OSHA LIABILITY IN TORT AND THE THREAT OF THE MULTI-EMPLOYER DOCTRINE

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I. INTRODUCTION

What duty does an employer owe to third persons affected by another employer under tort law? The answer to this question is traditionally limited to a test of the first employer's control, direct or otherwise, over the second.[1] However, in the realm of occupational safety, tort law is currently poised to eradicate this test through Occupational Safety and Health Administration ("OSHA")[2] violations because of the administratively-crafted multi-employer doctrine.[3] Obviously, the implication is that control will no longer be the

1. § 13:15. *Existence of duty of due care—Independent contractors, Plaintiff's Proof Prima Facie Case* § 13:15 (WESTLAW).

2. OSHA is an administrative agency which governs the health and safety of workers pursuant to regulations, inspections, and enforcement. *See infra* Part II.A.

3. The doctrine is explored more detail in Part II. It is a doctrine of liability by which OSHA may hold a party accountable for the regulatory violations of a third party, regardless of control. Typically, creating a violation, exposing one's own employees, contracting at all with the ordinarily independent contractor, or correcting the violative conduct will establish the duty. *See infra* Part II.C.

preeminent test of liability in an employer-independent contractor relationship. More insidiously, the problem is that contracts will no longer govern the relationship between parties.

A hypothetical best illuminates this quandary. In Florida, a general contractor of Accursed Construction, Inc. ("Accursed"), hired Billy Bob Roofing, LLC ("Billy Bob") to perform roofing work on a homeowner's property. Accursed has not dealt with Billy Bob in the past; however, Accursed is well-aware of the possibility of a subcontractor's OSHA violations, so it purposely disclaimed safety responsibility and liability in its standard-form contract, which it supplied to Billy Bob. During the project, Billy Bob is required to perform electrical work,[4] so it subcontracts the work to another company, Clod Electrical Co. ("Clod"). In sum, there is no contractual relationship between Accursed and Clod, and Accursed and Billy Bob share no safety responsibility. Nevertheless, Accursed visits the site while Billy Bob performs roofing work and takes photographs to give progress updates to the owner.

Sometime later, an OSHA inspector arrives at the site and cites both Billy Bob and Clod for safety violations. Unfortunately, the violations are imputed to Accursed under the theory of the multi-employer doctrine. Thus, Accursed must cease work temporarily while the violations are abated. During the temporary work stoppage, the homeowner becomes impatient, decides to climb the roof himself, and—shockingly—dies from the same electrical hazards which were imputed to Accursed.

The homeowner's estate sues Accursed, advancing a theory of negligence *per se*, which relies on the multi-employer theory. Meanwhile, Accursed had absorbed and settled the violations in administrative proceedings. Accordingly, the homeowner can (and does) use *both the violations of Billy Bob and Clod* as evidence that Accursed violated its duty of care.[5] How would the court rule? How should it?[6]

This Note contends that, although the law is currently poised to expand the multi-employer doctrine into the realm of tort, courts should decline to do so. The multi-employer doctrine is a creature of OSHA, which was not subject to the ordinary public-notice requirements of administrative rules.[7] Courts have traditionally allowed OSHA regulations and violations to serve as both evidence

4. This is an oversimplification, but generally, division II contractors may subcontract out work which they are prohibited from completing. FLA.STAT. § 489.113(2) (2012). Roofing contractors (division II contractors) are prohibited from completing electrical work under the statute, with certain exceptions. FLA. STAT. § 489.105 (2012).

5. *See infra* Part III.B.

6. Granted, in this situation, assumption of risk or comparative negligence would certainly apply to negate such a claim. However, the purpose of the hypothetical is to supply the absurdity that such a doctrine would apply successfully in the first place. The example would be the same whether the injured party was an employee or a homeowner.

7. *See infra* Part II.B.

of negligence and a basis for negligence *per se*.[8] Part of the problem is the retrospective nature of the application of OSHA violations to tort cases combined with the expansive definition and application of the doctrine. Applying the multi-employer doctrine in this way becomes fallacious, as doing so forces a court to conclude that the alleged tortfeasor violated the law, and therefore, he is a tortfeasor entirely based on the conduct of a third party. This line of logic has laid the groundwork to discard ordinary law governing the duty of care with respect to multiple employers on a worksite. Furthermore, the application of the doctrine ignores existing contract principles to prefer a rule which exists to sharpen OSHA enforcement. Its parallel application in tort will aid in a plaintiff's collection but at the cost of fairness and contracting principles between the parties. Finally, applying the doctrine in tort grants those who are ordinarily independent contractors a windfall in the absence of liability to a plaintiff. The law, as applied, would hold an employer accountable for the conduct of the true tortfeasor, *even in the absence of a contract*.[9] A multi-employer negligence doctrine spells the application of injustice, unfairness, and absurdity in practice.

Part II explores background, explaining OSHA and the multi-employer doctrine. Part III provides analysis of existing court decisions on OSHA-tort jurisprudence, including an existing case study of the multi-employer doctrine in tort. Finally, Part IV explains the folly of applying the multi-employer doctrine in tort and discusses counterarguments before reaching a conclusion.

II. BACKGROUND OF OSHA AND THE MULTI-EMPLOYER DOCTRINE

Relative to other federal administrative bodies,[10] OSHA's statutory and enforcement scheme is straightforward. A creature of statute, OSHA's role is to protect the regular members of the occupational sphere. To this end, OSHA created the multi-employer doctrine. However, key problems with the doctrine are that it 1) supplanted the required notice to the regulated community, 2) assigns a near strict-liability regime to employers, and 3) is difficult to contest because its application is subject to highly protected privileges which shield information from the public.

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8. *See infra* Part III.A.

9. To see how this would transpire given the hypothetical, see *infra* Part II.B.

10. For example, the EPA is quite flexible and broad in its enforcement and statutory scheme. The agency relies on a broad milieu of statutes and enforcement techniques. By comparison, OSHA's enforcement and implementation schemes are quite bland and straightforward. *See* Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities,* 29 VA. ENVTL. L. J. 237 (2011).

A. Scope, Purpose, and Functions of the OSH Act

Congress established OSHA in 1970 as a subdivision of the Department of Labor.[11] Pursuant to the Occupational Safety and Health Act of 1970 (the "OSH Act" or "Act"), OSHA is designed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[12] OSHA oversees and enforces the provisions of the Act through regulations, which inspections and corrective action reinforce and implement.[13] OSHA's regulatory programs are either 1) state run or 2) federally run.[14]

To be regulated by OSHA, an entity must be an "employer" under the Act.[15] An employer is a person engaged in interstate commerce who has employees,[16] while a person is defined as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons."[17] Because the overlapping definitions are broad, OSHA regulates a broad swath of the private sector, including non-profit organizations and any organization with at least one employee.[18] However, the Act does not cover public employers or employers whose safety and health are regulated by other federal agencies.[19]

For a variety of reasons, OSHA—through a Compliance Safety and Health Officer ("CSHO")—regularly or irregularly inspects employer worksites to assure the conduct of the employer accords with the regulatory goals of OSHA.[20] If a CSHO finds a violation, this will trigger a citation process.[21] Inspections have due process requirements, as OSHA's role in administrative enforcement implicates an employer's Fourth and Fifth Amendment rights.[22] If the inspection

11. 29 U.S.C. § 651, et seq. (1970); OSHA, REFLECTIONS ON OSHA'S HISTORY, U.S. DEP'T OF LABOR 4 (2009).

12. 29 U.S.C. § 651 (1970).

13. JAMES D. SCHONEY, ET AL., HANDLING AN OSHA INSPECTION (WESTLAW Practical Law Practice Note 8-502-3422, 2019).

14. Any state program must maintain a separate, OSHA-approved program, which meets OSHA approval and minimum standards of the OSH Act. State standards may exceed but not be less stringent than federal counterparts. 29 U.S.C. § 667(c) (1970).

15. 29 U.S.C. § 653 (1970).

16. 29 U.S.C. § 652(5) (1970).

17. 29 U.S.C. § 652(4) (1970).

18. SCHONEY, *supra* note 13. OSHA regulates four areas of law and the economy: general industry, construction, maritime and longshoring, and agriculture. Most of OSHA's inspection and enforcement activity occurs in the general industry and construction sectors.

19. *See generally* 29 U.S.C. § 653 (1970).

20. It is not necessary to go into detail about OSHA's enforcement process, and states with self-implemented plans vary from the federal plan, so this subsection is simplified and purposefully brief. For an in depth look at the OSHA citation and inspection process, see generally OSHA, *OSHA Field Operations Manual*, Directive CPL 02-00-160 (2016).

21. *Id.*

22. *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

reveals a violation, OSHA will issue a Citation & Notification of Penalty, at which point the employer has fifteen days to contest.[23] Failure to timely contest a violation may result in a default, where the employer is found responsible for the corresponding fine and violation.[24] OSHA's enforcement process as conducted by a CSHO and the Secretary of Labor may be criminal, civil, or both.[25]

In sum, OSHA regulates a significant portion of America's labor force as to safety and health regulations. OSHA accomplishes this through inspections and enforcement actions against employers. However, this regulation and enforcement excludes the public sector and those parts of the workforce regulated by other agencies.

B. Violations under the Act

There are two primary sections which impose duties on employers under the OSH Act.[26] These are 1) the general duty clause and 2) safety-specific standards.[27] The general duty clause imposes a duty on employers to ensure workplaces are free from any recognized hazards which are likely to cause death or serious physical harm to employees.[28] On the other hand, a violation of a specific provision requires 1) the cited standard to apply,[29] 2) the employer to fail to

23. 29 C.F.R. § 1903.17 (2019).

24. According to the OSH Act, an uncontested citation is "deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659(a) (1970).

25. OSHA, DIRECTIVE NO. CPL 02-00-160, OSHA FIELD OPERATIONS MANUAL, (2016), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf [https://perma.cc/ZGL8-NE9B].

26. 29 U.S.C. § 654 (1970).

27. *Id.* Both sections are worth discussing because of the applicability of the multi-employer doctrine to either; *see* OSHA, DIRECTIVE NO. CPL 02-00-124, MULTI-EMPLOYER CITATION POLICY, (1999), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024#MULTI [https://perma.cc/KZB4-EATL] [hereinafter *Multi-Employer Doctrine*].

28. 29 U.S.C. § 654(a)(1) (1970). In order to establish a section 5(a)(1) violation, the Secretary must prove: (1) the employer failed to render its workplace free of a hazard, (2) the hazard was recognized either by the cited employer or generally within the employer's industry, (3) the hazard was causing or was likely to cause death or serious physical harm, and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard. Baroid Div. of NL Indus., Inc. v. OSHRC, 660 F.2d 439 (10th Cir. 1981); Nat'l Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); U.S. Steel Corp., 10 BNA OSHC 1752 (No. 77-1796, 1982) (ALJ).

29. A standard must be read as a coherent whole and, if possible, construed so that every word has some operative effect. *See* Am. Fed'n of Gov't Emps., Local 2782 v. FLRA, 803 F.2d 737, 740 (D.C. Cir. 1986) ("[R]egulations are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.'") (internal citation omitted); E. Smalis Painting Co., 22 BNA OSHC 1553, 1580 (No. 94-1979, 2009) (same); Summit Contractors, Inc., 23 BNA OSHC 1196, 1202–1203 (No. 05-0839, 2010) (noting rule of statutory construction that every word be given effect), aff'd per curiam, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished).

comply with the cited standard,[30] 3) access or exposure to the zone of danger, and 4) actual or constructive knowledge of the violation.[31] The Secretary is required to establish all elements of either type of violation by a preponderance of the evidence, also known as a *prima facie* case.[32]

Because tort plaintiffs may rely on OSHA violations as evidence of negligence, it is worth exploring some of their aspects.[33] Regarding specific violations, the third element is particularly problematic. To demonstrate access or exposure to a hazard, the Secretary must show actual exposure or "that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger."[34] "The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent."[35] The test for whether an employee would be exposed to the "zone of danger" is based on "reasonable predictability."[36] This means "that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger."[37]

Regarding general duty clause violations, a key aspect is the absence of an existing standard.[38] Indeed, an established defense to

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30. This is a fact-specific inquiry, which involves applying the standard entertained by the first element. *See* Secretary of Labor v. TNT Crane & Rigging, Inc., 2019 WL 4267108 (July 30, 2019) (ALJ).

31. ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1316 (11th Cir. 2013); 29 USC 666(k); *see* W.G. Yates & Sons Constr. Co. v. Occupational Safety & Health Review Comm'n, 459 F.3d 604, 607 (5th Cir. 2006).

32. Sw. Bell Tel. Co. v. Chao, 277 F.3d 1374 (5th Cir. 2001); Ormet Corp., 14 BNA OSCH 2134, 2135 (No. 85-531, 1991); "[T]he Secretary bears the burden of proving the alleged violation . . . by a preponderance of the evidence." Astra Pharm. Prod., Inc., 9 BNA OSCH 2126, 2131 (No. 78-6247, 1981); knowledge may be constructive or actual. If constructive, the inquiry is whether the employer should have known a violation if, "with the exercise of reasonable diligence, [the employer] could have known of the presence of the violative condition." Pride Oil Well Serv., 15 BNA OSHC 1809, 1814 (No. 87-0692, 1992); This requirement applies to both supervisory and non-managerial employees. P. Gioioso & Sons, Inc. v. Occupational Safety & Health Review Comm'n, 675 F.3d 66, 73 (1st Cir. 2012).

33. *See infra* Part III.

34. Fabricated Metal Prod., Inc., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citing Gilles & Cotting, Inc., 3 BNA OSHC 2002, 2003 (No. 504, 1976)).

35. RGM Constr. Co., 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995); *see also* KS Energy Servs., Inc., 22 BNA OSHC 1261, 1265 (No. 06-1416, 2008).

36. Kokosing Constr. Co., Inc., 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996).

37. Gilles & Cotting, Inc., 3 BNA OSHC 2002, 2003 (No. 504, 1976).

38. "The legislative history of the general duty clause indicates that Congress recognized that there would not always be precise standards to cover every conceivable situation. Congress reasoned that the OSH Act would be seriously deficient if an employee were killed or seriously injured on the job simply because there was no specific standard applicable to the hazard that would have prevented the accident." 15 EMP. COORD. WORKPLACE SAFETY, § 3:14 (WESTLAW) (database updated Feb. 2020).

these types of violations is that a more appropriate standard exists, which OSHA has failed to apply.[39] Logically, an absence of notice of the alleged violative condition is no defense to one such violation.[40] The purpose of this class of violations is to protect employees from hazards which an employer should anticipate in the course of an employee's work onsite.[41]

C. Enforcement under the Multi-Employer Liability Scheme

As the hypothetical demonstrated, at times OSHA will hold a primary employer responsible for the conduct of a secondary, despite an independent contractor relationship between the parties.[42] This attribution of liability is known as the multi-employer doctrine.[43] Principally, the doctrine's reach revolves around OSHA's interpretation of "employee" under the Act. OSHA's expansion of the term to include other employer's employees originated from the Supreme Court's reasoning decision in *Darden*. The Court explained that, where Congress leaves the definition of the term "employee" unclear, courts are to interpret the term as meaning the traditional master-servant relationship, which may—at times—include independent contractors' employees.[44] Since *Darden*, OSHA has applied the Court's test to determine if an individual is an employee, because the Act circuitously defines employee and employer in developing and drafting the policy of the multi-employer doctrine.[45] Generally, in response to OSHA's new policy, courts have accepted a broader reading of the statute under *Darden*, which imposes a greater duty on employers "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[46] Accordingly, through a combination of purposivism and textualism, courts have read OSHA's multi-employer liability into the statute.[47]

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39. *See, e.g.*, Phelps Dodge Corp., Morenci Branch, 9 BNA OSHC 1222, 1223 (No. 79-1618, 1980) (ALJ) (detailing respondent's argument a more appropriate standard would apply to the violation).

40. *See* Integra Health Mgmt., Inc. 2019 CCH OSHD 33713 (No. 13-1124, 2019); *cf*., Cargill, Inc., 7 BNA OSHC 2045 (No. 78-2862, 1979).

41. 15 EMP. COORD. WORKPLACE SAFETY, *supra* note 38.

42. *Multi-Employer Doctrine*, *supra* note 27.

43. *Id.*

44. Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-24 (1992).

45. Jon M. Philipson, *Owner Beware: OSHA's Impact on Tort Litigation by Independent Contractors' Injured Employees Against Business Premises Owners*, 66 U. MIAMI L. REV. 987, 1003-04 (2012).

46. *See, e.g.*, Beatty Equip. Leasing, Inc. v. Sec'y of Labor, U.S. Dep't of Labor, 577 F.2d 534, 537 (9th Cir. 1978) (quoting 29 U.S.C. § 651 (2012)).

47. *See id.; supra* Part III.

But what exactly does the doctrine demand? First, this is a policy document rather than a rule.[48] In simple terms, this means the doctrine and its preferred application have not been subject to the traditional notions of notice-and-comment rulemaking and have instead been imposed without consideration for public comment, making its legal application largely controversial as it was subject to no democratic component.[49] Second, the doctrine establishes four ways OSHA may attribute liability to an employer.[50] An employer may be a:

> 1) Creating employer, who "caused a hazardous condition that violates an OSHA standard";[51]
>
> 2) Exposing employer, "whose own employees are exposed to the hazard";[52]
>
> 3) Correcting employer, "who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility [by contract]";[53] or
>
> 4) Controlling employer, "who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them."[54]

On controlling employers, OSHA has additionally noted that "[c]ontrol can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice."[55] Indemnification provisions, safety-responsibility provisions, and other contractual clauses establishing prime employer control over a secondary or the worksite in general have also been sufficient to

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48. *See* Philipson, *supra* note 45, at 1011; Gen. Elec. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("[E]lementary fairness compels clarity' in the statements and regulations setting forth the actions with which the agency expects the public to comply.") (quoting Radio Athens Inc. v. FCC, 401 F. 2d 398, 404 (D.C. Cir. 1968)). *See generally* Timothy A. Wilkins, *Regulatory Confusion, Ignorance of Law, and Deference to Agencies: General Electric Co. v. EPA*, 49 SMU L. REV. 1561 (1996) (discussing "regulatory confusion" and the use of the fair notice argument in administrative law cases); *see* Albert C. Lin, *Refining Fair Notice Doctrine: What Notice is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991, 994 (2003) (discussing the fair notice doctrine).

49. *See* Solis v. Summit Contractors, Inc., 558 F.3d 815, 826-27 n.6 (8th Cir. 2009). ("Summit contend[s] that the Secretary could not lawfully apply the multi-employer worksite policy without first adopting it through the informal rulemaking process of the Administrative Procedure Act. *See* 5 U.S.C. § 553. This argument may have some merit.").

50. *See Multi-Employer Doctrine*, *supra* note 27, at X.

51. *Id.* at X(B).

52. *Id.* at X(C). This mode of liability is, by the agency's uncharacteristic self-restraint, the sole avenue OSHA may use to establish a general duty violation under the policy. *Id.* at X.

53. *See id.* at X(D).

54. *Id.* at X(E).

55. *Id.* at 6.

establish this kind of liability.[56] Overall, a court looking for a controlling employer examines the contract and asks: does this employer control the conduct of the true violator?[57]

To understand how this doctrine works in practice, consider the initial hypothetical where Accursed failed to provide adequate safety, despite the contract exculpating liability and safety responsibility. Accursed may be a creating employer if it 1) possessed the expertise to detect the hazards and 2) had not taken reasonable steps to protect employees of either Billy Bob or Clod.[58] Particularly damning in this situation is the progress updates and photographs Accursed took on the site. It may be argued that these were supervisory actions, where Accursed was present with the ability to correct. Thus, because Accursed could detect or take reasonable steps to protect employees, it might be found for creating liability. Accursed would be a correcting employer if it directly supervised the work.[59] Again, this is entirely possible because of the nature of Accursed's relationship with the parties. Nevertheless, because the responsibility is exculpated by contract in this case, this would be a gray area with respect to Billy Bob. Additionally, Accursed would not be an exposing employer because its own employees would not be within the "zone of danger"—the work was subcontracted to Billy Bob and Clod respectively. Finally, and most confusingly, Accursed would be a controlling employer *with respect to both Billy Bob and Clod*. Billy Bob's violations would certainly extend to Accursed because the contract establishes control characteristics over the subcontractor's work.[60] Liability for Clod's violations may extend to Accursed if it was foreseeable that Billy Bob would complete the work through subcontract only.[61]

For an employer to escape the application of the multi-employer doctrine, a near absence of any work relationship is required. For example, in *IBP, Inc. v. Herman*,[62] the D.C. Circuit found a mere requirement imposed on other company's employees, irrespective of the employers' relationship, was insufficient to extend liability.[63] In that case, an OSHA court held IBP, Inc. responsible for the conduct of other employers' employees pursuant to a work rule, which required

56. *See* Summit Contractors, Inc., 23 BNA OSHC 1196 (No. 05-0839).

57. *Id.*

58. New England Tel. & Tel. Co. v. Sec'y of Labor, 589 F.2d 81, 82 (1st Cir. 1978).

59. Homes by Bill Simms, Inc., 18 BNA OSCH 2158 (No. 99-1713).

60. When the general contractor hired the subcontractor (the independent contractor), it was pursuant to a larger job on the residential contract. Here, the subcontractor is performing roofing work, probably in line with a larger project since the homeowner contracted directly with the general contractor. Thus, despite the provision explicitly exculpating safety responsibility, liability lies with the general contractor because of overall control over the job itself. *See* Summit Contractors, Inc., 23 BNA OSHC 1196 (No. 05-0839).

61. *Id.*

62. IBP, Inc. v. Herman, 144 F.3d 861, 867–68 (D.C. Cir. 1998).

63. *Id.*

employees to disconnect machines from main power sources before performing maintenance, and an option to cancel in a contract.[64] The OSHA court found this requirement sufficient to establish liability.[65] On appeal, the D.C. Circuit held the contract option and work rule, together, were insufficient to establish control, and accordingly, dismissed and vacated the action against IBP, Inc.[66] In practice, this is an exceptional case. Most recently, the Fifth Circuit implied the doctrine may apply in other situations where employees of one company perform work pursuant to an agreement with another, even in the absence of a contract—which is certainly a less stringent requirement than in the above case.[67] In these kinds of situations, the danger itself may be enough to extend liability.[68]

In sum, the OSH Act established OSHA, the goal of which is to ensure workplace safety throughout the nation. To this end, OSHA enforces general-duty and specific-provision safety requirements for employers. Ordinarily, the requirements obligate the employer to protect his or her employees; nevertheless, the multi-employer doctrine extends and attenuates the relationship and requirements under the Act to supposed third-parties in the agency's safety enforcement scheme.

D. Arrogance of Youth: Administrative Privilege and the Doctrine's Age

Outside of court opinions and the genesis guidance document itself, most of OSHA's analysis under the multi-employer doctrine is shielded from the public. This is because of the agency's deliberative process privilege. Combined with the relative recency of the doctrine, this prevents the public from analyzing the doctrine and fully understanding how OSHA applies the multi-employer doctrine, including which specific facts meet the required threshold for each element.

First, the deliberative process privilege protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation . . . ."[69] The limitation on the privilege is quite narrow; indubitably, courts have often minced the threshold requirement—that the document is "inter-agency or intra-agency" despite their opaque nature—with

64. *Id.* at 864.
65. *Id.*
66. *Id.* at 867–68.
67. Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 733–34 (5th Cir. 2018).
68. *Id.* at 734.
69. 5 U.S.C. § 552(b)(5) (2000).

documents ordinarily discoverable.[70] Ordinarily, this privilege seems to be confined to those documents generated by the agency.[71] However, the privilege extends not only to documents, but also the integrity of the deliberative process so long as exposure to that process would result in a harm.[72] The purposes of invoking the privilege are to 1) encourage open discussions on matters of policy, 2) protect against premature disclosure, and 3) protect against public confusion which might result from reasons and rationales being disclosed.[73]

Unfortunately, this means a decision or pre-decision concerning the doctrine's adoption in the context of agency enforcement is "[a]ntecedent to the adoption of agency policy"[74] and deliberative in nature, and therefore, not subject to disclosure.[75] This is precisely the situation regarding the multi-employer doctrine. Legal application of the policy is entirely deliberative—the agency need only disclose the doctrine applied. Although many questions can be asked concerning what specific acts led OSHA to tender its decision,[76] those specific facts are "part of the agency give-and-take by which the decision itself [was] made."[77] Thus, despite the irony, OSHA may both create standards without public comment and withhold its analysis regarding the same standards' application, and courts will uphold the application of the deliberative process privilege to the doctrine in individual adjudications.

Second, the multi-employer doctrine is relatively new. OSHA promulgated its guidance document explicating the standard in 1999.[78] Additionally, the Fifth Circuit recently adopted the doctrine

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70. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); *see* FTC v. Grolier, Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

71. *See* United States Dep't of Justice v. Julian, 486 U.S. 1, 19 n.1 (1988) (Scalia, J., dissenting).

72. *See, e.g.,* Nat'l Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1119 (9th Cir. 1988).

73. Russell v. Dep't of the Air Force, 682 F.2d 1045, 1048 (D.C. Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980); Jordan v. United States Dep't of Justice, 591 F.2d 753, 772–73 (D.C. Cir. 1978) (en banc); *see also* Heggestad v. United States Dep't of Justice, 182 F. Supp. 2d 1, 12 (D.D.C. 2000).

74. Jordan v. U.S. Dep't of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978). The D.C. Circuit Court of Appeals later disapproved of this ruling in Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981). *See also* Formaldehyde Inst. v. Dep't of Health & Human Serv., 889 F.2d 1118, 1123 (D.C. Cir. 1989).

75. Hamilton Sec. Group, Inc. v. Dep't of Housing & Urban Dev., 106 F. Supp. 2d 23, 30 (D.D.C. 2000).

76. OSHRC, SOUTHERN PAN SERV. CO., EMP' SAFETY & HEALTH GUIDE DECISIONS (2014).

77. Hinckley v. U.S., 140 F.3d 277, 284 (D.C. Cir. 1998) (quoting Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice, 823 F.2d 574, 585–86).

78. *Multi-Employer Doctrine*, *supra* note 27.

in 2018,[79] joining the majority of, but not all, circuits in doing so.[80] This means that compared to OSHA, the multi-employer doctrine is relatively new.[81] To understand why this is a problem, the elements of a specific-standard OSHA violation are a good example. Courts took nearly twenty years to develop those elements and specific standards under the OSH Act.[82] To develop the elements of the multi-employer doctrine, it may take courts just as long, since the doctrine requires specific, case-by-case application to flesh out its meaning.

The deliberative process privilege prevents agencies from having to disclose legal analysis as applied, despite the hypocrisy that the same agency may develop a policy upon which it does not elaborate. Additionally, the multi-employer doctrine is relatively new, so its true legal implications are unknown even by courts specializing in OSHA. Overall, the result is the doctrine will remain esoteric for some time.

III. A MULTI-DISASTER: OSHA LIABILITY IN TORT

This section analyzes the existing status of the law. The application of the multi-employer doctrine to tort liability is a two-part question which involves both 1) an existing violation or applicable standard and 2) existing jurisdictional law. Additionally, the application of the multi-employer doctrine to tort is a relatively new question.[83] Because of this, analysis of the existing application of the law will necessarily involve an analogous comparison of how jurisdictions have treated

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79. Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 730, 735 (5th Cir. 2018).

80. Many "appellate courts accept the use of the multi-employer doctrine either in tort cases or through the OSHA multi-employer citation policy." Thompson, *infra* note 121, at 163.

81. OSHA was established in 1970. *See* Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq. (1970); U.S. DEP'T OF LABOR, OSHA, REFLECTIONS ON OSHA'S HISTORY, 3-4 (2009); its modern version of the multi-employer policy only came into existence in 1999. *Compare with Multi-Employer Doctrine, supra* note 27.

82. The elements of OSHA's enforcement of a specific-provision violation originate from Brennan v. OSHRC, 511 F.2d 1139 (9th Cir. 1975). Soon after, the Eighth, First, Seventh, Tenth, D.C., Fifth, Eleventh, Second, Sixth, and Third Circuits have—respectively—required OSHA to bring a *prima facie* case. *See* American Smelting & Refining Co. v. OSHRC, 501 F.2d 504 (8th Cir. 1974); A.E. Burgess Leather Co. v. Occupational Safety and Health Review Comm'n, 576 F.2d 948 (1st Cir. 1978); Ill. Power Co. v. Occupational Safety and Health Review Comm'n, 632 F.2d 25 (7th Cir. 1980); Mountain States Tel. and Tel. Co. v. Occupational Safety and Health Review Comm'n, 623 F.2d 155 (10th Cir. 1980); United Steelworkers of Amer., AFL-CIO-CLC v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980); Bunge Corp. v. Sec'y of Labor, 638 F.2d 831 (5th Cir. 1981); West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950 (11th Cir. 1982); Pratt & Whitney Aircraft, Div. of United Tech. Corp. v. Donovan, 715 F.2d 57 (2d Cir. 1983); Quality Stamping Products v. Occupational Safety and Health Review Comm'n, 709 F.2d 1093 (6th Cir. 1983); Pa. Power & Light Co. v. Occupational Safety and Health Review Comm'n, 737 F.2d 350 (3d Cir. 1984). Only the 4th Circuit has not officially required a *prima facie* case.

83. The modern multi-employer policy, which courts have accepted, has only achieved widespread acceptance in 2018. *See* Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 730, 735 (5th Cir. 2018).

other kinds of OSHA violations. Thus, first, this section examines how OSHA violations fit into the tort framework. Second, this section examines the tort-liability of the multi-employer doctrine and, through case study, will demonstrate how the doctrine is poised to expand into tort. Overall, depending on the authority, the posture of the law currently favors entry of multi-employer liability into the tort realm, which—unfortunately for those required to comply—functions as a sword rather than a shield.

A. OSHA Violations and Tort

Under OSHA, the agency designed to protect worker safety and health in the workplace, liability enters torts in three ways: as negligence *per se*, as evidence of negligence, and in defense to liability through comparative negligence. Often, the role of OSHA liability is determined by the jurisdiction's existing legal framework. The ultimate thrust of the application of OSHA law to tort is that, because of existing statutes, OSHA law creates an offensive framework in the tort world, for which there is little to no comparable defense.

First, an OSHA violation of a safety regulation may constitute negligence *per se*. Negligence *per se* is a common-law doctrine which requires: 1) a violation of 2) a statute designed to protect a class of persons from harm, 3) of which the plaintiff is a class.[84] The rationale for applying the statute as a standard of care in torts is that "[c]ourts defer to these legislative policy decisions for reasons of institutional comity and comparative institutional advantage," which in turn imposes a statutorily-inspired standard of reasonable care.[85] Unlike negligence, which is an issue of fact, negligence *per se* may—depending on the state—divest the jury of the determinative power over an issue because it is a question of law.[86] In the context of OSHA violations, the legal theory is that when an OSHA violation is committed, it is sufficient to establish a claim of negligence *per se*.[87] A violation of the standard does not require an OSHA violation, merely that the tortfeasor was not in compliance with the OSHA standard in question.[88]

Courts are divided over whether a violation of OSHA regulations may establish negligence as a matter of law. The problem is that OSHA regulations are not statutes—drafted by elected representatives to which negligence *per se* would apply; rather, these are regulations—promulgated by unelected lifetime bureaucrats through notice and comment—and thus, there is a dispute about what level of

84. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 (AM. LAW. INST. 2010).

85. Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 993 (2014).

86. *Id.* at 93–94.

87. Kelley v. Howard S. Wright Constr. Co., 582 P.2d 500, 508 (Wash. 1978).

88. Johnson v. Interstate Power Co., 481 N.W.2d 310, 314–15 (Iowa 1992).

deference is due.[89] There are essentially three approaches to the issue. Some state courts, such as Montana,[90] New Jersey,[91] and Tennessee,[92] have banned the approach outright. Other states, such as Delaware,[93] Iowa,[94] and Washington,[95] have determined OSHA regulations not only supplant state occupational regulations, but also impose a duty of care. Some states have attempted to draw a compromise between the two approaches. One such example is North Carolina, as seen in *Schenk v. HNA Holdings*.[96] Here, an employee attempted to sue for exposure to asbestos dust.[97] The trial court found the employer's violations constituted evidence of negligence *per se* after submission to the jury.[98] On appeal, the court found a violation of OSHA regulations did not constitute negligence *per se*, but instead, such violations are evidence of industry standards.[99] This tension may reflect the importance of including juries on determinations of such issues, rather than removing factual determinations from their province entirely.[100]

On the one hand, it makes sense to attribute liability to tortfeasors based on conduct which fails to conform to safety regulations. Indeed, OSHA regulations are designed for this purpose—to ensure compliance with occupational safety for all workers.[101] Thus, when a person is harmed under a regulation, allowing the individual to bring suit pursuant to that regulation accords with common sense. However, OSHA regulations are, for the most part, promulgated pursuant to notice and comment rulemaking, which has democratic aspects, but is—for the most part—highly *undemocratic*, not to mention entirely different from the legislative process in general.[102] Holding a tortfeasor

89. *See* Steinberg v. Lomenick, 531 So. 2d 199 (Fla. 3d DCA 1988); Murray v. Briggs, 569 So. 2d 476, 480 (Fla. 5th DCA 1990).

90. Ellis v. Chase Commc'ns, Inc., 63 F.3d 473, 478 (6th Cir. 1995) (applying Tenn. law).

91. Kane v. Hartz Mountain Indus., Inc., 650 A.2d 808, 815 (N.J. Super. Ct. App. Div. 1994), *aff'd*, 669 A.2d 816 (N.J. 1996).

92. Crane v. Conoco, Inc., 41 F.3d 547, 553 (9th Cir. 1994) (applying Montana law).

93. Crawford v. Gilbane Bldg. Co., 563 A.2d 1066 (Del. Super. Ct. 1986); *cf.* Figgs v. Bellevue Holding Co., 652 A.2d 1084 (Del. Super. Ct. 1994) (regarding application of contractor law in Delaware).

94. Johnson v. Interstate Power Co., 481 N.W.2d 310, 315–16 (Iowa 1992).

95. Kelley v. Howard S. Wright Constr. Co., 582 P.2d 500, 508 (Wash. 1978).

96. Schenk v. HNA Holdings, Inc., 604 S.E.2d 689, 693 (N.C. Ct. App. 2004), *aff'd on reh'g*, 613 S.E.2d 503, 508 (N.C. Ct. App. 2005).

97. *Id.* at 691.

98. *Id.* at 691–92.

99. *Id.* at 693.

100. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. c (AM. LAW INST. 2010).

101. The purpose of the statute is to protect workers regarding safety and health. *See* 29 U.S.C. § 651 (1970); *supra* Part II.

102. The notice-and-comment rulemaking process is democratic in the sense it allows public participation, but by and large, agencies are run by unelected officials who set policy and do not answer in the polls when committing wrongs against their respective regulated communities. *See, e.g.,* A. Klein, *On Dams and Democracy*, 78 OR. L. REV. 641, 658–59 (1999)

accountable for a violation of an OSHA standard betrays the language of the Restatement, which requires "the actor [to] violate[] a *statute*."[103] A test which balances these interests, then, may be most appropriate. Although, it may be argued that involving a lay jury will not resolve the issue, particularly since complicated industry standards and practices may already confuse judges.[104] Rather, the appropriate compromise would involve competing experts on the issue, and because personal injury already involves a high percentage of contingency fee agreements,[105] this proposal is not too farfetched.

The second and more common approach is to use violation of an OSHA standard as evidence of the standard of care required in a negligence action. Under this approach, it is a matter of law whether a jury receives such evidence.[106] The theory behind use of this kind of evidence is one of legislative expansion of the duty of care:

> [W]here the statute does set up standard precautions, although only for the protection of a different class of persons . . . this may be a relevant fact, having proper bearing upon the conduct of a reasonable man under the circumstances, which the jury should be permitted to consider. There is, in other words, a statutory custom, which is entitled to admission as evidence.[107]

Most jurisdictions which have entertained the legal concept have accepted it.[108] Some have placed qualifications upon entertainment

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("Additionally, Congress has allowed federal administrative agencies and their leaders to accumulate—and often abuse—undemocratic concentrations of power."). Klein writes, in the context of environmental agencies and complex factual issues:

The technological complexity of environmental problems may entice a society to place excessive trust and authority in the technical experts who staff its administrative agencies. In its modern incarnation, this "environmental aristocracy" elevates scientists and engineers—rather than noblemen—to positions of power, believing that they are best qualified to make decisions affecting natural resources policy. The process of setting a national environmental agenda severely tests our democratic institutions, revealing their vulnerability to corrosive forces.

Id. at 654. Moreover, rulemaking in general is alien from the legislative process, which is carried out by elected representatives who must answer to the public. *Id.*

103. *See* RESTATEMENT (THIRD), *supra* note 84 (emphasis added).

104. Nancy Holtz, *The Judge's Toolbox: Lessons Learned from the Bench in Construction Cases* 16 No. 2 UNDER CONSTRUCTION NEWSLETTER (A.B.A.), at 1–2, https://www.jamsadr.com/files/uploads/documents/articles/holtz_aba-under-construction_the-judges-toolbox_2014.pdf [https://perma.cc/73ZN-E4YG].

105. *See generally* FLA. BAR, *Consumer's Pamphlet: Attorney's Fees* (Aug. 2018), https://www.floridabar.org/public/consumer/pamphlet003/#TYPES%2520OF%2520ATTORNEYS'%2520FEES [https://perma.cc/NY9T-DEJ7].

106. *See, e.g.*, Thoma v. Kettler Bros., 632 A.2d 725 (D.C. 1993).

107. W. KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, 231 (5th ed. 1984).

108. *See, e.g.*,Thoma v. Kettler Bros., 632 A.2d 725 (D.C. 1993); Cardin v. Telfair Acres of Lowndes Cty., Inc., 393 S.E.2d 731 (Ga. Ct. App. 1990); Miller v. Archer-Daniels-Midland Co., 634 N.E.2d 1108 (Ill. App. Ct. 1994); Brady v. Ralph M. Parsons Co., 609 A.2d 297, 303 (Md. 1992); O'Neil v. Wells Concrete Prod. Co., 477 N.W.2d 534 (Minn. Ct. App. 1991); Izzo

of violations as evidence of negligence.[109] In *Herson*, the Massachusetts court acknowledged the informative role OSHA standards play in determining the appropriate duty of care. Nonetheless, the court reasoned, "the admission of OSHA citations rather than OSHA standards" represented the expression of opinion and conclusion rather than evidence.[110] The court reasoned such evidence is properly excluded under the law.[111] This dividing line—between policy and adjudicative evidence—accords well with the theory behind the expansion of the duty of care. The difficulty may be, for those entertaining OSHA evidence, the distinction between an agency's rulemaking and adjudicatory authority.[112] In light of the conflation, the distinction is proper. After all, the "standard precautions" with which such evidence is designed to accord lay with the corresponding statute or regulation, which are vehicles of legislation, not a citation, which is a vehicle of enforcement.[113]

Third and finally, OSHA regulations or violations could be, but are generally not, admissible as a defense to torts.[114] In *Bertholf v. Burlington N. Railroad*, an injured employee brought a claim against a railroad company.[115] The company raised a defense of contributory negligence based on the employee's knowledge of a violation, which he failed to report.[116] As a matter of law, the judge excluded such evidence on the grounds the applicable statute precluded such evidence.[117] In another case, *Jasper v. Skyhook Corp.*, an estate brought a wrongful death action against a crane manufacturer under a products liability theory.[118] After the manufacturer introduced OSHA regulations in its

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v. Linpro Co., 651 A.2d 1047 (App. Div. 1995); Landry v. Gen. Motors Corp., Cent. Foundry Div., 621 N.Y.S.2d 255 (N.Y. App. Div. 1994); Wal-Mart Stores, Inc. v. Seale, 904 S.W.2d 718 (Tex. App. 1995); Slisze v. Stanley-Bostitch, 1999 UT 20, 979 P.2d 317; Marzec-Gerrior v. D.C.P. Indus., Inc., 674 A.2d 1248 (Vt. 1995); Manchack v. Willamette Indus., Inc., 621 So. 2d 649 (La. Ct. App.), *cert denied*, 629 So. 2d 1170 (La. 1993); Hebel v. Conrail, Inc., 475 N.E.2d 652 (Ind. 1985).

109. *See, e.g.*, Herson v. New Bos. Garden Corp., 667 N.E.2d 907 (Mass. App. Ct. 1996).

110. *Id.* at 917.

111. *Id.*

112. *See generally* Robert L. Glicksman & David L. Markell, *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENVTL. L.J. 318 (2018); WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 13 (3d ed. 2009).

113. Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 530 (2005).

114. This aspect of tort law has seen little development, but it is worthy of note.

115. Bertholf v. Burlington N. R.R., 402 F. Supp. 171 (E.D. Wash. 1975).

116. *Id.* at 173.

117. *Id.*

118. Jasper v. Skyhook Corp., 1976-NMCA-024, ¶ 1, 89 N.M. 98, 99, 547 P.2d 1140, 1141, *rev'd*, 1977-NMSC-017, ¶ 1, 90 N.M. 143, 560 P.2d 934.

defense, the trial court found in favor of this alleged tortfeasor.[119] On appeal, the court found such evidence was inadmissible because it could only confuse jurors.[120]

There is double standard applicable to OSHA regulations or violations. While these may be evidence of negligence or establish a negligence *per se* claim, the same luxury is not afforded to law-abiding defendants. Despite the possibility in theory, in practice, OSHA, in tort, is a sword, not a shield.

B. Tort and Multi-Employer Jurisprudence

Evidence of the multi-employer doctrine's shadow in tort is scarce. Therefore, this section aims to explore the disastrous legal effect of the doctrine through case study. Ultimately, this section will demonstrate why and how the doctrine is aimed to enter tort law.

Employing the multi-employer doctrine in tort has been a confusing affair. Indeed, one author confusedly believed the doctrine already applied to tort after the Seventh Circuit cited it with approval.[121] Instead, only recently have Circuit Courts of Appeals accepted the multi-employer doctrine—except for the Eleventh Circuit, which has not yet reached the question, *even in application to OSHA proceedings alone*.[122]

Nevertheless, in *Teal v. E.I. DuPont de Nemours & Co.*, the Sixth Circuit adopted the doctrine as applied to a personal injury case involving the application of the multi-employer doctrine to an action for negligence *per se*.[123] In *Teal*, an employee of Daniel Construction Company brought an action against the primary employer, DuPont, for injuries incurred while working at its plant.[124] The employee was there to "dismantle and remove hydraulic bailers" at the plant.[125] In his complaint, the employee asserted negligence *per se* against

119. *Id.*

120. *Id.*

121. "The Seventh Circuit Court of Appeals upheld the use of the multiemployer doctrine in a worksite injury case via a more expansive interpretation of § 654(a)(2) . . . ." William T. Thompson, *Solis v. Summit Contractors, Inc.—The Issue of Multi-Employer Liability in Tort Cases and the OSHA Multi-Employer Citation Policy*, 40 AM. J. TRIAL ADVOC. 153, 169 (2016) (citing U.S. v. Pitt-Des Moines, Inc., 168 F.3d 976, 983 (7th Cir. 1999)). There appear to be two sources of confusion here. First, this is not a personal injury case (although it is ostensibly one) but an OSHA violation prosecuted under the criminal provision of the OSH Act. Second, though the author indicated there was a tort at play, the only relation his case had to tort was the definition of "employee" under the Act relative to the Supreme Court's earlier use. This is clearly an OSHA prosecution under the criminal provisions of the Act. *See generally* U.S. v. Pitt-Des Moines, Inc., 168 F.3d 976 (7th Cir. 1999).

122. *See* Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 730 (5th Cir. 2018).

123. Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799, 804 (6th Cir. 1984).

124. *Id.* at 800.

125. *Id.* at 801.

DuPont.[126] His legal theory was that DuPont failed to maintain ladder safety as required under the Act,[127] and such a duty extended to the employees of an independent contractor, regardless of the contractual relationship between the parties.[128] The Court was persuaded by this argument.[129] It reasoned:

> We believe that Congress enacted Sec. 654(a)(2) for the special benefit of all employees, including the employees of an independent contractor, who perform work at another employer's workplace. The specific duty clause represents the primary means for furthering Congress' purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." The broad remedial nature of the Occupational Health and Safety Act of 1970 is the Act's primary characteristic. Consistent with the broad remedial nature of the Act, we interpret the scope of intended beneficiaries of the special duty provision in a broad fashion. In our view, once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace. Thus, Richard Teal, an employee of an independent contractor, must be considered a member of the class of persons that the special duty provision was intended to protect.[130]

This holding, however, runs counter to the provision of the Act, which requires courts *to not "enlarge or diminish or affect* in any other manner the common law or statutory rights, duties, or liabilities of employers."[131] Congress intended for the Act to be enforced by OSHA, not to create private causes of action in the courts.[132] There is some wiggle room with respect to negligence-type actions which pursue violations of a standard of care established under the OSH Act.[133] Nevertheless, this is not the problem posed by the multi-employer doctrine. Rather, the issue is—under this holding—an administrative-created doctrine, of which no public notice has been given,[134] which governs the conduct of parties in the ordinary affairs in the

126. *Id.*
127. *Id.*
128. *Id.* at 803.
129. *Id.*
130. *Id.* at 804–805 (citations omitted) (emphasis added).
131. 29 U.S.C. § 653(b)(4) (1970) (emphasis added).
132. *See* Minichello v. U.S. Indus., Inc., 756 F.2d 26, 30 (6th Cir. 1985); § 2:14. *Occupational safety and health standards—Admissibility of evidence of compliance*, AM. L. PROD. LIAB. 3D § 2:14 (WESTLAW).
133. *See* discussion and corresponding footnotes *supra* Part III.A.
134. *See* discussion and corresponding footnotes *supra* Part II.C.

workplace.[135] For what use is contract negotiation when an administrative agency unilaterally decides the parties' substantive rights and obligations prior to negotiation?

In contrast to the holding in *Teal*, the Fifth Circuit has treated liability expansion under the doctrine with skepticism. This is evident in *Pippen v. Tronox, LLC*, in which Pippen's estate brought a negligence action against a plant operator under the multi-employer theory.[136] Tronox, the plant operator, argued that, despite the Fifth Circuit recently accepting the doctrine for administrative OSHA violations in *Acosta*, its application was properly limited to the violations of the OSH Act, citing the restrictive liability clause thereunder as evidence of Congress's intent to restrict liability.[137] Indeed, the Fifth Circuit explicitly anticipated the possibility of the doctrine's expansion to tort in its holding in *Acosta*, where it explained that "no controlling-employer citation under § 654(a)(2) would, on its face, affect . . . common law duties as an employer."[138] This was enough for the court in *Pippen*, and it held—absent a duty in common law—the doctrine itself would not become a basis to expand that duty.[139]

As persuasive and logical as this reasoning seems to be, it appears to directly violate existing Fifth Circuit precedent. The Fifth Circuit previously held in *Melerine v. Avondale Shipyards, Inc.* that: 1) to establish a violation of an OSHA regulation is negligence *per se*, it must be shown that a "violation of a statute which is intended to protect the class of persons to which the plaintiff belongs against the risk of the type of harm which has in fact occurred"; and 2) the multi-employer doctrine did not apply in administrative OSHA proceedings.[140] *Acosta* did not abrogate the first part of the *Melerine*'s holding, only affecting the second: the Fifth Circuit's analysis of whether the multi-employer doctrine applied in OSHA proceedings.[141]

The court's analysis in *Acosta* is, thus, unhelpful. Indeed, the court's explanation appears to cast doubt on *Melerine*'s holding entirely, despite the apparent intention to only abrogate the second part of the decision.[142] The court writes: "no controlling-employer citation under § 654(a)(2) would, on its face, affect [the] common law duties" of an employer to whom the multi-employer doctrine applied.[143] Nonetheless, the contradiction is that, while OSHA standards may be

135. Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799, 804–05 (6th Cir. 1984).

136. Pippen v. Tronox, LLC, 359 F. Supp. 3d 440, 443–44 (N.D. Miss. 2019).

137. *Id.* at 450.

138. Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 734 (5th Cir. 2018).

139. 359 F. Supp. 3d at 450–51.

140. Melerine v. Avondale Shipyards, Inc., 659 F.2d 706, 709 (5th Cir. 1981) (quoting Marshall v. Isthmian Line, Inc., 334 F.2d 131, 134 (5th Cir. 1964)). *See* Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231, 1238 (5th Cir. 1982).

141. Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 743 (5th Cir. 2018).

142. *Id.* at 734.

143. *Id.* (emphasis omitted).

used to enlarge civil liability under *Melerine,* the Fifth Circuit in *Acosta* determined multi-employer liability does not enlarge those duties in the same way as ordinary OSHA regulations, without putting forth satisfactory reasoning other than a general assurance to those who may be liable. Thus, it appears that despite existing precedent in *Melerine* saying violations under the OSH Act may be used to establish negligence *per se*, the Fifth Circuit narrowly relied on the liability provision of the OSH Act to decline to extend liability to tort in *Acosta* and *Pippen*.

Only a thin, poorly-drawn line separates multi-employer liability from tort. As existing jurisprudence stands, courts that recognize OSHA regulations or violations as proof of negligence or informative of negligence *per se* are poised to strike down irrationality or legal technicalities and extend the doctrine.

IV. PUTTING THE BRAKES ON MULTI-EMPLOYER LIABILITY

The multi-employer doctrine should be eradicated from tort before it has the chance to set root. There are four reasons as for why it should not exist in tort law. The first is technical; the doctrine lacks the notice to the regulated community given by other regulations. Second, the doctrine is so expansive it would virtually always allow for recovery against a 'violator.' Third, applying the doctrine supersedes bargained-for contract principles on which parties rely to govern their relationship. Finally, the doctrine bestows a windfall upon the true tortfeasor, the violating employer.

A. Absence of Notice

First, the multi-employer doctrine owes its origins to a guidance document, not a statute or court-crafted doctrine. A guidance document is one which is intended to be a non-legal or policy document which may guide, but not dictate, agency decision making.[144] Sometimes, as here, such documents gain legal effect. Although it is unclear as to why OSHA created the doctrine,[145] the net effect is that it allows OSHA to reach other sources to find violations of safety rules and collect on fines through administrative enforcement.[146] Congress

144. *See* Robert L. Glicksman, et al., *Unraveling the Administrative State: Mechanism Choice, Key Actors, and Regulatory Tools*, 36 VA. ENVTL. L.J. 318, 329–331 (2018).

145. One of the purposes of notice and comment rulemaking is to illuminate the agency's thought process in promulgating rules. In failing to do so, OSHA also failed to articulate its reasoning. *See* OFFICE OF THE FEDERAL REGISTER, A GUIDE TO THE RULEMAKING PROCESS, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/CZU5-XG5K] (last accessed Nov. 3, 2019).

146. This is simply a function of the doctrine. Its application is a sort of "prosecutorial discretion;" however, when OSHA cites one employer under the doctrine, it may still cite another for its violations. *See* Thompson, *supra* note 121, at 153–58.

felt this part of government—administrative agencies—should not dictate public obligations without feedback from the same.[147] This is precisely why the notice and comment provision of the Administrative Procedural Act (the "APA") required notice and comment in the first place.[148] Notwithstanding the requirement under the APA, the multi-employer doctrine is a guidance document *not* subject to notice and comment. This means the public has had no chance to weigh in on the policy.

Occasionally, however, agencies should be allowed to use guidance documents for legal effect. Applying the multi-employer doctrine in the realm of OSHA is one way in which this occurred. Since agency action is expedient until reviewed, Congress or the courts may tacitly allow agencies to usethis sort of conduct to carry out the legislative intent of statutes.[149] Guidance documents obtaining legal effect is rather novel: despite the administrative state existing for more than half a century, the issue did not exist until 1999, when the Government Accountability Office addressed it directly to Congress.[150] However, this argument is primarily one of Clintonian-era conservatives,[151] and that era's Overton Window does not reflect the existing legal framework.[152] Instead, the subject matter of one side's argument reveals the political possibility for the legal effect of guidance documents. In this case, that subtext reveals itself to be the mere possibility agencies operate by using guidance documents for legal

147. "Some commentators have suggested that the very fact that § 553(b)(A) mentions interpretive rules and policy statements separately is a sign that Congress expected them to be construed separately." Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 320 (2018).

148. *See* 5 U.S.C. § 553(b)(A) (2012).

149. CONG. RESEARCH SERV., IF10003, AN OVERVIEW OF FEDERAL REGULATIONS AND THE RULEMAKING PROCESS, https://crsreports.congress.gov/product/pdf/IF/IF10003 [https://perma.cc/7YSF-T8E5] (2019).

150. *See generally* U.S. GEN. ACCOUNTING OFFICE, GAO-B-281575 (Jan. 20, 1999); *compare* Curtis W. Copeland, CONG. RESEARCH SERV., R40997, CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS (2009), *with* Maeve P. Carey, GAO ISSUES OPINIONS ON APPLICABILITY OF CONGRESSIONAL REVIEW ACT TO TWO GUIDANCE DOCUMENTS, CRS INSIGHT (2017), https://fas.org/sgp/crs/misc/IN10808.pdf [https://perma.cc/4DUF-4JHV], *and* Valerie C. Brannon & Maeve P. Carey, CONG. RESEARCH SERV., R45248, THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH "RULES" MUST BE SUBMITTED TO CONGRESS (2018).

151. *Id.* The issue is a Clinton-era relic of a partisan divide over policy and the purpose of the administrative state. To fully understand the issue, one needs to understand the Congressional Review Act, a statute designed to unwind agency doctrines with legal effect. *See* 142 No. 51, CONG. REC. H3651, E579 (daily ed. Apr. 19, 1996) (beginning full discussion on E578) (concerning the debate over which agency documents have policy or legal effect and surrounding text).

152. The Overton Window is a political theory that "regardless of how persuasive [a political pundit], lawmakers are constrained by the political climate." Nathan J. Russell, *An Introduction to the Overton Window of Political Possibilities*, MACKINAC CTR. FOR PUB. POL'Y (2006), https://www.mackinac.org/7504 [https://perma.cc/LA4U-PL4T].

effect. The same argument may be made, and indeed has been set forth by many Circuits, for the multi-employer doctrine to have legal effect.[153]

The problem, though, is twice attenuated in applying that doctrine to tort: an agency, through unelected bureaucrats, creates a doctrine without any public input, and a court, through a judge sometimes presiding for life, ultimately enforces it in a dispute between private parties. The issue is not that the promulgation and enforcement of the multi-employer doctrine, as a guidance document given legal effect, is incredibly undemocratic; rather, it is that there is *no sense of democracy whatsoever*. Ordinarily, OSHA standards have the opportunity for public feedback during the notice-and-comment process, but the multi-employer doctrine presented no such opportunity to the public. The only notice or opportunity for feedback inherent in the adoption of agency guidance, as in this case, is the arbitrary promulgation of a rule. Worse, for a court to then defer to the safety standard of the doctrine—as it would for an ordinary OSHA regulation subject to notice and comment—is the act of twice removing the democratic relationship between the agency and the regulated public. Although the legal effect of guidance documents is relatively novel, one court rejected the application of negligence *per se* to guidance documents in the context of the Food and Drug Administration, as "it is not clear that a violation of an agency 'guidance' document . . . would constitute negligence *per se* because [it] is not a federal statute or regulation."[154] In the situation of the multi-employer doctrine, the legal question becomes even more contentious, as the question is not simply about the strained application of a negligence doctrine. Here, the ultimate effect is the creation of a triangular duty to third parties and between parties with no legal relationship, which threatens to replace the independent contractor control test in the context of workplace safety. This bridge is too far attenuated and its consequences too severe to deserve the deference accorded to a standard of reasonable care. While it makes sense to hold parties accountable for violations of noticed regulations in negligence actions, the same does not hold true for guidance documents and unnoticed rules.

B. De Facto Strict Liability?

The second issue with the multi-employer doctrine is that it creates a scheme of near strict liability. OSHA standards and enforcement are intended to ensure compliance with safety regulations for workplace

153. "Accordingly, we reject Summit's contentions that the Secretary had to engage in notice-and-comment rulemaking before applying her multi-employer citation policy." Summit Contractors, Inc., 2009 CCH OSHD ¶ 33, 010 (No. 03-1622, 2009); *cf.* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASE AND MATERIALS 337 (5th ed. 2006); Philipson, *supra* note 45, at 1030.

154. Siotkas v. LabOne, Inc., 594 F. Supp. 2d 259, 278 (E.D.N.Y. 2009).

protection.[155] Recall there are four methods to establish liability under the doctrine: creation, exposure, correction, and control.[156] Employers that oversee a worksite through practice or with certain contractual provisions establishing control—such as indemnity or safety-responsibility provisions—will most certainly be controlling, while those that expose their own employees to a hazard will be exposing employers.[157] On the other hand, if an employer corrects violations habitually, then fails to do so, that employer is a correcting employer.[158] But where an employer fails to take reasonable steps to correct a violation, despite the capability, that employer is liable as creating the violation.[159]

To escape liability, employers practically must issue contracts free of control provisions or have no contract whatsoever and hold the secondary employer free from obligation.[160] This was the case in *IBP, Inc. v. Herman,* where a mere work rule was not enough to impose liability.[161] The doctrine's liability net makes sense in OSHA schemes, perhaps where an employer avoids fines,[162] or given a particularly difficult "zone of danger" analysis, such as where a hazardous condition may or may not be within an employee's scope of duties.[163] But under tort, an unavoidable liability is recognized as strict and is applied sparingly.[164] Moreover, "the common law recognizes that [a] person can rebut negligence per se [sic] by showing that [he or she] made a reasonable effort to comply with the statute."[165] A near strict liability regime such as the multi-employer doctrine should,

155. *See* discussion and corresponding footnotes, *supra* Part II.A.

156. See discussion and corresponding footnotes, *supra* Part II.C.

157. *Id.*

158. *Id.*

159. *Id.*

160. IBP, Inc. *v.* Herman, 144 F.3d 861, 864 (D.C. Cir. 1998).

161. *Id.* at 867–68.

162. *Id.* at 865; *but see* Cauldwell-Wingate Corp., 1978 CCH OSHD ¶ 22728 (Nos. 14620 & 14858, 1978). Even without a contract, multi-employer liability may lie where an employer's own employees are exposed to a danger, absent a contract. A contract *could* be a sufficient, but not necessary, condition to find liability outside of the D.C. Circuit.

163. At times, a violation may not be had where dangerous conditions exist. It may be necessary to prove a violator's employee was exposed to the harm. One instance where this may occur is trenching violations. Though a trench may be inadequately sloped to protect against cave-ins, no violation would be found where employees did not enter the trench—the "zone of danger"—to be exposed to the harm. *See, e.g.*, Triangle Eng'g Corp., 16 BNA OSHC 1583 (No. 91-1841, 1993) (ALJ).

164. Courts have applied strict liability principles to other agency cases where one of the following factors was present: non-natural use of the location see, e.g., Hudson v. Peavey Oil Co., 566 P.2d 175, 177 (Or. 1977)); violation of strict liability statutes (see, e.g., South Central Bell Telephone Co. v. Hartford Accident & Indem. Co., 385 So. 2d 830, 833 (La. Ct. App. 1980)); seller's product liability (see, e.g., Southern Co. v. Graham, 607 S.W.2d 677, 679 (Ark. 1980)); and damages from ultra-hazardous activities (see, e.g., Exxon v. Yarema, 516 A.2d 990, 1005 (Md. Ct. Spec. App. 1986). TAYLOR LEWELLYN, UNDERGROUND STORAGE TANK GUIDE § 1010 THEORIES OF LIABILITY (Feb. 2019, WL 13580288).

165. Restatement (Third) of Torts: Liability for Physical Harm, § 15 cmt. c (2010).

accordingly, not apply because there is no room for deference in the scheme of a court's application—only compliance. Such a liability regime should not be supplied to any injured plaintiffs, regardless of the merits of their cases, where the only real proof required is a violation of a separate safety standard and an injury.

C. Cost of Business

Third, the multi-employer doctrine would destroy contracts. Key features of contracts are indemnification provisions and control allocations, which are negotiated between parties as much as price. These features in contracts may be enough to establish control given a violation of OSHA rules.[166] This, however, may be the "cost of business" where OSHA violations rarely exceed $13,260,[167] but in civil actions, where damages are often much higher,[168] indemnification clauses may serve a necessary purpose in the overall agreement.[169]

As a company's liabilities increase, so must its assets, else it becomes insolvent—or worse, bankrupt.[170] Ultimately, because of this mathematical law of the universe (or, more precisely, the balance sheet),[171] increased costs are passed on to consumers.[172] This is not an argument for trickle-down economics: rather, it is merely one of inflation. Passing these costs serves a necessary purpose for overhead costs of a business, because otherwise, businesses would cease to exist.[173] Therefore, free contracting and negotiating for provisions are important parts of the contractual process. This is simply a reiteration of the aged question of whether unpredictable tort principles or predictable contract law should control employers' legal expectations in this context.[174]

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166. *See* Summit Contractors, Inc., 2010 CCH OSHD ¶ 33079 (No. 05-0839, 2010).

167. This is for other-than-serious, serious, failure to abate, and posting requirement violations, per violation. For willful or repeat violations, violators may face $132,598 per violation. *See* Patrick J. Kapust, *Memorandum: Implementation of the 2019 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act and Improvement Act of 2015*, OSHA (Jan. 23, 2019), available at https://www.osha.gov/dep/enforcement/penalty_adjustment_01232019.html [https://perma.cc/9JWW-H7TN].

168. "In 2005 plaintiffs won in more than half (56%) of all general civil trials concluded in state courts. Among all plaintiff winners the median final award was $28,000." BUREAU OF JUSTICE STATISTICS, *Civil Cases*, https://www.bjs.gov/index.cfm?ty=tp&tid=45 [https://perma.cc/J9DC-NQP2] (last accessed October 30, 2019).

169. In the context of construction, *see, e.g.,* Albert H. Dib, FORMS AND AGREEMENTS FOR ARCHITECTS, ENGINEERS AND CONTRACTORS § 6:23 (2020).

170. *See, e.g.*, Conor Sen, *Companies Suffered. Now It's Consumers' Turn to Pay*, BLOOMBERG (Jan. 22, 2019) https://www.bloomberg.com/opinion/articles/2019-01-22/consumer-prices-will-rise-in-2019-as-companies-pass-on-costs [https://perma.cc/J8GF-QHXB].

171. Eric J. Zinn, *Taxation of Llcs and the Use of Balance Sheets: An Introduction*, 40 COLO. LAW. 75, 76 (Jan. 2011).

172. Sen, *supra* note 170.

173. *Id.* Liabilities plus equity must equal assets.

174. *See, e.g.*, Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 380 (2008).

The net effect of such a radical change in liability may be to skew or alter who contracts with whom.[175] In the worst case, some businesses may not be contracted with at all in the case of a prior OSHA-violator, regardless of a one-time mistake.[176] Some tasks may additionally prove impossible to contract if the liability far exceeded its potential profit. It is hard to argue the purpose of such rules is to ostracize businesses from lively participation in a functional economy.

D. Windfalls for Wrong-Doers

Finally, the multi-employer doctrine in tort would gift a windfall to true tortfeasors. Even if a plaintiff holds an employer accountable and recovers his or her losses, the violator has no sense of deterrence to prevent it from continuing. Those of extraordinary prudence may discover the violator's past conduct, but most of the public would face exposure to the employer's unpenalized continuing propensity to cause harm.

A contractor in Florida typifies this example.[177] That contractor collected $2.2 million in safety fines from OSHA before shutting down his company and starting over.[178] The OSHA enforcement scheme is apparently no deterrent for his bad behavior. Indeed, for OSHA to achieve its enforcement role under the Act, it would be necessary for the agency to cite any other company the contractor works with and collect on fines owed for violations of the original contractor.[179] Such a scheme reveals a significant advantage of the multi-employer doctrine: collection from multiple employers in the case of an incooperative violator.

But, in the end, there is no deterrence. The same would be true of a multi-employer doctrine in tort. Rather than penalize the wrong-doer, multi-employer liability seeks to collect from the law-abiding employer. In sum, multi-employer liability, spawned of an absence of notice, would unduly inflate the cost of doing business through a

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175. This is a simple enough principle to understand. If net profits are income minus expenses, and a particular entity presents a high liability, the cost of doing business may far exceed any potential gains. "Accordingly, it is essential to itemize the categories of income and expense that will be used to calculate net profits." *See* Lawrence P. Terrell, *Overriding Royalties And Like Interests—A Review Of Nonoperating Lease Interests,* 33B RMMLF-INST 4, 35 (1993).

176. David J. Neal, *Roofer's Old Firm: $2.2 Million in Safety Fines. New Firm: $132,000 in Possible Fines*, MIAMI HERALD (Apr. 8, 2019), https://www.miamiherald.com/news/business/article228950369.html [https://perma.cc/X527-XTVP].

177. *See id.*

178. *Id.*

179. This is because violations require only a standard is violated, not that the violating employees are employed by the violator. Ordinarily, employers will cooperate with OSHA to abate violations in lieu of contesting a violation in administrative court. OSHA could cite other employers the contractor works with to achieve this goal, while effectively ignoring the true violator. *See supra* Part IIC.

near-strict liability regime, which grants a windfall to wrong-doers. Accordingly, it should not be extended to tort, in any form.

E. Counterarguments

There are several arguments against a flat moratorium against multi-employer liability, which is an OSHA doctrine designed to achieve greater safety compliance that imposes liability on one employer for the harms committed by another to a third party. First, the doctrine ensures there are more pockets from which a plaintiff may collect. In fact, in the situation of the rogue, non-conforming employer who is somehow slippery enough to avoid paying for wrongs, giving the plaintiff options for collection is arguably a greater good.[180]

This argument has several flaws. Applying liability purely because of collection-purposes supplants law with policy. It is wholly uncharacteristic of existing negligence schemes. Negligence requires a duty of care.[181] Without a duty owed to the plaintiff, collection should fail.[182] Moreover, if a wrong-doer is able to avoid liability, the fault lies with the wrong-doer, not the inadvertent third party. Accordingly, in an ideal tort scheme, the party with the unreasonable conduct should pay.[183]

Second, it may also be argued that in dealing with a multitude of employers such as in the initial hypothetical[184] the law should favor the unsophisticated over the sophisticated parties.[185] That is, in cases where multiple companies are involved in contracting with individuals, the plaintiff should have some kind of recourse. Unfortunately, inequality in dealings is no excuse for this kind of red herring. This kind of counterargument again fails in that parties can just as well sue the actual violators for their conduct.

A tempered version of the sophisticated-unsophisticated argument may attempt to strike a middle ground: instead of holding the first employer fully liable for the conduct of the employees of the second, one could propose an indemnification scheme where the wronged collects from the first employer. Thereafter, the liable employer could collect from others based on proportionate liability.

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180. Joint and several liability demonstrates this principle. Where one defendant can pay, but not another, it may be best to go after one, rather than both. *See* COMPARATIVE NEGLIGENCE MANUAL § 1:25 (3d ed).

181. *See* RESTATEMENT (THIRD), *supra* note 84, at § 6, cmt. b.

182. *Cf.*, THEORIES OF LIABILITY, *supra* note 164.

183. This, of course, is not true in situations of unreasonable risk. *See* W. KEETON, ET AL., THE LAW OF TORTS § 32, § 33 (1984).

184. *See supra* Introduction.

185. This is a common argument. *See, e.g.*, Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights? Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses under the Federal Arbitration Act 1800-2015*, 25 B.U. PUB. INT. L. J. 143, 153 (2016).

A scheme like this makes little sense. This type of *ex post facto* liability reads like an after-the-fact impleader.[186] Why would a court hold a party accountable only to continue proceedings and further extend business costs for the innocent party to collect? If anything, the true tortfeasor should have joined the lawsuit in the first instance. The burden, the cost of doing business, should not always be shifted to the prime employer, particularly where no wrong is committed on his or her part. This would be another instance of anticipated costs ultimately shifted to consumers.[187]

Third, it could be argued in cases where the first employer *knows of the history of violations of the second employer*, such a liability extension may be a necessary deterrent component. In this way, liability could be restricted by a sort of *mens rea* requirement,[188] which would place unsuspecting violators outside of the doctrine's reach.

It would be extremely difficult to find evidence of intent-oriented knowledge.[189] Perhaps the most sophisticated of employers would have incriminating memoranda, but most violators—those contractors in the original hypothetical—would barely have a contract.[190] Indeed, it would be difficult, if not impossible, to find indicia of knowledge. If knowledge were inferred from, say, the conduct of parties, it would place the doctrine back in a situation like strict liability. This could, in most cases, impose yet another duty on employers to affirmatively discover alleged violations of other employers in doing business. Consequently, although it would make sense in theory, a knowledge requirement is not a question of degree. Any burden imposed would be of a degree too great.

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186. "[I]mpleader . . . is the mechanism by which an existing party may join in a new party in order to assert a derivative liability claim, usually for . . . contribution or indemnity." FED. R. CIV. P. 14, RULES AND COMMENTARY.

187. For an example of how increased costs shift costs, see NATIONAL INDUSTRIAL CONFERENCE BOARD, TAX BURDENS AND EXEMPTIONS (1923).

188. For *mens rea* requirements in civil liability, see for example, Tex. Civ. Prac. & Rem. Code Ann. § 41.003(c) (2003).

189. For example, this may be understood in the context of finding knowledge under the False Claims Act:

> Recognizing, however, that providers lack sound quality of care measurement tools, it is unlikely that liability will be imposed on long-term care facilities for marginal quality of care failures. Consequently, the government will need to prove that a facility had actual knowledge of sufficient facts indicating that a quality of care problem existed, or that the facility deliberately ignored the problem by failing to institute corrective measures . . . .

Constantinos I. Miskis & William F. Sutton, Jr., *Enforcing Quality Standards in Long-Term Care: The False Claims Act and Other Remedies*, FLA. B.J., 108, 111 (1999). This necessarily means there needs to be evidence a party intentionally disregarded legal requirements or willfully ignored others. This will prove extraordinarily difficult in the context of less sophisticated parties, such as contractors, builders, developers, industry operators, and others.

190. *The Risks of Contraction Without a Written Contract in Place,* IT CONTRACTING, https://www.itcontracting.com/contracting-written-contract/ [https://perma.cc/H4KB-YY3N] (last visited July 23, 2020) ("Not all contractors start work with a signed contract in place.").

A fourth and parallel argument to the "knowledge" requirement in favor of the application of the multi-employer doctrine to tort is that the doctrine would deter companies from working with frequent violators of OSHA. A goal of this argument would be for companies to make safer decisions which protect vulnerable third parties from exposure to violations of OSHA safety standards, which are designed to protect the public.

This argument is an even stricter version of the knowledge requirement. Instead of searching for indicia of intent, this argument places an affirmative duty on employers to investigate companies with which they work. A failure to uncover those deficiencies in another business means strict liability. This is demonstrated by a company that may investigate a third-parties violative activity but fails to do so beyond a point of diminishing cost. Holding a primary employer liable because it failed to investigate *fully and exhaustively* is merely strict liability masquerading under a threshold. Thus, this argument again fails to address the true cause of liability—the wrong-doer. Why should the wrong-doer not pay simply because another employer failed to discover a dark secret in his or her history?

Fifth, it may be argued that the multi-employer doctrine in tort could ensure greater workplace safety overall. A prime tenet of this argument is that an employer would oversee and ensure safe conditions at the worksite, regardless of measures in place by all other employers. The net result is more accountability and levels of safety, and consequently, greater safety overall.[191]

This will not occur in practice. Parties engage in contract to negotiate from their respective positions, i.e. given their particular expertise in their respective enterprises.[192] The extension of the multi-employer doctrine to tort threatens to upset the positions from which the parties contract. For example, where an employer lacks the ability to supervise another, that employer would be forced to be held accountable for the wrongs of another better situated to supervise the trade.[193] Furthermore, these layers of supervision would add extra cost to all parties involved.[194] It would be more efficient for employers to assume the work without involving one another. Or

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191. *See, e.g.*, Kevin Phillip Cichetti, *United States v. Weitzenhoff*: *Reading Out the* "*Knowingly*" *from* "*Knowingly Violates*" *in the Clean Water Act, 18 U.S.C. S 1319(c)(2)(a)*, 9 ADMIN. L.J. AM. U. 1183, 1213 (1996).

192. *See* HORST EIDENMUELLER, REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION 492–93 (2013).

193. ALAN WILSON, ASSET MAINTENANCE MANAGEMENT: A GUIDE TO DEVELOPING STRATEGY & IMPROVING PERFORMANCE 521–22 (2002).

194. Harvey S. James, Jr., *Estimating OSHA Compliance Costs*, 31 POLI'Y SCI. 321, 322 (1998).

worse, economics could force non-employers to contract with each entity directly, without the advantage of delegating coordination and control to one employer.

Finally, it may be argued that the companies liable under the multi-employer doctrine are the least-cost avoiders. This argument explains that the companies that correct or control employees at a worksite have the best negotiating power, having contracted to be in their respective position relative to other employers. In addition, it could be argued that injured third parties should bear less costs of tracking down and collecting from potential defendants, since these parties may be situated in the worst economic position of all in the situation.

This argument fails because of the nature of the insurance market with relation to occupational safety. While insurers do not penalize employers for freak accidents at a worksite,[195] insurers already penalize OSHA violators in two ways: through increased costs to insurance holders or flat prohibitions on coverage for OSHA violations.[196] Where insurers increase premiums to the maximum amount rather than prohibit coverage, OSHA violations have the net effect of managing the aggregate liability insurance costs of the market.[197] This is because where more employers comply with OSHA regulations, insurance costs decrease.[198] However, failure to comply with OSHA may result in a drastic or maximum increase to an employer's liability insurance premium.[199]

This effect would likely transfer to liability insurance for tort over time, as adjusters and actuaries account for drastic increases in occupational liability.[200] This happens because insurance is not monetary magic, but merely the transfer of risk from the risk averse to the risk neutral in exchange for a contractually-managed payment

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195. *See Description for 6321: Accident and Health Insurance*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, https://www.osha.gov/pls/imis/sic_manual.display?id=87&tab=description [https://perma.cc/U4PY-2FG6] (last visited July 23, 2020).

196. *See Executive Liability and OSHA Compliance,* HUB (Oct. 3, 2016), https://www.hubinternational.com/blog/2016/10/executive-liability-and-osha-compliance/ [https://perma.cc/KKW8-H9Z3].

197. *See* Shawna Kreis, *OSHA: A Valuable Asset for Small Business Risk Management and Occupational Safety and Health*, SCURICH INS. SERVS., https://www.scurichinsurance.com/osha-a-valuable-asset-for-small-business-risk-managment-and-occupational-safety-and-health/ [https://perma.cc/PC5C-ZF3P] (last visited July 23, 2020).

198. *Id.*

199. *Id.*

200. New, unmeasured markets or changes in the market tend to raise the cost of insurance. This cost accounts for the price of uncertainty. *See, e.g.*, *Global Insurance Premiums Rise by 1.5% in 2017, Driven by Emerging Markets: Swiss Re,* INSURANCE J. (July 6, 2018), https://www.insurancejournal.com/news/international/2018/07/06/494331.htm [https://perma.cc/5QAF-72WR].

scheme in both directions.[201] The premium paid to transfer the risk reflects three factors: 1) the expected value of profit to the risk neutral, i.e., the market's "willingness" to take on a particular risk, 2) the value of security against that risk for the risk averse, and 3) the existing data concerning a risk's economic calculus.[202] Here, in a quasi-strict-liability scheme where the only comparable data in the OSHA realm is neither fully calculated nor aged sufficiently to calculate, one could expect the information available to insurers to be insufficient to draw intelligent inferences.[203] Moreover, employers would clamor to avoid the almost certain increased cost of absolute liability without culpability.[204] Thus, the cost of such insurance will be high.[205] Accordingly, the price will be borne entirely at the risk of an innocent party. In this situation and given the potential market-wide calamity to all employers, it may be more appropriate to worry less about a least-cost avoider and worry more about the market.

If the effect on the insurance market is not persuasive, consider that placing the economic considerations of OSHA compliance in the civil world results in an injustice. OSHA is a quasi-criminal scheme,[206] and the rules at play are entirely different than in tort.[207] Indeed, a failure to pay OSHA fines may even result in eighteen years or more in prison.[208] Holding violators accountable for their individually applicable OSHA regulations does not conflict with this principle. In this situation, a harmed individual in the civil realm merely uses negligence frameworks to achieve redress through

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201. "Insurance can therefore allow risk-averse individuals to transfer, for a price, the cost of their accidents to a common insurer that is effectively rendered risk-neutral through the diversification of policies." Matthew C. Turk, *The Convergence of Insurance with Banking and Securities Industries, and the Limits of Regulatory Arbitrage in Finance*, 2015 COLUM. BUS. L. REV. 967, 980 (2015).

202. *Id.* at 980–81.

203. For the discussion on the multi-employer doctrine's age, see *supra* Part II.A-B.

204. This is an uncontroversial tenet of insurance. *See* Turk, *supra* note 201, at 980.

205. *Id.*

206. Benjamin Ross & Travis Vance, *OSHA Warns Fines Must be Paid or You (Individually) May Face "18 and Life"*, OCCUPATIONAL HEALTH & SAFETY (Aug. 22, 2019), https://ohsonline.com/articles/2019/08/22/osha-warns-fines-must-be-paid-or-you-individually-may-face-18-and-life.aspx [https://perma.cc/C6Q8-KS49]; *cf.* William H. Dann, *Validity, Under Federal Constitution, of Provisions of Occupational Safety and Health Act of 1970 (29 U.S.C.A. §§ 651 et seq.) Relating to Inspections, Enforcement of Civil Penalties, and Administrative or Judicial Review*, 34 A.L.R. FED. 82, 106 (1977) (OSHA is only criminal in the context of certain kinds of violations). It may be said that, at bottom, OSHA is punitive. Insurance, in prohibiting coverage for violations or charging maximum premiums, reflects this.

207. *See supra* Parts II and III. For example, in OSHA, reasonableness is not part of the calculus. Unreasonableness is *presumed*. In addition, causation is not required. The only displacement of causation is the unavoidable employee misconduct defense, which requires the absolute absence of employer and supervisory employee knowledge. *See* WESTLAW, *§ 5:27. Substantive Defenses—Unpreventable employee misconduct* (Mar. 2019). This idea of the three union of these elements are my own theory, however.

208. *See* Ross, *supra* note 206.

OSHA regulations.[209] However, the multi-employer doctrine creates a different situation: rather than holding an individual accountable for his or her violations, the doctrine demands an individual *other than the one which violated applicable law be held accountable*.[210] While the same economic onus may carry with negligence schemes that incorporate OSHA regulations addressing the violations of an individual, those same considerations ought not transfer with a strict liability formula like the multi-employer doctrine, which may be sufficient to undermine any argument to transfer cost to the least-cost avoider.

V. CONCLUSION

OSHA law and regulations exist to make workplaces safer. In pursuit of this goal, OSHA created the multi-employer doctrine, which extends liability from one employer to independent contractors where the employer is creating, exposing, correcting, or controlling the independent contractor's employees. Negligence *per se* is not ordinarily a problem for common law and tort. However, tort law allows for OSHA regulations and violations to be used as evidence of negligence and the basis for negligence *per se*. Thus, because of this connection, multi-employer liability is seeping into tort law, with only technical precedent to hold back its application. There are a multitude of reasons to deny an expansion of the doctrine's liability scheme, as it: involves an absence of notice; presents a seemingly strict liability scheme; unduly increases the cost of business; and provides a windfall to wrong-doers. Thus, although courts are in a strong position to adopt the multi-employer doctrine with respect to OSHA liability in tort, they should refuse to extend its application.

209. *See supra* Part III.A.

210. The violated law discussed, of course, are those OSHA regulations other than the multi-employer doctrine itself. The multi-employer doctrine is a mechanism for imputing liability. In the absence of a violation, the doctrine cannot apply. *See supra* Parts II.B and III.B.

NOTES