interests is only required where they vitally affect the terms and conditions of employment of employees). Parties may insist that mandatory subjects be discussed in negotiations and included in the final contract. See Borg-Warner, 356 U.S. at 349. The parties may also use their lawful economic weapons, such as the strike or the lockout, to achieve their bargaining demands regarding mandatory subjects. See Lodge 76, IAM v. Wisconsin Employment Relations Comm’n, 427 U.S. 132, 149 (1976) (“[T]he use of economic pressure by the parties to a labor dispute is not a grudging exception under the [NLRA]; it is part and parcel of the process of collective bargaining.” (quoting NLRB v. Insurance Agents’ Intl Union, 361 U.S. 477, 495 (1960))). See generally NLRB Gen. Couns. Advice Mem., Case No. 4-CA-20660 (Aug. 28, 1992), available in LEXIS, 1992 NLRB GCM LEXIS 30, at *3-4 (finding employer lawfully bargained to impasse with union over removal of a successor clause); NLRB Gen. Couns. Advice Mem., Case No. 6-CE-1735 (May 12, 1988), available in LEXIS, 1988 NLRB GCM LEXIS 160, at *6-7 (finding union engaged in unlawful secondary picketing in an attempt to force the employer to agree to a successor clause).

12. This Comment addresses only changes in ownership that affect the actual ownership of a business and not single employer or alter-ego situations where the purchasing employer is “merely a disguised continuance of the old employer.” Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees, 417 U.S. 249, 259 n.5 (1974) (noting that in alter-ego cases courts “have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.” (quoting Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942))); see also PHILIP A. MISCHIMARA, THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION 181-83 (1983) (discussing the alter-ego doctrine in business sales).
purchasing employer. Finally, this Comment examines several means of enforcing successor clauses against the signatory employer. As with enforcement against a purchasing employer, this Comment demonstrates that merely including a successor clause in the collective bargaining agreement is not enough to compel the signatory employer to ensure the terms of the agreement survive the sale of a business. The language of the successor clause is critically important in an action to enforce the agreement.

This Comment suggests that unions should seek the inclusion of specifically worded successor clauses in collective bargaining agreements where job security is an important objective. As discussed herein, unions could better serve their members by insisting on a successor clause, even where inclusion results in a stronger management rights clause. Further, the value of a successor clause to union members far outweighs the value of several other clauses routinely bargained for by unions. Because the specific language used in the clause is critical, three “draft” clauses addressing potential problems are presented. This Comment concludes that successor clauses are enforceable and that all unions should seek their inclusion in collective bargaining agreements.

I. Bargaining Over Successor Clauses

Most successor clauses seek to bind a purchasing employer to all the terms and conditions of the existing collective bargaining agreement in the event of the sale, assignment, or other transfer of business ownership.13

The percentage of union contracts containing successor clauses has steadily increased from 1975 to 1995.14 More importantly, the number of industries where more than half of the collective bargaining agreements include a successor clause has tripled in the last twenty years.15 What,

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13. See Kelly, supra note 2, at 81; Zimny, supra note 6, at 76.
15. See Basic Patterns In Union Contracts (BNA) 8 (8th ed. 1975) (transportation, 61%; utilities, 60%; and services, 53%); Basic Patterns In Union Contracts (BNA) 5 (9th ed. 1979) (leather, 75%; utilities, 70%; transportation, 64%; and furniture, 50%); Basic Patterns In Union Contracts (BNA) 5 (10th ed. 1983) (leather, 75%; utilities, 80%; transportation, 68%; apparel, 56%; retail, 52%; and furniture, 50%); Basic Patterns In Union Contracts (BNA) 6 (11th ed. 1986) (furniture, 83%; utilities, 80%);
then, are the reasons that some collective bargaining agreements contain successor clauses while others do not?

A. The Motives of the Parties

In its 1996 Statement of Bargaining Goals, the United Steel Workers Basic Steel Industry Conference stated “[a]n up-to-date successorship clause is a must for all contracts.”¹⁶ One of the greatest threats to Un-

communications, 70%; apparel, 67%; transportation, 60%; retail, 52%; and leather, 50%); BASIC PATTERNS IN UNION CONTRACTS (BNA) 6 (12th ed. 1989) (apparel, 72%; utilities, 70%; communications, 65%; transportation, 62%; furniture, 60%; retail, 60%; foods, 50% and rubber, 50%); BASIC PATTERNS IN UNION CONTRACTS (BNA) 5 (13th ed. 1992) (apparel, 78%; transportation, 64%; communications, 60%; utilities, 60%; insurance and finance, 57%, retail, 56%; foods, 52%; furniture, 50%; and rubber, 50%); BASIC PATTERNS IN UNION CONTRACTS (BNA) 5 (14th ed. 1995) (utilities, 80%; apparel, 78%; retail, 70%; transportation, 68%; foods, 67%; insurance and finance, 57%; communications, 50%; furniture, 50%; mining, 50%; and rubber, 50%). These survey reports do not indicate what factors led to the changes in the percentage of successor clauses within an industry.

¹⁶. See Statement of USW Basic Steel Industry Conference’s Bargaining Goals, DAILY LAB. REP. (BNA) No. 24, at E-6 (Feb. 6, 1996) [hereinafter USW Basic Steel Bargaining Goals]. The Conference’s Statement went on to state that the “clause should require that any buyer of a plant must recognize the USWA, and that a USWA contract be in place before the sale of the company occurs.” Id. Other unions also have indicated that job security is a priority in their bargaining negotiations. See Excerpts for UAW 1996 Collective Bargaining Program, DAILY LAB. REP. (BNA) No. 67, at E-7 (Apr. 8, 1996) (stating that
ions' interest in preserving the privileges and benefits gained through collective bargaining is the change in ownership of a business. Generally unions seek the inclusion of a successor clause in order to protect the representation rights, jobs, and benefits of their members. A union's economic interests are best protected if the employer, who has signed a collective bargaining agreement with a successor clause, is obligated to find a buyer who will assume the obligations in the agreement. In addition, a union may seek a successor clause that binds the purchasing employer to the terms of the collective bargaining agreement so that the union seeks to "protect UAW members through clear and legally enforceable" successor clauses; Timber: Benefits To Top Woodworkers' Agenda Beginning this Month, DAILY LAB. REP. (BNA) No. 68, at A-5 (Apr. 9, 1996) (reporting the union intends to bargain for successor clauses); Nancy Moore, Job Security is OCAW's Main '96 Goal, PLATT'S OILGRAM NEWS, Oct. 6, 1995, at 5 (reporting that the Oil, Chemical & Atomic Workers will seek a successor clause in their national contract); Oil Workers Unveil Agenda (Sept. 16, 1995) <http://www.enews.com/data/magazines/alphabetic/all/It/Current%20Issue/091695.1> (same).

17. See N. Peter Lareau, DRAFTING THE UNION CONTRACT: A HANDBOOK FOR THE MANAGEMENT NEGOTIATOR § 18.01 (Feb. 1989); Zimny, supra note 6, at 73; Barbara Woller, Con Edison Strike Looms (June 6, 1996) <http://www.news.com/archive/b260621a.html> (reporting an impending order to divest some parts of the utility would leave the employees without union protection, thus the union sought a successor clause).


The USWA Basic Steel Industry Conference insists upon a successor clause in each of its collective bargaining agreements to protect the contracts if the business is sold and to protect the union's bargaining rights. See USW Basic Steel Bargaining Goals, supra note 16, at E-6. The Conference stated that "[w]ithout [the successor clause] the Union could not only end up with an inferior contract if the company is sold, but could also end up losing its bargaining rights." Id.


19. Arbitrator Norman Brand has explained that a binding successor clause gives the union the opportunity to negotiate a collective bargaining agreement from the existing terms and conditions of employment:
   Without a successorship clause, the buyer has an opportunity to lower his labor costs unilaterally, avoid dealing with the Union until after it has hired workers and is obliged to recognize the Union, and negotiate from a position of unilaterally imposed terms and conditions of employment.

High Sierra Casino/Hotel v. Hotel and Restaurant Employees Union, Local 86, No. NB 1037 (Oct. 28, 1990) (Brand, Arb.), available in WL, Arbit database; see also Phil Primack, Union Officials: Plant's New Owners Put Jobs at Risk, BOSTON HERALD, May 8, 1996 (reporting that local union officials acknowledge that their legal options for protecting the employees of a sold business were limited because the collective bargaining agreement with the selling employer did not contain a successor clause).
purchaser is required to retain the predecessor’s employees. Finally, in an era when union membership is down and job protection is a constant concern, unions find it important to announce to their members that they have negotiated a successor clause that protects jobs and benefits.

20. The Supreme Court has expressed concern that in binding a purchasing employer to the terms and conditions of an existing collective bargaining agreement, the agreement would contractually require the purchaser to accept the predecessor’s employees as its own, terminable only in accordance with the terms of the agreement. See NLRB v. Burns Int’l Sec. Servs., 406 U.S. 272, 288 (1972). The Court theorized that if a purchasing employer were required to accept the collective bargaining agreement, the purchaser would be required to acknowledge all of the predecessor’s employees’ preexisting rights. See id. at 288-89. The Court concluded that by requiring recognition of all the employees’ rights, the purchaser would not be free to hire its own workforce because it could not discharge the predecessor’s employees without following the provisions in the agreement, which presumably included requiring cause for any discharge. See id. In addition, the Court noted that these obligations would be imposed on the purchasing employer without requiring the union to bargain for them. See id. at 289.

The USWA Basic Steel Industry Conference insists upon a successor clause in each of its collective bargaining agreements in an attempt to obligate the buyer to rehire USWA members. USW Basic Steel Bargaining Goals, supra note 16, at E-6. The Conference stated, “without the right successorship clause in our contract it may be more difficult to obligate the buyer to rehire USWA members.” See id.

21. See A. Feren, Recent Decision, 32 CHI.-KENT L. REV. 170, 173 (1954) (noting a successor clause was included in the collective bargaining agreement by the union to give its members a greater sense of security); see also USWA Members at Lukens Approve New Four-Year Contract Highlighted by Employment Security, Wage and Benefit Increases, PR NEWSWIRE, Feb. 8, 1996, available in WL, PRWirePlus database (announcing a contract settlement that included a successor clause) [hereinafter USWA Members at Lukens]; New LG&E Contract with IBEW Provides Workers Protection In Event of Merger, ELECTRIC UTIL. WK., Dec. 18, 1995 (reporting on the agreement to a collective bargaining agreement that includes a successor clause) [hereinafter LG&E Contract with IBEW]; Larry Ringler, WCI Contract has Advantages for Company, Union, TRIBUNE-CHRON. (Warren, Ohio), Oct. 25, 1995, at A2 (reporting on union’s successful negotiation of an improved successor clause); Wesley Wells, Chrysler Story Distorted Agreement Between Company, Union, DAYTON (OHIO) DAILY NEWS, Oct. 2, 1995, at 8A (discussing the UAW’s 12 year successor clause with Chrysler Corporation). But see David Johnston, OCAW, Amoco Reach Terms on Three-Year Contract, PLATT’S OILGRAM NEWS, Feb. 5, 1996, at 1 (reporting that the Oil, Chemical & Atomic Workers abandoned their demand for a successor clause in exchange for a general wage increase). See generally Paul Langner, Nine Mental Health Workers Arrested at Choate, BOSTON GLOBE, Dec. 15, 1995, at 102 (reporting that members of a union whose collective bargaining agreement did not contain a successor clause were arrested for demonstrating outside the offices of the purchasing employer).

Indeed, some unions find announcement of a successor clause important enough to give it a prominent place on their Internet sites. See 1996 Chrysler Contract Highlights (visited Jan. 20, 1997) <http://www.uaw.org/bargaining/Chrysler/21.html#3> (explaining the successor clause obligates Chrysler to require a purchaser to assume the collective bargaining agreement); 1996 GM Contract Highlights (visited Jan. 20, 1997) <http://www.uaw.org/bargaining/GM_Contract/26.html> (explaining the successor clause requires a purchaser to assume the collective bargaining agreement); National Bituminous Coal Wage Agreement of 1993: Article I (visited Jan. 20, 1997) <http://www.access.digex.net/~umwa/art1.txt> (setting forth the full text of the successor clause); OCAW Signs the Best Contract Ever with British
Employers may also have an interest in including a successor clause in a collective bargaining agreement. A successor clause may help an employer fend off unwanted corporate takeover attempts, or improve the chances of a desired merger or takeover by providing clear evidence of stable labor relations. Alternatively, employers might be neutral toward a successor clause, accepting the clause in order to gain a government-sponsored contract or to demand concessions from a union. Traditionally, however, employers have resisted successor clauses. Employers have a strong interest in avoiding bargaining over subjects that are regarded as part of the managerial control of the business. A successor clause may restrict an employer's efforts to sell or transfer a business.

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22. See LG&E Contract with IBEW, supra note 21 (noting that the successor clause in the collective bargaining agreement could help fend off an unwanted corporate takeover).

23. See Feren, supra note 21, at 173 (stating it was to the employer's advantage to have a transferable collective bargaining agreement that was binding on the union).

24. See Wheelabrator Envirotech Operating Servs. v. Massachusetts Laborers Dist. Council Local 1114, 88 F.3d 40, 42 (1st Cir. 1996) (noting the city required the initial employer to recognize the union and assume the previously negotiated collective bargaining agreement as a condition of awarding the contract); see also id. at 48 (noting: (1) a successor clause imposes a risk of nonperformance liability only for the duration of the term of the collective bargaining agreement and those bargain for with a purchasing employer, where the signatory employer has achieved the best possible deal from the union, liability for nonperformance of the successor clause is unlikely because the union will probably be able to reach a better deal with the new employer; infra text accompanying note 45 (discussing an example of concessions received from a union in exchange for a successor clause).

25. In explaining the role of the union in managerial decisions, the Supreme Court stated:

Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed. Despite the deliberate openendedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place.

First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981); see also id. at 686 (holding a management decision to close portion of business was not a mandatory subject of bargaining where the decision was based on economic profitability); Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971) (noting the employer's termination of retirees' health care benefits is not a mandatory subject of bargaining); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (arguing choices concerning advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship and are not mandatory subjects of bargaining); cf. Allied Chemical, 404 U.S. at 178 (noting the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employees).
ness, or reduce its value. Further, if an employer fails to fulfill the terms of a successor clause, the employer may be found liable for damages resulting from the breach of the agreement. Thus, most employers resist inclusion of successor clauses in collective bargaining agreements.

B. Theories Of Collective Bargaining

There are currently two dominant methods of collective bargaining: (1) traditional offer and counter-offer bargaining; and (2) interest based bargaining. Traditional offer and counter-offer bargaining begins with the parties presenting their respective initial proposals. Neither party expects the other party to agree to their initial proposal. Generally, the parties incrementally modify their positions until an agreement or impasse is reached, although one party might concede a position in ex-

26. See LAREAU, supra note 17, § 18.02, at 18-2 (Feb. 1989); see also NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 287-88 (1972) (finding a purchasing employer may be unwilling to take over a troubled business if the purchaser is unable to reorganize the business and will be bound to the terms of an existing collective bargaining agreement that may have contributed to the business's problems); MISCIMARA, supra note 12, at 190 (noting successor clauses "can hamper employer flexibility"); John S. Irving, Jr., Closing and Sales of Businesses: A Settled Area?, 33 LAB. L.J. 218, 228-29 (1982) (stating that because a successor clause can cause irreparable harm to a selling employer, successor clauses, or passing references to successors, should be avoided); LG&E Contract with IBEW, supra note 21 (noting that the successor clause in a collective bargaining agreement could be a problem for a desired takeover).

27. See, e.g., UMWA, Dist. 15 v. Basin Coop. Servs., 53 F.3d 222, 225 (8th Cir. 1995) (affirming a $6.5 million jury verdict for breach of a successor clause); High Point Sprinkler Co. v. Road Sprinkler Fitters Local Union No. 669, 67 Lab. Arb. (BNA) 239, 248 (1976) (Connolly, Arb.) (awarding $18,725 in damages for breach of a successor clause); Rick Wartzman, Mine Workers Win Settlement of Suit From Massey Coal, WALL ST. J., May 26, 1988, at 15 (reporting that the employer agreed to pay $4.5 million to settle a lawsuit alleging breach of a successor clause); see also Wheelabrator Envirotech Operating Servs., 88 F.3d at 43 (noting selling city agreed to pay difference in wages in response to a grievance based on a successor clause); Inside the Auto Talks: How Axle Lesson Could Shorten Strike: '93 Deal with Former GM Unit Could Help Resolve CAW Dispute, DETROIT NEWS, Oct. 10, 1996, at B1 (reporting GM paid the difference between GM's wages and the purchasing employer's wages to avoid a lawsuit when GM sold a division without requiring the purchaser to adopt the collective bargaining agreement as required by a successor clause).


29. See MAURICE B. BETTER, CONTRACT BARGAINING HANDBOOK FOR LOCAL UNION LEADERS 115-32 (1993) (describing the process behind both theories of bargaining from a union perspective); CHARLES S. LOUGHRAN, NEGOTIATING A LABOR CONTRACT: A MANAGEMENT HANDBOOK 204-35 (2d ed. 1993) (describing the process behind both theories of bargaining from a management perspective).
change for a concession on another position by the other party. The parties conceal their bargaining positions in an attempt to reach an agreement they feel is most advantageous to themselves and is the most the other party will commit. Parties become more motivated to settle as deadlines approach and the ultimate outcome is determined by their relative bargaining strength. This traditional model of hard bargaining produces an agreement between adversaries.

Interest based bargaining, also known as win-win bargaining, begins with a discussion between the parties of their respective goals and problems. Negotiators attempt to promote the interests of their constituents without promoting positions. Bargaining proceeds in an open atmosphere with a free flow of information and no designated spokespersons. Because the parties attempt to avoid deadlines and contests of economic power, this model of bargaining produces a problem solving agreement.

Several theories attempt to explicate the interaction between the parties during the negotiation of a collective bargaining agreement and to predict the outcome of the negotiations. The most widely accepted the-

30. This type of trade-off or quid pro quo is a major feature of traditional bargaining and involves many tactical considerations. See Loughran, supra note 29, at 227-28.

The Supreme Court has recognized that collective bargaining over the terms of a contract necessarily involves give and take. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) (noting that a union's waiver of the right to strike is a quid pro quo for the employer's acceptance of a grievance arbitration procedure); see also Thomas R. Colosi & Arthur Eliot Berkeley, Collective Bargaining: How It Works And Why 116 (2d. ed. 1992) (stating that negotiating in collective bargaining is accomplished by each side giving up something in order to obtain something); cf. Gateway Coal Co. v. UMWA, 414 U.S. 368, 382 (1974) (finding that an agreement to arbitrate creates coterminous application of an implied duty not to strike over arbitrable disputes).

31. See Better, supra note 29, at 130. Management's interest has been described as the "total package" or "bottom line" concept. See Loughran, supra note 29, at 235. Avoiding consideration of what it feels the ideal contract would be, management focuses instead on the bottom line—what is the cost impact for each year of the agreement regardless of how it is constructed. See id. at 236. The flexibility found in this approach may be limited by management's refusal to consider certain proposals for policy reasons, e.g. a refusal to include sick leave in a contract because employees would feel entitled to take the leave regardless of need. See id. at 237.

32. See Raymond A. Friedman, Front Stage, Back Stage: The Dramatic Structure Of Labor Negotiations 6-12 (1994). Macro-economists look to the total outcome of all collective bargaining agreements as an aggregate, without reviewing the conduct of the parties at the negotiating table, to determine the probable outcome of future negotiations. See id. at 6. Micro-economists and Game Theorists develop abstract ideals of negotiations with defined goals and rules for decision making that, assuming rational participants, allows for prediction. See id. at 7. Social Psychologists simulate collective bargaining, studying an immense number of variables, to predict how any given variable will affect the outcome of bargaining. See id. at 8. Behavioral theorists review the processes of negotiations to determine how the internal and external factors affecting the
ory is founded upon a review of the behavioral actions of the parties, postulating four subprocesses of negotiations: (1) distributive bargaining, (2) integrative bargaining, (3) intra-organizational bargaining, and (4) attitudinal structuring. Distributive bargaining concerns issues where one party's gain is necessarily another's loss. Bargaining over wages is an example of distributive bargaining. Integrative bargaining addresses subjects that provide a solution for both parties, such as productivity and organizational performance. Intra-organizational bargaining occurs internally among one negotiating committee as they determine what they are seeking or will accept. Attitudinal structuring involves the degree of trust the parties feel towards one another. Using either model of collective bargaining, it is helpful to consider the subprocesses of negotiating when assessing the reception a successor clause proposal might receive.

C. Bargaining Over The Successor Clause

Collective bargaining is often referred to as a game played according to certain unwritten rules; one being the union presents its proposals first. The union enjoys an opportunity to frame the successor clause as either part of a complete agreement or an individual proposal, and to decide which presentation is most likely to succeed. Successor clauses can be

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34. See Walton & McKersie, supra note 33, at 11; Katz & Kochan, supra note 33, at 204.

35. See Walton & McKersie, supra note 33, at 126-27; Katz & Kochan, supra note 33, at 204.

36. See Walton & McKersie, supra note 33, at 127; Katz & Kochan, supra note 33, at 204.

37. See Walton & McKersie, supra note 33, at 281; Katz & Kochan, supra note 33, at 208.

38. See Walton & McKersie, supra note 33, at 184-85; Katz & Kochan, supra note 33, at 206.

bargained for under traditional or interest based bargaining,\textsuperscript{40} and the variations on how to present a successor clause, although directed by the factual situation, are limited only by the ingenuity of the negotiators.

For example, in \textit{Teamsters, Local Union No. 2707 v. Western Air Lines, Inc.},\textsuperscript{41} the Teamsters signed a letter of agreement whereby Western agreed that in the event of an unfriendly takeover, it would require the purchaser to assume the terms of its collective bargaining agreement.\textsuperscript{42} The agreement also provided that if Western failed to require the purchaser to assume the agreement, Western would be liable to the Teamsters for damages.\textsuperscript{43} The Air Transport Employees Union signed similar letters of agreement with Western.\textsuperscript{44} The letters of agreement were agreed to as part of "extensive negotiations" and required wage concessions of ten percent from the Teamsters and from ten to twenty percent from the Transport Employees.\textsuperscript{45}

Whatever the bargaining process, successor clauses continue to be a subject of collective bargaining.\textsuperscript{46} Once the parties agree to include a

\textsuperscript{40} For example, if the parties are bargaining traditionally and the union states in its initial proposal that the employees desire a successor clause, more likely than not the employer will oppose the clause. The employer will not include the successor clause in the collective bargaining agreement unless the union agrees to some management proposal. Yet, through a process of give and take, the clause may be agreed upon. In interest based bargaining, on the other hand, the union may be able to present the successor clause as a proposal that addresses both management's takeover concerns and the employee's concerns about job protection. Because the successor clause solves two problems, it should be supported and adopted by both parties.

\textsuperscript{41} 813 F.2d 1359 (9th Cir.), vacated, remanded for consideration of mootness, 484 U.S. 806 (1987).

\textsuperscript{42} See \textit{id.} at 1360.

\textsuperscript{43} See \textit{id.} at 1360-61.

\textsuperscript{44} See \textit{id.} at 1361.

\textsuperscript{45} See \textit{id.; see also infra notes 158-60 (discussing the enforcement of the letters of agreement between the unions and the employer).}

\textsuperscript{46} See '97 \textit{Bargaining Survey, supra} note 28, at C-22 (discussing anticipated bargaining over successor clauses). On February 2, 1996, USWA Local 1165 reached agreement with Lukens Steel Co. in Coatesville, Pennsylvania on a collective bargaining agreement covering 1,150 employees that included a successor clause. See \textit{USWA Members at Lukens, supra} note 21. In December 1995, IBEW Local 2100 reached agreement with Louisville Gas & Electric in Louisville, Kentucky on a collective bargaining agreement covering 1,800 employees that included a successor clause. See \textit{LG&E Contract With IBEW, supra} note 21. On October 25, 1995, USWA Locals 1375 and 6824 reached agreement with WCI Steel Inc. in Warren, Ohio for a collective bargaining agreement covering 1,700 employees that included a successor clause. See \textit{Steelworkers Approve New Pact with WCI Steel Inc., PR Newswire, Oct. 25, 1995, available in WL, PRWirePlus database.}

\textit{See generally No Settlement On Frontier's Horizon; Company Baffled by Strike, OCTANE Wk., May 20, 1996 (reporting that Oil, Chemical and Atomic Workers of Local 2-574, following the national bargaining agenda, were striking in part because the employer refused to agree to a successor clause); Jen Sisson, Dynagen Workers End 12-Day Walkout, RUBBER & PLASTICS NEWS II, June 10, 1996 (reporting that Rubber Workers Local 1124
successor clause in their collective bargaining agreement and further agree on the language of the clause, the NLRA requires that it be included in their final written agreement upon the request of either party.\textsuperscript{47} An employer who signs an agreement with a successor clause will be held to the terms of the collective bargaining agreement under general principles of contract enforcement.\textsuperscript{48} However, the effect of a successor clause on the obligations of a purchasing employer often depends on whether the purchaser is a successor employer under the NLRA's successorship doctrine.\textsuperscript{49}

II. The Successorship Doctrine and Enforcement of Successor Clauses Against Purchasers

A. The Successorship Doctrine

The NLRA does not specifically address the continuation of employees' union representation, or the continuation of their unexpired collective bargaining agreements when a business is sold, transferred, or otherwise changes ownership. The NLRB and the Supreme Court have attempted to fill these gaps with federal common law.\textsuperscript{50} This body of law, known as the "successorship doctrine," defines the rights of employees and the obligations of employers when a business changes ownership.\textsuperscript{51} The Supreme Court has also created a body of law holding that collective

\textsuperscript{48} See \textit{Lareau}, supra note 17, § 18.01, at 18-2 (Feb. 1989); see also infra Part III (discussing enforcement of successor clauses against signatory employers).
\textsuperscript{49} See \textit{Lareau}, supra note 17, § 18.02, at 18-2 (Feb. 1989).
\textsuperscript{50} See \textit{Textile Workers Union v. Lincoln Mills}, 353 U.S. 448, 454-55 (1957) (holding that § 301 of the LMRA, whose express language only states that federal courts have jurisdiction over contract disputes between employers and labor organizations, indicates that Congress intended for the federal courts to develop, from the policies behind the NLRA, a federal common law of labor contracts). See \textit{generally} Charles J. Morris & William Gaus, \textit{Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns}, 59 VA. L. REV. 1359, 1361-64 (1973) (discussing the Supreme Court's establishment of the collective bargaining agreement as a "new type of 'contract'" governed by different rules than ordinary contracts and subject to successorship obligations).
\textsuperscript{51} See \textit{generally} \textit{Bartosic & Hartley}, supra note 4, § 9.07(a)(2), at 322, § 11.03, at 372-80; \textit{Elkouri & Elkouri}, supra note 18, at 603-07; \textit{id.} at 160-62 (Supp. 1985-89); \textit{The Developing Labor Law}, supra note 4, at 761-850; \textit{id.} at 45-80 (Supp. 1995); George Murphy, \textit{Successorship and the Forgotten Employee: A Suggested Approach}, 31 N.Y.U. CONF. LAB. 75 (1978) ("The successorship doctrine is one of the most complex and controversial areas of federal labor law.") (quoted in UFCW v. Chambers Big Star 52, 124 L.R.R.M. (BNA) 2120 (W.D. Tenn. 1986))).
bargaining agreements are not ordinary contracts, but are tools for promoting stable labor relations.\textsuperscript{52}

When a business changes ownership, the first issue is whether the purchasing employer has a duty to recognize and bargain with the union.\textsuperscript{53} The Supreme Court has held that when a majority of the employees hired by a purchaser were represented by a certified bargaining representative under the previous employer, the purchaser may have a duty to recognize and bargain with the union.\textsuperscript{54} The Supreme Court has not provided a fixed definition of when a purchasing employer is a successor or a uniform declaration of what obligations follow a finding of successorship.\textsuperscript{55} The predominant factor in finding that a purchaser is a successor focuses on the degree to which the business continues to oper-

\bibliography{52. See Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-05 (1962) (finding collective bargaining agreements contain implied terms not expressly stated therein); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458-59 (1957) (dispensing with ordinary contract principles and enforcing executory agreements to arbitrate); J.I. Case Co. v. NLRB, 321 U.S. 332, 334-35 (1944) (characterizing the collective bargaining agreement as a "trade agreement" comparable to tariffs governing the terms of the relationship "whenever and with whomever" established).

53. The NLRA provides that the union representing a majority of the employees in an appropriate bargaining unit is the "exclusive representative" of the employees for purposes of negotiating the wages, hours, and other terms and conditions of employment. NLRB v. Savair Mfg. Co., 414 U.S. 270, 271 (1973). Thus, the employer cannot negotiate directly with employees when they are represented by a union. The NLRA does not explicitly require employers to affirmatively seek out the representatives of the employees and bargain with them; thus the union must request that the purchasing employer bargain before any bargaining obligations arise. See 29 U.S.C. § 158 (1994); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 41 (1987) (approving the NLRB's adoption of rule presuming a continuing demand for bargaining).

54. See Fall River, 482 U.S. at 41; NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 281 (1972). The Supreme Court has established that the union's status as exclusive representative of the employees is presumed to survive where a purchaser hires a majority of its predecessor's employees. See Fall River, 482 U.S. at 41. Thus, the obligation to bargain with the representative arises when the majority of the purchaser's workforce is comprised of the predecessor's employees and their representative requests bargaining. See id.

Importanty, a purchasing employer may not refuse to hire an employee because of his or her union support. See id. at 40 (stating a purchasing employer "is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in its hiring"); Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees, 417 U.S. 249, 262 n.9 (1974) (identifying the same hiring restriction); Burns, 406 U.S. at 280 n.5 (stating "an employer who declines to hire employees solely because they are members of a union commits a § 8(a)(3) unfair labor practice"). The discriminatory refusal to hire by the purchasing employer may be remedied by requiring the purchaser to hire the predecessor's employees and adopt the terms of the predecessor's collective bargaining agreement. See NLRB v. The Staten Island Hotel Ltd. Partnership, 101 F.3d 858 (2d Cir. 1997) (enforcing an NLRB order requiring adoption of the collective bargaining agreement).

55. Howard Johnson, 417 U.S. at 262 n.9 ("There is, and can be, no single definition of successor . . . ").
ate in a substantially similar manner with the same employees. The successorship doctrine attempts to balance the rights of the previous owner's employees hired by the purchaser, who previously chose to be represented by a union, with the rights of the employees hired by the purchaser, who have not yet made a representation choice.

The second issue that arises when a business changes ownership is whether the purchasing employer is bound by the terms of an unexpired collective bargaining agreement. A purchasing employer found not to be a successor employer has no duty to bargain with the union of its predecessor's employees and cannot be required to adopt the collective bargaining agreement. Thus, enforcement of a successor clause against a purchasing employer under section 8(a)(5) of the NLRA depends on a finding of successor status. Importantly, while Congress, through the NLRA, established an administrative scheme to police the process of collective bargaining, it did not impose any federal requirements on the content of a collective bargaining agreement. The Supreme Court has never held that a purchasing employer is required to assume the terms of the contract, but has held that arbitration over the terms of the contract may be required under section 301 of the Labor Management Relations Act (LMRA).

A third issue that may arise is whether a purchasing employer has a duty to remedy the previous owner's unfair labor practices. The Supreme


57. *See Fall River,* 482 U.S. at 43-44. The court noted that *Burns* carefully protected the employer's freedom to restructure its business, while recognizing the employees' interest in continued representation. *See id.* at 41. The Court stated:

[E]mphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate interests in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest.

*Id.* at 43-44; *see also* *Golden State Bottling Co.* v. NLRB, 414 U.S. 168, 184 (1973) (finding that *Burns* protected the employer's prerogative to restructure its business, but also using employee expectations as a factor in requiring a purchasing employer to remedy its predecessor's unfair labor practices). Thus, the successorship doctrine attempts to promote the NLRA's twin aims of industrial peace and labor stability by establishing that a simple change in ownership does not automatically end previously established collective bargaining obligations. *See Bartosic & Hartley,* supra note 4, § 11.03, at 373.

58. Before a union can consider holding the purchasing employer to the terms of the existing contract, the NLRB must find that the purchaser is a successor employer. *Cf. Burns,* 406 U.S. at 286-87 (finding that a successor employer is not normally bound to the terms of a collective bargaining agreement it has not signed).


60. *See Burns,* 406 U.S. at 274 (framing the issue before the court).

61. *See John Wiley & Sons,* 376 U.S. at 546-51; *see also infra* note 75 (discussing the conflict between *Wiley* and *Burns*).
Court has held that where a purchasing employer is a successor employer and purchases the business with knowledge of the unfair labor practice, the purchaser may be liable for its predecessor's conduct.62

A review of the Supreme Court jurisprudence establishing the principles of the successorship doctrine is helpful to an understanding of the enforcement of successor clauses.63

1. Requiring the Purchasing Employer to Arbitrate Its Obligations Under an Existing Collective Bargaining Agreement

The first Supreme Court case to consider the problems of successorship was the 1964 case of John Wiley & Sons v. Livingston.64 A union representing employees of a corporation that merged with another corporation brought an action under section 301 of the LMRA to compel the newly formed corporation to arbitrate the extent of its obligations under the existing collective bargaining agreement.65 The Supreme Court held that because there was a "substantial continuity of identity in the business," the change of ownership did not extinguish the contractual rights the collective bargaining agreement established.66 The Court, noting that New York law provided that a merger would not extinguish a claim against a corporation,67 found the central role of arbitration in national labor policy supported a finding that the newly formed corporation was required to arbitrate with the union pursuant to the terms of the previous employer's collective bargaining agreement.68 The Court left open the issue

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62. See Golden State Bottling, 414 U.S. at 184-85 (holding the purchaser was required to reinstate an employee with backpay).
63. See Zimny, supra note 6, at 73 (stating that a successor clause can "only be fully appreciated" when considered in the context of the Supreme Court's cases).
64. 376 U.S. 543 (1964).
65. See id. at 544. Arbitration was sought under the terms of a collective bargaining agreement signed by one of the merged corporations. See id. at 545. The Supreme Court noted that the union sought arbitration with a corporation that had not actually signed the collective bargaining agreement. See id. at 547.
66. Id. at 551. The Court found that the purchaser had retained all the employees of the previous employer and was engaged in substantially the same business operations as the previous employer. See id.
67. See id. at 547-48. The Supreme Court acknowledged that under its Lincoln Mills decision, federal common law controls the interpretation of collective bargaining agreements, but found that principles of state law could be used in particular cases to develop the federal common law. See id. at 548. The Court noted that "the law which ultimately results is federal." Id.
68. See id. at 550-51. The Supreme Court recognized that ordinary contract law would not bind an unconsenting party to a contract it had not signed, but reiterated that ordinary contract principles did not govern because "a collective bargaining agreement is not an ordinary contract." Id. at 550. The Court found that collective bargaining agreements were the product of bargaining imposed by federal law and not wholly consensual agree-
of whether the union continued to maintain representative status following a change in ownership.\textsuperscript{69}

2. \textit{Refusing to Impose the Terms of a Collective Bargaining Agreement on a Purchasing Employer}

Eight years later, in \textit{NLRB v. Burns International Security Services, Inc.},\textsuperscript{70} the Supreme Court addressed the continuance of a union's exclusive representative status and the purchasing employer's obligations under an existing collective bargaining agreement following a change in business ownership. In \textit{Burns}, the union alleged that the new employer had violated the NLRA by refusing to recognize the union or accept the collective bargaining agreement.\textsuperscript{71} The NLRB found that the new employer was a successor and was therefore required to recognize the union and the terms of the collective bargaining agreement.\textsuperscript{72} The Supreme Court affirmed the NLRB's holding that the new employer was a successor and therefore had a duty to recognize the union and bargain in good faith.\textsuperscript{73} However, the Court concluded that the duty to recognize and
bargain with the employees' representative established by section 8(a)(5) did not necessarily include observing the terms of a predecessor's collective bargaining agreement.\footnote{Id. at 278-79. The Court also found that the "mere change of employers or of ownership" did not justify disturbing the NLRB's determination that the union was the representative of the employees. \textit{Id.} at 279.} The Court found that hiring a majority of the predecessor's employees did not justify imposing the terms of the predecessor's collective bargaining agreement on the new employer.\footnote{See \textit{id.} at 281-82. The Court found that if it bound Burns to the collective bargaining agreement as the NLRB would have, Burns's obligation to the employees could logically be extended beyond the protections required by federal labor law. \textit{See id.} at 282. The Court found that Congress had avoided imposing mandatory terms that would interfere with the collective bargaining process by relying instead on voluntary arbitration. \textit{See id.}}

\footnote{See \textit{id.} at 286-87. The Court stressed that the NLRA established a procedure for private bargaining over the terms and conditions of employment and did not compel any specific terms of the agreement. \textit{See id.} at 287.}

In \textit{Wiley}, the Court required the purchaser to arbitrate its obligations under the existing collective bargaining agreement. Yet, without overruling or limiting \textit{Wiley}, the \textit{Burns} Court held that a successor was not obligated to assume the terms of the agreement. \textit{See id.} at 285. The Supreme Court did not explain the apparent contradiction between \textit{Burns} and \textit{Wiley}, but distinguished \textit{Wiley} on the grounds that (1) it was a section 301 suit to compel arbitration; (2) arbitration is a preference of national labor policy; and (3) the state law background required merging corporations to assume their predecessor's obligations. \textit{See id.} at 285-87. The majority of commentators have concluded that the cases are reconcilable, concluding that \textit{Burns} stands for the policy that the NLRB does not have the power to impose the terms of a collective bargaining agreement on a purchaser, while \textit{Wiley} involved a section 301 contract suit for enforcement of a collective bargaining agreement. \textit{See, e.g.}, Morris & Gaus, \textit{supra} note 50, at 1360, 1372-80 (concluding that because enforcement of collective bargaining agreements proceeds through arbitration of contractual provisions and not by application of § 8(a)(5) by the NLRB, Burns and Wiley are reconcilable); Lock Holmes, Comment, \textit{Contractual Successorship: The Impact of Burns}, 40 U. CHI. L. REV. 617, 627 (1973) (finding that Burns establishes that imposing the terms of a collective bargaining agreement on a successor must occur under § 301, a section the NLRB does not have power to enforce, and Wiley promotes § 301's policy of stability and certainty of contractual rights); Garrick M. Meyer & Ernest R. Malone, Jr., Comment, \textit{Defining "Successors" and the Significance of a Successors and Assigns Clause in a Collective Bargaining Agreement}, 49 TUL. L. REV. 644, 647 (1975) (arguing that Wiley established an arbitrator's power to impose existing collective bargaining agreements on purchasing employers under § 301, while Burns merely made clear that the NLRB and courts did not possess that power); Note, \textit{Contract Rights and the Successor Employer: The Impact of Burns Security}, 71 MICH. L. REV. 571, 586-88 (1973) (concluding that Burns should be read to determine which purchasing employers will be required to arbitrate contractual obligations under \textit{Wiley}). \textit{But see} Thomas G.S. Christensen, \textit{Successorships, Unit Changes, and the Bargaining Table, in Labor Law Developments—1973, at 197, 206-07 (1973); Charles G. Bakaly, Jr. & James S. Bryan, \textit{Survival of the Bargaining Agreement: The Effect of Burns}, 27 VAND. L. REV. 117, 126-27 (1974) (arguing Burns and Wiley are irreconcilable and rejecting the contractual distinction based on the specific facts of each case); David L. Benetar, \textit{Successorship Liability Under Labor Agreements}, 1973 WIS. L. REV. 1026, 1027, 1056-37 (arguing the concurrent application of \textit{Wiley} and Burns will result in the choice of forum, arbitration or unfair labor practice, being outcome determinative); Nell Margolis, Note, \textit{Labor Law}, 14 B.C. INDUS. & COM. L. REV. 193, 195-200 (1972) (arguing that labor
The Court found that, in creating the NLRA, Congress intended federal labor policy to regulate only the process of bargaining, leaving the relative economic strength of the parties to determine the content of their agreement. The Court also expressed concern that in binding a new employer to the terms and conditions of an existing collective bargaining agreement, the agreement would contractually require the new employer to accept the predecessor's employees, firing them only in accordance with the agreement.

Importantly, the Court concluded that the new employer's obligation to bargain as a successor did not arise until the new employer had hired enough of the predecessor's employees to comprise a majority of the employees of the new business. Because the new employer was not obligated to bargain until this majority was realized, the Court concluded that the new employer was free to set the initial terms and conditions of employment without bargaining. In dicta, the Court noted that in some law cannot maintain the position that the same collective bargaining agreement is not binding under bargaining obligations but is binding under contractual obligations.

76. See Burns, 406 U.S. at 287. The Supreme Court focused on the fact that the duty to bargain imposed by the NLRA did not "compel either party to agree to a proposal or require the making of a concession." Id. at 282 (citing 29 U.S.C. § 158(d)). In addition, the Court looked beyond the terms of the NLRA and stated that the free transferability of capital required that new owners should not be bound to the terms and conditions of existing contracts. See id. at 288. The Court found that binding a new owner to an existing collective bargaining agreement would prevent the new owner from freely restructuring the business. See id. at 287-88. Additionally, the Court concluded that the inability to freely restructure a business would discourage entrepreneurs from investing in unionized businesses and would hinder current owners of unionized businesses in their efforts to sell the business. See id. Finally, the Court stated that unions should not be bound by the terms of a collective bargaining agreement that might contain concessions which were made to help keep a previous employer in business but would not be made with the new employer. See id. at 288.

77. See id. The Court theorized that if a new employer were required to accept the collective bargaining agreement, the new employer would be required to acknowledge all preexisting rights. See id. at 288-89. The Court concluded that by requiring recognition of all the employees' rights, the new employer would not be free to hire its own workforce because it could not discharge the predecessor's employees without following the provisions of the agreement, which presumably include requiring cause for any discharge. See id. at 288. In addition, the Court noted that these obligations would be imposed on the new employer without requiring the union to bargain for them. See id. at 289. Finally, the Court noted that if the new employer were bound by the terms of the agreement, the employer might be found liable for contractual obligations that were not met by the predecessor. See id. at 289-90. The Court concluded that the substance and structure of the NLRA did not support imposing these obligations on a new employer. See id. at 290-91.

78. See id. at 295.

79. See id. at 294-95. Under section 8(a)(5) of the NLRA, an employer is prohibited from unilaterally imposing conditions of employment on employees represented by a union unless the employer has bargained to impasse with the union. See NLRB v. Katz, 369 U.S. 736, 741-42 (1962). Because the Supreme Court found that Burns was not a suc-
cases it would be "perfectly clear" that the employer planned to retain all of the predecessor's employees and thus the new employer would be required to bargain over any changes in the initial terms and conditions of employment.\textsuperscript{80}

3. A Successor Clause Does Not Automatically Bind a Purchasing Employer to the Terms of an Existing Collective Bargaining Agreement

The Supreme Court was again confronted with determining the contractual rights of employees represented by a union after the sale of a business in \textit{Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees}.\textsuperscript{81} In \textit{Howard Johnson}, the union representing the employees of the former owner brought a section 301 action against the purchasing employer seeking to compel arbitration over the terms of the collective bargaining agreement based on the inclusion of a successor clause.\textsuperscript{82} The Supreme Court applied the principles enunciated in \textit{Burns} and found that because the purchaser had not hired a majority of the predecessor's employees, there was no substantial continuity of employment and thus no duty to recognize the union or arbitrate.\textsuperscript{83} The Court concluded that the mere presence of a successor clause was insuffi-

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\textsuperscript{80}See \textit{Burns}, 406 U.S. at 294-95. The \textbf{NLRB} has held that the "perfectly clear" caveat in \textit{Burns} should be limited to circumstances where the new owner misleads employees into believing that they will all be rehired without change in the conditions of their employment, or where the purchasing employer fails to "clearly announce" that it intends to set different terms and conditions prior to obtaining the employee's acceptance of employment. See \textit{Spruce Up Corp.}, 209 N.L.R.B. 194, 195 (1974) (quoting \textit{Burns}, 406 U.S. at 294-95); see also \textit{Canteen Co.}, 317 N.L.R.B. 1052, 1054-55 (1995) (reaffirming \textit{Spruce Up} by a 3-2 margin), enforced, 154 L.R.R.M. (BNA) 2065 (7th Cir. 1997); \textit{Buying a Company? Be Careful, Recent NLRB Developments Make Successor Employers' Rights Less Than "Perfectly Clear"} (visited Jan. 20, 1997) <http://www.callow.com/mofo/mofo7.html> (discussing the \textit{Canteen Co.} decision's treatment of \textit{Spruce-Up} and \textit{Burns}); Jo B. Vestal & Gregg Rodgers, \textit{Successor Employers Should Consider Statements Carefully}, (visited Jan. 20, 1997) <http://www.wkg.com/resources/labor_employment/succemp.html> (same).
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\textsuperscript{81}417 U.S. 249 (1974).
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\textsuperscript{82}See \textit{id.} at 252-53. The purchaser, Howard Johnson, bought a motel from its original owners and, after publicly advertising, hired new employees to operate the motel under the Howard Johnson name. See \textit{id.} at 251-52. Only nine of the forty-three employees hired by Howard Johnson had worked for the predecessor employer. See \textit{id.} at 252. The union did not allege Howard Johnson discriminated against the former employees on the basis of their union membership. See \textit{id.}
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\textsuperscript{83}See \textit{id.} at 264-65. The Court found that because there was no continuity in the work force hired by Howard Johnson, it could not be held to the collective bargaining agreement's arbitration provisions. See \textit{id.}
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cient to bind a purchaser who was not a party to the collective bargaining agreement. The Court rejected the union’s argument that the collective bargaining agreement required the purchaser to hire the predecessor’s employees and affirmed the Burns analysis.

4. Requiring a Purchaser to Remedy Unfair Labor Practices Under an NLRB Successor Clause

In *Golden State Bottling Co. v. NLRB*, the Supreme Court considered whether a successor had a duty to remedy the unfair labor practices of its predecessor. In *Golden State*, a purchasing employer bought the business after the NLRB concluded that the predecessor committed an unfair labor practice and ordered the predecessor to reinstate a former employee with backpay. The NLRB included in its remedial order a statement binding its decision to the employer, “its officers, agents, successors, and assigns.” In a subsequent proceeding, the NLRB found that the purchasing employer was a successor, was required to reinstate the employee, and was jointly liable for the backpay award. The Supreme Court affirmed the NLRB’s order, holding that the purchaser bought the business with knowledge of the NLRB’s decision and the em-

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84. See id.
85. See id. at 261. The union’s position was that, under Burns, Howard Johnson was bound to the terms of the existing agreement and was required to accept the predecessor’s employees. See id. at 260. The Court, having determined that Howard Johnson was not bound by the terms of the agreement, relied on the finding in Burns that nothing in the NLRA “requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor.” Id. at 261 (quoting Burns, 406 U.S. at 280 n.5). The Supreme Court reiterated its holding in Burns that an employer had a right not to hire any of its predecessor’s employees. See id. at 262. The Court found that the right not to hire the predecessor’s employees was qualified to the extent that the NLRA prohibits any employer from refusing to hire an employee because of his or her union sentiments. See id. at 262 n.8 (stating “it is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under § 8(a)(3)”; see also supra note 54 (discussing cases).

In *Howard Johnson*, the Supreme Court noted that the union was seeking monetary damages from the predecessor in arbitration. See 417 U.S. at 258 n.3. The Court suggested that the union could have sought an injunction prior to the sale under the successor clause, preventing the change of ownership without assumption of the collective bargaining agreement. See id.
87. See id. at 170.
88. See id.
89. Id. The Court noted that inclusion of these successor clauses differs from those bargained for by private parties because they are imposed by the NLRB, a government agency “obligated to effectuate the policies of the [National Labor Relations] Act.” Id. at 177.
90. See id. at 171.
ployees had a legitimate expectation that their unfair labor practice grievances would be remedied.\textsuperscript{91}

5. \textit{Refining the Purchaser's Obligation to Bargain with the Union of the Predecessor's Employees}

In \textit{Fall River Dyeing & Finishing Corp. v. NLRB},\textsuperscript{92} the Supreme Court held the manner in which the change in ownership occurred did not control the determination of whether a purchasing employer was a successor.\textsuperscript{93} In \textit{Fall River}, a new company was formed by executives of a company that had ceased operating.\textsuperscript{94} The union representing the employees of the former employer requested that the purchasing employer bargain and when the purchaser refused the union filed unfair labor practice charges.\textsuperscript{95} The NLRB held that the purchaser was a successor and was obligated to bargain with the union.\textsuperscript{96} The Supreme Court rejected the argument that the seven month period between the closing of the predecessor and the reopening of the business compelled a finding that the purchasing employer was not a successor.\textsuperscript{97} Reviewing the union's position during an ownership change, the Court determined that a union is placed in "a peculiarly vulnerable position," having no relationship with the purchasing employer, but retaining responsibility for protecting the rights of the employees.\textsuperscript{98} The Court concluded that when a change

\textsuperscript{91} See id. at 184. The Court stated:

Avoidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by § 7 of the Act and protection for the victimized employee — all important policies served by the National Labor Relations Act — are achieved at a relatively minimal cost to the bona fide successor.

\textit{Id.} at 185 (citations omitted). The Court stressed that the successor must have notice of the unfair labor practice before liability can be imposed. See id.

\textsuperscript{92} 482 U.S. 27 (1987).

\textsuperscript{93} See id.

\textsuperscript{94} See id. at 32. The Supreme Court found the executives started the new company with the intention of purchasing the assets of the predecessor, servicing customers of the predecessor, and utilizing the trained employees of the predecessor. See \textit{id.} at 32-33, 44. In the initial hiring stage, 18 of 21 employees had been employees of the predecessor. See \textit{id.} at 32-33. Two months later, the purchaser had hired a total of 55 employees, 36 of whom had been employees of the predecessor. See \textit{id.} at 33. When the purchaser stopped hiring six months after it began, 52 or 53 of the 107 employees were predecessor employees. See \textit{id.}

\textsuperscript{95} See \textit{id.} at 33-34.

\textsuperscript{96} See \textit{id.} at 34; \textit{Fall River Dyeing & Finishing Corp.}, 272 N.L.R.B. 839, 840 (1984).

\textsuperscript{97} \textit{See Fall River}, 482 U.S. at 45. The Court found that a hiatus was only one factor to determine whether substantial continuity and successorship existed. See \textit{id.}

\textsuperscript{98} \textit{Id.} at 39. The Court also noted that the expectations of the employees also supported imposing a bargaining obligation on a successor. See \textit{id.} The Court stated, "[i]f the employees find themselves in a new enterprise that substantially resembles the old, but without their chosen bargaining representative, they may well feel that their choice of a
in ownership occurs and the majority of the predecessor's employees continue working for the purchaser, it should be presumed that the union represents a majority of the employees of the purchasing employer. Recognizing that in Burns it had protected the right of employers to reorganize a business, the Court found that the decision of the purchaser to continue the same business, in the same location, with a majority of the predecessor's employees, justified imposition of a bargaining obligation.

B. Enforcing Successor Clauses Against Purchasers as Successor Employers

The successorship doctrine, as articulated by the Supreme Court, holds that a purchaser will be deemed a successor employer, with an obligation to recognize and bargain with the union representing the predecessor's employees, where there is a substantial continuity of the employing enterprise. Where there is an unexpired collective bargaining agreement, however, a successor employer will not normally be bound to the terms of the agreement by section 8(a)(5). Significantly, the Supreme Court's decisions do not hold that a purchasing employer will never be bound by the terms of an existing collective bargaining agreement. Thus, union is subject to the vagaries of an enterprise's transformation. The Court found that such a situation would not promote industrial peace. See id. at 40.

See id. at 39. The Court emphasized that from the employees' perspective substantial continuity of employment existed. See id. at 43. The Court approved the consideration of "whether 'those employees who have been retained will understandably view their job situations as essentially unaltered'" as an appropriate factor in determining successorship. Id. (quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973)). The Court stated, "This emphasis on the employees' perspective furthers the [NLRA]'s policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." Id. at 43-44.

See id. at 40; see also supra notes 74-77 and accompanying text (discussing the Burns Court's protections of employers' rights).

See Fall River, 482 U.S. at 41. The Court noted that the purchasing employer was not obligated to continue the business with the same employees and found the imposition of a bargaining obligation was appropriate considering "the employer intends to take advantage of the trained work force of its predecessor." Id.

See BARTOSIC & HARTLEY, supra note 4, § 11.03, at 373, 379-80. It should be noted that the Supreme Court declined to review the NLRB's application of the successorship doctrine during its 1995-96 term. See Holly Farms Corp. v. NLRB, 48 F.3d 1360 (4th Cir. 1995), aff'd, 116 S. Ct. 1396 (1996); see also Perspective: ABA Conferees Debate Single Location Units, Successorship, BNA's Collective Bargaining Bull. (BNA) 44 (Mar. 1, 1996) (noting the Court declined to review the Fourth Circuit's affirmation of the NLRB's determination of successorship).


See LAREAU, supra note 17, § 18.02, at 18-3 (Feb. 1989). It may be found "as a matter of fact" that the purchaser has assumed the obligations of the collective bargaining
whether a purchasing employer will be required to honor its predecessor's collective bargaining agreement is best resolved under the contractual interpretation of a successor clause in a section 301 suit. The mere existence of a successor clause, however, is insufficient to bind a purchaser to a collective bargaining agreement that the purchaser did not adopt.

1. Section 301 Suits to Compel Arbitration

One means of enforcing a successor clause against a purchasing employer is through arbitration of the purchaser's obligations under the predecessor's collective bargaining agreement, an approach taken by the Supreme Court in John Wiley & Sons. Following this approach, in Local 1115 Joint Board Nursing Home and Hospital Employees v. B & K Investments, Inc., the union sued to compel arbitration with the agreement. Burns, 406 U.S. at 291. This finding is independent of the purchaser's status as a legal successor with a duty to bargain. Zimny, supra note 6, at 74-75; see also Redmond, supra note 6, passim (discussing cases where employers were required to assume existing collective bargaining agreements).

Where a purchaser has knowledge of the collective bargaining agreement, fails to disavow the agreement, hires a majority of its workforce from the predecessor's employees and substantially continues the same business in the same manner, the purchaser may be bound by the terms of the collective bargaining agreement under the successorship doctrine. See UFCW Local 545 Health and Welfare Fund v. Health Enters. of America, Inc., 543 F. Supp. 340 (E.D. Mo. 1982); Local Joint Executive Bd. v. Hotel Circle, Inc., 419 F. Supp. 778 (S.D. Cal. 1976), aff'd on other grounds, 613 F.2d 210 (9th Cir. 1980); see also supra note 80 (discussing the perfectly clear caveat in Burns). While not determinative, knowledge of the existence of a successor clause may be a factor in determining application of the successorship doctrine. See Health Enters., 543 F. Supp. at 346-47; see also General Truck Drivers, Union Local 92 v. Strabley Bldg. Supply, Inc., 98 L.R.R.M. (BNA) 3025, 3030-31 (N.D. Ohio 1978) (finding knowledge of the existence of a successor clause combined with failure to disclaim assumption of collective bargaining agreement indicated an intention to assume the agreement).


107. Zimny, supra note 6, at 75.

108. See supra Part II.A.1. (discussing the case and the Supreme Court's holding); see also Redmond, supra note 6, at 128-40 (discussing cases).

The district court found that imposing a duty to arbitrate the extent of the purchaser's obligations under the predecessor's collective bargaining agreement was warranted because of the degree of substantial continuity. In a similar action, UFCW Local 1529 v. Chambers Big Star, the union sought a court order compelling the seller and the purchaser to arbitrate their obligations under the existing collective bargaining agreement between the union and the seller. The court denied the purchaser's motion for summary judgment, finding that even after Howard Johnson, the policies supporting arbitration were strong enough to compel a successor employer to arbitrate a grievance under the predecessor's contract; even though the arbitrator might be precluded by the successorship doctrine from imposing the terms of the agreement on the successor. The court found that the selling employer was bound by the successor clause and would therefore be required to arbitrate the grievance.

The Sixth Circuit, however, recently granted a successor employer's motion for summary judgment in a similar suit. In Southward v. South

110. See id. at 1205. B&K Investments took over the leases of several nursing homes when the prior operator encountered severe financial difficulties. See id. B&K continued the operation of the homes under substantially similar management, with substantially similar employees for two months. See id. B&K recognized the union as the bargaining representative of the employees, but did not agree to accept the existing collective bargaining agreement and was unable to agree on a new contract. See id. at 1206. Upon learning that B&K intended to sell the nursing homes, the union instituted an action for injunction prohibiting a sale unless the purchaser agreed to accept the terms of the agreement and to compel arbitration on the same issue. See id.

111. See id. at 1209. The court initially found that the current employer was not the alter ego of the predecessor and had not agreed to adopt the collective bargaining agreement. See id. at 1207. The court concluded that the extensive negotiations occurring prior to the change in ownership and the continuation of the same business in the same manner and location with the same employees, were the same factors that led the Supreme Court in Wiley to require arbitration. See id. at 1209. The court noted that the Fifth Circuit had determined that Burns and Howard Johnson did not overrule Wiley. See id. at 1208 (citing United Steelworkers v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974) and Boeing Co. v. Machinists and Aerospace Workers, 504 F.2d 307 (5th Cir. 1974)).


113. See id. at 2120-21.

114. See id. at 2125. The court noted that the successor was "clearly" not bound by the successor clause in the collective bargaining agreement. See id. at 2125 n.5. The court further noted that prior to compelling arbitration the union would be required to prove that the purchaser was in fact the successor to the seller. See id.

115. See id. at 2125 n.5.

116. See Southward v. South Cent. Ready Mix Supply Corp., 7 F.3d 487, 497 (6th Cir. 1993). The successor clause stated, the agreement "shall be binding not only upon [the employer] and [the union], but also upon any individual, partnership, or corporation who shall succeed [the employer] or the [union] in carrying on the business." Id. at 489. After the employer informed the union that it was selling the business, the union learned that all employees would be terminated and that the purchaser had not agreed to be bound by the
Central Ready Mix Supply Corp., the court found that under section 8(a)(5), a purchaser is not bound by the terms of a collective bargaining agreement simply because of a substantial continuity of employment. In a similar case, American Bell, Inc. v. Federation of Telephone Workers, the Third Circuit refused to require a purchaser to arbitrate its obligations under a collective bargaining agreement containing a successor clause.

collective bargaining agreement. See id. The purchaser invited the employees of the seller to submit applications for employment and ultimately hired a majority of them. See id. at 489-90. The purchaser recognized the union as the collective bargaining representative of the employees and commenced negotiations, but was unable to reach an agreement with the union. See id. at 490.

The union filed for a preliminary injunction to block the sale pending arbitration, but later withdrew it as moot because the sale had already occurred. See id. The arbitrator ultimately denied the union's grievance, finding the seller was not obligated to condition the sale of the business on the purchaser's assumption of the collective bargaining agreement. See id. at 490-91. The union then filed an unfair labor practice charge, alleging the purchaser violated the NLRA by refusing to adopt the agreement. See id. at 491. The NLRB dismissed the charge after it determined there was no such obligation under the NLRA. See id. The union filed a second unfair labor practice charge alleging the purchaser violated the NLRA by not hiring several of the seller's employees. See id. Again, the NLRB found no merit to the charge and refused to issue a complaint. See id. Thereafter, the purchaser filed a petition for an election with the NLRB. See id. The employees subsequently voted against representation by the teamsters. See id.

Finally, the plaintiffs filed a state court action alleging that the purchaser had a state law obligation to assume the collective bargaining agreement. See id. The case was removed to federal court and the purchaser filed a motion for summary judgment. See id. The district court dismissed the state law claim, but found federal law might require the employer to bargain with the union and denied summary judgment. See id. The purchaser filed a second motion for summary judgment that was also denied. See id. In denying the motion, the district court found that the purchaser was not an alter ego of the seller and had not expressly or implicitly adopted the collective bargaining agreement. See id. at 491-92. The district court found there was a question of fact regarding the substantial continuity of employment and that if there was substantial continuity the purchaser would be bound to the agreement. See id. at 492.

Our review of the Supreme Court's decisions relating to a successor employer's responsibilities under a predecessor's [collective bargaining agreement] leads us to conclude that in order to be bound by the substantive terms of that agreement, the successor must be the "alter ego" of the predecessor, or the successor must have voluntarily assumed the obligations of the agreement. A successor employer cannot be bound by the substantive terms of a collective bargaining agreement negotiated and entered into by its predecessor merely because the successor's business is a 'substantial continuation' of the predecessor's business. Id. The court found that, at most, substantial continuity of employment obligates the purchaser only to bargain with the union that represented the predecessor's employees. See id.

The collective bargaining agreement between the union and the seller provided that "in the event of a sale or other voluntary transfer of ownership of all or
2. **Imposition of Collective Bargaining Agreements on Purchasers Under Section 8(a)(5) and the Successorship Doctrine**

Prior to the Supreme Court's decision in *Burns* and *Howard Johnson*, several successor clauses were held to bind purchasing employers. After *Howard Johnson*, however, most decisions bind a purchaser to the predecessor's collective bargaining agreement only if the purchaser is either an alter ego of the predecessor, or voluntarily assumes the agreement. Because the obligations of a successor employer are determined part of its business and physical assets" to "any successor organization," the seller would require the purchaser to agree to be bound by the agreement. *Id.* at 883.

The court described the successorship doctrine as an "extra-contractual remedial tool for imposing certain labor obligations on a new employer that has taken over the operations of an old employer." *Id.* at 888. The court found that the purpose of the successor doctrine is to protect the rights of employees working for the purchasing employer, not the rights of employees who are not hired. *See id.*

121. *See, e.g.*, United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891 (3d Cir. 1964) (holding a successor who purchased the assets of a business was bound by the existing collective bargaining agreement); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964) (same); Printing Indus. of Seattle, Inc. v. Lithographers Int'l Union, Local 45-L, 56 Lab. Arb. (BNA) 296, 300-01 (1971) (Jackson, Arb.) (finding stock purchaser bound because the purchaser was a member of the same multiemployer bargaining association that negotiated identical successor clauses in the seller's and purchaser's respective collective bargaining agreements, evidencing the purchaser's knowledge and consent); Lake States Leasing Corp. v. General Teamsters Local 126, 46 Lab. Arb. (BNA) 935, 939-41 (1966) (Gundermann, Arb.) (finding the purchaser bound by the seller's agreement based on substantial continuity, but denying enforcement because the union had terminated the agreement); Walker Bros. v. IBEW, Local Union 1088, 41 Lab. Arb. (BNA) 844, 850, 856 (1963) (Crawford, Arb.) (finding that where the purchaser has knowledge of a contract with a successor clause, the labor agreement survives the sale if the purchaser is a successor employer, but finding that only the NLRB could determine successor status).

122. *See Southward*, 7 F.3d at 493 ("A successor employer cannot be bound by the substantive terms of a collective bargaining agreement negotiated and entered into by its predecessors merely because the successor's business is a substantial continuation of the predecessor's business."); Sullivan Indus. v. NLRB, 957 F.2d 890, 895 (D.C. Cir. 1992) ("[W]hile a successor has a duty to bargain with an incumbent union, it is not bound by the substantive terms of the previously negotiated collective-bargaining agreement."); New England Mechanical, Inc. v. Laborers Local Union 294, 909 F.2d 1339, 1342 (9th Cir. 1990) ("In general, if an employer takes over another business, the employer is not generally bound by its predecessor's collective bargaining agreement."); Emark, Inc. v. NLRB, 887 F.2d 739, 750 (7th Cir. 1989) (holding a successor was not bound to a collective bargaining agreement executed by the prior employer); Johnson v. Pullman, Inc., 845 F.2d 911, 913 (11th Cir. 1988) (holding a purchasing employer was properly dismissed from a § 301 action because the purchaser was not a party to the collective bargaining agreement and therefore could not be bound by the successor clause); Clark Cincinnati, Inc. v. Warehouse Prod. and Maintenance Local No. 661, 92-2 ARB (CCH) ¶ 8477, at 5231 (1992) (Goggin, Arb.) (holding where the purchasing employer expressly declined to adopt the collective bargaining agreement it could not be legally obligated to assume the agreement). *But see* Schniefer's Finer Foods, Inc. v. Amalgamated Meat Cutters and Butcher Workmen, District Union 427, 72 Lab. Arb. (BNA) 881, 886-87, 889 (1979) (Belkin, Arb.) (holding the purchaser liable for predecessor's breach of successor clause because of its status as a succes-
by judicial standards, the practical ability of a union to enforce a contractual successor clause against a purchasing employer under section 8(a)(5) is very limited.\footnote{123}

III. ENFORCEMENT OF SUCCESSOR CLAUSES AGAINST SIGNATORY EMPLOYERS

While section 301 of the LMRA grants both state and federal courts jurisdiction to decide contract actions alleging breach of the terms of a collective bargaining agreement,\footnote{124} the NLRB does not have jurisdiction to adjudicate allegations of contract violations.\footnote{125} An employer who signs a collective bargaining agreement containing a successor clause can
be held liable for breaching the clause as a party to the contract.\textsuperscript{126} One prerequisite and two conditions, however, should be considered before an action to enforce the successor clause is instituted.\textsuperscript{127} First, the collective bargaining agreement must not have expired or the court will not have jurisdiction to enforce the contract.\textsuperscript{128} Second, the sale or transfer should be for all of an ongoing business or a discrete portion thereof.\textsuperscript{129} Successor clauses purporting to bind the sale of less than the whole business may violate section 8(e) of the NLRA.\textsuperscript{130} To avoid a section 8(e) violation, the successor clause should only be applicable to separable transac-


\textsuperscript{127} It has been argued that all three conditions are prerequisites to a successful enforcement action. See LAREAU, supra note 17, § 18.03, at 18-4 to 18-5 (Feb. 1989). However, intervening decisions indicate that existence of a non-expired collective bargaining agreement is the only prerequisite. See infra notes 128-33 and accompanying text (discussing the three conditions).

\textsuperscript{128} See LAREAU, supra note 17, § 18.03, at 18-4 (Feb. 1989); see also UMWA v. Allied Corp., 735 F.2d 121, 127 (4th Cir. 1984) (finding no jurisdiction); cf. Van Waters & Rogers, Inc. v. Teamsters, 56 F.3d 1132 (9th Cir. 1995) (approving an arbitrator's award of future damages for breach of a successor clause that extended beyond the expiration date of the collective bargaining agreement); New England Mechanical, Inc. v. Laborers Local Union 294, 909 F.2d 1339, 1344 n.4 (9th Cir. 1990) (refusing to dismiss an action on the ground that there was no valid collective bargaining agreement, where the collective bargaining agreement contained an automatic renewal clause and neither party had requested termination). But see MISCIMARA, supra note 12, at 186 (concluding the existence of a valid collective bargaining agreement is not a prerequisite for arbitration of vested employee rights).

\textsuperscript{129} See LAREAU, supra note 17, § 18.03, at 18-4 (Feb. 1989). In MGM-Telestudios, Inc. v. IBEW, Local 1212, 48 Lab. Arb. (BNA) 1267 (1967) (Wolff, Arb.), the collective bargaining agreement between the employer and the union provided:

In the event of a sale of its assets the Employer warrants that it will incorporate into the contract of sale with the purchaser a requirement that said purchaser employ all Engineers within the collective bargaining unit and assume and be bound by all of the terms and conditions of this Agreement. The Union also agrees to continue to be bound by this Agreement in the event of such a sale.

\textit{Id.} at 1268 n.1. The arbitrator held that the successor clause only covered the sale of a going business concern and not the sale of the employer's assets. See \textit{id.} at 1268.

\textsuperscript{130} Section 8(e) of the NLRA prohibits agreements between unions and employers that they will cease doing business with any other person. See 29 U.S.C. § 158(e) (1994).

The NLRB has held that in the maritime industry, a successor clause requiring an employer who purchases a ship to retain its crew under their existing collective bargaining agreement is a violation of section 8(e) because it forces the employer to cease doing business through the normal hiring hall. See Seatrain Lines, Inc., 220 N.L.R.B. 164, 164 n.2 (1975) (rejecting a union's claim that it did not violate § 8(e) in seeking to enforce a successor clause against the seller because it only sought monetary damages, finding the union's request for front pay evidenced restraint on doing business); Commerce Tankers Corp. (Vantage Steamship Co.), 196 N.L.R.B. 1100 (1972), enforced 486 F.2d 907, 911 (2d Cir. 1973) (noting that the court "doubted" whether the sale of a ship fit within § 8(e) but affirming because the parties had not appealed the issue). See generally LAREAU, supra note 17, § 18.03, at 18-4 (Feb. 1989); Pimentel, supra note 6, at 105, 116.
tions not concluded in the ordinary course of business. Third, the sale or transfer must be voluntary. For example, a successor clause may not be binding on a signatory employer whose business is sold involuntarily in bankruptcy.

The NLRB has not found a successor clause to violate section 8(e) of the NLRA outside of the maritime industry. See United Mine Workers (Lone Star Steel Co.), 231 N.L.R.B. 573, 575 (1977) (holding conditional sale of coal mine that operated independently did not violate § 8(e)); International Ass’n of Machinists (Harris Truck & Trailer Sales, Inc.), 224 N.L.R.B. 100, 103 (1976) (holding sale of discrete, separate portion of business that could continue operating did not violate § 8(e) when conditional under successor clause); IUOE, Local No. 701 (Cascade Employers Ass’n, Inc.), 221 N.L.R.B. 751, 752 (1975) (holding the contractual restriction on the sale of a business to a buyer who would assume the existing collective bargaining agreement did not violate § 8(e) because the sale was not “doing business” but the substitution of one entity for another while the business continues).

131. See NLRB Gen. Couns. Advice Mem., Case No. 3-CA-14113 (Mar. 14, 1988), available in LEXIS, 1988 NLRB GCM LEXIS 42, at *8-9 (finding a pertinent distinction in ascertaining whether a successor clause violates § 8(e) involves determining whether the successor clause contemplates a discrete, one-time transaction in which one entity is substituted for another or a continuing relationship between purchaser and its predecessor); NLRB Gen. Couns. Advice Mem., Case No. 2-CE-132 (May 28, 1981), available in LEXIS, 1981 NLRB GCM LEXIS 22, at *5 (finding a charge alleging a § 8(e) violation for imposition of a successor clause on the sale of an apartment building should be dismissed).

In Amax Coal Co. v. NLRB, 614 F.2d at 872 (3d Cir. 1980), the court enforced a decision of the NLRB finding that a successor clause did not violate section 8(e). See id. at 886. The court found that the successor clause only obligated the seller to secure the purchaser’s agreement to assume the collective bargaining agreement and did not prohibit doing business with another party. See id. at 887.

132. See LAREAU, supra note 17, § 18.03, at 18-4 (Feb. 1989); see also B&K Inves., Inc. v. Joint Board Nursing Home and Hosp. Employees, Local 1115, 71 Lab. Arb. (BNA) 366, 372-73 (1978) (Turkus, Arb.) (recognizing that the purchaser was forced to take control of the business to prevent a loss of assets and modifying the provisions of the collective bargaining agreement the purchaser was obligated to assume accordingly).


In In re Lady H Coal Co., 199 B.R. 595 (S.D. W. Va.), aff’d on other grounds, 99 F.3d 573, 579 n.7 (4th Cir. 1996), the United Mine Workers objected to the sale of a debtors property free and clear of the National Bituminous Coal Wage Agreement of 1993 (NBCWA or collective bargaining agreement). See id. at 599. The bankruptcy court found that claims asserted against the debtors pursuant to the successor clause in the NBCWA were covered by the Bankruptcy Act. See id. at 603-04. The bankruptcy court held that because a breach of the successor clause could be remedied by money damages asserted against the debtors in bankruptcy, the UMWA was not entitled to an injunction against the sale. See id. at 604. The court did not decide whether the debtors would violate the successor clause by selling their assets in bankruptcy without conditioning the sale on the assumption of the collective bargaining agreement. See id. at 604 n.5. The bankruptcy court held that the UMWA could not assert any contract claims against any successor. See id. at 608. The district court overruled the UMWA’s objection to the sale and adopted the bankruptcy opinion. See id. at 598. The court noted the possibility of damages for breach of the successor clause. See id.; see also In re Lady H Coal Co., 193 B.R. 233, 241 (Bankr. S.D. W. Va. 1996) (identifying a nine part test to determine whether a debtor has met the Bankruptcy Code requirements for rejection of a collective bargaining agreement and allowing
If the prerequisite is met and the other two conditions are satisfied, enforcement of the successor clause can be attempted in one of three ways: (1) an injunction;\textsuperscript{134} (2) an action for damages;\textsuperscript{135} or, (3) a state law action.\textsuperscript{136} The success of the enforcement action will depend on the language of the successor clause\textsuperscript{137} or the validity of the state law.\textsuperscript{138}

A. Injunctions

In \textit{Howard Johnson}, the Supreme Court suggested that successor clauses in collective bargaining agreements might be enforced by an injunction prior to the change in ownership.\textsuperscript{139} This suggestion, however, does not appear to take into account the Norris-LaGuardia Act's\textsuperscript{140} broad prohibition against federal court injunctions in labor disputes.\textsuperscript{141}

After bankruptcy proceedings, in \textit{UFCW Local 95 v. Reliable Drug Stores, Inc.}, 140 L.R.R.M. 2730 (W.D. Mich. 1991), the union brought an action for breach of contract against the seller and purchaser of several drug stores. \textit{Id.} The selling employer's assets had been sold through bankruptcy proceedings. In the bankruptcy proceedings the union objected to the proposed sale on the ground that it would violate the provision of the agreement establishing the agreement was between the union and the employer and "it[its] successors and assigns." \textit{Id.} at 2732 n.3. The bankruptcy court approved the sale over the union's objections. In dismissing the subsequent breach of contract action, the district court upheld the bankruptcy court's finding that there was no successor clause in the agreement. \textit{See id.} at 2734. The court acknowledged the bankruptcy court might have been outside its authority to decide the issue but held that the proper course of action would have been to appeal the bankruptcy court's decision. \textit{See id.}

\textsuperscript{134} \textit{See infra} Part III.A. (discussing enforcement by injunction).

\textsuperscript{135} \textit{See infra} Part III.B. (discussing enforcement through damages).

\textsuperscript{136} \textit{See infra} Part IV. (discussing enforcement under state law).

\textsuperscript{137} \textit{See infra} Part III.A.1.c. (discussing preamble language as a successor clause in injunction cases); \textit{infra} notes 236-42 and accompanying text (discussing the effect of successor clause language on the success of the § 301 enforcement actions); \textit{see also} Zimny, \textit{supra} note 6, at 77-81 (discussing the language requirements for an enforceable successor clause).

\textsuperscript{138} \textit{See infra} notes 257-65 and accompanying text (discussing the probability that state laws enforcing successor clauses are preempted by the NLRA).

\textsuperscript{139} \textit{See Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees, 417 U.S. 249, 258 n.3 (1974).} The Court stated, "The Union apparently did not explore another remedy which might have been available to it prior to the sale, i.e., moving to enjoin the sale to Howard Johnson on the ground that this was a breach by the [signatory employer] of the successorship clauses in the collective-bargaining agreements." \textit{Id.} (citing National Maritime Union v. Commerce Tankers Corp., 325 F. Supp. 360 (S.D.N.Y. 1971) (enjoining sale of business after arbitrator's decision that successor clause applied), \textit{rev'd}, 457 F.2d 1127 (2d Cir. 1972)).


\textsuperscript{141} The Norris-LaGuardia Act provides:

No court of the United States shall have jurisdiction to issue any restraining order or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in con-
In *Boys Markets, Inc. v. Retail Clerks Local 770*, the Supreme Court established a narrow exception to the Norris-LaGuardia Act's prohibition against federal court injunctions. The *Boys Markets* Court held that a district court could enter an injunction prohibiting union action if the action would violate the terms of a collective bargaining agreement and the parties had agreed to submit disagreements over the action to arbitration. In addition to the finding of arbitrability, the traditional equitable factors governing the issuance of injunctions must be met and an injunction bond must be posted.

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The district court's injunction in *National Maritime Union*, cited in *Howard Johnson*, did not violate the Norris-LaGuardia Act because it came within the courts' inherent powers and was used to enforce an arbitrator's award. *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960).


143. *See id.* at 253.

144. *See id.* at 237-38. The employer brought an action seeking an injunction against a striking union. *See id.* at 239-40. The collective bargaining agreement agreed to by the union and the employer contained a no strike clause and provided all disagreements would go to arbitration. *See id.* at 238-39. The Supreme Court concluded that:

- the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes,
- that the core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy, and consequently that the Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of the instant case.

*Id.* at 253. The Court cautioned that injunctions should not be issued routinely, only where the collective bargaining agreement contained a mandatory arbitration clause covering the dispute and where the ordinary principles of equity governing injunctions are met. *See id.* at 254.

145. *See id.* at 254. Traditional equity principles require the moving party to show that:

- (1) a breach has occurred and will continue;
- (2) the breach has caused or will cause irreparable injury; and,
- (3) the moving party will suffer more from the denial of the injunction than will the non-moving party from its issuance. *See id.* (citing Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962)).

Once it has been determined that the equitable predicates for the issuance of an injunction have been met, two statutory provisions require the moving party to post a bond as security against loss should the injunction be found to be erroneously issued. Rule 65(c) of the Federal Rules of Civil Procedure provides:

- No restraining order or preliminary injunction shall issue except upon the giving of a security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

*Fed. R. Civ. P.* 65(c). Section 7(e) of the Norris LaGuardia Act, specifically directed at labor disputes, provides:
The Supreme Court emphasized the narrow scope of this exception in *Buffalo Forge Co. v. United Steelworkers.*146 The *Buffalo Forge* Court held that even where a union party to a collective bargaining agreement violated an express term of the agreement, no injunction could be issued where the underlying dispute was not subject to arbitration under the agreement.147 Injunctions against employer actions that would violate arbitrable terms of a collective bargaining agreement, so called “reverse Boys Markets injunctions,” are included in the Court’s narrow exception to the Norris-LaGuardia Act’s prohibition against injunctions in labor disputes.148 The Court has restricted the use of Boys Markets injunctions to situations where they are necessary to enforce the parties’ agreement.

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146. 428 U.S. 397 (1976). The employer sought an injunction enjoining the union from engaging in a sympathy strike, alleging it was in violation of the no strike clause contained in the collective bargaining agreement. See id. at 401-02.

147. See id. at 407-12. The Supreme Court held that an injunction was improper because the union and the employer could not arbitrate the dispute underlying the sympathy strike, as it was between the employer and another union. See id. at 407-08. The Court stated that it had “never indicated that the courts may enjoin actual or threatened contract violations.” Id. at 409. The Court noted that the employer would be entitled to an injunction compelling arbitration over the legality of the strike or an injunction enforcing an arbitrator’s decision that the strike was illegal. See id. at 410.

to arbitrate a dispute. Thus, where the union and the employer have agreed to arbitrate all disputes, an injunction enjoining the sale of a business, pending arbitration of obligations arising under a successor clause, appears to fall within the *Boys Markets* exception. An injunction, however, may only be granted to preserve the status quo pending arbitration, not to enforce the successor clause.

1. Injunctions Requiring Arbitration of the Duty to Condition the Sale of the Business Prior to the Sale

If the union knows of a proposed sale prior to its occurrence and the employer refuses to condition the sale on the purchaser's assumption of the collective bargaining agreement, the union should file a grievance under the agreement and obtain an arbitrator's ruling on the employer's contractual obligations. Several courts have accepted the Supreme

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149. See id. at 281. This limitation follows the Supreme Court's recognition of the NLRA's emphasis on the resolution of labor disputes through arbitration. See *Buffalo Forge*, 428 U.S. at 407 (recognizing that the congressional preference for arbitration was the justification for the *Boys Markets* exception to the Norris-LaGuardia Act); see also the Steelworkers Trilogy: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960) (stating that in a § 301 action, "[t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (stating that under a § 301 action to compel arbitration, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.").


151. See *Conrad*, *supra* note 6, at 170; *Oppenheimer*, *supra* note 6, at 458; *Oppenheimer & Popper*, *supra* note 6, at 9.

152. See *Zimny*, *supra* note 6, at 85-89 (discussing injunctive relief). The NLRA requires employers to provide unions all information necessary to service the collective bargaining agreement. Where the collective bargaining agreement contains a successor clause the NLRB has indicated that an employer's failure to inform the union of a proposed sale, upon request, is an unfair labor practice. See *Island Creek Coal Co. v. NLRB*, 899 F.2d 1222 (6th Cir. 1990) (unpublished table decision), *available in* WL, 1990 WL 41848, at *1 (enforcing NLRB order finding employer committed an unfair labor practice in refusing to provide information on merger so that union could enforce obligations under successor clause); see also NLRB Gen. Couns. Advice Mem., Case No. GR-7-CA-29140 (June 30, 1989), *available in* LEXIS, 1989 NLRB GCM LEXIS 141, at *6 (finding that where the union requested information concerning the sale or transfer of the business pursuant to a notice of transfer provision in the collective bargaining agreement, the information was clearly relevant and refusal to provide it is an unfair labor practice).
Court's suggestion in *Howard Johnson* and granted injunctions preventing the sale of a business where the collective bargaining agreement contains a successor clause and an arbitration clause that covers disputes over the successor clause.\(^\text{153}\) In *Local Lodge 1266, IAM v. Panoramic Corp.*\(^\text{154}\) the union sought a preliminary injunction enjoining the employer from selling its business pending arbitration over the employer's duty to assure that the purchaser would assume the terms of the collective bargaining agreement.\(^\text{155}\) The Seventh Circuit analyzed the *Boys Markets* exception to the Norris-LaGuardia Act and approved an injunction preventing the sale of the business because there was an arbitrable dispute regarding a successor clause.\(^\text{156}\) The court found the preamble to the collective bargaining agreement, which purported to bind Panoramic's successors and assigns,\(^\text{157}\) supported the district court's injunction

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\(^{153}\) Two courts issued injunctions prohibiting the sale of a business pending arbitration of a successor clause prior to the Supreme Court's suggestion in *Howard Johnson*.

In *National Maritime Union v. Commerce Tankers Corp.*, cited in *Howard Johnson*, the court upheld an arbitrator's decision that the employer's sale of a ship violated the successor clause in the collective bargaining agreement and enjoined the sale until the employer complied with the successor clause. 325 F. Supp. 360, 361 (S.D.N.Y. 1971). The court later denied the NLRB's request for an injunction restraining enforcement of the successor clause pending determination of a charge that the clause violated section 8(e) of the NLRA's prohibition on restricting work. *See* McLeod v. National Maritime Union, 329 F. Supp. 151, 160 (1971), *rev'd*, 457 F.2d 1127, 1129 (2d Cir. 1972). In a consolidated appeal, the Second Circuit vacated the injunction enjoining the sale of the ship and remanded for entry of an injunction against enforcement of the successor clause pending the NLRB's determination of the legality of the successor clause. *See* National Maritime Union of America v. Commerce Tankers Corp., 457 F.2d 1127, 1129 (2d Cir. 1972). *See also supra* notes 130-31 and accompanying text (discussing successor clause violations of § 8(e)).

In *Amalgamated Food Employees Union, Local No. 590 v. National Tea Co.*, the district court issued a temporary injunction pending an arbitrator's ruling on whether the sale of a business should be prevented for failure to comply with a successor clause. 346 F. Supp. 875, 884-85 (W.D. Pa. 1972). The court found that a *Boys Markets* injunction was appropriate because the parties had agreed to arbitrate their disputes and it was necessary to protect the status quo pending the arbitrator's decision. *See id.* at 880-81, 883-84. The arbitrator held that because the language of the successor clause did not identify the duties of the signatory employer it was insufficient to impose a duty on the predecessor to secure compliance from the successor prior to sale of the business. *See* National Tea Co. v. Amalgamated Food Employees Union, Local No. 590, 59 Lab. Arb. (BNA) 1193, 1198-99 (1972) (Joseph, Arb.).

\(^{154}\) 668 F.2d 276 (7th Cir. 1981).

\(^{155}\) *See id.* at 279. The union filed a grievance asserting a violation of the collective bargaining agreement when Panoramic announced its intention to sell the business to a purchaser who refused to recognize or bargain with the union. *See id.* at 278-79. Panoramic agreed to arbitrate its obligations under the contract, but refused to delay the sale of the business. *See id.* at 279. The union then filed its complaint and a motion for a preliminary injunction. *See id.* The district court granted the union's injunction and Panoramic appealed. *See id.*

\(^{156}\) *See id.* at 281.

\(^{157}\) The collective bargaining agreement preamble provided:
against the sale, pending arbitration of the seller's obligation to require the purchaser to assume the terms of the collective bargaining agreement. The court stressed that without an injunction the union would be left without an adequate remedy.

Similarly, in Teamsters, Local Union No. 2707 v. Western Air Lines, Inc., two unions sought a preliminary injunction to prevent the employer from merging with another airline pending arbitration of the employer's duty to assure that the merged corporation would honor the terms of the unions' collective bargaining agreements. The Ninth Cir-

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THIS AGREEMENT was made and entered . . . by and between the PANORAMIC CORPORATION, its successors and assigns, of Janesville, Wisconsin . . . and LOCAL LODGE NO. 1266 of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AFL-CIO.

Id. at 278 n.3.

158. See id. at 285. The court noted that the employer had conceded that the successor clause was arbitrable under the contract. See id. at 284. The court concluded that the union's claim that the proposed sale of the company violated the successor clause of the collective bargaining agreement raised a dispute that supported a status quo injunction. See id. at 285. The court declined the employer's request to find that the language of the successor clause could not support an injunction. See id. Finally, the court concluded that because the purchaser had no duty to rehire the employees, a breach of the successor clause could not be adequately remedied by an award of monetary damages. See id. at 286. 159. The court stated:

Consummation of the sale before an arbitrator had an opportunity to rule on the Union's contention that the sale violated the labor agreement would have presented the arbitrator with a fait accompli, leaving him without any real power to award an adequate remedy in the event that the Union's claim was sustained.

Id. The court found that money damages are not an adequate remedy for the permanent loss of employment. See id. The court also found that under federal labor law, recovery for breach of the agreement against the purchaser was speculative and thus insufficient to prevent irreparable damage to the union. See id. at 287.

160. 813 F.2d 1359 (9th Cir.), stay granted, 480 U.S. 1301, vacated, 484 U.S. 806 (1987), dismissed as moot, 854 F.2d 1178 (9th Cir. 1988).

161. See id. at 1360. The district court dismissed the union's suits on the ground that the court lacked jurisdiction, because the dispute concerned a representation question. See id. at 1361. Under the Railway Labor Act all questions concerning the representation of employees are within the exclusive jurisdiction of the National Mediation Board. See id. at 1362 (citing 45 U.S.C. § 152). Similarly, under the NLRA all questions concerning the representation of employees are within the exclusive jurisdiction of the NLRB. See 29 U.S.C. § 159(a) (1994).

The Ninth Circuit correctly found that the unions were not seeking to establish themselves as the collective bargaining representative of the purchaser's employees because the unions had not requested arbitration with the purchaser. See Western Air Lines, 813 F.2d at 1362. The court found that the unions were only seeking arbitration over the employer's breach of the collective bargaining agreement by merging with an airline that would not voluntarily recognize the unions. See id. The court distinguished several cases dismissing actions in which the unions sought to enforce the terms of a collective bargaining agreement on the purchaser because the court did not have jurisdiction to determine representation issues. See id. at 1362-63 (citing Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157, 158 (5th Cir. 1983) (post merger arbitration); Air Line Employees Ass'n, Int'l v. Republic
cuit found that the agreements between the parties were subject to arbitration and supported an injunction. The court provided that the injunction would be lifted in the event the seller and purchaser filed a stipulation stating that the arbitrator’s decision would be binding on the successor.

a. The Requirement of an Arbitrable Successor Clause

To enter an injunction pending arbitration, the court must first find an arbitrable successor clause. In *Local 381, International Union of Operating Engineers v. Tosco Corp.*, the union sought a court order compelling the employer to arbitrate a grievance requiring the employer to condition the sale of the business on the purchaser’s assumption of the

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In an *ex parte* application to stay the Ninth Circuit’s order, decided without benefit of a written opinion from the Ninth Circuit, Justice O’Connor, sitting as a Circuit Justice, found that the injunction was contrary to precedent in other circuits. *See Western Airlines, Inc. v. Teamsters*, 480 U.S. 1301, 1305-07 (1987). Justice O’Connor also found that the inequities of the injunction weighed most heavily on the employer, and thus supported staying the Ninth Circuit’s opinion. *See id.* at 1307-10. A subsequent motion seeking to vacate Justice O’Connor’s stay order was denied. *See Western Airlines, Inc. v. Teamsters*, 481 U.S. 1002 (1987). After the merger occurred, the Supreme Court granted certiorari, vacated the Ninth Circuit’s decision, and remanded for consideration of mootness. *See Western Airlines, Inc. v. Teamsters*, 484 U.S. 806 (1987). On remand, the Ninth Circuit dismissed the unions’ claims as moot without considering their claims for breach of contract damages. *See Teamsters, Local Union No. 2701 v. Western Airlines, Inc.*, 854 F.2d 1178, 1178 (9th Cir. 1988).


162. *See Western Air Lines*, 813 F.2d at 1362. The unions separately negotiated letters of agreement providing that, in the event of a hostile takeover, the employer would require the purchaser to assume the terms of the collective bargaining agreement. *See id.* at 1360. The agreements also provided that the employer would be liable for damages if the purchaser failed to assume the agreement. *See id.* at 1360-61.

163. *See id.* at 1363. The court noted that the imminent merger would result in the disappearance of the employer over whom the district court could assert jurisdiction, resulting in the inability of the court to enforce an arbitration award. *See id.* The court found that if the successor corporation agreed to honor Western’s contractual obligations to the union this problem would be avoided. *See id.* Justice O’Connor found that the Ninth Circuit’s stipulation was either unnecessary or improperly balanced the hardships faced by the parties should the merger not occur. *See Western*, 480 U.S. at 1307-10.

164. 823 F.2d 265 (8th Cir. 1987).
The district court refused to compel arbitration because it found that the language of the successor clause did not require the employer to condition the sale of the business. Reversing the district court, the Eighth Circuit concluded the determination of whether the contract language supported the obligation was a question for an arbitrator and not the court. In *TRT Telecommunications Corp. v. Local 111, American Communications Ass'n*, the union filed a grievance based on the employer’s claim that the successor clause did not cover the sale at issue and refusal to disclose the identity of the purchaser. After first requesting arbitration, the employer moved to enjoin arbitration. The court held that the selling employer was required to arbitrate the question of whether the successor clause was applicable to the proposed sale. Similar decisions compelling arbitration on the collective bargaining agreement. The sale agreement between the employer and the purchaser contained a clause that expressly stated that the purchaser would not assume the collective bargaining agreement with the union. The union filed its grievances prior to the sale of the business.

The union alleged the language in the preamble to the collective bargaining agreement that stated, “This agreement made and entered into by and between Tosco corporation and its successors” obligated the company to condition the sale of the business. The district court determined, as a matter of law, that the successor language in the preamble did not support the imposition of an obligation on the seller and could not bind the purchaser to the terms of the contract.

The case of United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) (stating that the function of the court “is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.”)


See id. at 2-3. The employer notified the union that it intended to cease operations and sell one of its facilities. The union and the employer were parties to a collective bargaining agreement that provided:

[i]n the event of a merger or sale of [the employer’s] operations as a going business ... the purchaser acquiring the operations shall recognize the Union as the bargaining representative of the Company employees covered by the terms of this agreement and shall maintain the terms and conditions of this Agreement.

Id. (first alteration in original). The agreement also required the selling employer to encourage a meeting between the union and the purchaser and to provide the union with copies of any regulatory applications necessary to the sale.

See id. The employer refused to identify the purchaser or provide any regulatory applications. See id. The NLRB dismissed the union’s alter-ego charge, finding it was a matter of contract interpretation that properly belonged before a court or an arbitrator. See id. at 3. However, the NLRB issued a complaint against the employer for failure to supply information. See id.

See id. at 5. The court found that the union’s NLRB charges did not preclude it from arbitrating the dispute.
basis of successor language in the preamble of a collective bargaining agreement have been reached by other courts.¹⁷²

b. The Equitable Factors

In addition to the finding of arbitrability, the equitable factors necessary for an injunction must be met and an injunction bond must be posted.¹⁷³ In Teamsters, Local Union No. 251 v. Almac's, Inc.,¹⁷⁴ the First Circuit reversed a district court's grant of an injunction prohibiting the transfer of a business and the layoff of employees pending arbitration.¹⁷⁵ The court found that where the employer agreed to refrain from consummating the sale of the business until after the arbitrator issued a decision, the equitable factors did not support granting an injunction.¹⁷⁶ Distinguishing Panoramic, the court stressed that the injunction was improper because the lack of an injunction would not render the arbitrator's remedy meaningless.¹⁷⁷ Similarly, in UAW v. Goodyear Aerospace Corp.,¹⁷⁸ although the district court initially entered a temporary restraining order enjoining the employer from selling any assets unless such sale was conditioned on the purchaser's assumption of the collective bargaining agree-

¹⁷² See Local Lodge 1266, IAM v. Panoramic Corp., 668 F.2d 276, 285 (7th Cir. 1981) (upholding injunction pending arbitration on whether successor language in preamble requires employer to assure buyer assumes contract); Bressette v. International Talc Co., 527 F.2d 211, 214-16 (2d Cir. 1975) (compelling arbitration of successor dispute where union cited language in the preamble to the contract).

¹⁷³ See supra note 145 (discussing the equitable factors and the injunction bond).

¹⁷⁴ 894 F.2d 464 (1st Cir. 1990).

¹⁷⁵ See id. at 467. The collective bargaining agreement between the union and the employer bound the "parties . . . , their heirs, successors, administrators, executors and assigns" and contained a successor clause that provided:

In the event an operation is sold, leased, transferred or taken over by sale, transfer, lease or assignment, . . . such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof.

Id. at 465. The district court found that without an injunction an arbitrator's award in favor of the union would require the employer to reinstate terminated employees and spend $15 million restarting the business. See id. at 466.

¹⁷⁶ See id. at 467. The court noted that after proving its grievance was arbitrable, the union was required to show that without an injunction "irreparable harm and imbalanced hardships" would occur. Id. at 465.

¹⁷⁷ See id. at 467. The court distinguished Panoramic as a "Humpty Dumpty" case where the union members' permanent loss of employment could not be remedied because the arbitrator did not possess the authority to order the rescission of the sale of the business. Id. at 466. The court stated that "all Almac's horses and all Almac's men can put the distribution center back into operation again." Id. at 467.

ment, when ruling on the union’s request for a preliminary injunction the court found the balance of equitable factors weighed against issuing an injunction. Other courts, weighing the equitable factors considered in granting injunctions, have also denied the issuance of injunctions.

c. The Language of the Successor Clause

It has been suggested that a successor clause containing vague language that fails to identify the duties of the signatory employer will not support the issuance of an injunction. One of the equitable factors that must

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179. See id. at 1287. The union was party to a collective bargaining agreement with the employer that provided:

This Agreement shall be binding upon the successors and assigns of the parties hereto and no provisions, terms, or obligations herein contained shall be affected, modified, altered or changed in any respect whatsoever by the consolidation, merger, sales, transfer, or assignment of either party hereto, or affected, modified, altered, or changed in any respect whatsoever by any change of any kind in the legal status, ownership, or management of either party hereto.

Id. at 1284. The employer was actively engaged in the process of finding a purchaser for the business but refused the union’s request that any sale be conditioned on the buyer’s assumption of the collective bargaining agreement. See id. at 1284-85. The court noted that the defendants did not present any evidence of hardship that would be suffered if the injunction was issued. See id. at 1287. The court conditioned the issuance of the restraining order on the union’s posting of a $25,000 bond. See id.

180. See id. at 1296. The court concluded, as it did in granting the temporary restraining order, that the underlying dispute between the employer and the union was arbitrable. See id. at 1290. The court, concluding the union had proven breach and irreparable harm, balanced the harm the employer would suffer from the injunction against the harm the union would suffer from denial of the injunction. See id. at 1291. The court found that an injunction would be improper for several reasons: the employer was fighting a hostile takeover; the collective bargaining agreement covered less than one third of the employees; the union had presented no evidence that a purchaser would reject the collective bargaining agreement; and, both parties had agreed to an expedited arbitration proceeding. See id. at 1295-96.

181. See, e.g., UFCW v. Kroger Co., 778 F.2d 1171, 1176 (6th Cir. 1985) (upholding the denial of an injunction enjoining sale because the district court’s order compelling arbitration preserved the arbitral process for enforcement of an award against seller, the seller would suffer substantial economic harm from erroneous injunction in the absence of substantial union bond, and there was substantial doubt as to the likelihood of success on the merits); Nursing Home & Hosp. Union No. 434 v. Sky Vue Terrace, Inc., 759 F.2d 1094, 1099 (3d Cir. 1985) (denying injunction enjoining sale but granting injunction enjoining distribution of assets pending the outcome of arbitration); IAM Dist. 147 v. Northeast Airlines, Inc., 473 F.2d 549, 557-60 (1st Cir. 1972) (finding that although a successor clause included in a collective bargaining agreement would compel arbitration, the merger would not be enjoined if business’s continued existence was dependent on successful merger); Local 1115 Joint Bd. Nursing Home and Hosp. Employees v. B&K Inves., Inc., 436 F. Supp. 1203, 1209 (S.D. Fla. 1977) (denying injunction to enjoin transfer because the union failed to establish that transfer was imminent and the employer would be forced to go out of business unless it was able to sell).

182. See LAEVAR, supra note 17, § 18.04, at 18-7 (Feb. 1989). This observation was based on a review of several arbitrator’s decisions that ultimately held that a vague, non-
Successor Clauses

be considered is the likelihood of success on the merits; therefore, language in the preamble of a collective bargaining agreement that states that the agreement "will be binding on the employer's successors and assigns" may be insufficient to support a finding that the employer is obligated to condition the sale of the business on the buyer's assumption of the collective bargaining agreement.\(^\text{183}\) The Fourth, Seventh, and Ninth Circuits have found that a party seeking an injunction to maintain the status quo pending arbitration pursuant to *Boys Markets* must show the position to be presented is a genuine dispute over an arbitrable issue and is sufficiently sound to prevent the arbitration from being futile.\(^\text{184}\) This standard properly reinforces the Supreme Court's holdings that where the parties have agreed to arbitrate their disputes, questions of contract interpretation should be left to an arbitrator.\(^\text{185}\)

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\(^\text{183}\) Former NLRB General Counsel John S. Irving, Jr. has stated that simple successor clauses should not support the "drastic" step of enjoining a sale because the harm to the employer may be irreparable. Irving, supra note 26, at 228. Although, the effect of the injunction on the employer is properly considered in determining whether to grant the injunction, the language used by the parties to continue the obligation in the contract should govern arbitrability. See infra notes 236-42 and accompanying text (discussing the effect of the language of a successor clause on its enforcement).

\(^\text{184}\) See *Local Lodge No. 1266, IAM v. Panoramic Corp.*, 668 F.2d 276, 284-85 (7th Cir. 1981) (finding the plaintiff must only establish that arbitration will not be futile and that a genuine dispute exists regarding the arbitrability of the issue); *Drivers Local 71 v. Ackers Motor Lines, Inc.*, 582 F.2d 1336, 1342 (4th Cir. 1978) (same), *cert. denied*, 440 U.S. 929 (1979); Amalgamated Transit Union, Div. 1384 v. Greyhound Lines, Inc., 529 F.2d 1073, 1077-78 (9th Cir.) (same), *vacated and remanded*, 429 U.S. 807 (1976), *rev'd on other grounds*, 550 F.2d 1237 (9th Cir.), *cert. denied*, 434 U.S. 837 (1977).

\(^\text{185}\) See *United Steelworkers v. Warrior & Gulf Navigation Co.*., 363 U.S. 574, 582-83 (1960) (holding arbitration should not be denied unless the provision is not susceptible of the interpretation ascribed to it); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568-69 (1960) (stating that the role of courts in interpreting collective bargaining agreements containing arbitration provisions is limited to determining arbitrability of the dispute). See, e.g., *Teamsters, Local Union No. 2707 v. Western Air Lines, Inc.*, 813 F.2d 1359, 1363-64 (9th Cir. 1987) (noting that it is the function of the arbitrator to decide the meaning of a contract and granting an injunction to preserve the status quo pending arbitration of the successor clause); *Local Lodge 1266, IAM v. Panoramic Corp.*, 668 F.2d 276, 288 (7th Cir. 1981) (finding that determination of whether or not the term "successor," as used in the collective bargaining agreement, is identical to the labor law definition is a question for the arbitrator); *UAW v. Goodyear Aerospace Corp.*, 656 F. Supp. 1283, 1290 (N.D. Ohio 1986) (finding a dispute "as to the meaning and interpretation of certain language contained in the collective bargaining agreement," the successor clause is a "classic case of an arbitrable dispute" which the court should not decide); *Local 1115 Joint Bd. Nursing Home and Hosp. Employees v. B&K Inves., Inc.*, 436 F. Supp. 1203, 1208-09 (S.D. Fla. 1977) (noting that the question of whether or not the employer is bound by the substance of the predecessor's collective bargaining agreement is a question for the arbitrator).
2. Injunctions Requiring Arbitration of the Duty to Condition the Sale Prior to the Distribution of Assets

Another option for enforcement of a successor clause is to seek an injunction preventing the distribution of assets pending arbitration of the seller's obligations under the successor clause. In *Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc.*, the union sought an order compelling arbitration and an injunction enjoining both the sale and the distribution of assets from the sale. The Third Circuit, reviewing the *Boys Markets* exception to the Norris-LaGuardia Act, rejected the employer's contention that the dispute over the successor clause was not arbitrable. The court found that an arbitration clause covering "any dispute between the parties involving interpretation or application" of the collective bargaining agreement clearly qualifies the dispute over the successor clause as arbitrable. The court concluded that the district court properly enjoined the distribution of assets to ensure that an arbitrator's decision in the union's favor was not a "hollow formality."

Obtaining an injunction preventing the sale of a business is a costly legal process that does not result in a determination on the merits of the successor clause. An injunction will, however, allow the union to enforce the selling employer's contractual obligations and protect the job security of its members through an arbitrator's decision prior to the sale of the business.

186. 759 F.2d 1094 (3d Cir. 1985).
187. *See id.* at 1096. The district court granted the order compelling arbitration and enjoined the distribution of assets. *See id.* The court did not, however, enjoin the sale of the business. *See id.* The apparent basis for the denial of the injunction was the consummation of the sale 16 days prior to the filing of the union's complaint. *See id.*
188. *See id.* at 1098. The NLRA does not require that a grievance be submitted to arbitration unless the collective bargaining agreement requires it. *See Gateway Coal Co. v. UMWA, 414 U.S. 368, 374 (1974) (noting that a party must submit its grievance to arbitration only if it has contracted to do so).*
189. *Sky Vue, 759 F.2d at 1097.* The court also found that the dispute regarding the procedure to be followed in arbitration must be resolved by the arbitrator. *See id.*
190. *Id.* at 1098; *Teamsters Local Union No. 71 v. Akers Motor Lines, 582 F.2d 1336, 1341 (4th Cir. 1978) (affirming issuance of an injunction prohibiting liquidation of assets pending arbitration).*

The parties agree that this agreement shall be binding upon the Association [of employers], the members of the Association and the Union and their respective transferees, successors, and assigns, and that they will faithfully comply with its provisions.

In the event that a member of the Association sells or transfers the business or the shop, such member shall nevertheless continue to be liable for the complete performance of this agreement until the purchaser or transferee expressly agrees in writing with the Union that it is fully bound by the terms of this agreement.
B. Breach of Contract Actions

In addition to suggesting injunctive relief, in *Howard Johnson* the Supreme Court suggested that money damages, as determined by an arbitrator, might be an appropriate remedy for the breach of a successor clause.\(^{192}\) Frequently, unions are not aware of the contemplation of a sale or transfer of the business by the employer and are therefore unable to seek an injunction or arbitration prior to the change in ownership.\(^{193}\) If the purchaser does not voluntarily assume the collective bargaining agreement, the union may be left with no remedy other than money dam-

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\(^{192}\) *Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees*, 417 U.S. 249, 258 n.3 (1974); *see also* Zimny, *supra* note 6, at 76 & n.24 (discussing the availability of damage remedies and possible awards).

\(^{193}\) *Southward v. South Cent. Ready Mix Supply Corp.*, 7 F.3d 487, 490 (6th Cir. 1993) (noting the union withdrew its motion for a temporary restraining order as moot after the sale was completed); *Sky Vue*, 759 F.2d at 1096 (denying a motion for an injunction where complaint was filed 16 days after the sale of the business); *Lareau*, *supra* note 17, § 18.04, at 18-7 (Feb. 1989).
ages from the signatory employer. In order to be held liable for violation of the successor clause, the signatory employer must continue to exist with assets capable of satisfying a judgment.

Enforcement of a successor clause through an action for damages can proceed in two ways: (1) through an arbitrator's decision; or (2) through a section 301 suit for enforcement of a collective bargaining agreement. The majority of enforcement actions are by arbitration because the federal courts are required to defer section 301 suits to arbitration where the dispute is arbitrable. Where the collective bargaining agreement containing the successor clause does not contain an arbitration provision, or where the arbitration provision does not cover disputes over the successor clause, the union may bring an action for breach of contract under section 301. The issues to be determined by the arbitrator or the court

194. See Southward, 7 F.3d at 497 (finding that successor employer did not voluntarily assume predecessor's collective bargaining agreement and thus could not be obligated to honor the agreement); American Bell Inc. v. Federation of Tel. Workers, 736 F.2d 879, 889 (3d Cir. 1984) (reversing the district court's determination that the successor employer was bound to arbitrate its obligations under terms of the predecessor's collective bargaining agreement); Lareau, supra note 17, § 18.04, at 18-7 (Feb. 1989).

If the purchasing employer does not hire a majority of the predecessor's employees and is thus not a successor, the purchaser's recognition of the union and adoption of its predecessor's collective bargaining agreement would violate the NLRA's prohibition on employer support of a union that has not demonstrated its status as the representative of the majority of the employees. See 29 U.S.C. § 158(a)(2) (1994). Thus the union's only remedy is a breach of contract action against the seller. Cf. supra note 27 (noting the selling employer may voluntarily make payments to avoid a lawsuit).

195. See Howard Johnson, 417 U.S. at 257-58 & n.3. In Columbus Plastering Co. v. Wood Union, Local 240, 56 Lab. Arb. (BNA) 1076 (1971) (Marshall, Arb.), the collective bargaining agreement between the union and the employer provided:

This Agreement shall be binding upon the Employer, and their successors and assigns. If the Employer's business is purchased, assumed and/or continued by any corporation, partnership or single proprietorship, then this Agreement shall continue in full force and effect and be binding upon such successor or assignee with the same effect as if it had been originally signed by the successor or assignee.

Id. at 1076. The arbitrator found that the signatory employer, having sold the business and gone out of business in good faith, had no legal responsibilities to the union. See id. at 1078. Furthermore, because the purchaser was not a party to the grievance, the arbitrator did not have jurisdiction to enter an award against the purchaser. See id. at 1078-79; see also Dawn Farms Corp. v. Teamsters Local 584, 45 Lab. Arb. (BNA) 1075, 1076 (1965) (Wolff, Arb.) (concluding that the selling employer violated the successor clause and was liable for damages, but exercising the discretion to refuse an award because the employer acted in good faith and went out of business); Lareau, supra note 17, § 18.05, at 18-8 (Feb. 1989).

196. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (explaining arbitration policy); see also 1 The Developing Labor Law, supra note 4, at 1008-12 (discussing courts and arbitration proceedings).

197. It is important to note that individual employees do not have standing to bring a section 301 suit for enforcement of a collective bargaining agreement. In Gutierrez v.
Successor Clauses

are the same: first, what the parties to the collective bargaining agreement intended when they included a successor clause; and, second, whether either of the parties breached the agreement.

The basis for a successor clause breach of contract action is the assertion that the employer agreed to condition the sale of the business on the purchaser's assumption of the terms of the collective bargaining agreement. In Zady Natey, Inc. v. UFCW, Local No. 27, the employer

United Foods, Inc., 11 F.3d 556 (5th Cir. 1994), the union and the employer were signatories to a collective bargaining agreement that provided:

If the Owner or Company hereunder sells, leases or transfers his business or substantially all thereof, the successors, lessees or transferees shall be bound fully by the terms of this Agreement, and shall be obligated to pay the wages and salaries in effect at the time of the sale, lease, or transfer, and shall assume all obligations of this Agreement in the place and stead of the Owner or Company signatory hereto.

Id. at 557. The employer announced that it intended to sell the facility and terminate all of its employees. See id. The union, however, took no action to enforce the successor clause. See id. at 558. After they were terminated and their union refused to take any action, the plaintiffs filed suit in district court. See id. The court, concluding that the employer did not violate a uniquely personal right of the plaintiffs, dismissed the action for lack of standing. See id. at 560; see also Hill v. Ralphs Grocery Co., 896 F. Supp. 1492, 1496-97 (C.D. Cal. 1995) (dismissing former individual employees' § 301 suit to enforce a successor clause for lack of standing).

Several decisions have improperly focused on whether the purchasing employer is a successor under federal labor law in order to determine if the selling employer has breached the successor clause. See Young v. Easter Enters., Inc., 915 F. Supp. 58, 65-66 (S.D. Ind. 1995) (noting the arbitrator ruled the seller was not obligated to bind the purchaser to the terms of the collective bargaining agreement because the purchaser was not a successor under labor law and discussing other arbitration decisions); International Woodworkers, Local 3-393 v. General Box Co., 91-2 ARB (CCH) ¶ 8361, at 4781 (1991) (Flaten, Arb.) (holding an employer liable for breach of successor clause where there was a "substantial continuity" of the business after the sale); Tenco Servs. v. Oil Workers Union, Local 1-5, 86 Lab. Arb. (BNA) 734, 737 (1986) (McKay, Arb.) (holding the purchaser was not obligated to hire the predecessor's employees because it was not a successor to the prior employer); Leeds-Dixon Labs., Inc. v. Teamsters, Local 1518, 74 Lab. Arb. (BNA) 407, 411 (1980) (Kramer, Arb.) (finding that any rights arising from the successor clause were dependent on the purchaser's being a successor under labor law).

As the Supreme Court noted in Fall River, successor employer status is almost exclusively within the power of the purchaser. Fall River Finishing & Dyeing Corp. v. NLRB, 482 U.S. 27, 40-41 (1987). Thus, determining whether or not the purchasing employer is a successor under federal labor law is a separate determination from what the parties to the collective bargaining agreement negotiated. See Elkouri & Elkouri, supra note 18, at 342-65 (explaining the appropriate standards for interpreting contract language); id. at 82-99 (Supp. 1985-89) (same). The proper analysis is to determine whether or not the parties agreed that the employer would condition the sale of the business on the purchaser's agreeing to be bound by the terms and conditions of the collective bargaining agreement. See id.; Zady Natey, Inc. v. UFCW, Local No. 27, 995 F.2d 496, 498 (4th Cir. 1993) (applying this analysis); see also Wheelabrator Envirotech Operating Servs. v. Massachusetts Laborers Dist. Council Local 1114, 88 F.3d 40, 43 (1st Cir. 1996) (noting that in Burns the Supreme Court analyzed only NLRA imposed successor obligations, not contractual obligations imposed by successor clauses in collective bargaining agreements).
moved to vacate an arbitrator's determination that the employer violated a successor clause. The employer argued that the "successor" language was inapplicable because the purchaser did not hire a majority of the seller's employees and thus was not a "successor" employer as defined by the Supreme Court. Both the district court and the arbitrator found that if the section 8(a)(5) definition of "successor employer" was used, the successor clause would be mere surplusage, and that general principles of contract interpretation prevent the reading of any term of a contract to be meaningless. The employer also argued that the terms used in the successor clause did not obligate it to condition the sale of the business on the assumption of the collective bargaining agreement.

The court stated that it would be hesitant to uphold the arbitrator's decision imposing "an extraordinary" obligation on the employer if not for the employer's affirmative actions that made it impossible for the successor clause to take effect. The Fourth Circuit affirmed, noting that the narrow question presented was what the parties intended to agree on when including the successor clause in the collective bargaining agreement.

The court distinguished binding a successor employer to a predecessor's collective bargaining agreement under the NLRA from binding a seller under an agreement containing a successor clause. Agreeing

200. See id. at 143. The union filed a grievance and sought arbitration when the employer sold the business without requiring the purchaser to assume the terms of the collective bargaining agreement. See id. at 143-44. The district court ordered that the employer submit the dispute to arbitration. See id. at 144. The arbitrator decided in favor of the union. See id.
201. See id. at 144.
202. See id. at 145 n.5 (citing 1 BORNSTEIN & GOSLINE, LABOR AND EMPLOYMENT ARBITRATION § 14.02[1][d] (1992)). The district court found that the arbitrator did not ignore the plain language of the agreement in finding the purchaser was a successor. See id. at 145. The court found that the evidence established "successor" as used by the parties was not intended to be limited to the narrow definition under section 8(a)(5). See id.
203. See id. at 146.
204. See id. The court found, that as a condition of the sale, the employer terminated its employees and agreed to keep the sale a secret. See id.
205. See Zady Natey, Inc. v. UFCW, Local No. 27, 995 F.2d 496, 497 (4th Cir. 1993). The court noted that the Supreme Court has stressed the narrowness of judicial review of arbitrator's decisions. See id. at 498. The Fourth Circuit stated, "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Id. (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).
206. See id. The collective bargaining agreement between the employer and the union provided that "[t]his agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns." Id. at 497 n.2. The court noted that: (1) the language of the clause indicated general applicability; (2) the parties had not anticipated an actual change in ownership; (3) reading the clause narrowly would render it surplusage;
with the district court, the Fourth Circuit concluded the employer's actions in terminating employees and in keeping the sale a secret in order to assure that the purchaser was not bound by the successor clause breached the employer's duty to act in good faith when selling the business. In a similar action, the First Circuit found that an employer agreed to condition the change in ownership of the business on the assumption of its collective bargaining agreement, notwithstanding the possibility that the employer might not be able to require assumption of the agreement. In Wheelabrator Envirotech Operating Services Inc. v. Massachusetts Laborers District Council Local 1144, the employer moved to vacate an arbitrator's determination that the employer breached a successor clause on the ground that it was unable to require the purchasing employer to assume the collective bargaining agreement. The district court upheld the arbitrator's interpretation of the successor clause as requiring the employer to condition the change in ownership on assumption of the collective bargaining agreement, even where there was no privity

and (4) no other provision supported the narrow meaning. See id. at 499. The court concluded the district court correctly found the successor clause was ambiguous and properly construed by the arbitrator. See id. at 499-500.

207. See id. The court found that the district court had properly rephrased the arbitrator's "vehement" objections to the employer's bad faith in terms of a breach of the duty of good faith and fair dealing under the collective bargaining agreement. See id.

208. See Wheelabrator Envirotech Operating Servs. v. Massachusetts Laborers Dist. Council Local 1144, 88 F.3d 40, 47-48 (1st Cir. 1996) (finding performance of the successor clause might be difficult, but was not clearly impossible).

209. See id. at 43. Wheelabrator took over operation of Tauton, Massachusetts's waste water treatment plant from the city in 1980. See id. at 42. As a condition of the contract, Wheelabrator was required to hire the city's employees, recognize the union as the bargaining representative of the employees, and to adopt the existing collective bargaining agreement. See id. After the expiration of the original agreement, Wheelabrator and the union negotiated three collective bargaining agreements. See id. Each agreement contained a successor clause that provided:

In the event the operation of the plant, in whole or in part, is assumed by any other entity, public or private, the successor organization . . . shall agree to all terms and conditions of this Agreement unless that assumption in whole or in part would be in violation of the legal rights and obligations of the affected employees of the successor organization.

Id. Eleven months before the expiration of the third collective bargaining agreement, the city solicited new bids to operate the plant and awarded the contract to a new company, Operations Management International (OMI). See id. OMI hired a majority of Wheelabrator's former employees and recognized the union as their representative, but refused to adopt the collective bargaining agreement. See id. Wheelabrator requested that the city require OMI to assume the agreement but the city refused. See id.

The union filed a grievance alleging Wheelabrator breached its obligations by failing to require OMI to assume the terms of the collective bargaining agreement. See id. After a hearing, the arbitrator concluded that the union and Wheelabrator intended to require Wheelabrator to obligate all successors to assume the terms of the collective bargaining agreement and that Wheelabrator had breached the agreement. See id. at 42-43.
between the two employers. However, the district court vacated the arbitrator's award, finding the clause was unenforceable because the employer had no ability to require the purchasing employer to assume the agreement. The First Circuit reversed, reinstating the arbitrator's award on the basis that the parties had allocated the risk of nonperformance during bargaining.

Several other decisions have found the failure of a selling employer to condition the sale of a business on assumption of the collective bargaining agreement violated the successor clause. For example, in *UMWA, District 15 v. Basin Cooperative Services*, the union brought a section 301 breach of contract action against a selling employer that failed to require the purchaser to assume the collective bargaining agreement. The successor clause expressly required the seller to condition the sale of the business on the assumption of the collective bargaining agreement by the purchaser. The Eighth Circuit affirmed a jury verdict finding the employer violated the successor clause and awarding $6,500,000 in damages. In *UMWA v. Eastover Mining Co.*, a similar action, the union

210. See id. at 43. The court noted that it probably would have decided differently, but upheld the arbitrator’s plausible interpretation of the plain language of the clause. See id.
211. See id. The court reasoned the lack of privity between the employers rendered the clause unenforceable under the doctrine of impossibility. See id. at 44.
212. See id. at 44-45. The court found that in these circumstances the impossibility doctrine did not apply. See id. at 45. Reviewing the arbitrator’s determination of the parties’ intentions, the court found performance was not impossible and it was not improbable that Wheelabrator agreed to assume the risk of nonperformance. See id. 47-48. As part of its analysis of impossibility, the court noted that, in response to the union’s grievance against the city, the city agreed to pay all former Wheelabrator employees the difference in pay between the collective bargaining agreement and the purchasing employer’s wages. See id. at 43.
213. 53 F.3d 222 (8th Cir. 1995).
214. See id. at 223.
215. See id. The union and the selling employer were parties to the 1988 Surface Coal Wage Agreement that provided that the employer:

promise[d] that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred to any purchaser ... without first securing the written agreement of the purchaser ... to assume [the employer's] obligations under this Agreement.

Id. at 223-24. The agreement also provided that it covered all “coal lands, coal producing and coal preparation facilities” owned or leased by the employer. Id. at 224.
216. See id. at 225. The circuit court affirmed the magistrate judge’s ruling that the jury’s verdict was not excessive. See id. The union presented evidence that the unmitigated damages were $24 million. See id. The magistrate found that if the mine workers mitigated their damages by half, actual damages would remain $12 million, thus $6.5 million was not an unreasonable verdict. See id.

The court found that the jury’s verdict was supported by evidence in the record. See id. The court noted that the parties stipulated which miners had job rights, that the sold lands could have been mined until 2012, and that the miners earned an average of $40,000 per year. See id.; see also UMWA Wins $6.5 Million from Basin; Jury Says Sale Violated Suces-
filed a complaint alleging the employer breached its collective bargaining agreement by not requiring a purchaser to assume the agreement.\textsuperscript{218} The court found that, in light of the Supreme Court's successorship cases and the bargaining history between the employer and the union, the successor clause was clearly intended to cover the sale of the employer's property.\textsuperscript{219} The court granted summary judgment to the union against the selling employer.\textsuperscript{220}

In some cases, the selling employer may be held liable for selective terms of the collective bargaining agreement. In \textit{District 17, UMWA v. Allied Corp.},\textsuperscript{221} the Fourth Circuit upheld a district court injunction requiring a selling employer, that breached a successor clause, to continue to provide health care benefits to its former employees.\textsuperscript{222} The court found the seller knew that it was obligated by the successor clause and improperly sought to avoid those obligations.\textsuperscript{223} The court concluded

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In consideration of the Union's execution of this agreement, each employer promises that its operations covered by this Agreement shall not be sold, conveyed or otherwise transferred to or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.

\textit{Id.} at 417. The transfer agreement between the selling employer and the purchasers provided that the purchasers would not assume any of the seller's obligations except those specifically addressed. \textit{See id.} at 415. The court found that the seller violated the successor
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\textsuperscript{217} 603 F. Supp. 1038 (W.D. Va. 1985).
\textsuperscript{218} \textit{See id.} at 1039-40. The union and the employer were signatories to the 1981 NBCWA and its successor clause. \textit{See id.} at 1041. The purchaser knew the collective bargaining agreement contained a successor clause and hired a consulting firm to determine how the purchase could be made without assuming the agreement. \textit{See id.} at 1040. The purchaser submitted a proposal requiring the seller to shut down the mine and terminate all employees 45 days prior to the closing of the sale. \textit{See id.} at 1041. The seller's initial draft of the sale agreement required the purchaser to assume the seller's NBCWA obligations. \textit{See id.} The purchaser refused to accept this language and inserted a clause expressly stating that it was not assuming the NBCWA obligations. \textit{See id.} at 1041-42.
\textsuperscript{219} \textit{See id.} at 1044-45. The court reviewed the bargaining history of the parties and noted they changed the wording of the successor clause after the Supreme Court's decisions. \textit{See id.} at 1045.
\textsuperscript{220} \textit{See id.} at 1047. The court concluded that the selling defendants had "clearly" breached their contract. \textit{Id.}
\textsuperscript{221} 765 F.2d 412 (4th Cir. 1985), \textit{cert. denied}, 473 U.S. 905 (1986).
\textsuperscript{222} \textit{See id.} at 414. A divided panel of the Fourth Circuit reversed the district court's decision and absolved the employer of liability, but held the benefit trust fund liable for the health care benefits. \textit{See District 17, UMWA v. Allied Corp.}, 735 F.2d 121 (4th Cir. 1984). After a rehearing en banc, the Fourth Circuit reinstated the district court's decision. \textit{See Allied Corp.}, 765 F.2d at 414.
\textsuperscript{223} \textit{See id.} at 420-21. The court found that from 1950 to 1978 the parties had renewed their collective bargaining agreements and had continuously included a provision for continuation of health care benefits. \textit{See id.} The successor clause between the employer and the union provided:

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In consideration of the Union's execution of this agreement, each employer promises that its operations covered by this Agreement shall not be sold, conveyed or otherwise transferred to or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.

\textit{Id.} at 417. The transfer agreement between the selling employer and the purchasers provided that the purchasers would not assume any of the seller's obligations except those specifically addressed. \textit{See id.} at 415. The court found that the seller violated the successor
that the district court had fashioned an appropriate remedy to effectuate the policies of collective bargaining.\textsuperscript{224}

In contrast, several decisions have found that an employer's failure to condition the sale on the purchaser's assumption of the collective bargaining agreement did not breach the terms of a successor clause. In \textit{Local Union No. 1812, UMWA v. BethEnergy Mines},\textsuperscript{225} the union brought a breach of contract action against the selling employer.\textsuperscript{226} The union alleged that despite a contractual provision of the sale agreement, requiring the purchasers to assume the collective bargaining agreement, the seller did not meet its obligations because it knew the purchasers did not intend to observe the agreement.\textsuperscript{227} The Sixth Circuit, affirming a summary decision in favor of the seller, found that even if the seller knew the purchaser intended to default on its contract to assume the collective bargaining agreement, the seller had nevertheless fulfilled its obligations under the successor clause.\textsuperscript{228} In \textit{BethEnergy Mines, Inc. v. District 30}, the court relied on the Supreme Court's establishment of a broad federal common law for the enforcement of collective bargaining agreements. See id. (citing \textit{Textile Workers Union v. Lincoln Mills}, 353 U.S. 448, 456-67 (1957) (finding federal courts are to create a federal common law to enforce collective bargaining agreements)). The court found the district court's injunction, which allowed the selling employer to cease making payments if the purchasers agreed to assume the obligations, was an appropriate remedy for the employer's knowing breach. See id.

But see \textit{Carbon Fuel Co. v. USX Corp.}, 100 F.3d 1124, 1132-35 (4th Cir. 1996) (finding the 1992 Coal Act preempted successor clause private contractual allocation of health care costs).

\textsuperscript{224} See id. at 417. The district court assumed the seller was aware that breaching the successor clause "would leave the retirees without coverage and with no responsible employer against whom the [union] could make contract demands at the next round of bargaining." \textit{Id.} at 421.

\textsuperscript{225} 992 F.2d 569 (6th Cir. 1993).

\textsuperscript{226} See \textit{id.} at 571. The successor clause in the 1988 National Bituminous Coal Wage Agreement (NBCWA), to which the seller was a signatory, provided:

\[\text{[e]ach employer promises that its operations covered by this Agreement shall not be sold, \ldots to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.}\]

\textit{Id.} In addition, the seller was obligated to notify the union of any sale. See \textit{id.} The NBCWA also provided that, upon proper notification, "the Employer shall not be a guarantor or be held liable for any breach of the successor or assignee of its obligations \ldots" \textit{Id.} at 573. The selling employer complied with the successor clause by requiring, in the sale contract, that the purchaser fulfill "all of Seller's obligations and liabilities relating to the [business] Operations under a certain contract, dated February 1, 1988, between Seller and the International Union, United Mine Workers of America \ldots." \textit{Id.} at 572. The seller sent the union a copy of the sale agreement provision requiring the purchasers to assume the collective bargaining agreement. See \textit{id.} at 571.

\textsuperscript{227} See \textit{id.} at 573. The court found that under the NBCWA the seller was not a guarantor of the purchasers' performance. See \textit{id.}
UMWA, Local Union No. 5741, the selling employer sought review of an arbitrator’s decision finding it liable for a breach of the successor clause. The court vacated the arbitrator’s award, finding the terms of the collective bargaining agreement and the bargaining history of the parties indicated the successor clause covered only the “operations” of the employer and not the inactive coal lands which were leased. Similarly, in UMWA v. U.S. Steel Mining, Inc., the union brought a section 301 breach of contract action against a coal mining company and the purchaser of the coal mine to enforce the purchaser’s assumption of the collective bargaining agreement, as a successor clause required.

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230. See id. at 261. The successor clause between the union and the employer, contained in the 1984 National Bituminous Coal Wage Agreement (NBCWA), provided:
   This Agreement shall be binding upon all signatories hereto... and their successors and assigns. In consideration of the Union’s execution of this agreement, each employer promises that its operations covered by this Agreement shall not be sold, conveyed or otherwise transferred to or assigned to any successor without first securing the agreement of the successor to assume the Employer’s obligations under this Agreement...
   Id. at 262. The union filed a grievance when the employer failed to obligate its lessee to assume the terms of the collective bargaining agreement. See id.
231. See id. at 263-64. The magistrate judge noted that a previous court decision set aside an arbitrator’s decision for failure to distinguish the terms “coal lands” and “coal mining operations” in a previous version of the NBCWA. See id. at 263 (citing Clinchfield Coal Co. v. District 28, UMWA, 556 F. Supp. 522, 530 (W. D. Va.), aff’d, 720 F.2d 1365 (4th Cir. 1983)). The magistrate found the 1984 NBCWA, by its terms, applied only to operating coal mines and not dormant coal lands. See id. at 263-64. Because the leased coal land which was the subject of the arbitrator’s decision was not operational prior to the lease, the magistrate recommended vacating the arbitrator’s decision. See id. at 264. The district court agreed with the magistrate judge and found the leased coal lands were not covered by the successor clause. See id. at 261.

The district court declined to rule on the employer’s allegation that the successor clause violated section 8(e) of the NLRA because the issue was pending before the NLRB. See id. at 264. The NLRB recommended the section 8(e) charges be dismissed or withdrawn. See NLRB Gen. Couns. Advice Mem., Case No. 9-CE-49-1 (Sept. 26, 1989), available in LEXIS, 1989 NLRB GCM LEXIS 48, at *9. See generally Amax Coal Co. v. NLRB, 614 F.2d 872 (3d Cir. 1980) (enforcing an NLRB decision finding a successor clause did not violate § 8(e)); supra notes 130-31 (discussing § 8(e) violations and successor clauses).
232. 895 F.2d 698 (10th Cir. 1990).
233. See id. at 699. The selling company and the union were signatories to the 1984 NBCWA that provided:
   In consideration of the Union’s execution of this agreement, each employer promises that its operations covered by this Agreement shall not be sold, conveyed or otherwise transferred to or assigned to any successor without first securing the agreement of the successor to assume the Employer’s obligations under this Agreement.
   Id. at 700 n.1. The district court, finding that the sold property was a closed mine and not an “operation” covered by the successor clause, granted the seller’s and purchaser’s motions for summary judgment. See UMWA v. U.S. Steel Mining, Inc., 636 F. Supp. 151, 153-54 (D. Utah 1986).
Tenth Circuit affirmed the district court's grant of summary judgment for the defendants, finding the successor clause did not cover the land sold. In addition, several arbitrators' decisions have found that the contested sale of a business was not covered by the successor clause.

234. See U.S. Steel, 895 F.2d at 702. The circuit court noted that the district court had relied on the holding of another district court that found the term "operations," in a successor clause, did not cover closed mines. See id. at 700 (citing District 6, UMWA v. North American Coal Corp., No. C-279-242 (S.D. Ohio 1980) (holding the employer did not violate a successor clause by selling a mine that was closed for a year because it was not an "operation" covered by the successor clause)). In addition, the court relied on a more recent decision holding the term "operation" in a successor clause did not cover a closed mine. See id. at 701 (citing In re Chateauguay Corp., 891 F.2d 1034 (2d Cir. 1989) (holding that the term "operation" in the Coal Wage Agreement did not apply to a mine closed in good faith)). The court distinguished a case where the employer closed the mine to avoid the obligations imposed by the successor clause. See id. (citing UMWA v. Eastover Mining, Co., 603 F. Supp. 1038 (W.D. Va. 1985) (holding the sale of a closed mine was subject to the successor clause)); see also UMWA, District 31 v. Thames Development, Ltd., 821 F. Supp. 426, 428 (S.D. W. Va. 1993) (finding a signatory employer's sale of all the stock of a wholly owned subsidiary did not breach the successor clause because the subsidiary was not a covered "operation" under the clause); BethEnergy Mines, Inc. v. District 30, UMWA, Local Union No. 5741, 714 F. Supp. 260, 261 (E.D. Ky. 1988) (vacating an arbitrator's award upon finding that term "operation" in successor clause did not cover lands at issue).

235. In Kroger Co. v. General Teamsters Union, Local 406, 78 Lab. Arb. (BNA) 569 (undated) (Howlett, Arb.), the collective bargaining agreement between the selling employer and the union provided: "This Agreement made and entered into between ... [the employer], and Local Union ... , its successors and assigns ..." Id. at 579. The arbitrator contrasted the clause with the successor clause found in the union's collective bargaining agreement with the employer for a different store that provided:

This agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation, or any part thereof is sold, leased, transferred or taken over by sale, transfer, lease assignment, receivership, or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof. It is understood by this section that the parties hereto shall not use any leasing device to a third party to evade this contract. The employer shall give notice of the existence of this agreement to any purchaser, transferee, lessee, assignee, etc. of the operations covered by the agreement or any part hereof. Such notice shall be in writing with a copy to the union not later than the effective date of the sale, except in cases of replacement stores.

Id. The arbitrator held that the clause at issue was a "simple 'successor's and assigns' clause." Id.

In MGM-Telestudios, Inc. v. IBEW, Local 1212, 48 Lab. Arb. (BNA) 1267 (1967) (Wolff, Arb.), the collective bargaining agreement between the employer and the union provided:

In the event of a sale of its assets the employer warrants that it will incorporate into the contract of sale with the purchaser a requirement that said purchaser employ all engineers within the collective bargaining unit and assume and be bound by all of the terms and conditions of this Agreement. The Union also agrees to continue to be bound by this Agreement in the event of such a sale.

Id. at 1268 n.1. The arbitrator held that the successor clause only covered the sale of a going business concern and not the sale of the employer's assets. See id. at 1268-69.
Thus, where the successor clause unambiguously requires the employer to condition the sale of the business on the purchaser's agreement to be bound by the collective bargaining agreement, the selling employer will be found to have breached the agreement when the purchaser fails to assume the agreement. In addition, the successor clause will be enforced where it unambiguously provides that the selling employer contin-

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236 See UMWA, Dist. 15 v. Basin Cooper. Servs., 53 F.3d 222, 225 (8th Cir. 1995); UMWA v. Eastover Mining Co., 603 F. Supp. 1038, 1047 (W.D. Va. 1985). Even where the successor clause is ambiguous, courts will defer to an arbitrator's decision finding the clause binds an employer “unless it can be shown that the arbitrator acted in a way for which neither party could [possibly] have bargained.” Wheelabrator Envirotech Operating Servs. v. Massachusetts Laborers Dist. Council Local 1144, 88 F.3d 40, 47 (1st Cir. 1996) (quoting Local 1445, UFCW v. Stop & Shop Cos., 776 F.2d 19, 21 (1st Cir. 1985)). Thus, a review of arbitration decisions addressing successor clauses is useful in assessing the enforceability of a successor clause.

In Martin Podany Assocs., Inc. v. Graphic Arts Int'l Union, Local 1B and 229, 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.), the employer notified the unions that it was liquidating all assets and terminating all employees and the union agreement. Id. at 659. The unions commenced an action against the seller and purchaser in district court under section 301. See id. The court ordered the successor to proceed to arbitration whereupon the successor dissolved its corporation and went out of business. See id. The court then ordered the seller to proceed with arbitration. See id. The collective bargaining agreement provided:

The Employer agrees that all obligations under this contract, and the performance thereof, by the buyer, lessee, transferee or assignee, become a condition of sale, transfer, lease, or assignment.

Id. at 660. The arbitrator held that the language clearly and unambiguously imposed a duty on the employer to condition the sale of the business on the buyer's assumption of the collective bargaining agreement. See id. at 663. The arbitrator ruled the employer breached its duty and held a damages hearing. See id.

Similarly, in Kroger Co. v. General Teamsters Union, Local 406, 78 Lab. Arb. (BNA) 569 (undated) (Howlett, Arb.), the cases were referred to arbitration by the United States District Court for the Western District of Michigan. See id. at 569. The litigation and grievances followed the employer's decision to sell its distribution center to another employer. See id. The successor clause provided:

This Agreement shall be binding not only upon the parties hereto but upon their successors and assigns.

Id. at 571. The union contended that the purchaser was bound by the collective bargaining agreement and that the seller was required to condition the sale upon assumption of the collective bargaining agreement. See id. The arbitrator contrasted the clause with the successor clause found in the union's collective bargaining agreement with the employer for a different store that provided:

This agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation, or any part thereof is sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this agreement for the life thereof. It is understood by this section that the parties hereto shall not use any leasing device to a third party to evade this contract. The employer shall give notice of the existence of this agreement to any purchaser, transferee, lessee, assignee, etc. of the operations covered by the agreement or any part hereof. Such notice shall be
ues to be liable for the performance of the collective bargaining

in writing with a copy to the union not later than the effective date of the sale, except in cases of replacement stores.

*Id.* at 579. The arbitrator found that the clause at issue was a "simple 'successor's and assigns' clause." *Id.* The arbitrator found that the purchaser was not the section 8(a)(5) "successor" to the seller and could not be bound by the collective bargaining agreement. See *id.* at 580 (quoting Teamsters, Local 5 v. Foodtown Ethical Pharmacies, Inc., 84 L.R.R.M. (BNA) 2453, 2455 (M.D. La. 1973) ("Assuming arguendo, that [the buyer] was considered to be the legal successor to [the seller], and as such came within the meaning of the [seller]-union agreement, it would have been a violation of this agreement by [the seller] not to impose the union contract obligations on [the buyer], but [the buyer] would not be per se bound by the contract it never signed or assumed."). The arbitrator held that the selling employer was not required to condition the sale of the business on assumption of the collective bargaining agreement by the purchaser. See *id.* at 591.

In *Sexton's Steak House, Inc. v. Hotel and Restaurant Employees, Local 30, 76 Lab. Arb. (BNA) 576 (1981) (Ross, Arb.),* the successor clause provided:

This Agreement shall be binding on any and all successors and assigns of the Employer, whether by sale, transfer, merger, acquisition, consolidation or otherwise. The Employer shall make it a condition of transfer that the successor or assigns shall be bound by the terms of this Agreement.

*Id.* at 577. The selling employer had purchased the business and agreed to be bound by the collective bargaining agreement. See *id.* Faced with bankruptcy, the employer decided to sell to a purchaser who expressly refused to be bound by the agreement. See *id.* The union filed an action in state court and obtained an injunction enjoining the sale of the business unless the purchaser agreed to assume the collective bargaining agreement. See *id.* In remanding to arbitration, the court stated:

The purpose of successor clauses is to protect the rights and contractual benefits of members of a bargaining unit when there is a sale or transfer of the assets of a business to another who intends to use those assets in substantially the same business endeavor. The only purpose, and the clear purpose, of such clauses is to obtain continuing job security and other contract benefits when a business in which they have been employed continues in operation under a new owner. It is not intended to apply to the sale of assets to anyone who has no interest in pursuing the same operation, but who intends to resell the assets or use them for other purposes. It does intend to protect employees from being replaced by other employees or from loss of benefits or a reduction of working conditions while employed to perform the same work for another employer.

*Id.* at 578. The arbitrator found that the purchaser carried on substantially the same business with the same employees. See *id.* at 578-79. The arbitrator rejected the employer's contention that the successor clause did not apply, because only the assets of the business had been sold, and instead found the employer breached the contract. See *id.* at 579.

The agreement in *In re Hosanna Trading Co. Children's Dress Makers' Union, Local 91, 74 Lab. Arb. (BNA) 128 (1980) (Simons, Arb.),* provided:

The parties agree that this agreement shall be binding upon the Association [of employers], the members of the Association and the Union and their respective transferees, successors, and assigns, and that they will faithfully comply with its provisions.

*Id.* at 131. The arbitrator found that the proposed sale of the business would violate the terms of the agreement and prohibited the sale of the business unless the purchaser agreed in writing to be bound by the terms of the agreement. See *id.* at 132.
agreement when the purchaser fails to assume the agreement.\footnote{237} Finally, where the signatory employer attempts to avoid its obligations under the successor clause, it will be held liable for any breach.\footnote{238}

Where the successor clause contains only general language, however, the decisions frequently hold that the signatory employer is not required to condition the sale of the business.\footnote{239} Further, where the signatory employer engages in a good faith attempt to meet its obligations under the

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\footnote{237} In \textit{Claire Frock Co. v. International Ladies' Garment Workers Union Local 256, 92 Lab. Arb. (BNA) 637 (1989) (Bowers, Arb.)}, the successor clause stated:

The parties agree that this agreement shall be binding upon them and their respective transferees, successors and assigns, and that they will faithfully comply with its provisions. In the event the Employer sells or transfers the business or the shop, the Employer shall nevertheless continue to be liable for the complete performance of this agreement until or unless the purchaser or transferee expressly acknowledges in writing it is fully bound by the terms of this agreement. \textit{Id.} at 638. The employer sold all of its assets to a purchaser who continued to operate the business, hired all of the seller's employees, but refused to honor the collective bargaining agreement. \textit{See id.} at 639. The employer was ordered to make up the twelve percent difference between the wages and benefits paid by the purchaser and those due under the agreement. \textit{See id.}\n
The arbitrator ruled that a strike against the purchaser, which would have violated the no strike clause of the agreement had the purchaser honored the agreement, did not end the selling employer's obligation under the contract. \textit{See id.} at 640.

In \textit{In re Hosanna Trading Co.}, the agreement provided:

In the event that a member of the Association sells or transfers the business or the shop, such member shall nevertheless continue to be liable for the complete performance of this agreement until the purchaser or transferee expressly agrees in writing with the Union that it is fully bound by the terms of this agreement. \textit{Id.} However, in \textit{FMC Corp. v. UMWA, District 31, 92 Lab. Arb. (BNA) 1246 (1989) (Stoltenberg, Arb.)}, the successor clause expressly provided that the employer would not sell the business without securing the agreement of the purchaser to honor the collective bargaining agreement. \textit{See id.} at 1247. The successor clause also provided:

[T]he Employer shall not be a guarantor or be held liable for any breach by the successor or assignee of its obligations, and the [union] will look exclusively to the successor or assignee for compliance with the terms of this Agreement. \textit{Id.} The arbitrator found that the selling employer failed to have the purchaser assume the collective bargaining agreement and, thus, breached the agreement. \textit{See id.} at 1250. The arbitrator held, however, that the guarantor clause meant that the union was required to seek damages from the purchaser, who was outside the arbitrator's jurisdiction. \textit{See id.}\n
This holding erroneously overlooks the fact that although the clause provides that the employer is not a guarantor for the purchaser's breach of the clause, the clause does not provide that the employer is not liable for its own breach of the successor clause.\footnote{238} \textit{See Zady Natey, Inc. v. UFCW, Local 27, 995 F.2d 496 (4th Cir. 1993); District 17, UMWA v. Allied Corp., 765 F.2d 412, 417 (4th Cir. 1985); see also High Sierra Casino/Hotel v. Hotel Employees Union, Local 86, (1990) (Brand, Arb.), available in WL, Arbit database (holding that where the employer deliberately violated a successor clause that provided only for notification of sale to the union, the employer was liable for seven months of severance pay).}\n
In \textit{National Tea Co. v. Amalgamated Food Employees Union, Local 590, 59 Lab. Arb. (BNA) 1193 (1972) (Joseph, Arb.)} the successor clause provided:

This agreement shall be binding upon the parties hereto, their successors and assigns. It is the intent of the parties that the agreement shall remain in effect for
the full term of the Agreement, and shall bind the successors of the respective parties hereto.

*Id.* at 1197-98. The arbitrator held the language did not require the seller to require assumption of the agreement upon the sale of the business. *See id.* at 1198-99. The arbitrator rejected the union's contention that failure to find such an obligation would make the language meaningless and found the clause would be valuable in determining section 8(a)(5) successor status. *See id.* at 1198.

In *Gallivan's Inc. v. Hotel Employees Union, Local 17, 79 Lab. Arb. (BNA) 253 (1982)* (Gallagher, Arb.), the arbitrator reviewed *Walker Brothers, National Tea, High Point, Hosanna Trading,* and *Sextons Steakhouse.* *See id.* at 257-58. The arbitrator concluded that an obligation to condition the sale of a business on the assumption of the collective bargaining agreement is found only where the successor clause expressly provides for it. *See id.* at 258. The arbitrator found the negotiated clause was not intended to impose such an obligation on the employers. *See id.* at 259-60. Finally, the arbitrator rejected the union's contention that an adverse ruling would render the agreed upon clause meaningless. *See id.* at 260. Though he found the clause was meaningless because of intervening changes in the successorship doctrine, the arbitrator found the parties intended the clause to affect the successorship determination and possibly bind the purchaser. *See id.* The arbitrator concluded that the union could have obtained the protection it sought by persisting in its demands for express language. *See id.*

In *Wyatt Mfg. Co. v. IAM, Dist. Lodge No. 70, 82 Lab. Arb. (BNA) 153 (1983)* (Goodmann, Arb.), the arbitrator noted:

There is a significant difference between a seller who agrees that the contract shall be binding upon its successors and assigns and the seller who (a) agrees to continued liability if the buyer does not assume the agreement or, (b) obligates itself to find a buyer who will assume the agreement as a condition of sale, or (c) covenants to refrain from performing any act which evades or avoids the terms of the agreement.

*Id.* at 163. The arbitrator held that a successor clause without an express requirement that the employer condition the sale of a business on assumption of the collective bargaining agreement will not support such an obligation absent clear intent of the parties indicating otherwise. *See id.* at 164.

However, in *High Point Sprinkler Co. v. Road Sprinkler Fitters Local Union No. 669, 67 Lab. Arb. (BNA) 239 (1976)* (Connolly, Arb.), the arbitrator awarded breach of contract damages on an ambiguous successor clause. *See id.* at 248. The collective bargaining agreement provided:

This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. It is understood that the parties hereto shall not use any sale, transfer, lease, assignment, receivership, or bankruptcy to evade the terms of this Agreement.

*Id.* at 240. The employer assigned its assets to its creditors as security for its outstanding debts but did not require the creditors to assume the collective bargaining agreement. *See id.* at 243. The employer determined that it would go out of business and laid off its employees, whereupon the creditors took over operation of the business. *See id.* The arbitrator ruled the provision in the successor clause that no assignment would relieve the parties of their duties under the clause meant the employer was liable for breaching the agreement in assigning its assets. *See id.* at 248. The arbitrator awarded $18,725.00 in damages against the employer and reopened the hearing to determine lost wages owed by the employer. *See id.*

For additional analysis, compare *Nall Hills Payless, Inc. v. UFCW Local 576, 91-2 Lab. Arb. (CCH) ¶ 8409, at 5010 (1991)* (Heinz, Arb.) (holding successor clause expressly required employer to give the union notice of any proposed sale, not to condition sale on assumption of agreement); *Walker Bros. v. IBEW, Local Union 1088, 41 Lab. Arb. (BNA)*
successor clause, the employer may not be held liable for the failure of the purchaser to adopt the collective bargaining agreement.\textsuperscript{240} Finally, where the language of the successor clause does not cover the contested sale,\textsuperscript{241} or where there is no successor clause, the employer cannot be

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\item 844, 845, 852 (1963) (Crawford, Arb.) (finding that where the successor clause provided “this agreement is made by and between [the employer], its Successors and Assigns,” the selling employer “is not, contrary to the Union claim, obliged under the successor-assigns phrase to require a purchaser to assume its contract with the Union. The language just does not say this . . .”), \textit{with} International Woodworkers, Local 3-393 v. General Box Co., 91-2 Lab. Arb. (CCH) \textsection{} 8361, at 4783 (1991) (Flaten, Arb.) (holding employer breached general successor language by failing to assure purchaser assumed terms of collective bargaining agreement); Kohn Inc. v. Teamsters Local 377, 93 Lab. Arb. (BNA) 1124, 1131 (1989) (Dworkin, Arb.) (holding successor clause’s provision that after sale contract shall continue obligated employer to condition sale of business); Boardman Co. v. United Steelworkers, 91 Lab. Arb. (BNA) 489, 494 (1988) (Harr, Arb.) (holding that a selling employer, that did not make assumption of the collective bargaining agreement by the purchaser a condition of the sale, violated a general successor clause); Marley-Wyland Co. v. Local 10, Sheet Metal Workers’ Int’l Ass’n, 88 Lab. Arb. (BNA) 978, 985 (1987) (Jacobowski, Arb.) (holding that “successors” language in preamble of collective bargaining agreement required employer to condition sale of business on assumption of the agreement by the purchaser); Schnee’s Finer Foods, Inc. v. Amalgamated Meat Cutters, Dist. Union 427, 72 Lab. Arb. (BNA) 881, 885 (1979) (Belkin, Arb.) (holding that selling employer violated successor clause by not requiring purchaser to honor the collective bargaining agreement).
\item 240. See Local 1812, UMWA v. BethEnergy Mines, 992 F.2d 569, 573 (6th Cir. 1992); Columbus Plastering Co. v. Wood Union, Local 240, 56 Lab. Arb. (BNA) 1076, 1078 (1971) (Marshall, Arb.) (finding that where the signatory employer sold the business and went out of business in good faith it had no legal responsibilities to the union); Dawn Farms Corp. v. Teamsters Local 584, 45 Lab. Arb. (BNA) 1075, 1076 (1965) (Wolff, Arb.) (finding good faith and going out of business provided discretion to deny an award). \textit{But see} Wheelabrator Envirotech Operating Servs. v. Massachusetts Laborers Dist. Council, Local 1114, 88 F.3d 40, 45 (1st Cir. 1996) (noting that where a successor clause requires an employer to “obligate” a successor, more “than simply a good faith, but unsuccessful, attempt to obligate” the successor is required).
\item In \textit{MGM-Telestudios, Inc. v. IBEW, Local 1212}, 48 Lab. Arb. (BNA) 1267 (1967) (Wolff, Arb.), the collective bargaining agreement between the employer and the union provided:

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In the event of a sale of its assets the employer warrants that it will incorporate into the contract of sale with the purchaser a requirement that said purchaser employ all Engineers within the collective bargaining unit and assume and be bound by all of the terms and conditions of this Agreement. The Union also agrees to continue to be bound by this Agreement in the event of such a sale.
\end{quote}
\end{itemize}

\textit{Id.} at 1268 n.1. The arbitrator held that the successor clause only covered the sale of a going business concern, and not the sale of the employer’s assets. See \textit{id.} at 1268-69; see also C-F-M Co. v. Teamsters Local 377, 37 Lab. Arb. (BNA) 980, 982-84 (1962) (Kates, Arb.) (holding the successor clause covered only the sale of an “operation” not the assets of the business, and where sale agreement did not require purchaser to continue operating business the successor clause was not breached); Club Bingo, Inc. v. Local Joint Executive Bd., Culinary Workers, Local 226, (1983), available in WL, Arbit database (holding successor clause did not cover sale of physical assets); \textit{cf.} Alvan Motor Freight v. Teamsters Local
found to have breached the collective bargaining agreement by selling to a purchaser who does not assume the agreement.  

IV. **ENFORCEMENT OF SUCCESSOR CLAUSES AGAINST PURCHASERS AND SELLERS UNDER STATE LAW**

Enforcement of a successor clause may also be possible under state law. In the late 1970s, California, followed by Ohio and Massachusetts, enacted legislation declaring collective bargaining agreements between an employer and a labor organization containing a successor clause binding against purchasing employers, provided the purchaser was conducting the same or similar business at the same facilities. The statutes do not make a determination of successorship under the NLRA, but rather bind all covered purchasing employers to the terms of the agreement. California, Ohio, and Massachusetts specifically exempted employers subject to coverage under the NLRA from the provisions of their respective statutes. This exemption of NLRA covered employers leaves very few employers covered by these state statutes.

710, 103 Lab. Arb. (BNA) 513, 516 (1994) (Dworkin, Arb.) (finding extensive successor clause did not cover subcontracting).

242. In *Decatur Herald & Review, Inc. v. General Ill. Typographical Union No. 177, 73 Lab. Arb. (BNA) 745 (1979) (Jones, Arb.),* the arbitrator held that “[i]n the absence of a successor and assigns clause or any other provision in the Agreement expressly, or even impliedly, requiring the Company to sell its business only upon the condition that the purchaser assume its obligations under the Agreement” would require the arbitrator to create a contract provision in contravention of the collective bargaining agreement and principles of arbitration. *Id.* at 750. The union’s extensive job security provisions were extinguished when the employer ceased operations prior to selling the business. *See id.*

243. The Supreme Court held that, in enacting section 301, Congress intended for the federal courts to develop a federal common law for enforcement of labor contracts. *See Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 457 (1957). The Court held that state law could be used in developing the federal common law. *See id.*

244. *See CAL. LAB. CODE § 1127 (Deering 1991) (enacted 1975); OHIO REV. CODE ANN. § 4113.30 (Page 1991) (enacted 1978); MASS. GEN. LAWS ANN. ch. 149, § 179C (West 1996) (enacted 1979).*

California enacted its statute because “‘[e]xisting law [did] not impose the terms and conditions of collective bargaining agreements between employers and labor organizations upon employers succeeding to contracting employers’ businesses.’” Pimentel, *supra* note 6, at 113-14 (quoting 1976 Cal. Stats. Summary Digest 277 (alterations in original)).

245. *See CAL. LAB. CODE § 1127(b); OHIO REV. CODE ANN. § 4113.30(A)(1); MASS. GEN. LAWS ANN. ch. 149, § 179C.*

246. *See CAL. LAB. CODE § 1127(c); OHIO REV. CODE ANN. § 4113.30 (D)(2); 22 MASS. GEN. LAWS ANN., ch. 149, § 179C.* By exempting all employers covered under the NLRA, the state statutes avoid conflicts with federal law that could result in the preemption of the state statutes. *See Pimentel, supra* note 6, at 114 n.99.


The Delaware, Massachusetts, Pennsylvania, and Rhode Island statutes differ from the Illinois and Minnesota statutes in that the former bind a purchaser to the terms and conditions contained in the predecessor’s col-

(noting that there were no reported decisions under the California law). \textit{But see} Southward v. South Cent. Ready Mix Supply Corp., 7 F.3d 487, 491 (6th Cir. 1993) (noting that the plaintiffs’ state law allegations that purchaser was required to adopt the collective bargaining agreement were dismissed by the district court). The author was unable to locate reported decisions under any of these statutes.
lective bargaining agreement, regardless of whether or not the agreement contains a successor clause. The Delaware, Massachusetts, Pennsylvania, Rhode Island, Illinois, and Minnesota contract preservation statutes differ from the California, Ohio, and Massachusetts statutes, enacted a decade earlier, in that the former do not exempt employers the NLRA covers.

These state statutes would significantly increase the value of a successor clause were they not preempted by the NLRA. The United States District Court for the District of Minnesota held that federal labor law preempted the Minnesota successor statute in United Steelworkers v. St. Gabriel's Hospital. The court rejected the argument that because the


257. All of the commentators who have reviewed these various statutes agree that they are preempted under current federal law, although some argue that policy dictates the statutes should not be preempted. See John P. Furfaro & Maury B. Josephson, State Successorship and Severance Laws, 207 N.Y.L.J. 3 (1992) (finding all of the state successor statutes preempted by federal labor law); Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 Yale J. on Reg. 355, 425 n.257 (1990) (finding Massachusetts's statute preempted by § 301); Wilson McLeod, Rekindling Labor Law Successorship in an Era of Decline, 11 Hofstra L.J. 271, 346-53 (1994) (analyzing labor law preemption to find all of the state statutes preempted); Eileen Silverstein, Against Preemption in Labor Law, 24 Conn. L. Rev. 1 (1991) (analyzing labor law preemption to find all of the statutes preempted); Marcus Paul Efthimiou, Note, State Legislative Attempts to Mandate Continuation of Collective Bargaining Agreements During Business Change: The Unfulfilled Expectations and the Preempted Results, 77 Cornell L. Rev. 47 (1991) (analyzing labor law preemption to find the Delaware, Massachusetts, and Pennsylvania statutes preempted); Michael S. Marshall, Comment, Beyond the Third Generation: An Analysis of Pennsylvania's Latest Attack on Hostile Takeovers, 29 Duq. L. Rev. 579, 589 n.61 (1991) (noting that the provisions of Pennsylvania's statute dealing with successorship might be preempted); Scjerven, supra note 247, at 576 n.8 (analyzing labor law preemption to find the Illinois statute preempted and noting that the Illinois legislature discussed the fact that the statute would probably be preempted by federal law); Edward C. Sweeney, Comment, Dodging the Supremacy Clause Bullet: Do State Successor Statutes Survive Federal Labor Preemption, 13 Indus. Rel. L.J. 183 (1991) (analyzing labor law preemption to find the statutes preempted).

258. See United Steelworkers v. St. Gabriel's Hosp., 871 F. Supp. 335 (D. Minn. 1994). In St. Gabriel's Hosp., the USWA brought an action seeking to have the purchaser of St. Gabriel's kidney dialysis unit declared bound by the terms of a collective bargaining agreement pursuant to Minnesota's successor statute. Id. at 337. The Minnesota successor statute provides: "Where a collective bargaining agreement between an employer and a labor organization contains a clause regulating the rights and obligations of a new employer, that clause shall be binding upon and enforceable against any new employer . . . ." Minn. Stat. Ann. § 338.02 (West 1994). St. Gabriel's Hospital operated a kidney dialysis unit whose employees were covered by a collective bargaining agreement that contained a clause purporting to bind any successor or assign of St. Gabriel's to the terms of the agreement. See St. Gabriel's Hosp., 871 F. Supp. at 337. The clause provided:
successor purchaser was informed that the collective bargaining agreement contained a successor obligation and proceeded with the purchase, it had voluntarily assumed the collective bargaining agreement. The district court concluded that the Supreme Court had established that a purchasing employer is not bound by the terms of a collective bargaining agreement, even where there is a successor clause, unless the purchaser

This Contract Agreement shall be binding upon any successors or assigns of the Employer, and no terms, obligations and provisions herein contained shall be affected, modified, altered, or changed in any respect whatsoever by the whole or partial consolidation, merger, sale, transfer or assignment of the Employer, or affected, modified, altered, or changed in any respect whatsoever by any change of any kind of the ownership or management of the Facility.

Id. St. Gabriel's was unable to continue operating the dialysis unit at a loss and executed an agreement to sell the unit to St. Cloud Hospital. See id. During the negotiation of the sale agreement, St. Cloud announced that it would not honor the collective bargaining agreement. See id. St. Cloud operated non-union and intended to integrate the dialysis unit into its existing operations. See id. St. Gabriel's agreed to provide jobs to all dialysis unit employees who did not accept jobs with St. Cloud for a minimum of ninety days. See id. The Steelworkers sued seeking an injunction, under the Minnesota successor statute, to keep St. Gabriel's and St. Cloud from closing the sale of the dialysis unit unless the collective bargaining agreement was honored. See id. at 338. St. Gabriel's indicated that it would be forced to close the dialysis unit if it could not be sold. See id. St. Gabriel's and St. Cloud moved for summary judgment on the ground that the Minnesota successor statute was preempted by the NLRA. See id. at 336 n.1.

The court held that the Minnesota successor statute was preempted under the Supreme Court's Garmon doctrine because the statute compelled a purchasing employer to honor the terms of a collective bargaining agreement it did not negotiate in violation of the NLRA. See id. at 341 (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959)). The court noted that "[s]ection 8(d) of the NLRA 'does not compel either party to agree to a proposal or require the making of a concession.'" Id. (quoting 29 U.S.C. § 158(d) (1994)). The court held the statute was thus preempted because Garmon preemption exists to prevent conflict between state or local regulation and the federal labor policy established by Congress. See id. at 340.

The district court also rejected application of the local interest exception. See id. at 342. While acknowledging the state's interest in employment stability and enforceability of contracts was valid, the court held that the state's interests were too generalized to allow the state to intrude on federal law. See id. The court noted that the local interest exception is generally limited to tortious and criminal activity. See id.

259. See St. Gabriel's Hosp., 871 F. Supp. at 340. The court found that knowledge of the agreement was not the same as "conscious" assumption of obligations, especially where St. Cloud expressly refused to honor the agreement. Id. at 341. The court found the Minnesota statute would compel St. Cloud to accept the collective bargaining agreement where St. Cloud had explicitly rejected it. See id. The court also found the argument ignored the protection given to the free transferability of capital under federal labor law. See id. at 341-42 (citing NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272 (1972)). Because the Supreme Court had avoided inhibiting the transfer of capital in Burns, the court found Minnesota's successor statute undermined federal policy. See id. at 342.
The court thus found that Minnesota's successor statute impermissibly added to an employer's federal obligations in collective bargaining and was preempted under the Supreme Court's Machinists preemption doctrine. Based on its conclusion that the Minnesota successor statute was preempted, the district court never reached the issue whether the statute required interpretation of a collective bargaining agreement and was thus preempted by section 301 of the LMRA. However, since disparate contract interpretation in each state would destroy the national uniformity required by section 301, Minnesota's successor statute would probably have been preempted.

There are no reported decisions in which the terms of a collective bargaining agreement were found to be binding on a purchasing employer under one of these statutes. Although only Minnesota's statute has

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260. See id. at 343 (citing Howard Johnson Co. v. Detroit Joint Executive Bd., Hotel & Restaurant Employees, 417 U.S. 249, 258 n.3 (1974)).
261. See id. (citing Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976)). The statute added to the employer's obligations in two ways. First, a purchasing employer is not required to honor an agreement that it has not bargained for or voluntarily assumed under federal law. See id. By requiring St. Cloud to honor the collective bargaining agreement, Minnesota's successor statute impermissibly added to the obligations required by federal law. See id. Second, by requiring an employer to include a clause indicating the purchaser is bound by the collective bargaining agreement, Minnesota's statute effectively required St. Gabriel's to condition the sale of the dialysis unit on the assumption of the collective bargaining agreement by St. Cloud. See id. Because the successor clause in St. Gabriel's contract with the Steelworkers union did not require conditioning the sale on assumption of the agreement, Minnesota law impermissibly added a term to the collective bargaining agreement for which the parties had not bargained. See id. The court concluded that Minnesota's statute upset the balance of power between labor and management by giving employees greater protection under state law than they had under the NLRA. See id. at 343-44. Where a business changes ownership, the court concluded, the purchasing employer and the union must bargain freely to reach their own balance of power, not a balance of power established by the state. See id. at 344.
262. See id. The plaintiffs argued that the state statute was not an interpretation of the collective bargaining agreement, but merely a continuation of the agreement's terms. See id.
264. The Displaced Worker Protection Act (DWPA), D.C. CODE ANN. § 36-1501 (Supp. 1996), is an example of a statute which might require a purchasing employer to adopt an existing collective bargaining agreement. Enacted by the City Council for the District of Columbia in 1994, the DWPA requires that certain service contractors hire their predecessor's employees when assuming a service contract. See id. §§ 36-1501 to 1502. The DWPA might make it "perfectly clear" that a new employer will hire all of the predecessor's employees and thus be required to assume any existing collective bargaining agreement. See supra note 80 (discussing the perfectly clear caveat). The DWPA was challenged under federal labor law preemption on exactly these grounds. See Washington Service Contractors Coalition v. District of Columbia, 858 F. Supp. 1219, 1223 (D.D.C. 1994),
been challenged, all of these state statutes are presumably preempted under rationales similar to those explained by the Minnesota District Court.265

V. A SUGGESTED APPROACH TO SUCCESSOR CLAUSES

A. Propose a Successor Clause in Collective Bargaining

A contractual provision that would protect the jobs of union members when a business is sold would appear to be an item that all unions would be interested in including in their collective bargaining agreements. If such a contractual provision were a mandatory subject of bargaining, unions could lawfully insist on its inclusion. Since successor clauses exemplify such job protective contractual provisions, why are they not included in every collective bargaining agreement?

rev'd 54 F.3d 811 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1015 (1996). Although the district court found the DWPA preempted, the circuit court reversed. See 54 F.3d at 818. The circuit court majority found that it was not necessary to invalidate a state law that would, under current interpretation and operation of the successorship doctrine, impose a bargaining obligation on the new employer because the NLRB had not ruled that the successorship doctrine would apply where there was a state statute on employee hiring. See id. at 817. Noting the Supreme Court's labor law preemption doctrine had been developed to avoid proceeding on a case-by-case basis, the dissenting judge found that the majority's reliance on the lack of a ruling by the NLRB was improper. See id. at 819 (Sentelle, J., dissenting).

In a subsequent proceeding before an NLRB Administrative Law Judge, a new employer was required to recognize and bargain with the union representing the predecessor's employees after hiring the employees pursuant to the DWPA. United States Service Indus., Inc., Case No. 5-CA-24575 (Dec. 13, 1995), available in LEXIS, 1995 NLRB LEXIS 1151. The ALJ refused to modify the new employer's obligation because of the existence of the DWPA. See id. at *11-12. Thus, it is conceivable that the operation of the DWPA and the perfectly clear caveat will require new employers to assume the terms of their predecessor's collective bargaining agreements. See also Exec. Order No. 12,933, 59 Fed. Reg. 53,559 (1994) (requiring service contractors taking over government contracts to offer employment to their predecessor's employees and thus implicating the perfectly clear caveat in the same manner as the DWPA).

265. See supra note 257 (discussing the general view among commentators that these statutes are preempted).

As this Comment went to print, the United States District Court for the Northern District of Illinois issued two opinions finding the Illinois successor statute preempted. See Commonwealth Edison Co. v. IBEW, Local Union No. 15, No. 96 C 3989, 1996 WL 754073 (N.D. Ill. Dec. 31, 1996) (denying a motion to remand on the basis that § 301 of the LMRA completely preempted the union's action for breach of the Illinois successor statute because the statute required interpretation of the successor clause); Commonwealth Edison Co. v. IBEW, Local Union No. 15, No. 96 C 3989, 1997 WL 85150 (N.D. Ill. Feb. 21, 1997) (granting the employers' motions for summary judgment after finding the Illinois successor statute was preempted by § 301 of the LMRA and the Supreme Court's Garmon and Machinists preempted doctrines).
The answer is relatively simple: Unions do not always ask for what they want. Collective bargaining is usually a process of give and take. Forcing an employer to bargain over a successor clause does not necessarily mean that the employer will agree to a successor clause. As noted above, a union will probably be required to offer concessions in exchange for a successor clause. In the past, unions may have considered successor clauses unnecessary and not worth bargaining over. However, in the modern era of corporate mergers, takeovers, and sales, job security is a primary concern of most employees. Where a union has a contract provision addressing employee concerns at its disposal, that provision should be included in bargaining. Thus, unions should always propose a successor clause as part of their overall contract. Indeed, an employer may simply accept a successor clause without demanding quid pro quo. The employer might want a successor clause for reasons of its own: to discourage an unwanted takeover, or to demonstrate its stable labor relations to a "white knight" or other desired purchaser. In such situations, it would be inexcusable for a union to fail to protect its members by not requesting a successor clause.

Realistically, however, most employers will not want a successor clause in the collective bargaining agreement and will seek some concession from a union in exchange for its inclusion. In such a situation, a union could allow, or even suggest, stronger management rights over effects bargaining upon a sale of the business. This relinquishment of bargaining power does not harm union members because their rights would already be protected by the successor clause. Alternatively, a union could propose eliminating clauses that inure primarily to the benefit of the union in favor of clauses that benefit its members. For example, "dues check off" clauses provide their main benefit to unions, not membership. Unions should offer to give up a demand for, or remove, dues check off in ex-

266. See Robert J. Samuelson, Are Workers Disposable?, NEWSWEEK, Feb. 12, 1996, at 47 (noting that employees fear job loss more than jobs are actually lost).

267. The union’s failure to request a successor clause is compounded when it is considered that a purchasing employer may voluntarily comply with a successor clause in order to avoid further disruption during the transfer of the business. See Keeley v. Refiners Transport & Terminal Corp., 71 L.R.R.M. (BNA) 2627, 2629 (E.D. Mich. 1969) (identifying the successor clause as the express reason for the purchasing employer’s retention of “all past seniority and benefits accrued” under the existing collective bargaining agreement).

268. A dues checkoff is defined as “a procedure through which the employer deducts union dues directly from employees’ pay and remits the amount to the union.” 2 THE DEVELOPING LABOR LAW, supra note 4, at 1547. The “primary value” of the checkoff is administrative convenience to the union. Id. The dues checkoff procedure must be bargained for by the union but cannot be exercised without written consent of each employee. See id. Further, section 302(a)(4) of the LMRA makes it unlawful to compel an employee to authorize a dues checkoff. See 29 U.S.C. § 186(a)(4) (1994). Thus, a union seeking a
change for a successor clause. This is a bargain many employers would accept because they find dues check off so distasteful. Further, the value of a successor clause far outweighs the value of a dues check off provision to union members.

B. Use Specific Language in the Successor Clause

Historically, unions may have been unwilling to bargain for a successor clause they perceived as unenforceable. As case law demonstrates, a properly worded successor clause should be enforced under the federal common law of labor contracts. The most commonly enforced successor clauses are those that require a selling employer to condition the sale of the business upon the assumption of the collective bargaining agreement by the purchasing employer. An expansive successor clause that conditions the sale of the business on this assumption would require the purchasing employer to hire the union's members and to preserve its representative status. Such a successor clause might read as follows:

This Agreement and the Supplemental Agreements hereto, hereinafter referred to collectively as this Agreement, shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation or Interstate Commerce Commission rights only are sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation or use of such Interstate Commerce Commission rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof. On the sale, transfer or lease of an individual run or runs, or rights only, or such rights are taken over by assignment, receivership or bankruptcy proceedings, the specific provisions of this Agreement, excluding riders or other conditions, shall prevail. It is understood by this section that the parties hereto shall not use any leasing device to a third party to evade this Agreement. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement or any part thereof. Such notice shall be in writing with a copy to the Union, at the time the seller, transferee, or lessor executes a contract or transaction as herein described. The Union shall also be advised of the exact nature of the transaction, not in-

dues checkoff procedure uses part of its bargaining power to obtain a clause whose main value is administrative and which cannot be forced upon unwilling employees.

269. See supra Part II.B. (discussing enforcement of successor clauses against purchasing employers); supra Part III. (discussing enforcement of successor clauses against selling employers).
cluding financial details. In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreement, the Employer (including partners thereof) shall be liable to the Union and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this Agreement, but shall not be liable after the purchaser, the transferee or lessee has agreed to assume the obligations of this Agreement. Corporate reorganization by a Signatory Employer, occurring during the term of this Agreement, shall not relieve the Signatory Employer of the obligation of this Agreement during its term.

The Employer's obligations under this Agreement shall be binding upon its successors, administrators, executors and assigns. The Employer agrees that the obligations of this Agreement shall be included in the agreement of sale, transfer or assignment of the business. In the event an entire active or inactive operation or a portion thereof, or rights only, are sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation or use of rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof. Transactions covered by this provision include stock sales or exchanges, mergers, consolidations, spin-offs or any other method by which a business is transferred.\(^{270}\)

It is hard to imagine a situation where this clause does not protect the rights of union members covered by the collective bargaining agreement in the event of sale or transfer of a business.\(^ {271}\)

In many situations, however, a union may not be able to convince an employer to agree to such an expansive and strongly worded clause. This does not necessarily mean that a union must entirely concede an enforceable successor clause. The possible variations of the language used in the clause are limited only by the creativity of the union's negotiators. At a minimum, however, the clause should clearly indicate that the selling employer is obligated to condition the sale of the business on assumption of the collective bargaining agreement by the purchaser. Enforcement of successor clauses against purchasing employers often fails because the purchaser is found not to be a "successor" under the successorship doctrine. With proper wording, however, a successor clause could exclude all

\(^{270}\) Alvan Motor Freight v. Teamsters Local 710, 103 Lab. Arb. (BNA) 513, 515 (1994) (Dworkin, Arb.). Although the Interstate Commerce Commission no longer exists, a successor clause should include language covering any regulatory agency, state or federal, whose actions affect the transfer of ownership.

\(^{271}\) It should be noted that, as the arbitrator found, such a clause does not cover subcontracting. See id. at 516.
interpretation under the successorship doctrine and establish itself as purely contractual. For example:

The Employer agrees that all obligations under this contract, and the performance thereof, by the buyer, lessee, transferor or assignee, become a condition of sale, transfer, lease, or assignment. In the event an entire active or inactive operation or a portion thereof, or rights only, are sold, leased, transferred or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation or use of rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof. Transactions covered by this provision include stock sales or exchanges, mergers, consolidations, spin-offs or any other method by which a business is transferred.

Such a successor clause contractually protects the collective bargaining agreement rights of union members against a purchasing employer without ever mentioning "successor" employers. The absence of any references to a "successor" should preclude interpretation under the successorship doctrine. Thus, a union could enforce the terms of a collective bargaining agreement on the purchaser of a business. The union would be required to forego establishing itself as the representative of all the employees of the purchasing employer until a representation election could be held, but the contractual rights of the union's members would be protected.

Where a union is unable to obtain an employer's agreement to condition the sale of the business on assumption of the collective bargaining agreement, the union is still obligated to protect the contractual rights of those members who may eventually be hired by a purchasing employer. The union in such a position should at least seek a non-binding successor clause:

Company shall try to ensure continued contract benefits

(a) Before any sale, assignment, or other change in name or ownership is made by an Employer party to this Agreement, the Union shall be notified in writing of the contemplated sale, as-


273. See supra note 206 (discussing the Fourth Circuit's correct interpretation of a successor clause as a contract issue separate from the successorship doctrine); see also Zimny, supra note 6, at 82-84 (discussing who is a "successor" within the meaning of a successor clause and finding the Supreme Court's cases under the successorship doctrine only establish a duty to bargain, not the meaning of a successor clause).

Alternatively, the collective bargaining agreement should contain a very specific definition of who is a successor covered by the agreement. Cf. MARCEAU, supra note 8, at 89 (explaining some aspects of specificity in defining successor).
signment or change at the time of filing of the NOTICE OF INTENT TO SELL. The new ownership shall be fully informed as to all terms and conditions of this Agreement.

(b) The Employer will do everything in his power to see that employees covered by this Agreement do not suffer loss of benefits provided by this Agreement through sale, assignment, or other changes in name or ownership.\(^{274}\)

Such a clause has two benefits. First, the union is placed on notice of an impending ownership change and is given the opportunity to seek recognition from the purchaser. This may enable the union to prevent the purchaser from changing the initial terms and conditions of employment. Second, the clause would expressly prevent bad faith avoidance of the obligations of the clause. This type of clause provides the union with an opportunity to protect its prior bargaining accomplishments.

C. Bring Enforcement Actions Under Section 301

Finally, enforcement of successor clauses should proceed as section 301 suits for enforcement of contractually created labor obligations. Section 301 requires a determination of the contractual rights bargained for and therefore should focus primarily on the bargaining of the parties. Legal efforts to impose the terms of a collective bargaining agreement on a purchasing employer via a section 8(a)(5) unfair labor practice charge will fail absent unusual circumstances.\(^{275}\) The differing outcome is grounded in the policy distinction between the arbitration forum for contract dispute resolution and the NLRB forum for unfair labor practice charges. In an unfair labor practice case, the NLRB determines whether an obligation imposed by law has been violated. In contrast, in contract dispute arbitration, the arbitrator determines whether an obligation agreed to by the parties has been violated. Thus, the Supreme Court's protection of the free transferability of capital under labor law is preserved while the private ability to restrict such transfers is also recognized.\(^{276}\) It is entirely consistent with maintenance of these differing fora

\(^{274}\) See 2 COLLECTIVE BARGAINING NEGOT. & CONT. (BNA) 70:182-83 (May 12, 1994) (quoting the collective bargaining agreement between California Metal Trades Association and Machinists, expiring May 1995); see also '97 Bargaining Survey, supra note 28, at C-20 (noting 48% of the collective bargaining agreements in the survey contained advance notice clauses).

\(^{275}\) See NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 291 (1972). See generally Redmond, supra note 6, passim (discussing cases under the successorship doctrine).

\(^{276}\) See W.R. Grace & Co. v. Local Union 759, Rubber Workers, 461 U.S. 757, 770 (1980) ("The Company voluntarily assumed its obligations under the collective-bargaining agreement and the arbitrators' interpretation of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocation of the
that successor clauses are generally enforceable in one but not the other.\textsuperscript{277}

VI. Conclusion

In collective bargaining where job security is an important objective, unions should seriously consider and usually demand the inclusion of specifically worded successor clauses in collective bargaining agreements. Successor clauses should be advanced regardless of other concessions ultimately made or rejected. Although in the past, enforcement of successor clauses has been limited by application of the judicially created successorship doctrine, a properly worded successor clause should be enforceable against both the seller and the purchaser in a subsequent section 301 action.

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\item \textsuperscript{277} The choice of forum is not outcome determinative; the choice of a proper, or improper, claim determines the outcome. \textit{Cf.} Benetar, \textit{supra} note 75, at 1036-37. Further, there is no inconsistency within the law; because \textit{federal labor law} does not impose collective bargaining agreement terms on purchasing employers, does not mean that the \textit{common law of collective bargaining agreements} may not enforce private arrangement of such provisions. \textit{Cf.} Margolis, \textit{supra} note 75, at 195-200.
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