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I. INTRODUCTION

In 1957 the Supreme Court announced in *Textile Workers Union v. Lincoln Mills*[1] that section 301 of the Labor Management Relations Act[2] gives federal and state courts jurisdiction over suits for breach of collective bargaining agreements. The Court also ruled that the substantive law to be applied in these suits was a federal common law to be fashioned by the federal courts from the policies of the federal labor laws.

During the two decades following the *Lincoln Mills* decision the Supreme Court and lower federal courts had to decide who could sue and be sued under section 301. The courts eventually held that labor unions could sue employers for breach of contract on behalf of the employees they represent, even to enforce rights which do not benefit the union directly. The courts next extended section 301 to permit suits by employees even though they are not signatory parties to collective bargaining agreements.

The proper analysis and treatment of suits against nonsignatory employers, however, has not yet been settled. Except for the so-called "successorship" situation, where a nonsignatory enterprise has taken over the business of the signatory employer,[3] the Supreme Court has not ruled on a suit against a nonsignatory employer. Nor have the lower federal courts

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1. 353 U.S. 448 (1957).

2. 61 Stat. 136 (1947), 29 U.S.C. §§ 141-197 (1976).

3. The development of this doctrine of "successor employers" is beyond the scope of this Article and will be discussed only for the purpose of identifying policies which might apply to suits against nonsignatories which do not purchase or take over the signatory enterprise.

reached any consensus about the proper body of law or rules to apply in such suits.

This Article investigates the emerging federal common law applicable in suits against nonsignatory employers under section 301. After a brief discussion of the development of the common law applicable in section 301 suits, a number of recent decisions in the federal courts involving actions against nonsignatories will be discussed in order to describe the various legal doctrines currently applied by the courts. Next, the policies that should guide decision making in section 301 suits against nonsignatory employers will be identified. Finally, this Article will apply these policies to the different contexts in which suits against nonsignatories arise in an attempt to develop a conceptual framework under which suits against nonsignatory employees should be determined.

II. Background and Development of Federal Law Under Section 301

The proposition that collective bargaining agreements are enforceable contracts is a fairly recent alteration of the traditional common law rule. Throughout the nineteenth century and early in this century the common law regarded collective bargaining agreements as unenforceable "gentlemen's agreements." Such agreements created only moral obligations, not legal rights or duties.[4] Other courts analogized collective bargaining agreements to treaties, or characterized them as a "custom" or "usage" which became enforceable only when incorporated into individual employment contracts.[5]

By the early 1930's, however, courts were beginning to characterize collective bargaining agreements as contracts enforceable within the traditional framework of the common law. By likening collective bargaining agreements to third party benficiary contracts, the courts made them enforceable by a labor union for the benefit of union represented employees.[6] By 1944, nine years after passage of the National Labor Relations Act,[7]

4. *See, e.g.*, Shinsky v. Tracey, 226 Mass. 21, 114 N.E. 957 (1917); Commons & Andrews, Principles of Labor Legislation, 118 (2d Ed. 1920).

5. *See, e.g.*, Yazoo & M.V.R. Co. v. Webb, 64 F.2d 902, 903 (5th Cir. 1933) (adopting treaty analogy); Hudson v. Cincinnati N.O. & T.P. Ry., 152 Ky. 711, 154 S.W. 47 (1913) (relying on analysis of collective agreement as a custom or usage).

6. *See* Yazoo & M.V.R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931).

7. 49 Stat. 449 (1935).

the Supreme Court had no difficulty in viewing collective bargaining agreements as enforceable contracts which even supercede individual employment contracts.[8]

In 1947 Congress passed the Labor Management Relations Act,[9] which provided in section 301(a) that suits by or against labor organizations for breach of contract could be brought in federal court.[10] One of the primary purposes of section 301 was to reverse the common law rule that unincorporated associations, including labor unions, could not sue or be sued for breach of contract. Noting that breaches of collective bargaining agreements had become commonplace,[11] Congress enacted section 301 to ensure that labor unions would not be able to escape responsibility for breach of the collective bargaining agreements which courts had begun enforcing against employers.[12] The legislative history of section 301 does not, however, address the question whether a nonsignatory business may be sued.

Individual employees typically are not actual signatories to collective bargaining agreements. Instead, labor organizations sign the agreement as representatives of the employees. Nevertheless, in *Smith v. Evening News Association*[13] and *Humphrey v. Moore*,[14] the Supreme Court held that employees have the

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8. *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). The Court observed that after the union and employer had negotiated a collective bargaining agreement, "the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring." *Id.* at 335.

9. 61 Stat. 136 (1947).

10. Section 301(a), codified at 29 U.S.C. § 185(a) (1976), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

11. "[B]reaches of collective bargaining agreement[s] have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur . . . ." S. REP. No. 105, 80th Cong., 1st Sess. 15 (1947), *reprinted in* 1 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 421 (1948).

12. *See, e.g.*, S. REP. No. 105, 80th Cong., 1st Sess. 15-18, *reprinted in* 1 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 421-24 (1948); H. R. REP. No. 245, 80th Cong., 1st Sess. 45-46, *reprinted in* 1 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 336-37; 93 CONG. REC. S3955 (daily ed. April 23, 1947)(Statement of Sen. Taft), *reprinted in* 2 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 1014 (1948).

13. 371 U.S. 195 (1962).

14. 375 U.S. 335 (1964).

right to enforce their individual contractual rights in suits for breach of contract under section 301.[15]

Accordingly, by 1964 it was settled that section 301 conferred jurisdiction over suits to enforce collective bargaining agreements against the signatory parties. Section 301 altered the common law rule that collective bargaining agreements are not enforceable against labor organizations and eventually was interpreted to give unions standing to sue on behalf of employees.[16] Further, individual employees, though not actually signatory to the collective bargaining agreement, could also bring suit to enforce their rights under it.[17] However, outside the successorship context[18] the Supreme Court has not yet addressed the conditions under which nonsignatory businesses may be sued under section 301.[19] Nor have the lower federal courts been consistent in deciding which body of law or doctrine controls such a case.

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15. In *Evening News* an employee brought the action individually and on behalf of employees similarly situated. In *Moore,* on the other hand, a group of employees sued both their employer and their union. Both decisions, however, recognized the standing of employees in § 301 suits.

16. In the Court's first encounter with § 301, a majority of the Justices declared that § 301 did not confer jurisdiction over a union's suit to enforce individual employee rights arising from a collective bargaining agreement. Association of Westinghouse Salaried Employees v. Westinghouse Corp., 348 U.S. 437 (1955). This decision was not overruled until Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

17. In order to protect the agency relationship between labor unions and the employees they represent and to shield the arbitration process from interference by the courts, the Supreme Court soon imposed severe limits upon an employee's right to bring suit against his employer. *See* Vaca v. Sipes, 386 U.S. 171 (1967) (employee must allege and prove union breached its duty of fair representation in processing grievance before recovering against employer for breach of contract); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) (employee must attempt to exhaust the arbitration process provided under a collective bargaining agreement before bringing suit under § 301). *See generally* Feller, *A General Theory of the Collective Bargaining Agreement* 61 CAL. L. REV. 663, 696-707 (1973).

The right of employers to sue individual employees for breach of contract under § 301 is more complicated. Since the legislative history of § 301 indicates that Congress did not intend that individual employees who are not signatory to the collective bargaining agreement should be held individually liable for breaches of collective bargaining agreements, the Supreme Court has held that such employees cannot be held liable for money damages in suits for breach of a no-strike pledge in a collective bargaining agreement. Complete Auto Transit v. Reis, 451 U.S. 401 (1981). On the other hand, individual employees can be enjoined from participating in a strike which violates a no-strike clause in a collective bargaining agreement. Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

18. The only context in which the Court has discussed the conditions under which a nonsignatory enterprise may he bound by a collective bargaining agreement is in suits against so-called "successor" employers who take over the business of a signatory company.

19. *See* text accompanying notes 64 through 77, *infra.*

III. Applicable Legal Doctrines in Section 301 Suits Against Nonsignatories

Pursuant to the Supreme Court's mandate in *Lincoln Mills*,[20] federal courts have begun developing a federal common law to apply in section 301 suits against businesses which are not parties to the applicable collective bargaining agreement. These actions typically arise when a nonsignatory employer has a close business relationship with another company and a union or employees sue the nonsignatory company in order to obtain a remedy not available from the signatory employer.

The initial question presented by a section 301 suit against a nonsignatory enterprise or employer is what set of legal rules applies. In *Lincoln Mills* the Supreme Court declared that the applicable substantive law in section 301 suits is federal. This federal law must be fashioned by the courts "from the policy of our national labor laws."[21] The Court observed that the federal labor statutes themselves furnish some substantive law and courts should also consider the federal policies behind the labor laws in fashioning appropriate remedies.[22] Federal courts may even resort to state law "in order to find the rule that will best effectuate the federal policy."[23] Of course, which law a court adopts in a section 301 suit may well determine the outcome.[24]

Federal courts have generally used one of six different approaches in dealing with suits against nonsignatory employers. The first and most simplistic analysis limits the inquiry to whether the defendant employer or enterprise has signed the collective bargaining agreement. The dispositive rule adopted in these cases appears to be that signatories may be bound to the collective bargaining agreement, while nonsignatories may not.[25] This simple answer overlooks the fact that the Act does not require a collective bargaining agreement to be in writing or to be in any particular form.[26] Moreover, this analysis would permit

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20. 353 U.S. 448 (1957).

21. *Id.* at 456.

22. *Id.* at 457.

23. *Id.*

24. *See, e.g.*, United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981).

25. *See, e.g.*, Baker v. Fleet Maintenance, Inc., 409 F.2d 551, 554 (7th Cir. 1969); Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 423 (1st Cir. 1968); Teamsters Local Union No. 30 v. Helms Express, Inc., 591 F.2d 211, 216, 217 (3rd. Cir.), *cert. denied*, 444 U.S. 837 (1979).

26. Certified Corp. v. Hawaii Teamsters Local 996, 597 F.2d 1269, 1272 (9th Cir. 1979).

any nonsignatory to obtain a summary dismissal for lack of subject matter jurisdiction, since section 301 confers jurisdiction only over suits for violation of contracts.[27]

Many of the courts of appeals have rejected this simple answer to the issues presented by suits against nonsignatory enterprises. Instead, the majority of courts has adopted one of several other approaches. The first approach relies upon the so-called "single employer" doctrine developed by the National Labor Relations Board.[28] Second, at least one court has relied upon the alter ego doctrine developed by the National Labor Relations Board.[29] Third, a number of decisions have analyzed the right to sue a nonsignatory employer or enterprise under the alter ego doctrine as it has been developed in the law of corporations.[30] Finally, two other legal doctrines, the so-called "successorship" doctrine and the primary jurisdiction of the Board over bargaining unit determinations, should also be explored in order to determine their relevance in deciding section 301 suits against nonsignatories.

A. The Single Employer Doctrine

The so-called "single employer" doctrine has been developed by the National Labor Relations Board primarily in unfair labor practice cases brought under section 8(a)(5)[31] of the Act. A union may claim, for example, that an employer has failed to bargain in good faith by refusing to discuss with the union the terms and conditions of employment for employees at a separate operation or separate business owned or controlled by the signa-

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27. *E.g.*, Local 531, Int'l Bhd. of Teamsters v. Dumpson, 76 Lab. Cas. (CCH) ¶ 53,558 (E.D.N.Y. 1974). With respect to subject matter jurisdiction, most decisions hold expressly or by implication that courts have jurisdiction under § 301 to determine the merits of a claim against a nonsignatory. *See, e.g.*, Russom v. Sears, Roebuck & Co., 558 F.2d 439, 443 n.7 (8th Cir. 1977); Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc., 653 F.2d 143, 146-47 (5th Cir. 1981).

28. *See, e.g.*, Bricklayers v. J.E. Hoetger & Co., 672 F.2d 580 (6th Cir. 1982); Kaylor v. Crown Zellerbach, Inc., 643 F.2d 1362, 1368 (9th Cir. 1981); Russom v. Sears, Roebuck & Co., 558 F.2d 439, 442 (8th Cir. 1977).

29. *See* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982).

30. *See, e.g.*, Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc., 653 F.2d 143 (5th Cir. 1981); Plumbers & Fitters Local No. 761 v. Matt J. Zaich Constr. Co., 418 F.2d 1054 (9th Cir. 1969); Bugher v. Frash, 98 L.R.R.M. (BNA) 3010 (S.D. Ind. 1978); Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of Am. v. Cardwell Mfg. Co., 416 F. Supp. 1267 (D. Kan. 1976).

31. 29 U.S.C. § 158(a)(5) (1976).

tory employer.[32] The union typically argues that the nonsignatory company or operation should be treated as a part of the signatory company[33] and should accordingly be subject to the same duty to bargain with the union. A union may also invoke a similar defense to a "secondary boycott" unfair labor practice charge. The union may argue that the business it is pressuring by a strike, picketing, or otherwise is not actually a separate "person" under section 8(b)(4)(B) or section 8(e), but should be treated as the same entity as the business with which the union has its primary dispute.[34]

Pursuant to its statutory mandate to hear unfair labor practice cases, the Board has adopted a four-factor analysis for determining if two separate enterprises should be treated as a single entity:[35]

> The Board often treats separate corporations as one employer . . . where it is found that the firms, despite their nominal separation, are highly integrated with respect to ownership and operation. Some of the principal factors which have been considered relevant in determining the extent of integration are: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management and (4) ownership or financial control.[36]

This four-factor test has been approved by the Supreme Court.[37]

In applying this test of integration, the Board and the courts have emphasized that no one factor is determinative,[38] although the Board has tended to emphasize the first three factors, with particular emphasis upon centralized control of labor relations.[39]

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32. *See, e.g.*, Peter Kiewit Sons' Co., 1973 NLRB Dec. (CCH) ¶ 25,865.

33. Of course the statutory duty to bargain in good faith applies to employers who may not have signed any agreement with a union, but typically a union's single employer claim arises after one company or operation has entered into a collective bargaining agreement with the union.

34. *See, e.g.*, Vulcan Materials Co., 1974 NLRB Dec. (CCH) ¶ 26,153, *enforced* 543 F.2d 1373 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); Bigge Drayage Co., 1972 NLRB Dec. (CCH) ¶ 24,258.

35. *See* Sakrete of N. California, Inc., 1962 NLRB Dec. (CCH) ¶ 11,415.

36. *Id.*

37. Radio Union v. Broadcast Serv., 380 U.S. 255 (1965).

38. NLRB v. Welcome-American Fertilizer Co., 443 F.2d 19, 21 (9th Cir. 1971).

39. Parklane Hosiery Co., 1973 NLRB Dec. (CCH) ¶ 25,364.

B. The National Labor Relations Board's Alter Ego Doctrine

The Board has also developed an alter ego doctrine upon which it relies in unfair labor practice cases. Unlike the single employer doctrine, however, the Board's alter ego rule is invoked primarily in situations where an ownership or other change in the employing business occurs. For example, where a new company takes over operations after the signatory company has been liquidated,[40] or where a signatory company transfers its operations to a nonunion company,[41] the Board may find that the nonsignatory enterprises are mere alter egos of the signatory business and are therefore bound by the latter's collective bargaining agreement. In making an alter ego determination the Board typically relies upon a number of factors which indicate that the two enterprises are in fact one. These include substantial identity in management, business purpose, operation, equipment, customers, supervision, ownership, and employees.[42]

As noted, the Board's alter ego doctrine is generally invoked in a successorship situation. Since *NLRB v. Burns Security Services*,[43] however, a mere successor employer is not, absent consent, bound by the substantive terms of its predecessor's collective bargaining agreement. Accordingly, the alter ego doctrine is typically used to distinguish a mere successor employer from a business which is so closely connected to the predecessor enterprise that it is bound by the predecessor's collective bargaining agreement.[44]

The Board's single employer and alter ego doctrines differ in a number of other respects. Comparison of the factors relied upon by the Board indicates that the alter ego standard requires a significantly greater identity in two operations. For example, an alter ego generally must be involved in essentially the same business as the signatory employer and must also typically use the same equipment, service the same customers, and often employ at least some of the same employees.[45] On the other hand, two operations may constitute a single employer with few or

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40. *E.g.*, Crawford Door Sales Co., 1976-77 NLRB Dec. (CCH) ¶ 17,571 (1976).

41. *E.g.*, P.A. Hayes, Inc., 1976-77 NLRB Dec. (CCH) ¶ 17,443 (1976).

42. *See, e.g.*, Republic Engraving & Designing Co., 1978 NLRB Dec. (CCH) ¶ 19,437; Crawford Door Sales Co., 1976-77 NLRB Dec. (CCH) ¶ 17,571 (1976).

43. 406 U.S. 272 (1972).

44. *See, e.g.*, NLRB v. Tricor Prods., Inc., 636 F.2d 266 (10th Cir. 1980).

45. *See id.*

none of those similarities.[46]

C. *Corporate Law Alter Ego Doctrine*

The corporate law alter ego doctrine, also referred to as the "instrumentality rule", is an equitable doctrine invoked by courts to justify disregarding a corporate structure. This act of "piercing the corporate veil" may make shareholders individually responsible for corporate acts or debts. In other cases, it may result in several nominally separate corporations being treated as a single entity. In the labor context, the doctrine can be used to reach the shareholders of a signatory corporation. The alter ego doctrine or instrumentality rule is generally described as establishing a two-prong test for deciding if the corporate veil may be pierced. This two-prong test requires first that there be "such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist."[47] Second, the court must find that "observance of the corporate form would result in fraud or injustice."[48]

Of course such tests are more easily stated than applied, since the factual circumstances which determine whether the test is met are so varied. Indeed, some courts have instead simply listed a large number of factual circumstances which may lead to disregard of the corporate entity.[49] The presence of a number of these factors, along with "fraud or injustice," is then invoked to justify disregarding the corporate structure.[50] Regarding such factual tests, the Supreme Court has implied that the instrumentality rule is nothing more than an equitable doctrine which provides no general test for deciding when the corporate veil may be pierced. In reversing a court of appeals' decision which purported to pierce the corporate veil based upon a host of different factors, the Court observed:

> The [instrumentality] rule was much discussed in the opinion

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46. *See, e.g.*, Local 627, Int'l Union of Operating Eng'rs v. NLRB, 518 F.2d 1040 (1975) *aff'd on this issue sub nom.* South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976).

47. Norman v. Murray First Thrift Loan Co., 596 P.2d 1028, 1030 (Utah 1979).

48. *Id.; see also* United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977).

49. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1378 n.4 (10th Cir. 1980) (listing 11 factors to be considered in deciding if corporate structure of parent and subsidiary may be disregarded); Arnold v. Browne, 27 Cal. App. 3d 386, 394-95, 103 Cal. Rptr. 775, 781-82 (1972) (listing 16 pertinent circumstances).

50. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373, 1379 (10th Cir. 1980).

> below. It is not, properly speaking, a rule, but a convenient way of designating the application in particular circumstances of the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice.[51]

Lower courts have also emphasized that in determining whether to pierce the corporate veil each case must be decided on its own facts[52] even though the relevant circumstances "have rarely been articulated with any clarity."[53]

A more important question than the precision with which the relevant factors can be identified is whether a showing of fraud is necessary before the corporate structure can be disregarded. This issue is important because fraud requires proof of intention[54] while a showing of inequity or injustice does not. Some recent decisions have required proof of fraudulent intent before the corporate veil may be pierced.[55] The majority view, however, requires only a showing of legal wrong or inequity, and not fraud.

In *Anderson v. Abbott*,[56] for example, the Supreme Court held that shareholders of a holding company could be held individually liable without a showing of fraudulent intent. The Court declared:

> Limited liability is the rule not the exception . . . . But there are occasions when the limited liability sought to be obtained through the corporation will be qualified or denied . . . . The cases of fraud make up part of that exception. But they do not exhaust it. . . . It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement.[57]

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51. Taylor v. Standard Gas & Elec. Co., 306 U.S. 307, 322 (1939).

52. Brown Bros. Equip. Co. v. State, 51 Mich. App. 448, 215 N.W.2d 591 (1974).

53. Swanson v. Levy, 509 F.2d 859, 861-62 (9th Cir. 1975). A number of courts have also settled on a three-factor test for determining application of the instrumentality rule. *E.g.*, Interocean Shipping Co. v. National Shipping & Trading Co, 523 F.2d 527, 534 (2d Cir. 1975); Berger v. Columbia Broadcasting Sys., Inc., 453 F.2d 991, 995 (5th Cir. 1972).

54. *See, e.g.*, Audit Servs., Inc. v. Rolfson, 641 F.2d 757, 762 (9th Cir. 1981).

55. *Id. Cf.* Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105 (9th Cir. 1979) (identifying fraudulent intent of the incorporators as one factor in the alter ego analysis).

56. 321 U.S. 349 (1943).

57. *Id.* at 362-63 (citations omitted). *Cf.* Bangor Punta Operations, Inc. v. Bangor & A.R.R. Co., 417 U.S. 703, 713 (1973) (where used to defeat public policy, corporate form may be disregarded in the interest of justice).

The majority opinion emphasizes that no showing of fraud is required to disregard the corporate form because a specific legislative policy mandating individual liability for stockholders of national banks was involved.[58] Consequently, some courts imposing a fraudulent intent requirement have distinguished *Abbott* on that ground.[59] Nevertheless, the majority of lower courts have held that proof of inequity or injustice is sufficient to justify piercing the corporate veil. As the Court of Appeals for the Fifth Circuit has explained: "Although there is no doubt that fraud is a proper matter of concern in suits to disregard corporate fictions, it is not a prerequisite to such a result, especially when there is gross undercapitalization or complete domination of the corporate entity under scrutiny."[60] Federal[61] and state[62] courts are generally in agreement on this issue. Similarly, commentators have suggested that an improper purpose or effect rather than fraudulent intent is sufficient to justify disregard of the corporate structure.[63]

D. Successorship Doctrine

One doctrine adopted in the last decade by both the Board and the federal courts has since been severely restricted by the Supreme Court. This doctrine arose in the context of suits against nonsignatory businesses which have taken over a signatory enterprise and is commonly referred to as the "successorship doctrine." This successorship context is the only one in which the Supreme Court has dealt with the issues raised by suits against nonsignatories.

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58. 321 U.S. at 362-64.

59. Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1111 n.6 (9th Cir. 1979).

60. National Marine Serv., Inc. v. C.J. Thibodeaux & Co., 501 F.2d 940, 942 (5th Cir. 1974).

61. *See, e.g.*, Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir. 1973), *modified*, 490 F.2d 916 (1974); Wyoming Constr. Co. v. Western Casualty & Sur. Co., 275 F.2d 97, 103-04 (10th Cir.) *cert. denied*, 362 U.S. 976 (1960); Bucyrus-Erie Co. v. General Prods. Corp., 643 F.2d 413 (6th Cir. 1981). *But see* Audit Servs. Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981) (requiring proof of fraudulent intent of incorporators to pierce corporate veil).

62. *See, e.g.*, Julian J. Studley, Inc. v. Lefrak, 48 N.Y.2d 954, 401 N.E.2d 187 (1979); Ampex Corp. v. Office Elecs., 24 Ill. App. 3d 21, 320 N.E.2d 486 (1974); Parker Peanut Co. v. Felder, 200 S.C 203, 20 S.E.2d 716 (1942).

63. *See, e.g.*, Krendl & Krendl, *Piercing the Corporate Veil: Focusing the Inquiry*, 55 DEN. L.J. 1, 23, 31-34 (1978); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 867-69 (1982).

In *John Wiley & Sons v. Livingston*[64] the Supreme Court held that a contractual promise to arbitrate in a collective bargaining agreement could survive a corporate merger in which the signatory corporation ceased to exist. Under certain circumstances, the Court held, substantive terms of a collective bargaining agreement could be imposed on a nonsignatory successor through the arbitration process.[65] The Court declared:

> [T]he impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot be readily assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the parties sought to be obligated.[66]

The National Labor Relations Board eventually adopted what it perceived as the *Wiley* successorship doctrine, holding that absent unusual circumstances the national labor policy embodied in the Act requires the successor employer to honor the collective bargaining agreement negotiated by its predecessor.[67] However, in *NLRB v. Burns Security Services*,[68] the Supreme Court found fault with the Board's application of *Wiley*. The Court rejected the Board's position that national labor policies require a nonsignatory successor to assume its predecessor's collective bargaining agreement. The Court somewhat perfunctorily distinguished *Wiley* on the grounds that *Wiley* arose in the context of a section 301 suit to compel arbitration and was decided "against a background of state law . . . that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."[69] *Burns* thus left open the question of *Wiley's* scope and continued vitality.[70]

The Court was eventually required to deal more forthrightly with the tension between *Wiley* and *Burns*. In *Howard Johnson Co. v. Detroit Local Joint Executive Board*,[71] the Court refused to bind a purchaser of a signatory company's assets to the pred-

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64. 376 U.S. 543 (1964).
65. *Id.* at 550-51.
66. *Id.* at 550.
67. William J. Burns Int'l Detective Agency, 1970 NLRB Dec. (CCH) ¶ 21,863.
68. 406 U.S. 272 (1972).
69. *Id.* at 285-86.
70. *See generally* Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 VA. L. REV. 1359 (1973).
71. 417 U.S. 249 (1974).

ecessor's collective bargaining agreement. In *Howard Johnson* the seller operated a franchise hotel and restaurant and owned the real property on which it operated that business. The seller had a collective bargaining agreement with two different local unions which provided that the agreement would bind the seller's successors, purchasers or assigns.[72] The franchisee-seller then sold its personal property and leased its real property to Howard Johnson, which continued to run the business at the same location. Howard Johnson retained only nine of the seller's fifty-three employees.[73]

The local unions filed suit under section 301 seeking to bind Howard Johnson as a nonsignatory successor to the collective bargaining agreement with the signatory seller. The unions argued that Howard Johnson should be bound to arbitrate over its obligations as a successor under the seller's collective bargaining agreement. Both lower courts agreed with the unions that the case was controlled by *Wiley* and ordered Howard Johnson to arbitrate.[74]

The Supreme Court reversed, holding that Howard Johnson was not required to arbitrate with the unions because there was no express or implied assumption of the agreement to arbitrate and because there was no "substantial continuity in the identity of the work force across the change in ownership."[75] This recasting of the inquiry in successorship cases severely limits the scope and application of the successorship doctrine. In particular, the "substantial continuity of identity" inquiry is not even relevant in situations where there has been no change in ownership of the signatory enterprise.[76] Accordingly, after *Howard Johnson* the successorship doctrine itself plainly cannot dictate the result in suits against nonsignatories who have not expressly or impliedly assumed the signatory's collective bargaining agreement. Nevertheless, the underlying policies recognized by the Supreme Court in *Burns* and *Howard Johnson* may still be used to guide decisionmaking outside the successorship context.[77]

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72. *Id.* at 251.

73. *Id.* at 252.

74. *Id.* at 253.

75. *Id.* at 263, 264.

76. *Cf.* United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33, 35 (1st Cir. 1978) (recognizing that suit to compel nonsignatory to arbitrate is not controlled by successorship doctrine).

77. *See* text accompanying notes 91 through 102, *infra.*

E. Primary Jurisdiction of the NLRB over Bargaining Unit Determination

Another doctrine which courts must take into account in ruling on suits against nonsignatories is the primary jurisdiction of the Board to determine appropriate bargaining units under the Act. Section 9(b) of the Act[78] provides, with certain provisos, that the Board shall decide which bargaining unit is appropriate for purposes of collective bargaining.[79] One type of suit against a nonsignatory employer, however, seeks to have the court rather than the Board apply the collective bargaining agreement to a group of employees who may constitute a separate bargaining unit. Before discussing what effect the Act's delegation of bargaining unit determinations to the Board has on suits against nonsignatories, the significance of bargaining unit determinations should be briefly summarized.

A bargaining unit is a group of jobs and the employees who fill them. A group of jobs is treated as a single unit because of similarity in the skills, supervision, and other working conditions which employees in those jobs share. These similarities are the predicate for the Board's decision that a group of employees share a "community of interest" sufficient to permit them to bargain with the employer as a single unit.[80] Bargaining unit determinations are important for a number of reasons, not the least of which is that an employer must bargain in good faith only with the exclusive representative of employees within a given unit. Moreover, only employees holding jobs within the bargaining unit have the right to vote in Board elections or to designate by other means an exclusive representative with the statutory power to bargain on their behalf with their employer.

The significance of Board jurisdiction to determine appropriate bargaining units is best explained with reference to the Supreme Court's decision in *South Prairie Construction Co. v. Operating Engineers,*[81] commonly known as the *Peter Kiewit* case. In *Peter Kiewit* a union filed an unfair labor practice

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78. 29 U.S.C. § 159(b) (1976).

79. The section provides, in relevant part: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." 29 U.S.C. § 159(b) (1976).

80. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 66-70 (1976).

81. 425 U.S. 800 (1976) (per curiam).

charge against two highway construction firms. The two companies, South Prairie Construction Co. (South Prairie) and Peter Kiewit Sons' Co. (Kiewit), were both wholly owned subsidiaries of a third corporation. The plaintiff union had a collective bargaining agreement only with Kiewit. The union contended in its charge to the Board that by refusing to recognize and bargain with the union and by refusing to apply the collective bargaining agreement between Kiewit and the union to its own employees, South Prairie was guilty of an unfair labor practice for "refusing to bargain" with the union under section 8(a)(5) of the Act.[82]

Relying upon the "single employer" doctrine, the Board found that Kiewit and South Prairie were separate employers and consequently that South Prairie had no obligation to recognize the union or to extend the terms of the union's collective bargaining agreement with Kiewit to South Prairie's employees.[83] On review, the Court of Appeals for the District of Columbia Circuit determined that Kiewit and South Prairie constituted a "single employer." The court reversed the Board and directed it to apply the terms of the collective bargaining agreement between Kiewit and the union to South Prairie's employees.[84]

The Supreme Court did not disturb the court of appeals' decision regarding the single employer status of the two companies. The Court declared, however, that the court of appeals erred in holding that the collective bargaining agreement between Keiwit and the union should be applied to the employees at South Prairie. The Court observed:

> [W]e think that for [the court] to take upon itself the initial determination of this issue was "incompatible with the orderly function . . . of judicial review." . . . Since the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, "if not final, is rarely to be disturbed," . . . we think the function of the Court of Appeals ended when the Board's error on the "employer" issue was "laid bare."[85]

Based upon the court of appeals' error in deciding the bargain-

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82. 29 U.S.C. § 158(a)(5) (1976).

83. Peter Kiewit Sons' Co., 1973 NLRB Dec. (CCH) ¶ 25,865.

84. Operating Eng'rs, Local No. 627 v. NLRB, 518 F.2d 1040, 1042, 1050 (D.C. Cir. 1975), *vacated in part sub nom.* South Prairie Constr. Co. v. Local 627 Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976).

85. 425 U.S. at 805-06 (citations omitted).

ing unit question, the Supreme Court remanded the case to the court of appeals with instructions that the unit determination issue be remanded to the Board.[86]

Until recently there appeared to be no disagreement about the significance of the *Peter Kiewit* decision. Courts uniformly held that the Supreme Court's decision prevented them from applying a collective bargaining agreement covering employees at one operation to a nominally separate operation or enterprise, since that would require a finding that employees from both operations should be included in the same bargaining unit.[87] In a recent opinion, however, the Fifth Circuit has rejected that position, holding that federal courts do have jurisdiction to determine the initial scope of bargaining units in section 301 suits.[88] That decision is discussed in some detail below.[89]

IV. Policies Applicable in Section 301 Suits Against Nonsignatories

As noted above, courts have relied upon several different legal doctrines in deciding section 301 suits against nonsignatories. Most frequently courts have relied upon the single employer doctrine developed by the Board. Other courts have relied upon the corporate law alter ego doctrine or the Board's alter ego rules. Still others, relying upon the *Peter Kiewit* decision, have dismissed suits against nonsignatories on the ground that courts cannot initially determine the scope of bargaining units.

Before analyzing the question of which doctrine to apply in deciding suits against nonsignatories, the principles and policies relevant to that analysis should be identified. *Lincoln Mills*[90] declares that the policies of the national labor laws should inform judicial decision making in section 301 suits.

Several of these policies have been identified in recent cases, including the policies of uniformity and consistency, freedom of

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86. *Id.* at 806.

87. *See, e.g.*, Local Union 204 v. Iowa Elec. Light & Power Co., 668 F.2d 413 (8th Cir. 1982); Local No. 3-193, Int'l Woodworkers v. Ketchikan Pulp Co., 611 F.2d 1295 (9th Cir. 1980); Couchigian v. Rick, 489 F. Supp. 54 (D. Minn. 1980). *But see* Local 66, Operating Eng'rs v. Linnesville Constr. Co., 457 Pa. 220, 322 A.2d 353 (1974) (holding prior to *Peter Kiewit* that if the nonsignatory is an alter ego of the signatory employer, the contract should be applied to employees of the nonsignatory construction company).

88. *See* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982).

89. *See* text accompanying notes 144 through 184, *infra*.

90. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

contract, protection of contractual remedies, and the policy underlying the primary jurisdiction of the Board over bargaining unit determination.

A. Uniformity and Consistency

It appears beyond dispute that at least two general policies exist which must guide decision making under section 301. These two policies are uniformity and consistency. The policy of uniformity requires that the same doctrines be used to determine the rights and duties of parties to section 301 suits. This policy has been invoked principally to preempt state laws which would be inconsistent with federal labor law or policy.[91] The second policy which must guide judicial choice of law in this area is consistency between the law applied by the Board in its unfair labor practice and representation cases and the common law applied under section 301. The Supreme Court emphasized the importance of this consistency in *Howard Johnson Co. v. Detroit Local Joint Executive Board*[92] when the Court explained that even though a prior case, *NLRB v. Burns Security Services*,[93] arose in the context of a Board unfair labor practice case, the principles it recognized must be taken into account in the section 301 context.[94]

B. Freedom of Contract

The recent Supreme Court decisions in the successorship context have been particularly helpful in pointing out some of the policies to be applied in suits against nonsignatories. Though these successorship cases do not involve an analysis of the general conditions under which nonsignatory employers may be sued under section 301, the Court has made it clear that these policies must be taken into account in the section 301 context.[95]

As noted above, in *NLRB v. Burns Security Services*[96] the Supreme Court rejected the Board's successorship doctrine which automatically bound a successor employer to the collective bargaining agreement negotiated by its predecessor. This

91. *See, e.g.*, Local 174, Teamsters v. Lucas Flour, 369 U.S. 95 (1962).
92. 417 U.S. at 256.
93. 406 U.S. 272 (1972).
94. 417 U.S. at 256.
95. *Id.*
96. 406 U.S. 272 (1972).

holding appeared to be inconsistent with the Court's earlier decision in *John Wiley & Sons, Inc. v. Livingston,*[97] where the Court held that a nonsignatory successor could be bound by the signatory's promise to arbitrate.

The Court attempted to clarify its position in *Howard Johnson Co. v. Detroit Local Joint Executive Board,*[98] holding that the principles it had emphasized in *Burns* could not be so lightly disregarded by the lower federal courts in section 301 suits. In particular the Court gave great weight to the principle of "freedom of collective bargaining—'private bargaining . . . without any official compulsion over the actual terms of the contract.' "[99] The Court explained that even though *Howard Johnson,* like *Wiley,* was a suit to compel arbitration under section 301 while *Burns* arose from an unfair labor practice proceeding, the statutory policies relied upon in *Burns* applied to both cases:

> In *Textile Workers v. Lincoln Mills,* . . . this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills* did not envision any free wheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion[ed] from the policy of our national labor laws."[100]

The statutory policy underlying the decision in both *Burns* and *Howard Johnson* derived from the national labor law policy favoring collective bargaining without any "official compulsion" over the terms of agreement.[101] In *Burns* the prohibited "official compulsion" was the Board's decision that a collective bargaining agreement would apply to a successor business by simple operation of law. Although it is less clear what official compulsion would be involved in a suit for breach of contract under section 301, the *Howard Johnson* opinion appears to reject any automatic application of a collective bargaining agreement to a new owner or operator of the signatory enterprise. The Court stressed, for example, that the employer in *Burns* had neither

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97. 376 U.S. 543 (1964).

98. 417 U.S. 249 (1974).

99. *Id.* at 254 (quoting NLRB v. Burns Int'l Sec. Servs., 406 U.S. 272, 287 (1972)).

100. 417 U.S. at 255 (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 456 (1957)).

101. 417 U.S. at 254-55.

expressly nor impliedly assumed the collective bargaining agreement.[102]

C. *Protection of Remedies*

The *Howard Johnson* decision further distinguishes *Wiley* on the grounds that *Wiley* involved a corporate merger rather than a sale of assets.[103] In explaining this nice distinction the Court identified another policy which courts should recognize in section 301 suits. The *Wiley* decision was justified primarily on the ground that a contrary result would have left the employees without a remedy. The Court explained that "the disappearance of the original employing entity in the *Wiley* merger meant that unless the union were afforded some remedy against Wiley, it would have no means to enforce the obligations voluntarily undertaken by the merged corporation."[104]

The policy underlying the Court's distinction appears to be the protection of employees' contractual remedies in situations where the corporate structure would deprive them of their ability to vindicate their rights under a collective bargaining agreement.[105]

D. *Primary Jurisdiction of the NLRB*

A fifth policy which courts must take into account in deciding section 301 suits is the Board's jurisdiction under the Act to determine appropriate bargaining units. Whether or not Board jurisdiction is ultimately deemed preemptive of federal court jurisdiction, the Board's broad discretion in deciding bargaining unit questions and the limited judicial review accorded its determinations indicate a strong policy favoring Board determination of initial bargaining unit issues.[106]

E. *Labor Policy Favoring Arbitration*

Finally, one other policy which might be considered applica-

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102. *Id.* at 255.

103. *Id.* at 257.

104. *Id.*

105. *Id. Cf.* Carpenters' Dist. Council v. W.O. Kessell Co., 487 F. Supp. 54, 57-58 (W.D. Pa. 1980) (*Wiley* recognizes policy favoring protection of employees from sudden changes in ownership, particularly where change would leave employees with no entity to sue for breach of contract).

106. *See* Local 3-193, Int'l Woodworkers v. Ketchikan Pulp Co., 611 F.2d 1295, 1298-99 (9th Cir. 1980).

ble in section 301 suits against nonsignatories is the policy favoring arbitration of disputes arising under collective bargaining agreements. This policy was relied upon by the Supreme Court in *Wiley* and some decisions suggest that it still retains some vitality in the successorship context, even after *Howard Johnson.*[107] However, such cases fail to recognize that the *Howard Johnson* decision treats a promise to arbitrate the same as any other contractual promise. Unless a nonsignatory employer has expressly or impliedly assumed the collective bargaining agreement, or unless a "substantial continuity in the identity of the work force" exists, the nonsignatory is not bound by the promise, whether it be a promise to arbitrate or any other substantive provision of the collective bargaining agreement.[108] Accordingly, whatever relevance the policy favoring arbitration of labor disputes may have in a successorship context,[109] courts should not use it as a basis for adopting a special standard for deciding suits to compel nonsignatories to arbitrate.[110] Instead, the alter ego or single employer doctrines should be used to analyze suits to apply arbitration clauses or any other provision of a collective bargaining agreement to a nonsignatory employer.[111]

In summary, the policies of uniformity, consistency, protection of remedies, freedom of contract, and Board jurisdiction over bargaining unit determinations must guide the courts in deciding which doctrine to apply in section 301 suits. These five policies should also guide courts in the interpretation and appli-

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107. *See, e.g.,* Graphic Arts Int'l Union Local 1B v. Martin Podany Assocs., 531 F. Supp. 169 (D. Minn. 1982) (relying upon *Wiley* in ordering successor employer to arbitrate). *See also* Bartenders & Culinary Workers Union, Local 340 v. Howard Johnson Co., 535 F.2d 1160, 1164 (9th Cir. 1976).

108. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 264-65 (1974).

109. Even in suits against successor employers under § 301, courts should rely upon the Board's alter ego doctrine. Since that doctrine is employed by the Board in deciding analogous § 8(a)(5) cases, use of the doctrine would promote the policy of consistency. Moreover, since the doctrine focuses on the substantial identity of the enterprises across changes in ownership, it accommodates the principle of freedom to contract. Accordingly, such cases as Graphic Arts Int'l Union Local 1B v. Martin Podany Assocs., 531 F. Supp. 169 (D. Minn. 1982), should be decided under the Board's alter ego doctrine. The result would be the same in any event. *See Martin Podany,* 531 F. Supp. at 172 (relying upon factors employed by the Board in alter ego cases).

110. For a discussion of the current status of the labor policy favoring arbitration in the area of representation and work assignment disputes, see Comment, *Arbitration of Representational Disputes: A Critique of* Carey, 1983 B.Y.U. L. Rev. 349.

111. *Cf.* United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978) (affirming lower court's application of corporate law alter ego doctrine).

cation of whichever doctrine they select.

In addition to the foregoing policies, courts should be guided by the recognition that suits against nonsignatories encompass a variety of different claims and typically involve a number of distinct remedies. The judicial selection of the appropriate doctrine or rule should therefore focus not only upon these five general policies but upon the specific character of the relief sought.

V. Analysis of Section 301 Suits Against Nonsignatories

Since judicial selection of the appropriate legal doctrine to be applied in suits against nonsignatories should take into account the underlying purpose of the suit, the question of which doctrine to apply is best analyzed by first distinguishing the principal varieties of 301 actions against nonsignatory defendants. Suits against nonsignatories are of three general types.

The first type of section 301 suit seeks to disregard the corporate structure in order to hold owners or managers of the corporation personally liable for an alleged breach of contract. The second type of section 301 action seeks to bind a nonsignatory buseinss entity to the collective bargaining agreement to obtain some remedy for employees of the signatory business. This type of action is sometimes brought because the status of the signatory employer makes obtaining relief against it impossible[112] or unattractive.[113] The third kind of section 301 suit is an action against two related companies or against two enterprises owned by the same company which seeks to bring employees of the nonsignatory business under the signatory employer's collective bargaining agreement.[114]

A. Suits to Hold Shareholders Individually Liable

The first type of 301 suit against nonsignatories seeks to pierce the corporate veil in order to hold shareholders individually liable for the obligations of the corporation. This type of

112. Russom v. Sears, Roebuck & Co., 558 F.2d 439 (8th Cir.), *cert. denied*, 434 U.S. 955 (1977).

113. United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978).

114. This is the § 301 version of the *Peter Kiewit* "refusal to bargain" unfair labor practice case brought before the Board. An example of the analogous § 301 case is Florida Marble Polishers Health & Welfare Trust Fund v. Edwin M. Green, Inc., 653 F.2d 972 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2235 (1982).

suit should not be decided under the single employer doctrine, which focuses on the close relationship of two enterprises, but should be decided under the corporate law alter ego doctrine.

The policies underlying the national labor laws serve to confirm this choice of law. Initially, the policy of consistency might appear to suggest application of the single employer doctrine. However, that doctrine focuses upon the connectedness of two enterprises and therefore is inapposite in situations where individual liability of shareholders or corporate officers is involved. Similarly, the policy of consistency does not require application of the Board's alter ego doctrine, since that doctrine also deals with relationships between companies or operations, not shareholder liability. Nor do the other policies identified above weigh against application of the corporate law alter ego doctrine.[115] Accordingly, the principal issue for consideration in this type of suit is not whether, but how the corporate law alter ego doctrine should be applied in view of the underlying policies applicable in section 301 suits.

The most thorough discussion of the applicable law in this type of suit occurs in the opinion of the Court of Appeals for the Ninth Circuit in *Seymour v. Hull & Moreland Engineering.*[116] In *Seymour* trustees of employee trust funds brought an action against a corporation and its sole shareholders to recover unpaid fund contributions. One issue on appeal was whether the trial court properly refused to pierce the corporate veil to hold the individual shareholders liable for the unpaid contributions.

The court of appeals correctly pointed out that under *Lincoln Mills* state corporate law may be relied upon in section 301 suits if it effectuates the policies underlying federal labor legislation.[117] The court ultimately relied upon federal common law, however, observing that federal decisions "naturally draw on state law for guidance in this field."[118] After reviewing a number of federal alter ego decisions, the court stated:

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115. Since shareholder liability would be imposed only if justified by the alter ego doctrine, no automatic application of the contract to a nonsignatory would be involved. Hence, the policy of freedom to contract would not be violated. The policy of protecting contractual remedies would favor application of the alter ego doctrine to ensure that a union or employees are not unjustly deprived of a remedy by recognition of a corporate structure. The policy favoring Board jurisdiction over bargaining unit determinations is inapplicable here.

116. 605 F.2d 1105 (9th Cir. 1979).

117. *Id.* at 1109.

118. *Id.* at 1111.

> Viewing the jumble of federal decisions together, we find a sort of generalized federal substantive law on disregard of corporate entity which concentrates on three general factors: the amount of respect given to the separate identity of the corporation by its shareholders, the degree of injustice visited on the litigants by recognition of the corporate entity, and the fraudulent intent of the incorporators.[119]

One commentator has criticized the *Seymour* decision on the ground that it "ignored the doctrine established in many areas of labor law that an employer's honest intent is not a valid defense."[120] This criticism appears misplaced.[121] The doctrine that an employer's good faith is not a defense to certain unfair labor practice charges is currently applied[122] by the Board and reviewing courts only where employer actions are deemed "inherently destructive" of employee rights under the Act.[123] Even

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119. *Id.*

120. Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law* 95 HARV. L. REV. 853, 865 (1982).

121. The criticism is also confusing because under the alter ego analysis finally suggested by the Note, *id.*, the plaintiffs in *Seymour* would have had to prove, inter alia, "a federally defined violation," which the Note identifies as a direct violation of federal law, a violation of state law incorporated by federal statute, or an "unsuccessful defense under federal civil statutes." *Id.* at 867-68. Presumably, the Note does not mean to argue that piercing the corporate veil would be an appropriate remedy in every situation where a corporation breaches a contractual obligation to make fund contributions. If that position were adopted there would be no need for any alter ego analysis at all, since shareholders would be held strictly liable for any failure of the corporation to meet its contractual obligations.

The Note explains that "[t]he true test must be whether the corporation was created for a legitimate business purpose or primarily for evasion of a federal policy or statute." *Id.* at 868. Since the *Seymour* court ruled that there were sufficient facts to conclude that the corporation was incorporated and had conducted its business in good faith and for a legitimate business purpose, the Note's criticism of the decision appears to be groundless. *See Seymour*, 605 F.2d at 1113.

122. The "balancing test" for determining violations of §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act used in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), has largely been superseded by the two-part analysis adopted by the Court in NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) and NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). The *Republic Aviation* case was cited by the Note, *supra* note 119.

123. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967). Cases of independent § 8(a)(1) violations may still be subject to the "balancing test" approach employed in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), but such cases are based upon the Act's protection of the seminal right of self-organization and should surely not be decisive in the context of the suit for breach of contract, where that right has been effectuated in the signing of a collective bargaining agreement. *See generally* Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails* 52 CORNELL L. Q. 491 (1967).

if this rule were somehow applicable by analogy in section 301 suits, conducting business through a corporation is surely not itself "inherently destructive" of employee rights. Consequently, in order to pierce the corporate veil, the allegedly improper activity in a section 301 suit must lie in some fraudulent, unjust, or bad faith use of the corporate structure. Since that is precisely the focus of the inquiry under the alter ego doctrine, argument by analogy to unfair labor practice cases is unnecessary.

As noted above, the *Seymour* decision does emphasize the "fraudulent intent of the incorporators" as one element in the alter ego inquiry. While that emphasis might appear to be contorary to the position of the majority of state and federal decisions,[124] which require only a showing of legal wrong or inequity, the court's opinion goes on to explain that no bad faith or inequitable result was involved.[125] Consequently, despite the court's misleading summary of the alter ego rule, it appears not to have imposed a rigid "fraudulent intent" requirement.

Based upon the foregoing analysis of policies applicable in section 301 suits, however, the *Seymour* court's reasoning is not satisfactory. The court justified its application of the alter ego standard solely on the grounds that it satisfies the Act's policy of uniformity:

> The traditional rules on disregard of the corporate entity do not expose interpretation and enforcement of labor contracts to the risk of disharmony which 301(a) is designed to prevent. At most, the quality of the remedy only is affected if a labor organization finds itself with a judgment against an insolvent corporate shell.
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> This is not to suggest that under different circumstances another rule might not apply. Courts must always evaluate litigation under 301(a) with an eye to the policy of uniformity which that statute embodies. In cases where change of business form might present a more direct threat to uniformity, courts would be required to take a harder look at the corporate form.[126]

The court overlooked the fact that the policy of uniformity can be used to justify any rule so long as that rule can be consistently applied by all courts in section 301 suits. Thus, uniformity

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124. *See* cases cited in notes 61 and 62, *supra.*
125. Seymour v. Hull & Moreland Eng'g, 605 F.2d 1105, 1112-13 (9th Cir. 1979).
126. *Id.* at 1111.

is typically invoked to justify disregard of state laws which would apply only to cases brought in that jurisdiction. The Supreme Court has emphasized, for example, that uniformity forbids the existence of two "competing legal systems" using "possibly conflicting legal concepts"[127] which might result from the application of state law. In short, the policy of uniformity itself does not dictate which rule best effectuates federal policies. In order to justify the substance of the doctrine or rule to be applied, courts must look to other policies embodied in the Act or case law under section 301.[128] Accordingly, the court should have determined whether any other policies might require alteration of the alter ego doctrine in section 301 cases.

The only other policy which might suggest modification of the alter ego doctrine in this type of section 301 suit is the policy of protection of contractual remedies. As noted above, in *Howard Johnson*[129] the Supreme Court justified its decision not to bind the nonsignatory employer partially on the grounds that the plaintiffs had a "realistic remedy" against the signatory employer.[130] In a different case, where the signatory corporation is insolvent or otherwise unable to provide an adequate remedy for its breach of contract, courts should alter the burden of proof to require that the signatory corporation demonstrate that the corporate structure was established for a legitimate business purpose. This would give effect to the policy of protection of remedies and would also place the burden of proof upon the party with readiest access to the relevant evidence.

B. Suits to Obtain a Remedy Against a Nonsignatory Enterprise

The second major type of section 301 suit seeks to disregard a corporate stucture, not in order to hold shareholders individually liable, but in order to bind a nonsignatory enterprise to the collective bargaining agreement. Unlike the third type of section 301 suit, which attempts to extend coverage of the collective bargaining agreement to employees of the nonsignatory enterprise, this second type of action seeks to obtain a remedy, only

127. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 104 (1962).

128. *Cf. id.* (federal labor policy favoring peaceful resolution of disputes justifies result reached by state court applying state rules of contract interpretation).

129. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974).

130. *Id.* at 257.

for the signatory's employees. The single employer doctrine,[131] the Board's alter ego doctrine,[132] and the corporate law alter ego doctrine[133] have all been relied upon by courts in analyzing this type of 301 action.

The Board's alter ego doctrine appears to be an appropriate standard in suits to bind a nonsignatory enterprise, since using it would clearly promote consistency between Board and court decisions. For example, consistency appears to have been the primary policy offered recently by the Court of Appeals for the Fifth Circuit in a decision applying the Board's alter ego doctrine.[134] Because the Board's alter ego doctrine relies on the identical business purpose of the employers and the substantial identity of the two enterprises' operations, equipment, and customers, that doctrine is the appropriate standard to apply in situations where it is alleged that the two enterprises conduct the same business and that work is being shifted from the signatory to the nonsignatory enterprise. In other situations, however, a nonsignatory such as a parent corporation may be sued on its subsidiary's collective bargaining agreement, not because the two corporations are in the same business or because work is being shifted from one to the other, but because the parent has allegedly dominated the subsidiary and is therefore responsible for a breach of the latter's collective bargaining agreement with the plaintiff.[135] Given the emphasis of the Board's doctrine on identity of business purpose, equipment, customers, and employees, use of that doctrine in situations where the two companies are not in the same business would clearly be inappropriate. The corporate law alter ego doctrine should be applied in this latter case.

Consistency would also call for use of the Board's single employer doctrine in situations where it is alleged that the signatory and nonsignatory businesses constitute a single integrated enterprise. Again, however, where the two businesses have some other relationship such as parent and subsidiary or where they are affiliated corporations not engaged in the same business, the

131. *E.g.*, Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger & Co., 672 F.2d 580 (6th Cir. 1982).

132. *E.g.*, Carpenters Local 1846 v. Pratt-Farnsworth, 640 F.2d 489 (5th Cir. 1982).

133. *E.g.*, Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc., 653 F.2d 143 (5th Cir. 1981).

134. Carpenters Local 1846 v. Pratt-Farnsworth, 690 F.2d at 509-13 (5th Cir. 1982).

135. *See, e.g.*, United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978); U.A.W. v. Cardwell Mfg. Co., 416 F. Supp. 1267 (D. Kan. 1976).

single employer doctrine, with its emphasis on the interrelation of the operations of the two enterprises,[136] should not be used. Where the signatory and nonsignatory employer are not in the same business or do not constitute an integrated enterprise, courts should apply the corporate law alter ego doctrine rather than the single employer doctrine.

Courts have not generally analyzed the differences between suits aginst two enterprises whose operations are integrated and suits in which the nonsignatory conducts some other business. With few exceptions,[137] however, they have applied the corporate law alter ego doctrine to the latter type of case[138] and the Board's single employer doctrine to the former.[139] At least one case has relied upon both doctrines.[140]

C. *Suits to Apply the Collective Bargaining Agreement to the Employees of the Nonsignatory Employer*

The third type of 301 suit against a nonsignatory seeks not just to hold the nonsignatory employer responsible for the signatory's breach of collective bargaining agreement, but also to extend coverage of the collective bargaining agreement to the nonsignatory's employees. This remedy raises issues not involved in the first two types of suits. The principal issue presented by a suit which attempts to apply the signatory's collective bargaining agreement to employees of the nonsignatory employer is whether federal courts have jurisdiction to grant this type of relief. As noted above, in the *Peter Kiewit*[141] decision the Supreme

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136. *See, e.g.*, Local No. 627, Int'l Union of Operating Eng'rs v. NLRB, 518 F.2d 1040, 1047 (D.C. Cir. 1975), *vacated in part sub nom.* South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976) (per curiam).

137. *See, e.g.*, Kaylor v. Crown Zellerbach, Inc., 643 F.2d 1362 (9th Cir. 1981); Russom v. Sears, Roebuck & Co., 558 F.2d 439 (8th Cir.), *cert. denied*, 434 U.S. 955 (1977). *Kaylor* and *Russom* each involved suits to obtain a remedy against companies for whom the signatory, a trucking company, performed their services. Under the rubric of "coemployer" these decisions appear to apply the Board's single employer doctrine. While the decisions should probably have also considered the alter ego doctrine, it is unlikely that a different result would have heen reached in either case.

138. *See, e.g.*, United Paperworkers Int'l Union v. T.P. Property Corp., 583 F.2d 33 (1st Cir. 1978).

139. Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger & Co., 672 F.2d 580 (6th Cir. 1982).

140. Florida Marble Polishers Health & Welfare Trust Fund v. Edwin M. Green, Inc., 673 F.2d 972 (5th Cir. 1981) *cert. denied*, 102 S.Ct. 2235 (1982).

141. South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976) (per curiam). *See supra* text accompanying notes 81-88.

Court held that the court of appeals erred when it ruled that the signatory's collective bargaining agreement should be applied to employees of the nonsignatory enterprise.[142]

Peter Kiewit did not involve a section 301 action for breach of contract but reached the court of appeals through petitions for review and enforcement of a Board ruling on a "refusal to bargain" unfair labor practice charge under section 8(a)(5) of the Act.[143] Nevertheless, until recently, courts interpreting *Peter Kiewit* have uniformly concluded that the Supreme Court's decision deprives district courts of jurisdiction to make initial bargaining unit determinations in the context of a section 301 suit against a nonsignatory.[144]

In *Carpenters Local 1846 v. Pratt-Farnsworth*[145] the Court of Appeals for the Fifth Circuit rejected this interpretation of *Peter Kiewit*, however, holding that district courts do have jurisdiction under section 301 to make initial bargaining unit determinations in suits for breach of contract against nonsignatories. The court based its decision that the Board does not have exclusive jurisdiction over bargaining unit determinations on the "congressional commitment to judicial enforcement of contractual rights involved in section 301."[146]

Several of the policies identified above might appear to support that conclusion, or at least appear not to weigh against it. For example, it could be argued that permitting courts to apply a collective bargaining agreement to a nonsignatory's employees would promote the policy of protection of contractual remedies. This would ensure that unions, trustees of employee benefit funds, and employees would have a remedy in the courts for breach of contract in addition to any remedy before the Board for an alleged refusal to bargain. Similarly, if courts applied the same standard as that employed by the Board in making bargaining unit determinations, the policies of uniformity and consistency would not be contravened. Finally, since the basis for application of a collective bargaining agreement to a new group of employees would include a finding of the nonsignatory's single employer or alter ego status, the policy of freedom to contract would not be violated.

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142. *Id.* at 805-06.
143. 29 U.S.C. § 158(a)(5) (1976).
144. *See* cases cited in note 87, *supra.*
145. 690 F.2d 489 (1982).
146. *Id.* at 2805.

On the other hand, these considerations may be less significant if the aggrieved parties already have a remedy before the Board. More importantly, permitting courts to share jurisdiction over initial bargaining unit decisions might violate the Act's policy favoring Board determination of issues relating to designation of collective bargaining representatives. Accordingly, the principal question presented by the *Pratt-Farnsworth* decision is whether congressional delegation to the Board of jurisdiction over bargaining unit determinations indicates a policy requiring that the Board maintain *exclusive* jurisdiction over such matters even in the face of the competing policy favoring judicial enforcement of contractual rights. In order to assess the source and relative weight of these policies, a brief discussion of the basis of the Board's jurisdiction is necessary.

The two general areas of Board jurisdiction under the Act are unfair labor practices and representational matters, including bargaining unit determinations. The former area is set out in section 8 of the Act,[147] the latter in section 9.[148] The basis and extent of Board jurisdiction over unfair labor practices has been the subject of numerous court decisions. A conclusion that courts are preempted from exercising jurisdiction over unfair labor practice claims would almost certainly dictate a similar conclusion regarding bargaining unit determinations. Thus, a brief discussion of cases addressing court jurisdiction over unfair labor practices should be useful in analyzing the extent of court jurisdiction over initial bargaining unit determinations.

In 1959 the Supreme Court declared in *San Diego Building Trades Council v. Garmon*[149] that both state and federal courts are deprived of jurisdiction over activities which are either protected or prohibited by the Act. The Court explained that: "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."[150] Although a number of decisions following *Garmon*

147. 29 U.S.C. § 158 (1976).

148. 29 U.S.C. § 159 (1976).

149. 359 U.S. 236 (1959).

150. *Id.* at 245. Section 7 of the Act grants certain rights and protections to employees, while § 8 identifies activities of unions and employers which constitute unfair labor practices. For the text of § 7, see note 178, *infra*.

have focused on preemption of state jurisdiction,[151] as the above quote indicates *Garmon*'s preemptive rule applies both to state and federal courts. The Board's "exclusive competence" under the Act to prosecute and decide unfair labor practice cases deprives both state and federal courts of jurisdiction over conduct which is even arguably subject to such proceedings.

The Supreme Court has articulated several exceptions to *Garmon*'s rule, however. One of these exceptions is that federal court jurisdiction under section 301 is not preempted even though the conduct alleged to be a violation of the collective bargaining agreement might also constitute an unfair labor practice.[152] The scope of this exception is not entirely clear. It was initially used to prevent displacement of court jurisdiction under section 301 any time the alleged breach of contract might arguably constitute an unfair labor practice.[153] That result does not involve any real interference with Board jurisdiction, however, since the court can rule on the breach of contract issue without deciding the merits of any unfair labor practice claim.

In two recent cases the Supreme Court has further ruled that courts can actually decide the merits of a defense based upon an unfair labor practice section of the Act. In *Connell Construction Co. v. Plumbers Local Union No. 100,*[154] an employer brought suit under the antitrust laws to void a subcontracting agreement it had entered into with a union. The union defended on the grounds that the agreement fell within a protective proviso to an unfair labor practice provision, section 8(e) of the Act.[155] The union maintained that since section 8(e) specifically permits so-called "hot cargo" agreements in the construction industry, its agreement was legal under the labor laws and hence immune from scrutiny under the antitrust laws. The lower court refused to rule on the union's defense because that would require a determination whether enforcement of the agreement constituted an unfair labor practice under section 8(e), which determination is, under *Garmon,* within the exclusive unfair labor practice jurisdiction of the Board.[156] The Supreme Court

151. *See, e.g.,* Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Farmer v. United Bhd. of Carpenters, Local 125, 430 U.S. 290 (1977).

152. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

153. *See id.* at 197.

154. 421 U.S. 616 (1975).

155. 29 U.S.C. § 158(e) (1976).

156. Connell Constr. Co. v. Plumbers Local Union No. 100, 483 F.2d 1154, 1174 (5th Cir. 1973).

disagreed, and decided the issue, stating:

> This court has held . . . that the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws.[157]

In *Kaiser Steel Corp. v. Mullins*,[158] trustees of employee health and retirement funds sued a coal producer for breach of contract alleging that the coal producer had failed to make required contributions pursuant to a so-called "purchase of coal" clause. That contract clause required signatory employers to contribute specified amounts to the funds based on the amount of coal the employer bought from nonsignatory coal producers. The coal producer, Kaiser Steel, defended on the grounds that the agreement was void under the antitrust laws and under section 8(e) of the Act. The Supreme Court held that a federal district court has jurisdiction in a section 301 suit to determine whether the agreement is "unenforcible and void" within the meaning of section 8(e).

Mullins thus makes it clear that courts have jurisdiction in a section 301 case at least to decide if a contract provision violates section 8(e). However, since 8(e) makes "entering into" hot cargo agreements generally an unfair labor practice *and* provides that such agreements are "unenforcible and void," it is not clear that *Mullins* would support court jurisdiction to decide the merits of unfair labor practice claims arising under other sections of the Act. Indeed, given the Court's reliance upon the "unenforcible and void" language of section 8(e) and its emphasis on the duty of federal courts not to enforce agreements which are illegal or which contravene public policy,[159] *Mullins* appears to be limited to court jurisdiction over 8(e) defenses.

Two other Supreme Court cases which interpret the scope of *Garmon* preemption deserve brief discussion. In *Vaca v. Sipes*,[160] the Court held that the Board does not have exclusive jurisdiction over a claim that a union has breached its statutory duty of fair representation, even though the Board has ruled that breach of the union's duty constitutes an unfair labor practice. The Court ruled that *Garmon* did not preempt court juris-

157. Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616, 626 (1975).
158. 455 U.S. 72 (1982).
159. *Id.* at 84.
160. 386 U.S. 171 (1967).

diction over unfair representation claims because the duty of fair representation doctrine was developed by the courts long before the Board ever decided it constituted an unfair labor practice and because of the "unique interests" served by the duty of fair representation.[161] The Court therefore concluded that Congress never intended to vest the Board with exclusive jurisdiction over unfair representation claims. Given the Court's special reasons for distinguishing the duty of fair representation from other unfair labor practices, *Vaca* cannot be read to impose any general limit on *Garmon.*

Nor does it appear that the Supreme Court's analysis of the *Garmon* rationale in *Sears, Roebuck & Co. v. Carpenters,*[162] requires a different conclusion. In *Sears,* the Court divided the *Garmon* analysis into two prongs, one which preempts court jurisdiction over conduct which is "arguably prohibited" by the Act, the other which preempts jurisdiction over conduct which is "arguably protected."[163] The Court concluded that state court jurisdiction over the conduct involved in that case, trespassory picketing, was not preempted under the "arguably prohibited" prong of *Garmon* because the controversy presented in the state court would be different from the inquiry the Board would make in an unfair labor practice proceeding.[164] With respect to the "arguably protected" prong of the *Garmon* analysis, the Court concluded that even though the inquiry in the state court would overlap with issues the Board would decide in an unfair labor practice proceeding, the *Garmon* rationale does not require preemption of court jurisdiction if "the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so."[165]

If the *Sears* analysis of *Garmon* were applied by analogy to decide the extent of Board jurisdiction over initial bargaining unit determinations, it is still unlikely that *Sears* suggests the result reached in *Pratt-Farnsworth.* First, the issue to be decided in the section 301 action would be precisely the same as that determined by the Board. The *Sears* standard for Board preemption of court jurisdiction under the "arguably prohib-

161. *Id.* at 179-82.
162. 436 U.S. 180 (1978).
163. *Id.* at 190.
164. *Id.* at 198, 201 n.31.
165. *Id.* at 202-03.

ited" prong of *Garmon* is therefore met. Second, section 301 plaintiffs can invoke the Board's jurisdiction by filing a refusal to bargain unfair labor practice charge or by filing a petition for bargaining unit clarification.[166] Even if a plaintiff such as a pension fund trustee does not have the right to invoke Board jurisdiction through a unit clarification proceeding, an employer, the party who would invoke the defense in a section 301 action, has such a right. Consequently, the *Sears* standard for preemption under the "arguably protected" prong is also met. Therefore, it would be consistent with the *Sears* analysis of the *Garmon* rationale to hold that courts are preempted from deciding bargaining unit issues in this type of section 301 suit.

In sum, the scope of court jurisdiction to rule on unfair labor practice claims under section 301 is not settled. It is not clear, for example, that the cases just discussed would permit a court to grant declaratory relief to a section 301 plaintiff who alleges that a contract provision is illegal and unenforceable because it requires or permits commission of an unfair labor practice. In the absence of the "unenforcible and void" language of section 8(e), court jurisdiction under section 301 would still likely be preempted under *Garmon*.[167]

As noted above, if it were clear that the Board's jurisdiction over unfair labor practice cases preempts the court jurisdiction under section 301 to decide whether a party has committed an unfair labor practice, it would follow that courts are similarly foreclosed from making initial bargaining unit determinations. The foregoing discussion indicates, however, that the extent of court jurisdiction to decide claims based on the unfair labor practice provisions of the Act is not settled. Consequently, whether courts are preempted from making initial bargaining unit determinations must turn on whether any principles or policies of the Act require that the Board's jurisdiction over those matters be exclusive.

The standards of judicial review of Board bargaining unit determinations as well as the Board's discretion in deciding bargaining unit issues suggest Board jurisdiction should be exclusive. Unlike Board cease and desist orders issued in unfair labor practice cases, the Board's bargaining unit determinations are

166. *See* note 29 U.S.C. §§ 158(a)(5), 159(c) (1976).

167. *Cf.* New Mexico Dist. Council of Carpenters v. Mayhew Co., 664 F.2d 215, 217 (10th Cir. 1981) (employer defense to § 301 action on grounds that agreement would constitute unfair labor practice held preempted).

not final orders subject to direct review in the courts of appeal.[168] Accordingly, under the Act an employer which disagrees with the bargaining unit determination must challenge the Board's decision by refusing to bargain with the union over the employment conditions of employees within the unit. The Board's bargaining unit determination will then, pursuant to section 9(d) of the Act,[169] become part of the record of the Board's unfair labor practice proceeding and only then becomes subject to review in the courts of appeals.

The courts of appeals review Board decisions in unfair labor practice cases under the statutory standard of "substantial evidence on the record considered as a whole."[170] While bargaining unit determinations may become a part of that record, courts reviewing Board unit decisions have emphasized that the Board has broad discretion in making such determinations. As the Court of Appeals for the District of Columbia Circuit has explained:

> The very vagueness of the statute shows that Congress was largely delegating to the Board the task of developing, through experience and by means of expertise, the standards of appropriateness. When Congress has broadly delegated such a task to an agency, it is not for a court to substitute its own judgment for a rationally supported position espoused by the agency.[171]

Board discretion in making bargaining unit determinations is particularly important because the Board has only a statutory

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168. *See* AFL v. NLRB, 308 U.S. 401 (1940).

169. Section 9(d), codified at 29 U.S.C. § 159(d) (1976), provides:

> Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Id.

170. 29 U.S.C. § 160(e) (1976).

171. Local 1325, Retail Clerks Int'l Ass'n v. NLRB, 414 F.2d 1194, 1200 (D.C. Cir. 1969). Apart from the provisos to § 9(b) of the Act the only statutory limit on Board discretion to decide if a unit is appropriate is contained in § 9(c)(5), which provides that in determining appropriateness, "the extent to which employees have organized shall not be controlling." 29 U.S.C. § 159(c)(5). The foregoing decision relied upon this statutory limit in rejecting the Board's unit determination. 414 F.2d at 1205.

mandate to select *an* appropriate unit; it may therefore select among several equally appropriate units.[172]

This discretion of the Board under the Act to make bargaining unit determinations is reflected in the more limited standard of review courts employ in appeals involving disputes over the scope of bargaining units. Courts will uphold Board unit determinations if they are "rational and in accord with [the Board's] past precedent,"[173] or unless they are arbitrary or unreasonable.[174]

Given this background of limited court review and extensive Board discretion in determining appropriate bargaining units under the Act, it appears that the Act establishes a policy favoring exclusive Board jurisdiction over initial bargaining unit determinations. The *Pratt-Farnsworth* opinion urges that it would be "self-contradictory" to grant courts exclusive jurisdiction to decide breach of contract issues under section 301 and to deny them the power to determine the identity of the persons or entities obligated by that contract.[175] This argument exaggerates the impact that a rule recognizing exclusive Board jurisdiction over initial bargaining unit determinations would have on court jurisdiction under section 301. Courts would still have section 301 jurisdiction over the first two types of suits against nonsignatories discussed above—suits to bind corporate shareholders and suits to bind a nonsignatory employer. Recognition of exclusive Board jurisdiction would only foreclose court jurisdiction over the third type of suit.[176]

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172. *See, e.g.*, Wheeler-Van Label Co. v. NLRB, 408 F.2d 613, 617 (2d Cir.) *cert. denied*, 396 U.S. 834 (1969); State Farm Mutual Auto Ins. v. NLRB, 411 F.2d 356, 358 (7th Cir.), *cert. denied*, 396 U.S. 832 (1969).

173. Local 627, Int'l Union of Operating Eng'rs v. NLRB, 595 F.2d 844, 849 (D.C. Cir. 1979).

174. American Bread Co. v. NLRB, 411 F.2d 147, 153 (6th Cir. 1969).

175. 690 F.2d at 518.

176. The *Pratt-Farnsworth* decision also suggests that the Board may have primary, but no exclusive jurisdiction over initial bargaining unit determinations *Id.* at 515 n.11. The court did not decide, however, whether the doctrine of primary jurisdiction would require a court to stay or dismiss the proceedings if the plaintiff had the right to invoke Board jurisdiction, or whether a court should do so only if an unfair labor practice charge or representation petition were actually filed. *Compare id.* at 515 n.11 *with id.* at 519 (the court's summary of its holding). In any case, granting primary rather than exclusive jurisdiction to the Board would result in the anomaly that Board expertise in the unfair labor practice area would be entitled to less deference and protection than the Board's expertise in the area of employee representation. That position runs counter to the Act's special limitations on court involvement in the process of employee designation of bargaining unit representatives.

The *Pratt-Farnsworth* opinion also maintains that courts cannot simply enforce an accretion clause[177] in a collective bargaining agreement which by its terms purports to cover employees at other companies and work sites where the union has not been recognized. Instead, courts must make bargaining unit determinations based upon the same principles used by the Board in deciding representation cases:

> [T]he single employer theory we have discussed in this opinion . . . requires a showing that the two subentities are a single employer and then requires a further *independent* determination that their employees constitute an appropriate bargaining unit. In fact, the presence of any contractually stipulated bargaining unit in the collective bargaining agreement of the union company is wholly irrelevant to the finding of single employer status . . . . [T]his determination cannot be disguised in contractual garb but must be encountered head-on as a bona fide representational issue.[178]

This language highlights the fact that denying courts jurisdiction to make initial bargaining unit determinations would not deprive them of any jurisdiction to construe the terms of the parties' contract, since the contract is quite irrelevant to the statutory inquiry. Courts would only be foreclosed from deciding issues which the Act has delegated to the Board.

The court's statement also underscores the fact that the only context in which courts would make bargaining unit determinations under section 301 is when the nonsignatory's employees are alleged to be an "accretion" to the signatory employer's bargaining unit. Since employees added into a preexisting bargaining unit are denied their section 7 right[179] to select, through a Board election or otherwise, their bargaining representative,

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177. An "accretion clause" typically extends the coverage of the collective bargaining agreement to additional work sites or to companies owned by the signatory employer. For examples of such clauses see Florida Marble Polishers Health & Welfare Trust Fund v. Edwin M. Green, Inc., 653 F.2d 972, 975 n.4 (5th Cir. 1981) *cert. denied*, 102 S.Ct. 2235 (1982); Local 3-193, Int'l Woodworkers v. Ketchikan Pulp Co., 611 F.2d 1295, 1296-97 (9th Cir. 1980).

178. *Pratt-Farnsworth*, 690 F.2d at 520.

179. Section 7 of the Act provides, in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

29 U.S.C. § 157 (1976).

accretion decisions have a serious potential for interfering with rights which lie at the core of the Act's protective ambit. Given this potential for interference with the Act's election procedures, accretion cases present the most compelling situation for recognizing the administrative expertise and jurisdiction of the Board.

Based upon the foregoing discussion, the Supreme Court's *Peter Kiewit* decision cannot be interpreted as narrowly as the Court of Appeals for the Fifth Circuit suggests. To be sure, the Supreme Court was concerned in part with "a time-honored principle relating to appellate review of an agency determination,"[180] but the Court's decision plainly has a broader basis. The *Peter Kiewit* opinion also emphasized that selection of a bargaining unit "lies largely within the discretion of the Board" and that the Board's decision, " 'if not final, is rarely to be disturbed.' "[181] Indeed, the Court's remark that the court of appeals' initial determination of the bargaining unit issue was " 'incompatible with the orderly function of the process of judicial review' "[182] was taken from an earlier Sureme Court decision, which went on to explain: "Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' "[183] Accordingly, it appears most plausible to interpret *Peter Kiewit* as more than a limitation on *appellate* review of agency decisions. Rather, the Court's opinion reflects a concern for protecting the Board's statutory jurisdiction over bargaining unit determinations from interference by courts reviewing Board unfair labor practice decisions or exercising original jurisdiction under section 301.[184]

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180. *Pratt-Farnsworth*, 640 F.2d at 514.

181. 425 U.S. 800, 805 (citations omitted).

182. *Id.*

183. NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 444 (1965) (quoting Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947)).

184. It should be noted, however, that the foregoing analysis of court jurisdiction over bargaining unit determinations may not conclusively foreclose permitting suits against nonsignatory employers by trustees of employee health and retirement funds. In particular, it is not clear that holding a nonsignatory alter ego liable for contributions to an employee benefit fund would necessarily interfere with the § 7 rights of the nonsignatory's employees to the same extent as would application of the entire collective bargaining agreement, complete with its recognition clause. A court might conclude, for example, that since the nonsignatory and the signatory employers are in effect one entity, the signatory employer itself may be ordered to pay the delinquent contributions of its alter ego. Imposing this obligation as a remedy for the nonsignatory's failure to make

V. CONCLUSION

In this century the collective bargaining agreement has evolved from a "gentlemen's agreement" unrecognized by the courts to a fully enforceable contract creating rights which can even displace individual contracts between an employer and an employee. In *Textile Workers Union v. Lincoln Mills* the Supreme Court sharply accelerated this evolution by declaring that section 301 of the Labor Management Relations Act authorizes federal courts to fashion and apply a body of federal substantive law in suits for breach of contract.

Since *Lincoln Mills,* the Supreme Court has decided a number of section 301 cases which have clarified the rights and liabilities of labor unions, employers, and employees under collective bargaining agreements. Outside the successorship context, however, the Court has not ruled on the applicable doctrines or policies which should govern section 301 suits against nonsignatory employers. Nor have the lower courts agreed on which legal doctrine should be applied in deciding such suits. In analyzing suits against a nonsignatory employer, courts should be guided by the policies of uniformity, consistency, freedom to contract, protection of contractual remedies, and jurisdiction of the National Labor Relations Board over representational matters. In addition to the foregoing policies, courts should also distinguish between the three major types of 301 actions, since selection of the proper decisional rules or doctrine depends in part on the type of suit involved.

In suits to hold shareholders individually liable for the acts of the signatory corporation, the corporate law alter ego doctrine should be applied. A majority of courts relying on the alter ego doctrine have not required a showing of fraudulent intent in order to disregard the corporate structure. That interpretation of the alter ego doctrine better effectuates the policy favoring protection of contractual remedies than does a standard which requires proof of fraudulent intent. Further, in situations where the signatory corporation is insolvent or otherwise unable to afford the plaintiff a remedy for its breach of contract, courts should place the burden of proving that the corporate structure was established for a legitimate business purpose upon the employer. This would recognize and effectuate the policy of protec-

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the contributions would not appear to endanger the § 7 rights of the nonsignatory's employees.

tion of contractual remedies.

In suits to bind a nonsignatory company to the collective bargaining agreement, courts should distinguish between cases where the nonsignatory employer and the signatory enterprise have the same business purpose and cases in which the signatory and nonsignatory employer are in different businesses. In the latter case the appropriate doctrine to apply is the corporate law alter ego doctrine, while in the former the Board's single employer and alter ego doctrines will best effectuate the Act's policies.

The third type of 301 suit seeks to apply the collective bargaining agreement to employees of a nonsignatory enterprise. In deciding this type of suit courts should consider the Act's policy favoring Board jurisdiction over initial bargaining unit determinations. The Court of Appeals for the Fifth Circuit ruled in *Carpenters Local 1846 v. Pratt-Farnsworth* that the Act does not require exclusive Board jurisdiction over initial bargaining unit determinations. However, the *Pratt-Farnsworth* decision does not give sufficient weight to the Act's special recognition of Board expertise and discretion in making bargaining unit determinations, and therefore should not be treated as persuasive authority on that issue. In order to promote the Act's policy favoring Board jurisdiction over representational matters, including bargaining unit determinations, courts faced with this type of 301 suit by a labor union should instead recognize the Board's exclusive jurisdiction to grant the remedy sought and dismiss the action.