



Narrowing Successorship: The Alter Ego Doctrine and the Role of Intent

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Narrowing Successorship: The Alter Ego Doctrine and the Role of Intent

Drew Willis & Richard A. Bales

ABSTRACT

When one company is acquired by another in a bona fide transaction, the successor employer generally is not bound by the substantive provisions of a collective bargaining contract negotiated by its predecessor. When, however, a company merely changes its name or corporate form, courts will use the alter ego doctrine to hold the company to its labor obligations. Courts are split regarding the role intent should play in distinguishing successor companies from alter ego companies. Our Article argues that courts should be able to infer invidious intent from anti-union animus, from the employer's receiving a foreseeable benefit by eliminating its collective bargaining obligations, or from the employer's desire to avoid its collective bargaining obligations, even if the employer was motivated by other factors, as well.¹

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1. For additional information on this topic, see Gary Alan MacDonald, *Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations*, 86 MICH. L. REV. 1024 (1988) (arguing that the courts should adopt the "foreseeable" approach); see also *Bargaining Obligations after Corporate Transformations*, 54 N.Y.U. L. REV. 624 (1979) (arguing that intent is critical in an alter ego determination).

I. INTRODUCTION

Both the labor organization and the employer, as signatories to a collective bargaining agreement (“CBA”), obligate themselves to adhere to its terms, which are the product of their collective bargaining.² However, a party that was a non-signatory can become bound to the CBA, entered into by its predecessor, if it is deemed to be the “alter ego” of the previous employer.³

The alter ego doctrine was developed to prevent employers from evading obligations under the National Labor Relations Act (“NLRA”) merely by changing or altering their corporate form.⁴ It focuses on whether one business entity should be held to the labor obligations of another business entity that has discontinued operations.⁵ The alter ego doctrine is most commonly used in labor cases to bind a new employer that continues the operations of an old employer where the new employer is “merely a disguised continuance of the old employer.”⁶

A successor employer, as opposed to an alter ego employer, arises only when there is “a *bona fide* purchase or sale, meaning an arm’s length relinquishment of control between two independent entities.”⁷ In contrast to an alter ego employer, a successor employer is not bound by the substantive provisions of a CBA negotiated by its predecessor but not agreed to or assumed by it.⁸ Therefore, although an alter ego employer is considered the successor, it is important to distinguish the two in determining what “successor” employers are bound by a CBA.

In determining whether a successor employer is the alter ego of its predecessor, the courts generally agree that that the first step is to determine “whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership” (the *Crawford Door* factors).⁹ However, none of these factors, taken alone, is the *sine qua non* of a finding of

2. See 20 WILLISTON ON CONTRACTS 55:19 (4th ed. 2009) (citing *In re Hillsboro-Deering Sch. Dist.*, 737 A.2d 1098 (1999)).

3. See, e.g., *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir. 1983).

4. See *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986).

5. See *Iowa Express Distrib., Inc. v. NLRB*, 739 F.2d 1305, 1310 (8th Cir. 1984) (citing *Bargaining Obligations After Corporate Transformations*, *supra* note 1, at 638).

6. See, e.g., *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 336 (6th Cir. 1990) (citing *Southport Petroleum, Co. v. NLRB*, 315 U.S. 100, 106 (1942)); see also *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 259 (1974).

7. Gary Alan MacDonald, *supra* note 1, at 1035.

8. See *NLRB v. Burns Int’l Sec. Servs., Inc.*, 406 U.S. 272, 273 (1972).

9. See, e.g., *Allcoast Transfer*, 780 F.2d at 579 (citing *Crawford Door Sales Co.*, 226 NLRB 1144 (1976)).

alter ego status.¹⁰ Although the *Crawford Door* factors are generally applied in alter ego cases, the circuits are split three ways on what weight an employer's intent in forming a new entity should be given in determining whether that company is the alter ego.¹¹ One group of circuits adopts the "necessary" approach, where a finding of unlawful motive or intent is critical in an alter ego analysis.¹² Another group of circuits adopts an "important" approach, where the courts look only at intent to evade union responsibilities as one of the relevant factors that must be considered in an alter ego analysis.¹³ Finally, the Fourth Circuit adheres to a "foreseeable" approach, where the court will look at whether the employer obtained a reasonably foreseeable benefit by opening a separate entity.¹⁴

This Article argues that the circuits should adopt a modified "foreseeable" approach in determining whether a successor employer is the alter ego of its predecessor and is therefore bound by the predecessor CBA. Part II of this Article will further examine the United States Supreme Court's decision in *Southport Petroleum, Co. v. NLRB*, 315 U.S. 100 (1942), and its relevance to the alter ego test. Part III will examine the "necessary," "important," and "foreseeable" approaches, taken by the different circuits in an alter ego analysis. Part IV will analyze each of these approaches.

Part V will argue that the modified "foreseeable" approach is the best option for two reasons. First, it provides the best guidance on how intent should be applied in an alter ego analysis. Second, it is the most consistent with existing Supreme Court precedent as set forth in *Southport Petroleum*.

II. BACKGROUND: *SOUTHPORT PETROLEUM*

To deal with cases involving a reorganization of an employer, the National Labor Relations Board (the "Board") developed its alter ego doctrine, which was first recognized by the Supreme Court in *Southport Petroleum*.¹⁵ *Southport Petroleum* was also the last pronouncement of the Court on the alter ego doctrine.¹⁶ *Southport Petroleum*

10. See, e.g., *Fugazy Cont'l Corp. v. NLRB*, 725 F.2d 1416, 1420 (D.C. Cir. 1984).

11. See, e.g., *Alkire v. NLRB*, 716 F.2d 1014, 1018 (4th Cir. 1983) (stating that although the Court in *Southport Petroleum* indicated that "a disguise intended to evade" the labor laws was a sufficient condition to impose alter ego status, it did not decide whether such an intent was necessary to that determination).

12. See, e.g., *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir. 1983).

13. See, e.g., *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 150 (3d Cir. 1994).

14. See, e.g., *Alkire*, 716 F.2d at 1021.

15. See Gary Alan MacDonald, *supra* note 1, at 1029.

16. *Id.*

was a Texas corporation that had engaged in various unfair labor practices and was ordered by the Board to cease and desist from these practices and to reinstate three employees found to have been discriminatorily discharged.¹⁷ Southport was further ordered to pay these employees back pay for the period from the time of discharge to the date of the offer of reinstatement.¹⁸

Southport entered into a written stipulation with the Board that it would obey the order except as it related to back pay, and the Board stipulated that it would accept the performance promised as sufficient compliance with its order.¹⁹ However, Southport failed to live up to its promise with the Board, and therefore the Board filed a petition with the Fifth Circuit for enforcement of its order.²⁰

Soon after the Board filed its petition, Southport filed an application under the NLRA to adduce additional evidence before the Board.²¹ The application stated that three days after Southport executed the stipulation of obedience to the Board's order, it distributed all of its assets to its four shareholders as a liquidating dividend.²² The application further stated that the shareholders conveyed Southport to a newly organized Delaware corporation whose shareholders were at no time shareholders of Southport.²³ Southport therefore asked the Fifth Circuit to order that these facts be taken before the Board and that the court dismiss the enforcement proceedings.²⁴ The Fifth Circuit sustained the Board's order based upon Texas law and denied the motion to dismiss and application for leave to adduce additional evidence.²⁵ The Supreme Court granted certiorari, limited to the question of whether the court of appeals erred in denying Southport's application for leave to adduce additional evidence that it had dissolved.²⁶

17. *Southport Petroleum, Co. v. NLRB*, 315 U.S. 100, 101-02 (1942)

18. *Id.* at 102.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Southport Petroleum*, 315 U.S. at 103.

23. *Id.*

24. *Id.*

25. *See NLRB v. Southport Petroleum Co.*, 117 F.2d 90, 92 (5th Cir. 1941), *aff'd*, 315 U.S. 100 (1942) (“[Southport] has filed . . . for leave to adduce additional evidence to the effect that, subsequent to the entry of the order by the Board, it disposed of all of its assets, and was dissolved. [Southport] is a Texas corporation. Under the laws of that state the corporation, upon dissolution, is continued in existence for a period of three years for the purpose of suing and being sued. Conceding that the dissolution has taken place, it can have no effect upon this proceeding.”). *Id.*

26. *See Southport Petroleum, Co. v. NLRB*, 315 U.S. 100, 104 (1942).

In affirming the Board's order, the Supreme Court stated what would become the test for determining alter ego status. The test laid out by the court in *Southport Petroleum* is "[w]hether there was a *bona fide* discontinuance and a true change of ownership . . . or merely a disguised continuance of the old employer, . . ."²⁷ The court went on to say that "[the] operation might have continued under the old business form or under a disguise intended to evade this provision."²⁸ If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief . . . , instead there is added ground for compelling obedience."²⁹ The Supreme Court held that it did not clearly appear in this case whether there was a true change of ownership, and it therefore remanded the case to the Board for a determination.³⁰ Speaking for the Court, Justice Jackson further stated that "[t]he additional evidence was immaterial for the further reason that the Board's order ran not only to the petitioner, but also to its 'officers, agents, successor, and assigns.'³¹ Therefore, the narrow holding in *Southport Petroleum* was that leave to adduce additional evidence pursuant to Section 10(e) of the NLRA is denied when this evidence is not material.³²

III. THE "NECESSARY," "IMPORTANT," AND "FORESEEABLE" APPROACHES

The circuits are split three ways regarding what role an employer's motive should play in finding a successor employer to be the alter ego of its predecessor. The United States Courts of Appeal for the First, Seventh, and Eighth Circuits have adopted the "necessary" approach.³³ In determining whether a successor employer is the alter ego, these circuits state that a finding of intent to evade union obliga-

27. *Id.* at 106.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Southport Petroleum*, 315 U.S. at 106.

32. *See id.*

33. See, e.g., *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir. 1983) (stating "[u]nlawful motive or intent are critical inquiries in an alter ego analysis . . ."); *Trs. of the Pension, Welfare & Vacation Fringe Benefit Funds of IBEW Local 701 v. Favia Elec. Co.*, 995 F.2d 785, 789 (7th Cir. 1993) (stating "[w]hat is essential for the application of the alter ego doctrine, though, is a finding of 'the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as through a sham transfer of assets. In sum, unlawful motive or intent are critical inquiries in an alter ego analysis . . .'. Therefore, the district court correctly found that the unlawful motive or intent necessary for the application of the alter ego doctrine was not present during this period."); *Iowa Express Distrib., Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir. 1984) (stating "for an alter ego finding * * * the employer must act from anti-union animus").

tions is necessary in an alter ego analysis.³⁴ The approach taken by the Second, Third, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits, is the “important” approach.³⁵ This approach states that although intent to thwart a Board order or statutory requirement is an important criteria, a showing of employer intent is not required in an alter ego analysis.³⁶ Under the “foreseeable” approach, the Fourth Circuit looks to whether the successor employer gained a “foreseeable benefit,” rather than intent to evade labor obligations.³⁷

A. *The “Necessary” Approach*

The First, Seventh, and Eighth Circuits adhere to the “necessary” approach, in which a finding of intent to evade union obligations is necessary to find the successor company the alter ego.³⁸ For example,

34. *See id.*

35. *See, e.g.,* Goodman Piping Prods., Inc. v. NLRB, 741 F.2d 10, 12 (2d Cir. 1984) (stating “[t]he argument that the Board must find . . . an intent to evade union obligations before it can impose alter ego status is unpersuasive.”); Stardyne, Inc. v. NLRB, 41 F.3d 141, 150 (3d Cir. 1994) (holding that a finding of intent is not critical in an alter ego analysis but is only one factor that should be considered); J. Vallery Elec., Inc. v. NLRB, 337 F.3d 446, 451 (5th Cir. 2003) (stating “[w]hether two companies are alter egos is a question of fact answered through two inquiries. First, the Board must determine ‘whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.’ Second, it must gauge whether there was an unlawful motive behind the creation of the new business entity, determining whether there was a ‘disguised continuance’ or ‘attempt to avoid the obligations of [an existing] collective bargaining agreement through a sham transaction or technical change in operations.’”); NLRB v. Allcoast Transfer, Inc., 780 F.2d 576, 581 (6th Cir. 1986) (concluding that a finding of employer intent is not essential or prerequisite to the imposition of alter ego status); Haley & Haley, Inc. v. NLRB, 880 F.2d 1147, 1150 (9th Cir. 1989) (stating “the determination that one entity is merely another’s alter ego will depend to some extent on whether or not the transfer of assets or the dissolution of the old entity is motivated by union animus.”); NLRB v. Tricor Prods., Inc., 636 F.2d 266, 270 (10th Cir. 1980) (stating “evidence of anti-union sentiment by an employer, occurring either before or after the change in the structure of the business, is germane.”); Fugazy Cont’l Corp. v. NLRB, 725 F.2d 1416, 1419 (D.C. Cir. 1984) (stating “the Board will give substantial weight to evidence that the motive for the transaction was to evade statutory and contractual duties under the NLRA or to escape the reach of the Board’s remedies.”).

36. *See id.*

37. *See, e.g.,* Alkire v. NLRB, 716 F.2d 1014, 1020 (4th Cir. 1983). “A similar analysis is appropriate in determining whether *alter ego* status should be imposed. When business operations are transferred, the initial question is whether substantially the same entity controls both the old and new employer. If this control exists, then the inquiry must turn to whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations.” *Id.*

38. *See, e.g.,* Penntech Papers, 706 F.2d at 24 (stating “[u]nlawful motive or intent are critical inquiries in an alter ego analysis”); Favia Elec., 995 F.2d at 789 (stating “[w]hat is essential for the application of the alter ego doctrine, though, is a finding of ‘the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as through a sham transfer of assets. In sum, unlawful motive or intent are critical inquiries in an alter ego analysis’ Therefore, the district court correctly

in 1993, the Seventh Circuit decided *Trustees of the Pension, Welfare and Vacation Fringe Benefit Funds of IBEW Local 701 v. Favia Electric Company, Inc.*, in which the court determined that Favia Electric, a/k/a T & M Electric, did not have the requisite intent to be determined the alter ego.³⁹

In 1982, Thomas Miniscalco (“Thomas”) started doing business as Tom’s Electric, a non-union sole proprietorship.⁴⁰ During the next two years, Thomas repeatedly used the name of Favia Electric, because Favia Electric had a contractor’s license and Thomas did not, and Favia Electric no longer performed electrical work.⁴¹ In 1984, Thomas and his wife, Mary Ann, hoping that the use of the name “Favia Electric” would bring them additional business, entered into a licensing agreement with Favia, the sole owner of Favia Electric, for the use of Favia Electric’s corporate name.⁴² At the same time the licensing agreement was executed, Mary Ann was elected president and sole director of Favia Electric.⁴³

Although both Favia Electric and Tom’s Electric employed the same two individuals, Thomas and George Anderson, the two businesses kept separate books, bank accounts, and equipment.⁴⁴ Further, Favia Electric and the International Brotherhood of Electrical Workers (“IBEW”) had a CBA in which Favia Electric was obligated to contribute to the pension fund, thus, pension contributions were made on work Thomas performed as Favia Electric; Tom’s Electric never entered into a CBA with IBEW and did not make pension contributions.⁴⁵ Thomas testified that the use of the Favia Electric name during the licensing agreement did not bring in any additional customers, consequently, Thomas terminated the licensing agreement with Favia Electric in 1985.⁴⁶ Upon terminating the licensing agreement, Mary Ann resigned as president of Favia Electric, and Thomas also ceased doing business as Tom’s Electric.⁴⁷ The day after terminating the licensing agreement and ceasing to do business as Tom’s Electric,

found that the unlawful motive or intent necessary for the application of the alter ego doctrine was not present during this period.”); *Iowa Express*, 739 F.2d at 1311 (stating “for an alter ego finding * * * the employer must act from anti-union animus”).

39. See *Favia Elec.*, 995 F.2d at 789.

40. *Id.* at 786.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Favia Elec.*, 995 F.2d at 786.

45. *Id.*

46. *Id.* at 787.

47. *Id.*

Thomas and Mary Ann started T & M Electric.⁴⁸ T & M Electric thereafter began performing work for thirty-nine customers, thirty of which were new and nine of which had been previously employed by Favia Electric.⁴⁹

IBEW sued Favia Electric a/k/a T & M Electric, and Thomas and Mary Ann individually to establish liability for contributions to the pension fund.⁵⁰ The district court entered judgment in favor of T & M Electric and Thomas and Mary Ann, and IBEW appealed to the Seventh Circuit.⁵¹ In its analysis of whether T & M Electric and Thomas and Mary Ann should be held liable for pension contributions under the alter ego doctrine, the Seventh Circuit began by acknowledging that the finding of the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a CBA, such as through a sham transfer of assets, is essential for an application of the alter ego doctrine.⁵² The court continued by stating that, “[i]n sum, unlawful motive or intent are critical inquires in an alter ego analysis.”⁵³

In determining whether the defendants were the alter ego of Favia Electric, the Seventh Circuit examined two periods of time.⁵⁴ The Seventh Circuit looked at the time when Tom’s Electric and Favia Electric were operating under the licensing agreement, and also when Thomas and Mary Ann were operating as T & M Electric.⁵⁵ The Seventh Circuit held that, during the course of the licensing agreement, Thomas and Mary Ann were seeking to improve their business prospects through the use of the Favia Electric name,⁵⁶ and because new customers were obtained for Favia Electric by Thomas while the licensing agreement was in effect, Thomas and Mary Ann were not trying to evade union obligations but were making pension contributions that otherwise would not have been made.⁵⁷ Further, when looking at the time when Thomas and Mary Ann were operating T & M Electric, the Seventh Circuit stated that, because the decision to terminate the licensing agreement was motivated by valid business concerns and not

48. *Id.*

49. *Favia Elec.*, 995 F.2d at 787.

50. *Id.* at 786.

51. *Id.*

52. *Id.* at 789.

53. *Id.* (quoting *Int’l Union of Operating Eng’rs. v. Centor Contractors*, 831 F.2d 1309, 1312 (7th Cir. 1987)).

54. *Favia Elec.*, 995 F.2d at 787.

55. *Id.* at 788.

56. *Id.* at 789.

57. *Id.*

an intent to avoid union obligations, T & M was not the alter ego of Favia.⁵⁸

Therefore, the Seventh Circuit agreed with the district court that the unlawful motive or intent necessary for the application of the alter ego doctrine was not present during either period.⁵⁹ The Seventh Circuit based its holding on the lack of a benefit received by Thomas and Mary Ann from the use of the Favia Electric name.⁶⁰ The Seventh Circuit held that valid business reasons existed for Thomas and Mary Ann to create the new employer.⁶¹ Consequently, the Seventh Circuit affirmed the district court's entry of judgment in favor of Tom's Electric and Thomas and Mary Ann.⁶² The alter ego test set forth by the Seventh Circuit is also followed by the First and Eighth Circuits.⁶³

B. *The "Important" Approach*

The majority of circuits have adopted the "important" approach, holding that while intent is a relevant factor to consider, a finding of anti-union motivation is not necessary.⁶⁴ For example, in 1986, the Sixth Circuit decided *NLRB v. Allcoast Transfer, Inc.*, in which the court determined that Ward Moving was the alter ego of A.E. Ward, without a determination of the defendant's intent.⁶⁵

In *Allcoast*, Robert Harris was the president, chief operating officer, and owner of A.E. Ward.⁶⁶ A.E. Ward was a trucking company that transported goods three ways: 1) under the authority of its own license issued by the Interstate Commerce Commission ("ICC"); 2) under the authority of its own license issued by the Public Utilities Commission of Ohio; and 3) as an agent for Atlas Van Lines, Inc. ("Atlas"), under the authority of an ICC license issued in Atlas's name.⁶⁷ All truck drivers employed by A.E. Ward, regardless of whether they performed Atlas business or independent business, were represented by Local 392.⁶⁸

58. *Id.*

59. *Favia Elec.*, 995 F.2d at 789.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See, e.g.,* *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir. 1983) (finding "[u]nlawful motive or intent are critical inquiries in an alter ego analysis, . . ."). *See also, e.g.,* *Iowa Express Distrib., Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir. 1984) (stating "for an alter ego finding * * * the employer must act from anti-union animus").

64. *See, e.g.,* *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986).

65. *Id.* at 583.

66. *Id.* at 577.

67. *Id.*

68. *Id.*

In 1982, Atlas adopted a new policy prohibiting companies acting as Atlas agents from having their own independent ICC licenses, which A.E. Ward possessed.⁶⁹ Atlas informed its agents that they “could either ‘shelve’ their independent operating authority or they could transfer it to a separate corporation which could operate under that authority as long as the business and equipment were not associated with Atlas.”⁷⁰ Based on Atlas’s suggestion, Harris created a new corporation to preserve A.E. Ward’s independent authorities.⁷¹ The company that Harris incorporated to operate as the Atlas agent was named Ward Moving and Storage, Inc. (“Ward Moving”).⁷² Harris transferred the Atlas agency relationship to Ward Moving to operate under Atlas’s interstate operating authority.⁷³ A.E. Ward retained its own operating authorities to transport goods.⁷⁴

In 1983, Atlas enacted a new policy stating that the name of the corporation not acting as the agent for Atlas could not be “similar to or otherwise identifiable with the name of the Atlas agent.”⁷⁵ This meant that A.E. Ward, the company no longer acting as the agent for Atlas, could not have a similar name to the company that was acting as Atlas’s agent, Ward Moving.⁷⁶ To comply with this new Atlas policy, Harris changed the name of A.E. Ward to Allcoast Transfer, Inc.⁷⁷ Allcoast succeeded to A.E. Ward’s independent authorities to transport goods, and Harris continued to be president and chief operating officer of Allcoast.⁷⁸

Following this corporate transformation, Union Local 392 (the “Union”) notified Harris that it considered both Allcoast and Ward Moving to be bound by the CBA between A.E. Ward and the Union.⁷⁹ Responding to the Union, Harris stated that A.E. Ward had changed its name to Allcoast and, therefore, only Allcoast would comply with the CBA.⁸⁰ Harris further contended that Ward Moving was not bound by the CBA because it was a completely separate corporation from A.E. Ward and Allcoast.⁸¹ The Union subsequently filed an

69. Allcoast Transfer, 780 F.2d at 577.

70. *Id.* at 577-578.

71. *Id.* at 578.

72. *Id.*

73. *Id.*

74. Allcoast Transfer, 780 F.2d at 578.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Allcoast Transfer, 780 F.2d at 578.

80. *Id.*

81. *Id.*

unfair labor practice against both Allcoast and Ward Moving.⁸² After a hearing, the administrative law judge (“ALJ”) determined that Allcoast and Ward Moving were alter egos of A.E. Ward, and each was therefore bound by the CBA entered into between A.E. Ward and the Union.⁸³ The Board affirmed the ALJ’s finding; it ordered Allcoast and Ward Moving to cease and desist from their unfair labor practices and to compensate Ward Moving employees for losses incurred due to the failure to honor the CBA.⁸⁴ The case was brought before the Sixth Circuit by the Board, which sought enforcement of its order.⁸⁵

In its determination of whether Allcoast and Ward Moving were the alter egos of A.E. Ward, the Sixth Circuit began by stating that the policy behind the alter ego doctrine is to prevent employers from evading obligations under the NLRA merely by changing or altering their corporate form⁸⁶ and the circumstances surrounding a change in corporate form must be examined to determine whether the change resulted in a “*bona fide* discontinuance and a true change of ownership” or was merely a “disguised continuance of the old employer.”⁸⁷

In *Allcoast*, Harris agreed that the *Crawford Door* factors had been met but asserted that unlawful intent on the part of the employer, either anti-union animus or intent to evade obligations under the NLRA, must also be found, and that such intent was not present in this case.⁸⁸ In response to Harris’ assertion that unlawful intent should be considered, the Sixth Circuit stated that, as the Supreme Court had not previously handled the question, it was therefore not bound by any precedent in making its decision.⁸⁹ The Sixth Circuit then looked at the approaches taken by other circuits on the issue of intent in an alter ego analysis.⁹⁰ Upon analyzing the opinions of its sister circuits, the Sixth Circuit reasoned that a finding of employer intent is not essential or prerequisite for imposition of alter ego status; instead, it is one of the relevant factors the Board can consider along with the *Crawford Door* factors.⁹¹ The Sixth Circuit stated that, rather than intent, the essential inquiry is “whether there was a *bona fide* discon-

82. *Id.*

83. *Id.*

84. *Allcoast Transfer*, 780 F.2d at 578.

85. *Id.* at 579.

86. *Id.*

87. *Id.* (citing *Southport Petroleum, Co. v. NLRB*, 315 U.S. 100, 106 (1942)).

88. *Id.*

89. *Allcoast Transfer*, 780 F.2d at 579.

90. *Id.* at 579-581.

91. *Id.* at 581.

tinuance and a true change of ownership . . . or merely a disguised continuance of the old employer.”⁹²

In rejecting Harris’s argument that the Board must find an intent to evade union obligations before imposing alter ego status, the Sixth Circuit stated that its rejection advanced the purpose of the alter ego doctrine, which is to prevent employers from evading obligations under the NLRA by merely changing or altering their corporate form.⁹³ The Sixth Circuit further stated that if a finding of intent were required, an employer who desires to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation’s structure based on some legitimate business reason, retaining essentially the same business and utilizing the change to escape the unwanted obligations.⁹⁴ Therefore, the Sixth Circuit reasoned that its flexible approach would discourage such attempts at circumvention by allowing the Board to weigh all of the relevant factors, instead of requiring it to always show employer intent.⁹⁵

Applying the above framework to the facts of the case, the Sixth Circuit held that Ward Moving was the alter ego of A.E. Ward.⁹⁶ The Sixth Circuit began with the *Crawford Door* factors and made the following findings: the two enterprises had substantially identical management and supervisors,⁹⁷ the business purpose and operations of the two were substantially identical,⁹⁸ and the equipment was substantially identical.⁹⁹ In conclusion, the Sixth Circuit held that “[w]hen the circumstances so strongly support a finding of alter ego status, as they do here, the Board can properly weigh all of the relevant factors and infer that the employer intended to evade union obligations.¹⁰⁰ An inquiry into employer intent may be appropriate in other situations involving application of the alter ego doctrine but here it simply is not necessary.”¹⁰¹ Although the Sixth Circuit did not determine Harris’s intent, the court did state that the record revealed anti-union animus

92. *Id.* (quoting *Southport Petroleum*, 315 U.S. at 106).

93. *Id.* at 582.

94. *Allcoast Transfer*, 780 F.2d at 582.

95. *Id.*

96. *Id.* Harris did not dispute that Allcoast was the alter ego of A.E. Ward and, therefore, the Sixth Circuit was left only to determine if Ward Moving was the alter ego of A.E. Ward. *Id.*

97. *Id.* Harris always managed A.E. Ward, and he also managed both Ward Moving and Allcoast. *Id.*

98. *Id.* A.E. Ward and Ward Moving operations were essentially the same; they both performed moving services for Atlas. *Id.*

99. *Allcoast Transfer*, 780 F.2d at 582. Ward Moving primarily obtained its equipment from A.E. Ward and leased the original A.E. Ward trucks from Allcoast. *Id.*

100. *Id.* At 583.

101. *Id.*

on the part of Harris, showing that Harris saw a change in corporate structure as an opportunity to evade unwanted obligations under the NLRA.¹⁰²

Therefore, finding that Ward Moving satisfied the *Crawford Door* factors, the Sixth Circuit concluded that Ward Moving was the alter ego of A.E. Ward.¹⁰³ Although the Sixth Circuit stated that intent could be considered in an alter ego analysis, it did not take into account Ward Moving's intent to evade union obligations in concluding that it was the alter ego of A.E. Ward.¹⁰⁴ Consequently, the Sixth Circuit granted enforcement of the Board's order, requiring Allcoast and Ward Moving to compensate Ward Moving employees for losses incurred due to the failure to honor the CBA and to post the appropriate notice.¹⁰⁵ A majority of circuits that have ruled on the issue adhere to the approach taken by the Sixth Circuit, which is that employer intent is only a relevant factor in an alter ego analysis.¹⁰⁶

C. The "Foreseeable" Approach

The Fourth Circuit is the sole circuit that follows the "foreseeable" approach.¹⁰⁷ In an alter ego analysis, the Fourth Circuit begins by asking whether substantially the same entity controls both the old and new employer.¹⁰⁸ If this control exists, the Fourth Circuit will then determine whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations.¹⁰⁹ In 1987, the Fourth Circuit decided *Alkire v. NLRB*, in which the court found that Mountaineer Hauling and Rigging, Inc. ("Mountaineer") was not the alter ego of Alkire.¹¹⁰

In *Alkire*, Denzil Alkire, a sole proprietorship, operated a trucking business hauling coal in and around West Virginia.¹¹¹ Prior to 1977, approximately ninety percent of Alkire's business was hauling coal for the Badger Coal Company, which was a union company; the other ten percent of Alkire's business consisted of non-union hauling.¹¹² In late 1977, a nationwide coal strike virtually shut down Alkire's hauling op-

102. *Id.*

103. *Id.*

104. *Allcoast Transfer*, 780 F.2d at 583.

105. *Id.* at 578.

106. *See* Gary Alan MacDonald, *supra* note 1, at 1045.

107. *Id.*

108. *See* *NLRB v. McAllister Bros., Inc.*, 819 F.2d 439, 444 (4th Cir. 1987) (citing *Alkire v. NLRB*, 716 F.2d 1014, 1020 (4th Cir. 1983)).

109. *Id.*

110. *See* *Alkire*, 716 F.2d at 1016.

111. *Id.*

112. *Id.*

erations, and he informed his employees that he was dissolving his business for economic reasons.¹¹³ Alkire thereafter began looking for a way to divest himself of his hauling operations.¹¹⁴

Two months after the strike, a former driver for Alkire formed a company called Mountaineer.¹¹⁵ Alkire and Mountaineer soon entered into a sale and lease agreement, in which Mountaineer acquired the assets of Alkire's trucking business.¹¹⁶ However, before Mountaineer's loan was effective, the parties agreed that Mountaineer would lease the vehicles and equipment from Alkire, with Alkire remaining responsible for taxes, licenses, and loan payments.¹¹⁷ The sales agreement also provided that, before the loan was effective, Alkire would receive the net profits from the business, as well as a weekly consulting fee.¹¹⁸

Upon the ending of the coal strike in early 1978, Mountaineer began hauling union coal, principally to the same customers as Alkire, including Badger.¹¹⁹ Mountaineer hired back many of the drivers who had worked for Alkire prior to the strike but refused to hire some of Alkire's former employees who sought work.¹²⁰ Later in the year, Mountaineer informed Alkire that his loan had been cancelled, thus Alkire sold his trucking business assets to another party.¹²¹

The Board filed a complaint, which listed nine individuals that Alkire and Mountaineer failed and refused to recall from layoff.¹²² The Board found, based upon Alkire's continued involvement in the business, that Mountaineer was the alter ego of Alkire.¹²³ The Board then stated that Mountaineer was under a duty to reinstate each of Alkire's drivers who wanted to return to work, and it ordered back pay for the individuals that Mountaineer failed to hire back.¹²⁴ Alkire appealed the Board's order to the Fourth Circuit.¹²⁵

In its analysis as to whether Mountaineer was the alter ego of Alkire, the Fourth Circuit began by setting forth the policy underlying the alter ego doctrine, which is to prevent an employer from gaining

113. *Id.*

114. *Id.* at 1016-17.

115. Alkire, 716 F.2d at 1016.

116. *Id.*

117. *Id.* at 1017.

118. *Id.*

119. *Id.*

120. Alkire, 716 F.2d at 1017.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Alkire, 716 F.2d at 1017.

an unearned advantage in its labor activities simply by altering its corporate form; the doctrine will treat two nominally separate business entities as if they were a single continuous employer, when appropriate.¹²⁶

After a review of the decisions from other circuits, the Fourth Circuit determined that one emphasis in each of those cases was whether the owners of the original business entity obtained a benefit from transferring business operations to another entity that the original business entity also controlled.¹²⁷ The Fourth Circuit thereafter set forth the test to apply in an alter ego analysis.¹²⁸ Initially, the Fourth Circuit would determine whether substantially the same entity controlled both the old and new employer.¹²⁹ If this control existed, the Fourth Circuit would then determine whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations.¹³⁰

In support of this approach, the Fourth Circuit stated that without a reasonably foreseeable benefit to the employer, the transfer of ownership is *bona fide*.¹³¹ The Fourth Circuit reasoned that, “[t]o the extent that obtaining the benefit was a motive for the transfer, or was a reasonably foreseeable effect, the result represents a disguised continuance of the old employer.”¹³² Also, in explaining its reasoning for not requiring an intent element, the Fourth Circuit reasoned that, although the court in *Southport Petroleum* indicated that a disguise intended to evade the labor laws was a sufficient condition to impose alter ego status, it did not decide whether such an intent was necessary.¹³³

In *Alkire*, the Fourth Circuit determined that no economic benefit was obtained or reasonably expected by Alkire in the transfer, and therefore, Mountaineer was not the alter ego of Alkire for two reasons.¹³⁴ First, the Fourth Circuit explained that Alkire retained no interest or benefit from the continued operation of the business other than the sale price obtained from Mountaineer.¹³⁵ Second, although the Fourth Circuit recognized that Alkire was to receive all of the net

126. *Id.* at 1018.

127. *Id.* at 1019.

128. *Id.* at 1020.

129. *Id.*

130. *Alkire*, 716 F.2d at 1020.

131. *Id.*

132. *Id.*

133. *Id.* at 1018 (citing *Southport Petroleum, Co. v. NLRB*, 315 U.S. 100, 106 (1942)).

134. *Id.* at 1021.

135. *Alkire*, 716 F.2d at 1021.

profit in return for renting equipment to Mountaineer prior to Mountaineer obtaining the loan, the Fourth Circuit found that since this provision of the sale agreement was to protect Alkire before the loan was effective, Alkire remained responsible for payment and, as a result, did not receive a benefit involving Alkire's labor obligations.¹³⁶

Therefore, the Fourth Circuit concluded that there was no basis upon which one may reasonably conclude that Alkire received or expected any benefit in the transaction.¹³⁷ Consequently, finding that Alkire's termination of the business was bona fide, the Fourth Circuit denied enforcement of the Board's order to reinstate the union members who had been employed by Alkire.¹³⁸

IV. ANALYSIS AND PROPOSAL

A. *The "Necessary" Approach*

Under the "necessary" approach, a finding of intent to evade union obligations is necessary in order to find the successor company the alter ego.¹³⁹ Courts that follow the "necessary" approach do so because of their interpretation of *Southport Petroleum*.¹⁴⁰ This approach thus seems most consistent with Supreme Court precedent, as the Court in *Southport Petroleum* clearly included intent to evade in the alter ego test.¹⁴¹

Despite its attempt at following Supreme Court precedent, the "necessary" approach does not provide the best framework for an alter ego analysis for two reasons. First, as the Sixth Circuit pointed out in *Allcoast*, to require a finding of employer intent may enable an employer who desired to avoid union obligations to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business and utilizing the change to escape the unwanted obligations.¹⁴² Thus, an employer who had not previously shown any outward anti-union sentiment could avoid its union obligations by forming a new company and could cite a legitimate business purpose, such as financial difficulties, as its justification. In this instance, although the *Crawford Door* factors

136. *Id.*

137. *Id.* at 1022.

138. *Id.* at 1016.

139. *See, e.g., Iowa Express Distrib., Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir. 1984).

140. *See, e.g., Trs. of the Pension, Welfare & Vacation Fringe Benefit Funds of IBEW Local 701 v. Favia Elec. Co.*, 995 F.2d 785, 788 (7th Cir. 1993).

141. *See Southport Petroleum, Co. v. NLRB*, 315 U.S. 100, 106 (1942).

142. *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir. 1986).

would likely be met, the successor employer would not be considered the alter ego because intent would be too difficult to prove.

Second, the circuits adhering to the “necessary” approach have given little guidance on how intent to evade is to be determined, and therefore, this approach fails for lack of guidance in its application. Courts applying the “necessary” approach have determined that intent to evade union responsibilities can be shown when the employer is found to have made anti-union statements.¹⁴³ However, outside of anti-union statements by an employer, it is unclear what other ways intent to evade can be established. Thus, in contrast to *Alkire*, where an employer could circumvent the alter ego doctrine by not making any outward anti-union statements, an employer who has made anti-union statements outside the context of forming a new company could be found to be the alter ego, even though he has a legitimate business reason for doing so and lacks an intent to evade the union.¹⁴⁴

B. *The “Important” Approach*

Under the “important” approach, intent is a relevant factor to consider, but a finding of anti-union motivation or intent is not necessary in an alter ego analysis.¹⁴⁵ Courts have articulated two reasons for favoring the “important” approach.

First, it provides a way to prevent employers who seem to have legitimate business reasons from altering their structure in order to evade their union obligations.¹⁴⁶ As stated in *Allcoast*, by applying all of the relevant factors in an alter ego analysis, including intent, employers will not be able to avoid union obligations simply by setting forth a valid business reason for their change in structure.¹⁴⁷ These circuits have concluded that the alter ego analysis should be flexible.¹⁴⁸

Second, the circuits that follow the “important” approach also rely on the fact that, although anti-union motivation may be a sufficient

143. *See, e.g., Iowa Express*, 739 F.2d at 1311. “Most importantly, as the administrative law judge noted, “Walker had expressed an attitude toward his unionized employees from which one could conclude that he would have gone to almost any length to achieve his objective in regard to them.” *Id.*

144. *See Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983).

145. *See, e.g., Allcoast Transfer*, 780 F.2d at 581-82.

146. *Id.*

147. *Id.*

148. *Id.* (citing *Goodman Piping Prods., Inc. v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984) (“[T]he cases explain that the test of alter ego is flexible.”); *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982) (“In an alter ego analysis, “[n]o factor is controlling and all need to be present.”); *NLRB v. Tricor Prods., Inc.*, 636 F.2d 266, 270 (10th Cir. 1980) (“There is no hard and fast rule.”)).

basis for imposing alter ego status, *Southport Petroleum* did not establish that anti-union motivation is necessary.¹⁴⁹

However, the “important” approach is not the best approach for two reasons. First, the “important” approach fails to properly follow Supreme Court precedent. Although the circuits that have adopted the “important” approach correctly find that *Southport Petroleum* did not affirmatively state whether intent was “critical” in an alter ego analysis,¹⁵⁰ they fail to adhere to the precedent of *Southport Petroleum*, which clearly states that “intent” is to be included.¹⁵¹ The relevant language from *Southport Petroleum* is “[w]hether there was a *bona fide* discontinuance and a true change of ownership . . . or merely a disguised continuance of the old employer”¹⁵² The language from *Southport Petroleum* therefore necessitates that intent is not just a factor to be considered, but it must be proven in order to find alter ego status.¹⁵³

Second, by not requiring intent, an employer who altered the corporate structure for a legitimate business reason, such as financial difficulties, would be found to be the alter ego if only the *Crawford Door* factors were satisfied. However, satisfying the *Crawford Door* factors merely determines whether the same entity controls both the old and new employer,¹⁵⁴ and not whether the successor employer is a “disguised” continuance.

Accordingly, the “important” approach is not the best approach because it is inconsistent with Supreme Court precedent since it does not require an intent element.¹⁵⁵ Also, by not requiring an intent element, a successor employer can be found to be the alter ego merely by being controlled by the same entity, which is against the purpose of the alter ego doctrine to prevent employers from “evading obligations” under the NLRA merely by changing or altering their corporate form.¹⁵⁶ Finding a successor employer to be controlled by the same entity does not prove that the new entity was established to “evade” obligations.

149. *Goodman Piping Prods.*, 741 F.2d at 12.

150. *Id.* at 10.

151. *See id.* at 11-12 (holding that defendant was the alter ego based upon it meeting the *Crawford Door* factors.) In making only intent a factor to consider, the courts, as in *Goodman Piping*, can choose not to consider intent, which flies in the face of the language from *Southport Petroleum*.

152. *Southport Petroleum, Co. v. NLRB*, 315 U.S. 100, 106 (1942).

153. *Id.*

154. *See, e.g. NLRB v. McAllister Bros., Inc.*, 819 F.2d 439, 444 (4th Cir. 1987) (citing *Alkire v. NLRB*, 716 F.2d 1014, 1020 (4th Cir. 1983)).

155. *See, e.g., Allcoast Transfer*, 780 F.2d at 581-82.

156. *See id.* at 579.

C. *The "Foreseeable" Approach*

Under the "foreseeable" approach, courts look to see whether substantially the same entity controls both the old and new employer, and if so, the court looks to see whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations.¹⁵⁷ The Fourth Circuit, the lone circuit that follows the "foreseeable" approach, has set forth two reasons in support of following this approach.

First, as with circuits following the "important" approach, the Fourth Circuit stated that, "[a]lthough the Court in *Southport Petroleum* . . . indicated that 'a disguise intended to evade' the labor law was a sufficient condition to impose alter ego status, . . . it did not decide whether such an intent was necessary to that determination."¹⁵⁸

Second, the Fourth Circuit stated that "[i]f the employer obtains no benefit from the transfer, . . . and none was reasonably foreseeable, nothing in labor policy justifies preventing it from arranging its affairs as it sees fit."¹⁵⁹ The Fourth Circuit based its reasoning on the observation that other circuits that have covered the alter ego doctrine all seem to include some type of test for a foreseeable benefit to the employer, even if foreseeability is not the focus of those tests.¹⁶⁰

However, the "foreseeable" approach is not the best approach for two reasons. First, as with the "important" approach, it is inconsistent with Supreme Court precedent, set forth in *Southport Petroleum*, that employer intent to evade is included in an alter ego analysis.¹⁶¹

Second, it is unclear whether the Fourth Circuit would allow an employer to escape alter ego status if the employer had a legitimate business reason for making a change in corporate form that also resulted in a benefit related to eliminating labor obligations.¹⁶² By not requiring an intent element, an employer with no anti-union motivation and a valid business purpose could be determined the alter ego under the "foreseeable" approach.

D. *Proposal: The Modified "Foreseeable" Approach*

This article argues that the circuits should adopt the modified "foreseeable" approach.

157. *McAllister Bros.*, 819 F.2d at 444 (citing *Alkire*, 716 F.2d at 1020).

158. *Alkire*, 716 F.2d at 1018 (citing *Southport Petroleum*, 315 U.S. at 106).

159. *Id.* at 1021.

160. *Id.* at 1020-21.

161. *Southport Petroleum*, 315 U.S. at 106.

162. See Gary Alan MacDonald, *supra* note 1, at 1050.

When business operations are transferred, the initial question is whether the old and new employer are the same employer in fact, given the Board's consideration of the following factors: substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.¹⁶³ If the employers are determined by the Board to be in reality the same employer, then the inquiry must turn to whether the employer acted with an unlawful motive or intent related to the elimination of its labor obligations.¹⁶⁴ Intent may be shown by any of the following: 1) anti-union animus; 2) a foreseeable benefit obtained by the employer regarding the elimination of its CBA obligations; or 3) a desire by the employer to avoid its CBA obligations, even if the employer was motivated by other factors, as well.

Based upon the shortcomings of the "necessary," "important," and "foreseeable" approaches, the circuits should adopt a modified version of the "foreseeable" approach for two reasons.

First, the modified "foreseeable" approach succeeds where the other approaches fail. Intent may be difficult to prove where an employer, without previously displaying anti-union animus, alters the corporate structure based on some legitimate business reason.¹⁶⁵ By applying a broader test, where employer motivation and intent can be determined by more than a showing of prior anti-union animus, employers who have not previously exhibited negative behavior towards the union can be found to be the alter ego when their intent can be shown by the foreseeable benefit they received. Further, by requiring more than a foreseeable benefit, the modified "foreseeable" test ensures that employers who change their corporate structure without an intent to evade, and also receive a foreseeable benefit from this transfer, will not be determined the alter ego.

Second, the modified "foreseeable" approach is most consistent with Supreme Court precedent as set forth in *Southport Petroleum*.¹⁶⁶ Although the circuits have correctly recognized that *Southport Petroleum* did not decide whether such intent was necessary to an alter ego determination,¹⁶⁷ the plain language of *Southport Petroleum* demands that employer intent to evade union obligations must be included in

163. See Alkire, 716 F.2d at 1020.

164. See *id.*

165. See, e.g., *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986).

166. Although the "necessary" approach may be the best approach from the plain language of *Southport Petroleum*, its overall approach fails when compared to the modified "foreseeable" approach. See *supra* Part III.A.

167. See, e.g., Alkire, 716 F.2d at 1018.

an alter ego determination.¹⁶⁸ By including employer motivation and intent in the alter ego analysis, the modified “foreseeable” approach is the best approach in determining whether a “*bona fide* discontinuance” or a “disguised continuance” occurred.¹⁶⁹

V. CONCLUSION

The circuits are split three ways regarding what role an employer’s motive should play in finding a successor employer to be the alter ego of its predecessor. The First, Seventh, and Eighth Circuits have adopted the “necessary” approach.¹⁷⁰ In determining whether a successor employer is the alter ego, these circuits state that a finding of intent to evade union obligations is necessary in an alter ego analysis.¹⁷¹ The approach taken by the Second, Third, Fifth, Sixth, Ninth, Tenth, District of Columbia Circuits, is the “important” approach.¹⁷² This approach states that although intent to thwart a Board order or statutory requirement is an important criteria, a showing of employer intent is not required in an alter ego analysis.¹⁷³ The Fourth Circuit takes the approach that, rather than intent to evade labor obligations, the test should look to determine whether the successor employer gained a foreseeable benefit.¹⁷⁴

This Article argues that courts should adopt a modified “foreseeable” approach. This approach allows the courts to take into consideration different reasons for an employer creating a new company, and it is therefore not as restrictive as the other three approaches. In doing so, this approach provides the best guidance to the courts when determining whether an employer is an alter ego.

The modified “foreseeable” approach has two benefits over the other approaches courts have taken to the issue. First, this approach will prevent an employer from circumventing the alter ego doctrine by altering the corporation’s structure based on some legitimate business reason, and it will also protect an employer who changes its corporate structure based on some legitimate business reason. By including that intent may be shown by a foreseeable benefit related to the elimination of labor obligations, the proposed approach would eliminate the ability to evade in this way. Second, by still requiring that intent be

168. *See generally*, Southport Petroleum, 315 U.S. 100 (1942).

169. *See supra* Part III.A-B (discussing the test from Southport Petroleum and how it should be interpreted).

170. *See supra* note 31 and accompanying text.

171. *Id.*

172. *See supra* note 33 and accompanying text.

173. *Id.*

174. *See supra* note 35 and accompanying text.

shown, this approach best adheres to the precedent set forth in *Southport Petroleum*.

For these reasons, it is clear that a modified “foreseeable” approach is the best method. This approach is the best option to ensure that companies do not use a change in business form to evade obligations under a CBA.