INTRODUCTION

The corporate reorganization problem is a potpourri of items which we at GM have systematized under a “due diligence” checklist. The first basic inquiry is the nature of the reorganization we are studying. The major division is into the asset acquisition or stock purchase categories.

As a general proposition from the employment law context, the asset acquisition is an easier transition for the acquiring company, and is less apt to lead to complications with either the policies or the practices of the acquired company. Stock transitions are more complex, particularly in the benefit area. Again, as a general proposition, benefit plans would not be assumed in asset purchases without specific direction.
I

OVERVIEW OF GENERAL MOTORS REORGANIZATIONS

General Motors has taken a particular approach in a number of reorganizations in the last several years. One generalized proposition that we have followed is that whatever the nature of the reorganization, we have established a two-year grace period for the benefit of our employees. If the surviving company does not live out the two years, the employees would be reinstated to their General Motors benefits.

Whether you are the acquired or the acquiring company, it is very important to determine what you want out of the reorganization. Do you merely want the assets? Do you want an ongoing business? Do you want the people involved either in the acquired or the acquiring company? Do you want some survival of the business as such?

For example, in our sale of our heavy-duty truck business, the surviving entity, GM-Volvo, was very definitely interested in our engineering capability and our merchandising capability. The enterprise therefore wanted the people, and the benefit plans were fashioned accordingly. In contrast, in the NUMMI\(^1\) joint venture, in Fremont, California, our Japanese partner wanted to start afresh with the salaried work force. They did want the hourly work force, and that influenced the entire approach of the Japanese to that venture.

To accomplish your objectives, fashion an employment matrix. In doing so, however, you should at least be aware of the nonbargaining unit equivalent of *National Car Rental*.\(^2\) You really have to allow for some percolation time, if you are going to change policies or practices that are in effect. The standard admonition that all of you would issue to clients, that you can not change a policy on Friday and effectuate it on Monday, would apply.

It is extremely important for the acquiring company to have an experienced labor lawyer on the due diligence team. Specifically, the company should have someone well-schooled in the ERISA and tax-related implications of the benefit policies in order to study the benefit plans of the acquired company knowledgeably.

We use, incidentally, a fairly simple checklist. We require both personnel and legal experts to check staffing. The most important input is in the benefit/pension area where liabilities are greatest. For unrepresented employees, a thorough search must be made to determine if there are any employment agreements concerning the executives of the acquired com-

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1. New United Motors Manufacturing, Inc.
2. NLRB v. National Car Rental Sys., Inc., 672 F.2d 1182 (3d Cir. 1982), enforcing 252 N.L.R.B. 159 (1980). In *National Car Rental*, the court upheld the Board's finding that where the opportunity for meaningful effects bargaining was foreclosed by the employer, the employer violates the duty to bargain.
pany and the extent of liabilities created by them. This is important from a financial standpoint, but even more so from a management perspective. In some instances, the acquiring company may wish to extend employment agreements to the executives. If you do, you want to consider such things as who the contracting party will be, the term, level of compensation, and such items as the right to relocate, the right to terminate, non-competition clauses, arbitration, and the like.

Golden parachutes should also be checked. They are, however, pretty much in disfavor at the moment because of the Deficit Reduction Act of 1984, which do not outlaw golden parachutes but make them tax disadvantageous both to the executive, with a twenty-percent excise tax penalty, and to the company which is denied tax deduction. We also give consideration to noncompetition agreements and the enforceability of these agreements under applicable state laws. In addition, severance payments must be evaluated. Although this problem is not as serious as it is in Europe, the personnel policies of the acquired company must be reviewed to determine if there is any obligation to pay severance payments. Sloppily worded policies might obligate the acquiring company to pay even when there is a mere change in ownership. The personnel policies as well as the employment agreements must be carefully reviewed by people schooled in this area. The acquiring company should obviously review all of the personnel policies and manuals to determine its obligations under employment-at-will.

An additional party of due diligence is a review of all open law suits and charges. Be sure that people competent to judge potential liability do the review. Do not rely on reserves of acquired company. For example, in EEOC v. Macmillan Bloedel Containers, Inc., the court held that a successor corporation can be held liable for acts of discrimination by its predecessor if the successor has notice, can provide relief, and there is substantial continuity of business operations—our old friend. So you do want to check out the civil rights aspects.

For represented employees, the checklist is slightly different. You should consider the necessity of notice to unions under state law and the existing bargaining agreements, and review the successorship clauses. Review the labor history, including ongoing grievances and arbitrations and contract expiration dates. Finally, section 301 suits should also be checked. Obviously, as you check the litigation dockets from a labor standpoint, what is most important to you would be either class action

3. 26 U.S.C. § 280G (Supp. IV 1986). But see Wall St. Journal, May 13, 1987, at 1, col. 5, stating that “[p]rivately held corporations are exempted from the penalties retroactively, and also reasonable compensation for services under any continued employment contract, not severance pay, is exempt from penalty under certain conditions.”

4. 503 F.2d 1086 (6th Cir. 1974).
suits or suits which might threaten injunctive relief affecting the operations of the enterprise.

II

RECENT GENERAL MOTORS EXPERIENCE

A. GM-Toyota Joint Venture

The restructuring of the General Motors facility at Fremont, California, is a recent example of an innovative approach to corporate governance and staffing. In establishing NUMMI, GM and Toyota used a joint-venture approach with Toyota the dominant partner from a management standpoint. After the venture was formed, extensive discussions with the UAW followed. From the beginning, it was recognized that the principal source of workers for NUMMI would be the laid off workers.

Obviously, the problem of successorship was carefully studied both from a labor law standpoint and from the perspective of internal union governance. A letter-of-intent approach was used by the UAW and the joint venture. The following language was included in the joint venture in reference to the future work force:

The Joint Venture commits itself to utilize the former Fremont workers as the primary source for the Joint Venture work force. While utilizing this source for recruitment, the Joint Venture retains the right to utilize other sources if it is found that such actions are necessary to achieve the best operations or to obtain the required skills. It is further agreed, however, that with the exceptions noted above, the Joint Venture will hire its work force from among the former Fremont workers.

Also relevant was this provision:

In the event that the action taken by the Joint Venture involves hiring from a source other than the former Fremont workers, and the UAW is not satisfied with the Joint Venture's explanation and still believes the candidate to be treated unfairly, the matter may be referred to a committee to be established jointly by the parties after the commencement of hiring. The Committee will have the responsibility to review the positions of both parties and submit its recommendations to the Joint Venture management for implementation.

As far as the GM-UAW agreements are concerned, there was a specific repudiation:

The parties recognize that all of the UAW's former agreements with General Motors Corporation (GM) covering former GM employees at its operations at Fremont, California, including all local agreements, are null and void and of no force and effect with respect to the Joint Venture Company. Based upon the written representation made by W.J. Usery to the UAW, the UAW acknowledges and agrees that the Joint Venture Company is in no way a joint or integrated employer with, or alter ego of, GM; rather the Joint Venture Company is a wholly new and distinct
entity without any obligation under any GM contract and without any prior relationship with the UAW. The UAW covenants that, without specific written approval of the Joint Venture Company, it will not take a position contrary to the foregoing in any form. In the event any person or entity, including a UAW Local Union, takes such a contrary position, the UAW will use its best efforts to oppose actively such position.

In fact, the joint venture did hire most of its production and maintenance workers from the former GM work force. There were some rumblings about premature recognition, but no challenge was brought.

B. Saturn

The innovative Saturn agreement found its origin in the recession of the early 1980s when General Motors and the UAW first discussed the possibility of building a small car in the United States. The problems with building the car included labor costs and the competitive disadvantage of the U.S. industry, both in terms of cost and productivity. Cooperation on a project such as this was certainly unique in light of the GM-UAW history.

It was finally determined by the parties that they would establish, and in fact did establish, a resource center staffed ultimately by ninety-nine representatives from the Union and Management. Management people included everything from floor supervisors to plant managers to labor reps. The Union representatives reflected the full range of skills and abilities in the represented work force, everything from stewards to assemblers to skilled trades people. They were detached from work and challenged with only one mandate from the parties, to determine if there is a different, a new way to approach the problem of building the car.

Out of this resource center developed two lengthy reports which covered a variety of subjects including practically all of the traditional collective bargaining areas of discussion. It was results of the resource center work which ultimately caused both Management and the UAW to approve continued discussions on the Saturn project.

The successful resource center approach led to a unique collective bargaining process in Saturn. The collective bargaining team was composed of six people, three from the Union and three from Management. A facilitator acceptable to both parties was named and advisors were brought in as and when needed. The six person team, again without any guidance or direction from either the Union or Management and only with the resource center work in hand, met and developed the Saturn collective bargaining agreement.

They used a very different approach—a consensus approach where specific issues were developed by two-person teams from within the six. Results of their deliberations were taken to the six-person team for final consensus approval.
Obviously, the successorship problem was considered and the following language from the agreement was used in terms of recognition:

From the outset, the Saturn project has been a joint effort of both Union and Management. The success of Saturn is fully dependent on its people. Hiring and retention of experienced, dedicated personnel is essential. It is recognized that the best source of such trained automotive workers is found in the existing GM-UAW work force. Therefore, to insure a fully qualified work force, a majority of the full initial complement of operating and skilled technicians in Saturn will come from GM-UAW units throughout the United States and be hired as Saturn members.

During the period of organization and start-up, certain particular skilled personnel will be required, including operating technicians and skilled technicians, virtually all of whom will come from UAW-represented units; therefore, the UAW is recognized as the bargaining agent for the operating and skilled technicians in the Saturn manufacturing complex.

It was important that Saturn start fresh and not be bound by prior agreements, so the following language was adopted:

Saturn will adopt a separate, freestanding, Agreement that will govern bargaining unit Saturn employees. The provisions of the current or any subsequent GM-UAW National Agreement will have no bearing on Saturn unless expressly adopted by consensus agreement of the Saturn parties.

Reflecting the unusual approach, but central to Saturn was the mission and philosophy both of which are memorialized in the agreement.

We believe that all people want to be involved in decisions that affect them, care about their jobs and each other, take pride in themselves and in their contributions and want to share in the success of their efforts.

Fundamental to the Saturn philosophy is the shared belief that meeting the needs of people, customers, Saturn members, suppliers, dealers and neighbors is fundamental to fulfilling the Saturn mission.

The mission of Saturn is to market vehicles developed and manufactured in the United States that are world leaders in quality, cost and consumer satisfaction through the integration of people, technology and business systems and to transfer knowledge, technology and experience throughout General Motors Corporation.

In addition, all employees are compensated on a salaried basis, a problem-solving (grievance) procedure with final and binding arbitration is established, health care will be HMO or PPO and individual retirement accounts will be established.

The recognition of the UAW for GM’s Saturn Corporation subsidiary presents a somewhat novel approach to prehire recognition. Prehiring recognition had been approved in the Supreme Court’s Burns
decision where a new employer takes over a unionized business and it is "perfectly clear" that the new employer "plans to retain" all or a significant number of the predecessor's employees so that they will constitute a majority of the new employer's work force. The new employer is obligated to recognize the union as soon as it is apparent that the union will represent the new work force. As noted, this obligation arises whenever the intent to hire predecessor employees becomes "perfectly clear," not necessarily only when there is actual hiring. Thus, it can arise before the work force is hired.

In Saturn it was "perfectly clear" that GM planned and had agreed to give a hiring preference to employees now in GM-UAW units and there is a strong likelihood that these employees will constitute a majority of the employees at the new facility. This likelihood of majority status was sustained by the Board for the reason that GM has over 420,000 UAW-represented employees waiting to apply at Saturn, plus, at the time of the charge, approximately 20,000 UAW-represented employees on layoff status. Moreover, the Saturn Agreement gives favorable treatment to such UAW-represented employees in that it preserves certain existing pension rights and provides comparable wages with opportunities for productivity bonuses. Saturn's position was further buttressed by the viewpoint shared by many that Saturn is an experimental venture in union-management relations and, therefore, "worth getting into on the ground floor." A GM-commissioned poll of a representative sample of skilled and operating technicians at two GM facilities represented by the UAW revealed that some 114,000 to 145,250 GM skilled and unskilled workers would be willing to consider working for Saturn Corporation in Springhill, Tennessee.

Although in Burns the employer purchased a facility and operated it in the same manner and at the same place, while Saturn involved a new and different operation and a new and different location, the Board and the courts have consistently focused on the intent of the employer and to the composition of its work force. Once the NLRB determined that it was perfectly lawful to engage in collective bargaining with the UAW as to the effects of Saturn on its UAW-represented employees, then it became similarly lawful to memorialize those discussions in the form of a Saturn Agreement. As in the case of Kroger Co., recognition of the UAW at the Springhill facility and the operation of the Saturn Agreement must be supported by a UAW demonstration of majority status among the Saturn employees.

INTRODUCTION

Successorship law can best be described as falling into four main categories or major issues. Two of them are of a transitional nature, and two have a lasting effect on the buyer in a transaction.

The first issue is whether a successor employer must arbitrate with its predecessor’s union under its predecessor’s collective bargaining agreement. This is the Wiley,7 Howard Johnson8 line of cases.

The second issue is whether a successor employer must be responsible for remedying its predecessor’s unfair labor practices. This is the Golden State Bottling9 line of cases.

The third issue has two parts: 1) whether a successor employer is obligated to recognize and deal with the predecessor’s union, and

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2) whether such an employer is obligated to honor the predecessor’s collective bargaining agreement.

The fourth issue deals with successors and assigns clauses in collective bargaining agreements. The issue is the impact such a clause has on the buyer, on the seller, and on the transaction.

As background, one must discuss the concept of “successor.” One might assume by this time, more than two decades after the Supreme Court started to decide these cases, that the concept of successor would be well defined and would apply across the board in all these categories of issues. Those would be incorrect assumptions. As the Supreme Court stated in the *Howard Johnson* case, “there is, and can be, no single definition of ‘successor’ which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.”

**I**

**Successor Employer’s Duty to Arbitrate Under the Predecessor’s Collective Bargaining Agreement**

The first issue as previously mentioned is represented by the *Wiley*, *Howard Johnson* line of cases. This started back in 1964 in a bizarre case known as *Wiley*, where the Court held that the buyer of a business could, under certain circumstances, be required to arbitrate with the predecessor’s or seller’s union under the seller’s collective bargaining agreement.

In this case, a company called Interscience merged into Wiley. It was a statutory merger, and virtually all of Interscience’s employees went to work for Wiley. The Court held, primarily for that reason, that there was a substantial continuity in the employing entity; therefore, the successor, Wiley, had to arbitrate under the seller’s contract. The arbitrator then required Wiley to honor the seller’s contract for four months until the Interscience work force was moved to the Wiley plant and merged with the Wiley work force. This result is entirely contrary to the concept of *Burns*, which is discussed below. Moreover, this decision flies in the face of the concept of exclusive recognition, which is embedded in the NLRA. This is evident from the Court’s statement:

12. *Id*.
15. 29 U.S.C. § 159(a) (1982) provides: "Representatives designated or selected for the pur-
the fact that the union does not represent a majority of the appropriate bargaining unit in Wiley does not prevent the union from representing the employees who are covered by the agreement.\textsuperscript{16}

This decision has been an embarrassment to the Supreme Court, which has endeavored to distinguish it ever since. The same issue arose ten years later in the \textit{Howard Johnson} case.\textsuperscript{17} In that case, Howard Johnson bought the assets of a restaurant and motor lodge and continued to operate them, but it hired few of the employees who previously worked there. The employer argued that the intervening decision in \textit{Burns}\textsuperscript{18} is totally inconsistent with \textit{Wiley}; therefore, it should not be required to arbitrate.\textsuperscript{19}

The Supreme Court, in \textit{Howard Johnson}, acknowledged openly that the rationale of \textit{Wiley} was suspect and was in conflict with \textit{Burns}.\textsuperscript{20} However, the Supreme Court simply distinguished the case because Howard Johnson had not hired a large number of the predecessor's employees.\textsuperscript{21}

So \textit{Wiley} has not been overruled, although the stage has been set for \textit{Wiley} to be overruled the next time the issue is squarely presented to the Court. Nevertheless, \textit{Wiley} does remain law and must be considered whenever a company acquires an operation that has a collective bargaining agreement. Otherwise, the buyer may have a very unpleasant surprise, especially if told by its attorneys that it will not be obligated to honor the collective bargaining agreement after the transaction—which, in itself, is correct. But a very important caveat should also be added to the advice. In addition, a buyer should seek an indemnification from liability under the \textit{Wiley} line of cases in the transaction documents.

\section*{II

\textbf{Successor Employer's Responsibility for Predecessor's Unfair Labor Practices}}

The second branch of successorship law is \textit{Golden State Bottling}.\textsuperscript{22} In that case, a company known as All American Beverages bought the bottling and distribution operations of Golden State Bottling, a soft-drink operation. All American knew before the transaction closed that Golden State had previously fired an employee and had been found guilty poses of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit.''

\textsuperscript{16.} \textit{Wiley}, 376 U.S. at 551, n.5.
\textsuperscript{17.} \textit{Howard Johnson Co. v. NLRB}, 417 U.S. 249 (1974).
\textsuperscript{18.} \textit{See infra} Part III.A, pp. 69-71.
\textsuperscript{20.} \textit{Howard Johnson Co.}, 417 U.S. at 254.
\textsuperscript{21.} \textit{Id.} at 263-65.
of an unfair labor practice. Meanwhile, the employee had not been made whole and reinstated. \(^{23}\)

The union argued that the successor, All American, should be required to remedy that unfair labor practice. The Supreme Court found the Board had not exceeded its authority or abused its discretion in finding that the buyer was obligated to reinstate the employee and otherwise to make him whole. The Court reasoned that the buyer, All American, knew about the existence of the unremedied unfair labor practice. The Court reiterated the Board's position that if the buyer had not known of the unfair labor practice, it would not have been so obligated. \(^{24}\)

III

SUCCESSOR EMPLOYER'S DUTY TO BARGAIN WITH PREDECESSOR'S UNION

A. NLRB v. Burns International Security Services

The third and most important branch of successorship law is the famous Burns case. \(^{25}\) In this case, the Wackenhut Corporation, a contractor of security services to the Lockheed Aircraft Corporation, and the United Plant Guard Workers ("UPG") entered into a three-year collective bargaining agreement. During the same time period, Lockheed entertained competitive bids for the security services contract, and the Burns Company succeeded in securing the contract over Wackenhut. Burns retained twenty-seven of the former Wackenhut guards, and brought in fifteen of its own guards from other locations. Burns refused to recognize the UPG upon the union's request, and instead supplied the Wackenhut guards with membership cards for a rival union with whom it had existing collective bargaining agreements at other locations. Burns then recognized this rival union on the basis of a perceived card majority. The UPG filed unfair labor practice charges against Burns under sections 8(a)(1) and 8(a)(5), \(^{26}\) alleging Burns had unlawfully refused to bargain and these charges were upheld by the Board. \(^{27}\) The Supreme Court held that Burns was a successor employer because there was a substantial continuity in the operations of the business, especially in the work force. The key fact was that Burns had hired enough employees of its predecessor so that its work force consisted primarily of the predecessor's previous employees. \(^{28}\)

The Court held that, since Burns was a successor employer, it was

\(^{23}\) Id. at 170. \\
^{24}\) Id. at 185. \\
^{27}\) 406 U.S. at 274-76. \\
^{28}\) Id. at 278-79.
required to recognize and bargain with its predecessor's union, but it was not obligated to honor the predecessor's collective bargaining agreement. Thus, the Court held that the successor could negotiate its own deal.\textsuperscript{29}

The Court also held that a successor can set its own initial terms and conditions of employment before it bargains with the predecessor's union unless it is "perfectly clear," to use the Court's term, at the outset that the successor employer will be a successor.\textsuperscript{30} This is obviously a critical issue from the practical standpoint. If a successor can set its own initial terms and conditions of employment at the outset of taking over the business, before it bargains, its bargaining position will obviously be greatly enhanced. The \textit{Spruce Up} decision suggests some techniques for structuring the hiring process so that it will never be "perfectly clear" at the outset that the employer is going to be a successor.\textsuperscript{31}

The traditional test for successorship employed by the Board is whether there is substantial continuity in the identity of the employing enterprise.\textsuperscript{32} In determining whether the employing enterprise remains the same the Board examines a number of factors, including: 1) whether there has been a substantial continuity in the company's business operations; 2) whether the new employer uses the same plant; 3) whether the same or substantially the same workforce is employed; 4) whether the same jobs exist under the same working conditions; 5) whether the same supervisors are employed; 6) whether the same machinery, equipment and methods of production are used; and 7) whether the same product is manufactured or the same service offered.\textsuperscript{33}

In applying this test, the Board considers the totality of the circumstances, keeping in mind the question whether those employees who have been retained will understandably view their job situations as essentially unaltered.\textsuperscript{34} Although the Board has stated that it will not accord controlling weight to any single factor, it should be stressed that work force

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{29} Id. at 294.
\item \textsuperscript{30} Id. at 294-95.
\item \textsuperscript{31} Spruce Up Corp., 209 N.L.R.B. 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975).
\item \textsuperscript{32} In \textit{Spruce Up}, the Board suggested it would not automatically find a new employer to be a successor if the successor makes clear from the outset that it intends to set its own initial terms of employment, and conditions retention of incumbent employees on their willingness to accept such terms. Additionally, the Board counseled that a "cautious employer," desirous of retaining the right to set initial terms of employment "would probably be well advised not to offer ... at least some of the old work force" employment in light of the obligations imposed on him by \textit{Burns}. Id. at 195.
\item The lawfulness of these techniques for structuring the hiring process, however, is limited by the dictates of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1982), which constrains a successor employer from both making hiring decisions on the basis of the applicant's union status, and refusing to hire a predecessor's former employees to avoid recognizing an incumbent union. See infra note 37.
\item Fall River Dyeing & Finishing Corp. v. NLRB, 107 S. Ct. 2225, 2236 (1987).
\end{itemize}
\end{footnotes}
continuity is the key to successorship status. More specifically, if the resulting successor's work force consists predominantly of people who worked for the predecessor, it is very likely to be a successor. However, the buyer may not refuse to hire the predecessor's employees in order to avoid being a successor. That will not work.

B. Determining Workforce Continuity

In Burns, the Supreme Court suggested that workforce continuity would not be tested until the buyer has hired his "full complement" of employees. In other words, one does not make the mathematical computation to see if more than fifty percent of the buyer's employees formerly worked for the seller until the buyer has reached his full complement of employees. The Board, however, has determined that a full complement is not necessary and that the composition of the buyer's work force should be measured once that work force has become a substantial and representative complement.

This issue was squarely presented to the Supreme Court in the recent Fall River Dyeing case. There, Fall River Dyeing bought a textile plant that had been closed down. The plant was reopened by Fall River Dyeing, and the company gradually built up the work force. While the buyer was still in the start-up phase, the seller's union requested recognition. At that point, the buyer had not hired very many employees.
Several months later the buyer reached what the Board and the First Circuit regarded as "a substantial and representative complement" of employees.\textsuperscript{42} That consisted of slightly more than half of the employees, in net effect. There were some other arcane aspects to the formula that the Board applied in determining whether a substantial and representative complement had been reached. Since the Board and the First Circuit concluded that a substantial and representative complement had been reached, they concluded that Fall River Dyeing was a successor at that time.\textsuperscript{43} This is a very significant holding, because by the time that Fall River Dyeing had reached its full complement of employees, if that term is taken literally, it was not a successor because only a minority of its work force had been employed by the predecessor company.\textsuperscript{44}

The Supreme Court, however, rejected Fall River Dyeing's argument that the determination as to the composition of its work force should have been made only after it had hired its "full complement." The Court stated that its reference in \textit{Burns} to a "full complement" was not intended to define the moment when a successor has a duty to bargain with the union.\textsuperscript{45} It also held that the Board's "substantial and representative complement" rule was a reasonable rule for fixing the time to measure the composition of the new employer's work force because it struck a balance between the interest in insuring maximum employee participation in the selection of the bargaining agent and the significant interest of employees in being represented as soon as possible. The Court found that a "full complement" test was inadequate because it failed to take into account the goal of permitting employees to be represented quickly.\textsuperscript{46}

There was also an important secondary issue in that case. The union had made its recognition demand before the employer had become a successor—if it ever did—under \textit{Burns}.\textsuperscript{47} The recognition demand was not renewed when the buyer reached that substantial-and-representative-complement-of-employees level. The Board and the First Circuit treated the union's untimely recognition demand as a continuing demand which the union did not have to renew. It took effect when the buyer reached the level of a representative and substantial complement of employees.\textsuperscript{48}

\textsuperscript{42} \textit{Id.} at 2232.
\textsuperscript{44} After reaching its initial hiring goal, Fall River Dyeing continued to expand its work force for two more months, until it had hired enough workers to operate two full shifts. Of these 107 workers, 52 or 53 were former Sterlingware employees, comprising slightly less than half of the full complement of workers. 107 S. Ct. at 2231.
\textsuperscript{45} \textit{Id.} at 2238.
\textsuperscript{46} \textit{Id.} at 2239.
\textsuperscript{47} \textit{See supra} note 41 and accompanying text.
\textsuperscript{48} 775 F.2d at 432-33.
The Supreme Court upheld the Board’s “continuing demand” rule as a reasonable one. The Court held that the rule places a minimal burden on the employer, and makes sense because the union is likely to be unaware of the successor’s plans for hiring and therefore is likely to make its demand for recognition prior to the time the successor reaches its “substantial and representative complement.”

Finally, the Supreme Court’s Fall River Dyeing decision is important because the Court turned aside an effort by the successor to limit Burns to situations in which the union had been certified just before the change in employers. The Court held that a successor’s obligation to bargain was not limited to such situations, and that where the union has a rebuttable presumption of majority status, that status continues despite the change in employers.

C. Successorship and the Sale of Assets

Most of the successorship cases involve a sale of assets. However, at times the issue arises in the context of a sale of stock. The question is when should successorship principles apply. The answer depends on whether one applies corporate law principles or labor law principles. The Supreme Court cases have hinted or implied all along that labor law principles should be applied. There are statements in Burns, Howard Johnson, and Golden State that strongly suggest that this is the rule, although the cases do not so hold. It is implied in Wiley, because Wiley was a merger case, yet successorship principles of a sort were applied.

Nevertheless, in the early post-Burns years, the Board, with the concurrence of the courts, applied a corporate law analysis, although the Board usually does not pay any attention to corporate structures. The Board held that in a stock transaction there has been no change in the employing entity, so successorship principles are irrelevant.

In 1976, however, the Board started to drift away from that analy-
sis.\textsuperscript{53} As often happens, for a number of years the Board flip-flopped back and forth on this issue. In one case it adopted a corporate law analysis,\textsuperscript{54} and in another case it adopted a labor law analysis, resulting in a finding of successorship.\textsuperscript{55} The courts followed along, apparently not noticing the inconsistency in the Board's decisions. However, in the 1980s, the trend away from the corporate law analysis has become stabilized. In 1980, the Ninth Circuit in the \textit{Edjo} decision stated that the corporate law "rationale creates its own problems in that it too rigidly characterizes the relations involved."\textsuperscript{56} The court said that it preferred to view the issue primarily in the light of labor-management relations, and not bind itself to the structures of corporate law.\textsuperscript{57}

Finally, in 1984 in the \textit{Spencer Foods}\textsuperscript{58} case, the Board applied successorship principles in a stock transfer case. In that case, under the facts, the Board held that the buyer was not a successor.\textsuperscript{59} The D.C. Circuit reversed the decision and remanded the case, but agreed with the Board that the labor law analysis, not the corporate law analysis, should prevail.\textsuperscript{60} The decision was reversed on another ground. Namely, the court disagreed with the Board on the question of whether the buyer was a successor.\textsuperscript{61} The case has, once again, been remanded to the Board. In remarks made at an ABA meeting recently, one of the Board members, Mary Cracraft, commented that the Board now has another opportunity to reconsider the obligations of the stock purchaser in the successorship context. So, the Board will probably decide this issue of stock transfers as opposed to asset transactions sometime in the near future.

IV

\textbf{SUCCESSOR AND ASSIGNS CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS}

The fourth branch of successorship law involves the successor and

\textsuperscript{53} See MPE, Inc., 226 N.L.R.B. 519, 521 (1976) (new owners, after a change in stock ownership, not required to honor seller's collective bargaining agreement).
\textsuperscript{55} Lauer's Furniture Stores, Inc., 246 N.L.R.B. 360, 365 (1979) (successorship principles applied by ALJ to stock sale case and Board affirms without comment).
\textsuperscript{56} NLRB v. Edjo, Inc., 631 F.2d 604, 606 n.3 (9th Cir. 1980).
\textsuperscript{57} Id.
\textsuperscript{59} Id. at 1485.
\textsuperscript{60} United Food & Commercial Workers Local 152 v. NLRB, 768 F.2d 1463, 1471 (D.C. Cir. 1985).
\textsuperscript{61} Id. at 1474.
assigns clause in a collective bargaining agreement. These clauses typically state that the collective bargaining agreement will be binding upon a buyer of the business. Sometimes the clauses specifically require the employer to impose the collective bargaining agreement on the buyer as part of the transaction.

It is perfectly clear, under the *Howard Johnson* case, that a successor and assigns clause has no binding effect on the buyer. Therefore, unions have sought legal remedies in two forums to get around this result. One forum is arbitration, and the other forum is the courts, where unions typically seek an injunction in support of an arbitration award or a stay pending arbitration.

Some arbitrators have held that a successors and assigns clause does not obligate the seller to bind the buyer unless it specifically states that requirement. Others have ruled otherwise and have assessed damages against a seller for a violation of the successors and assigns clause. Some courts have denied injunctions against the sale transaction, pending arbitration of the union’s grievance under the successors clause, although at least one court has granted such an injunction in order to preserve the status quo pending arbitration. Another court enjoined the sale of a business when an arbitrator had already ruled that the successors clause would be violated unless the seller imposed the contract on the buyer. And one court, in an interesting decision that suggests future pitfalls, enjoined the distribution of the proceeds of the sale, pending arbitration of the application of the successors and assigns clause.

The recommendation for the seller is to be cognizant of the successors and assigns clause, and act accordingly, because there is a risk if one

62. *Howard Johnson Co.*, 417 U.S. at 258 n.3.
64. *High Point Sprinkler Co.*, 67 Lab. Arb. (BNA) 239, 248 (1976) (Connolly, Arb.); see also *Schneier’s Finer Foods, Inc.*, 72 Lab. Arb. (BNA) 881, 885 (1979) (Belkin, Arb.) (arbitrator stated that the dissolved seller would have been liable for damages had it remained a viable entity).
does not. The buyer has no real liability or risk except that the transac-
tion may be disrupted by an injunction.

There is a case involving many of these issues, for which a petition
for a writ of certiorari is pending at the Supreme Court. The case arose
from the Western Airlines/Delta Airlines merger. The Delta employees
are not unionized. The Western employees were represented by two un-
ions, the Teamsters and the Air Transport Employees. The collective
bargaining agreement had a successors and assigns clause which required
Western to impose its contract on the buyer.69

Western ignored that requirement. The unions went into court and
sought an injunction, pending arbitration of their grievances, based on
the successors and assigns clause. The Ninth Circuit enjoined the merger
of the two work forces the night before it was to become effective.70
Western then went to Justice O'Connor and sought a stay of the Ninth
Circuit decision, to allow the merger to go forward. Justice O'Connor
granted that stay.71 She found it very likely that at least four justices
would vote to grant certiorari, and that Western was likely to prevail on
the merits on the theory that the injunction interfered with the exclusive
jurisdiction of the National Mediation Board under the Railway Labor
Act to decide representation disputes.72

Note carefully that this decision did not arise under the National
Labor Relations Act; it arose under the Railway Labor Act, which is a
different statute with a different set of rules, and has a different adminis-
trative mechanism. Moreover, the case thus far has not been based on
successorship principles. So it is not extremely meaningful at this time to
the subject of successors and assigns clauses under the National Labor
Relations Act. However, it is likely that certiorari will be granted in that
case, and it is possible that the decision will be meaningful by analogy to
cases arising under the NLRA.

69. See International Bhd. of Teamsters Local 2707 v. Western Airlines, 813 F.2d 1359, 1360-
01 (9th Cir.), stay granted, Western Airlines, Inc. v. International Bhd. of Teamsters, 107 S. Ct. 1515
70. Id. at 1364.
72. Id. at 1518.
INTRODUCTION

The task with which I was originally charged was to prepare a presentation equally divided between an exploration of traditional labor law concepts of successorship and a discussion of union involvement in takeover mania. The earlier presentation by William Emanuel has relieved me of my obligation of a traditional exegesis into labor successorship law.73 The fact is that there is not a great deal of difference between us on that subject. However, I do think that the question of an employer's obligations in a stock transfer should not be analyzed in terms of successorship. Whatever mythology of corporate law one wishes to adhere to, if the sense of the corporate entity is to have any meaning at all, the sale of corporate stock cannot relieve the buyer of the duty to adhere to the obligations the corporation had before the transfer. It is perfectly sound to say that principles of successorship and the applicability of successors and assigns clauses are irrelevant to that analysis. In short, a corporation is a corporation is a corporation. It should not make any difference in that Gertrude Stein formulation who it is that, from time to time, happens to own the stock of the corporation.74

I

THE IMPACT OF Mergers ON Employees

Moving into the area of what we can do to represent the interests of employees in this reshuffling and rearranging of the corporate world of

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73. Supra pp. 66-76.


America, let me quote labor economist Hoxie's 1923 statement, as a description of what I believe to be a common attitude among certain elements of business and government. "Unionism is in its very essence a lawless thing . . . . [T]he law cannot help being in spirit inimical to unionism." Indeed, the Reagan Board is only the most recent institutional expression of that fundamental approach to labor unions and the rights of workers to pursue their interests in a concerted manner.

The Labor Board is not alone in its retreat from some earlier adherence to the principles of the Wagner Act and other doctrines which attempted to strike a balance between the interests of workers and that mythical free-enterprise system in which the pure flow of capital, shareholder ownership and democracy, and management stewardship in the interests of shareholders was performed. The Supreme Court led the way in its First National Maintenance decision, which represented the rejection of the social compact that the Wagner Act and the first thirty years of its administration reflected. That compact was the tradeoff that government entered into in the mid-1930s to stop the marches on Washington, to quell the revolutionary forces, to stave off the introduction of communism into this country, by providing as a matter of public policy that there was a right to organize and an obligation by employers to recognize and deal with the representative of employees. The Wagner Act created a public policy that labor contracts were something special and entitled to an extraordinary amount of respect.

First National Maintenance puts that program to rest, at least when it counts, by establishing a new policy that anything that goes to the core of entrepreneurial control, anything that interferes with the ultimate wisdom of the movers and shakers of corporate America to do as they will with their corporate assets, anything that would seem to pose a threat to their power is no longer to be respected or adhered to.

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76. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 679 (1981) (the decision to partially close an enterprise would be subject to the duty to bargain "only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business").


78. First Nat'l Maintenance, 452 U.S. at 678-79, 682-83. Following the Court's rationale in First National Maintenance, the Board subsequently ruled that an employer has no duty to bargain over decisions which cause the termination of employment unless those decisions "turn" upon labor
In the past couple of years the trade union movement has become distrustful and disenchanted with the NLRB, and at gatherings of union lawyers the Board is denounced for the antiunion character of its recent decisions. Union leaders feel even stronger pessimism and disappointment with the Board's decisions.

Lane Kirkland is an extraordinarily thoughtful, intellectually driven, very softspoken, and very careful man, who is not given to hyperbole. When that mild-mannered and rational human being suggests that labor would be better off with repeal of all labor laws, including the Wagner Act, and calls for a return to the law of the jungle, one should at least ponder what it is that brings him to that level of frustration.

Given the current predilection of companies to use strikebreakers, and the willingness of a large number of unemployed and underemployed workers to serve as scabs, it is not clear to me that the good old-fashioned jungle of the traditional strike is the best turf on which unions should battle. But there is another jungle available: the jungle of Wall Street, the jungle of hostile take-overs, tender offers, and proxy fights.

Since January of 1983, 12,200 companies and corporate divisions worth $490 billion have changed hands, and the pace is quickening. In 1986, the amount of money involved in mergers and acquisitions totaled over $160 billion, more than four times the amount just a few years before in 1980. Every time the ownership or assets of a company change hands, the new company is faced with the temptation to challenge the collective bargaining agreement and the bargaining rights of employees. Unions, therefore, have an obvious, direct interest in what occurs at the corporate reshuffling table.

Since 1980, imports of manufactured goods to this country have increased by fifty-one percent, while the export of American goods during the same period has dropped by two percent. An increasing number of United States companies have packed up and joined the foreign competition, moving their plants abroad in search of low wages or attractive tax packages. Beginning at least in 1979, American businesses were investing in foreign businesses to the tune of $300 billion a year. The impact of these changes on this country, its economy, and its employing entities, has been drastic. Between 1981 and 1986, 13.1 million workers in this country lost their jobs due to slack work, layoff, and

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80. Id. at 39.
82. Tyler, Charting America's Future: The Deindustrialization of America, New Leader 9, 9-10 (Aug. 9-23, 1982).
plant closings.\textsuperscript{83} Five hundred thousand fewer workers today are employed in manufacturing and construction industries,\textsuperscript{84} the traditional strongholds of organized labor.

Any assessment of whether labor is likely, in this Congress or in the short-term future, to be able to realize its agenda and deal with these concerns in the political process is foolhardy, to say the least. There is no real opportunity for us to make a significant shift in the kinds of problems organized labor faces in the political process.

II

EMPLOYEE PARTICIPATION IN REORGANIZATIONS

One innovative response to corporate reorganizations is participation of employees through Employee Stock Ownership Plans ("ESOPs"). However, these mechanisms are often used when the company being reorganized is in questionable financial health. It is important to look at particular cases in greater depth to see whether they represent a likely scenario for trade unions or employees in the future. In particular, I will review three major employee-owned companies—Rath Meatpacking, Hyatt Clark, and Weirton Steel—and see how they have fared. I will then discuss the role unions played in the sale of TWA.

A. ESOPs

Rath Meatpacking became ESOP-owned and controlled, and the former union president became the chief executive officer of the successor corporation after the ESOP took control. Unfortunately, it went into Chapter 11, had a strike against it by its employees, and closed its doors. No one has fared well under that situation except for the lawyers. Rath is a fairly decent indication of the fact that there is no magic to an ESOP. If the fundamental economics do not work, there is nothing that a change of ownership, even to the hands of employees, is going to effect.\textsuperscript{85}

Hyatt Clark is only a half-step away from the same denouement as Rath. General Motors sold its New Departure Hyatt Roller Bearing Plant in Clark, New Jersey to its employees in the fall of 1981. In Hyatt Clark, as well, there has been a subsequent Chapter 11. There was a continuation of labor relations which was only slightly better than the relationship that existed between General Motors and its corporations. The employees were able to negotiate a contract with themselves, a situation that General Motors had not been able to effectuate. Surely it is not

\textsuperscript{84} Id.
\textsuperscript{85} See Olson, Union Experiences with Worker Ownership: Legal and Practical Issues Raised by ESOPs, TRASOPs, Stock Purchases and Co-Operatives, 1982 \textit{Wts. L. Rev.} 729; see also N.Y. Times, Nov. 2, 1983, at D1, col. 6.
irrelevant that the collective bargaining agreement they negotiated with themselves provided for a twenty-five percent reduction in wages.\textsuperscript{86}

It is fundamental to an analysis and understanding of ESOPs and their potential weaknesses to note that the notion of "our" dealing with "ourselves"—"our" at this point, being unions in general—is a myth; that in every significant ESOP or employee-owned company there has yet to be an employee-controlled company. When outside financing is required, as is inevitably the case, the lenders impose as a condition of their financing the operation that there be both an independent board of directors not controlled by employee members or officers, on which employee-represented members of the board are in a distinct minority, and also independent management responsive to the independent board of directors.\textsuperscript{87} So, in a real sense, while the underlying equity owners of the common stock are in fact the employees, their ability to control their own destiny, to control labor relations, let alone to control the corporate direction of the employing entity, is zero.

The situation was particularly egregious in Hyatt Clark because there the employees could not vote their stock for a period of ten years. ESOPs can be and are being structured today so that votes on critical matters are being passed through to the underlying equity owners of the common stock interest.\textsuperscript{88}

One of the reasons that Hyatt Clark failed was that the employees soon realized that they had been scammed, that General Motors had used this device to unburden itself of an asset it considered to be uneconomic and which no longer fit within its corporate scheme. General Motors unloaded a company producing a product that it had decided was obsolete, using equipment and machinery which was obsolete. General Motors held out to the employees the prospect of employee ownership in return for a series of significant sacrifices by them, but it was a myth. It failed. It was a cynical exercise.

The third example is Weirton Steel, which is one-hundred percent ESOP-owned and probably is the most successful steel company in the country today. It was structured by investment bankers, not by untutored labor union attorneys. It was structured with a view towards making sure that there was a market for the product, making sure that there was going to be a level of capital expenditures necessary to maintain their position in the marketplace. It also was structured with a view

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\textsuperscript{86} Olson, \textit{supra} note 85, at 761.
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\textsuperscript{87} \textit{Id.} at 761, 762 n.177.
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\textsuperscript{88} Financing for the buyout at Hyatt Clark was obtained from private and government sources including GM. But in order to obtain the financing, the employees had to forego exercising their voting rights for ten years, until 1991. In the meantime, the stock is under control of an administrator. Simon & Stewart, \textit{Employee Buyouts to Prevent Plant Closings}, in \textit{LABOR RELATIONS LAW AND CORPORATE RETRENCHMENT} 473, 508-10 (1984).
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towards giving employees not only the sense but also the reality of meaningful input into the direction of the company they owned.

One of the things that makes it less instructive for us in terms of the future is that there was, in effect, a company union, not the United Steelworkers Union. It was a company union in a company town where the town depended upon Weirton. This was a unique and fact-specific situation that makes its usefulness as a guide somewhat limited.

B. Union Efforts to Influence a Stock Transfer

The union participation and role in the TWA situation is very instructive. It also reflects the necessity for a union to be able to turn on a dime and move quickly in the world of mergers and acquisitions.

The unions originally aligned themselves with the existing management in TWA to ward off the corporate raider and greenmailer, Carl Icahn. The unions distributed thousands of “Stop Carl Icahn” buttons, appeared at Congress and encouraged Missouri to pass some interesting, albeit unconstitutional, laws trying to restrict Icahn’s ability to take over the company, until Frank Lorenzo appeared on the scene. Suddenly, Carl Icahn became the savior, and the unions entered into a fascinating agreement with him which culminated in his purchase of the majority and controlling interest in TWA. The agreement included major concessions from union groups. The pilots agreed to a pay reduction of twenty-six percent of their current wages. The machinists agreed to a somewhat lower cut.

The unions invested those concessions in a significant equity participation in the company, and with interesting controls: limitations on Icahn’s ability to sell assets or, indeed, to sell the company; and mandatory requirements that he put back into the company hundreds of millions of dollars of capital investment, to maintain the employer as a viable entity. The jury is still out, and we will have to wait to see whether or not the TWA case is successful.

CONCLUSION

Almost all of the instances of employee control and ownership have dealt with distressed companies. These were companies faced with an immediate demise, either as a result of the obsolescence of their equipment, the disappearance of their markets to international competitors, and other similar problems. For one reason or another, they were employers that were facing sure disappearance were it not for the introduction of employee concessions or employee ownership as a saving grace. The next logical step is for employee groups to take advantage of the opportunities in the free-enterprise system and acquire not only companies on the verge of destruction, but also companies that are healthy,
thriving, and which present a future for the employee not only as a worker but also as an equity participant. United Airlines is only the first of a series of efforts that unions will be making in the corporate markets to manifest this interest and to pursue this device.
INTRODUCTION

Anyone involved in a merger or acquisition faces an enormous task in considering all of the facts about employee benefits that can possibly affect the decision to sell or buy, and what the price or the other terms ought to be. In ERISA89 matters, more than any other, due diligence is clearly a necessity for both buyers and sellers. To complete this task properly, one has to know what to look for, where to find it, and then how to measure it once it is found. Almost all the legal questions are directly related to the economics of the deal being developed.

The seller has to ask himself: What are my liabilities in case I sell or shut down? To what extent are they triggered by that event? To what extent can I pass them on to the buyer? Are there ways to avoid them in part or entirely in the way that we structure the deal?

And the buyer asks: What is it that the seller has for sale? What are its dimensions? How much unwanted baggage comes with it? How much can I leave the seller with? And can any of it be eliminated entirely in the deal?

To some extent, there are costs of employee benefits that cannot be avoided. They have to be retained by the seller or assumed by the buyer. Obviously, they seriously affect the price of the business. In fact, in mergers and acquisitions, the cost of employee benefits often becomes a critical point. The seller demands more to cover costs that it has discov-


ered in its due diligence, and the buyer offers less if it sees potential liabilities. Many representations and warranties are demanded and bargained for in the process. To the extent that some of these costs are never discovered, somebody is going to get hurt.

For the seller, it is sometimes a real shock to find out how much its benefit costs are. Many of the fringe benefits, payroll practices and working conditions that it put into effect years ago may have been adopted without any thought of ever going out of business. For instance, pension plans were adopted with a thirty- or forty-year amortization schedule to write off the initial cost of the past-service liabilities that were assumed. That may not have resulted in a crushing annual cost as long as the company stayed in business, but could deal a crushing blow if the total comes due early in the amortization period.

Contributions to a multiemployer pension plan are just part of the expected cost of labor—until the employer goes out of business. Then the hidden liability, the withdrawal liability, springs out. The immense cost of going out of business stares it directly in the face.

A medical benefit plan for retirees looks pretty cheap so long as the company is growing and the ratio of retirees to active employees is small. But when medical expenses skyrocket, and suddenly the work force is terminated, a defunct company is looking at twenty-five to thirty years of medical expense for all those retirees, plus those who take retirement when the company is sold, plus those who are not yet eligible to retire but have rights to those benefits. Suddenly, the retiree medical plan is an albatross around the neck of the seller or the company that is going defunct.

There are severance pay plans that are carefully written to exclude quits and discharges for cause. They seem like no-cost benefits, until the whole work force is terminated through no fault of their own and an immense liability is triggered. Suddenly, the seller sees a strong need to get the buyer to hire them all and assume the severance plan, with all of its accrued liabilities, which may very well fall due if the buyer terminates the people for any reason.

These are just illustrations of the kind of problems that are discovered in the due diligence process. When due diligence is first performed at the point of sale, big problems are often discovered. By then, it is usually too late to do anything about them.

Companies ought to look down the road and ask themselves: Are we a potential takeover target? Are we likely to be put up for sale? Unions need to take a look at the employers they deal with and ask: Is there a high risk of this company shutting down, selling out, or being taken over? How does our present contract deal with such an event, and what can we do to protect our members?
Some of the problems can be corrected if they are addressed far enough in advance, particularly when they are addressed at the bargaining table. They may be even more difficult when dealing with a unilaterally adopted plan.

I
PENSION BENEFIT ISSUES

A. Single-Employer Plans

Consider a single-employer pension plan, with defined benefits, that is underfunded. Usually, when such plans are adopted, the intent is to fund them over many years. In the plan document, the employer probably has reserved the right to terminate the plan for any reason. If the plan is collectively bargained, the plan document may allow termination if there is no contract to support it. In the past, if that happened at a time when the plan was not fully funded, the plan assets would be applied as far as they went, in accordance with a schedule of priorities. The rest of the accrued benefits would go down the drain. Then came the Pension Benefit Guarantee Corporation ("PBGC"), and at least some of the benefits were insured. The employees, to the extent of the guaranteed benefits, were protected.

That system is still in effect, but it was more expensive than anyone expected. The PBGC is an economic failure. The premium which started out at a dollar is now $8.50 per person per year. Too many employers, with little or no net worth, have dumped their plans, and the PBGC has picked up that liability.

In 1986 Congress reacted. They made the employer the guarantor of those benefits, so it could not walk away. Now, the plan's vested benefit commitments have to be fully funded before the plan can be terminated. That is true unless the employer is insolvent or in comparable distress, in which case the PBGC is a creditor for up to seventy-five percent of the unfunded guaranteed benefits and has a claim against the employer. The employees, through a special PBGC interim trust, are also creditors for benefits that are not guaranteed. For a solvent seller,

94. The employer may terminate its single-employer pension plan if Chapter 7 or Chapter 11 bankruptcy proceedings have been initiated, or if the employer is deemed otherwise insolvent. This is known as a distress termination. ERISA §4041(c), 29 §U.S.C. 1341(c) (Supp. IV 1986). In some cases, the PBGC may itself institute termination proceedings. ERISA §4042, 29 U.S.C. §1342 (1982).
the requirement now is either to fund the plan to the extent required or to get the buyer to take it over.

The other side of that coin is that if the plan is overfunded, there is now not only an income tax on the amount of recovery in the event that the plan is terminated and the excess recovered, but a special ten-percent excise tax to discourage plan terminations. Once again, getting the buyer to assume the plan and pay the seller for the funding excess may be the cheapest way out, but there are some very tricky income tax consequences of that kind of a deal.

B. Multiemployer Pension Plans

The legislation regulating single-employer pension plans was preceded in 1980 by the Multiemployer Pension Plan Amendments Act ("MPPAA"), which was a great surprise at the time. It covered employers which contributed by the hour to multiemployer plans. These employers had no other responsibility for plan funding and, therefore, had no incentive to prevent excessively high benefits, huge unfunded past-service liabilities, retroactive increases in benefits, or aggressive actuarial assumptions. The MPPAA made these employers liable, pro rata, for the unfunded portion of these benefits if they left the plan. Withdrawal liability was imposed without warning and has been held to be constitutional.

Many companies did withdraw, and became liable for more money than they were worth. This has resulted in pressure to get these plans funded, in order to eliminate withdrawal liability.

There is still a lot of exposure for employers. When a company which has contributed to an underfunded multiemployer plan must go out of business, the withdrawal liability is difficult to avoid. The seller may try to get the buyer to assume the collective bargaining agreement and meet all the requirements of the MPPAA. However, the process is a

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100. The term "multiemployer plan" is defined in ERISA § 3(37)(A), 29 U.S.C. § 1002(37)(A) (1982), as a plan to which more than one employer is required to contribute pursuant to a collective bargaining agreement.


complicated one for both buyer and seller.103

C. The Controlled Group Concept of Liability

It is important to note that an employer's liability for a single-employer plan termination can be imposed on related entities.104 The concept of limited liability of corporations is deeply ingrained in our business culture and immensely important decisions are based on it. However, limited corporate liability is no longer available in the ERISA plan termination situation.105 It is a great shock to some to realize that the corporate walls are not watertight. The controlled-group concept of liability applies, and determining what is a controlled group is very difficult in some situations. Therefore, determining the full reach of this provision can be a very complicated process.106

It is relatively easy to determine a controlled group involving parents and subsidiary organizations, because there must be eighty-percent control at each level of the chain. It becomes more difficult when the group consists of brother-and-sister entities. There the rule is almost too complicated to explain.107 A controlled group must have five or fewer people owning an eighty-percent controlling interest in all of the businesses that are connected, and with identical interests, fifty-percent controlling interests, in each of them.

It becomes even more complicated where a controlled group consists of both parentsubsidiary, brother-sister organizations, partnerships, proprietorships, and trusts and estates. One may have to attribute stock ownership of family members to the individual in question.108 For instance, stock owned by adult children, or grandchildren, or parents, or grandparents can be counted for some purposes.

One of the most interesting aspects of this question is when attempts

103. If the buyer is to relieve the seller of withdrawal liability, buyer and seller must meet the bonding and other requirements of ERISA § 4204, 29 U.S.C. § 1384 (1982), or obtain a variance or exception from the PBGC. See 29 C.F.R. §§ 2643.1-.15 (1987).
104. Liability of controlled group members is applicable in cases of single-employer plan terminations, PBGC v. Quimett Corp., 630 F.2d 4 (1st Cir. 1980), and in cases of withdrawal from a multiemployer plan, IUE Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3d Cir. 1986).
105. ERISA § 4001(b), 29 U.S.C. § 1301(b) (1982), provides that for purposes of Title IV of the Act (which establishes benefit guarantee provisions), employees of businesses under common control shall be treated as employees of a single employer. Entities (whether or not incorporated) which are part of a "controlled group" of trades or businesses are treated as jointly and severally liable when ERISA is concerned, using definitions from the Internal Revenue Code, 26 U.S.C. § 414(b)-(c) (1982).
106. 29 C.F.R. § 2612.3 (1987).
107. 29 C.F.R. § 2612 (1987). These regulations must be read in light of United States v. Vogel Fertilizer Co., 455 U.S. 16, 21-22 (1982) (in determining a controlled group of brother-sister organizations, it is not permissible to count ownership of a person who does not own an interest in each member of the purported group).
108. 29 C.F.R. § 2612.
are made to break up a controlled group in anticipation of the imposition of this liability. The employer is broke; it is not going to hurt anybody if it terminates an unfunded plan or incurs withdrawal, but the employer has some rich relatives in the controlled group. The efforts to break up the controlled group will not succeed if made for a principal purpose of evading that liability. This is unsettling doctrine because it is almost impossible to tell when it is applicable.

Suppose a hypothetical situation involving a solvent parent corporation with an insolvent subsidiary. The subsidiary withdraws from the plan with a huge withdrawal liability. Anticipating that, the parent dissolves itself and distributes its assets. Then the plan attempts to reach the stockholders of the dissolved parent. The motivation for that dissolution is the key to whether the stockholders will be liable. If at least one principal purpose was to evade the liability, then the stockholders may be liable. Of course, if there is proof that the looming withdrawal liability was not a "but for" motivation, they may escape. At any rate, these provisions create a significant concept regarding exposure if a corporation is planning that kind of change.

It is worth noting that multiemployer plans are apparently doing a good job of eliminating withdrawal liability. Recently, the Martin E. Segal Company, which is actuary to a great many of these plans, reported that over eighty percent of such plans are now fully funded. The Western Conference of Teamsters plan probably will complete the funding of its defined benefit plan in another year and a half. So the problem is getting smaller.

With single-employer plans, there is a strong push on to relieve the pressure on PBGC by forcing employers to fund their plans better and making them liable if they go out of business. The administration has seriously proposed this.

II

ISSUES RELATING TO OTHER EMPLOYEE BENEFITS

The problem of severance pay when a sale of assets is involved—and, by the way, the difference between corporate and labor law still applies here—is not just determining if there is such a thing as a severance pay plan, but in identifying its terms. \footnote{109} \textit{Scott v. Gulf Oil} \footnote{111} is a class

\footnote{109} ERISA § 4212(c), 29 U.S.C. § 1392(c) (1982), states: "[I]f a principal purpose of any transaction is to evade or avoid liability under this part [estimating withdrawal liability], this part shall be applied without regard to such transaction."


\footnote{111} See, e.g., Holland v. Burlington Indus., 772 F.2d 1140, 1149 (4th Cir. 1985) (not arbitrary and capricious to deny severance pay to employees offered jobs with successor), cert. denied, 106 S. Ct. 3271 (1986); Jung v. FMC, 755 F.2d 708 (9th Cir. 1985) (no severance pay to employee when she
action case now pending in the Central District of California, involving the sale of a refinery by Gulf Oil to a company called Thrifty. The plaintiffs are trying to show, based on what the company had done in other instances when it had sold refineries, that there was a severance plan in effect. This is a plan allegedly arising from past practice since nothing was ever promised to them specifically. They alleged that they knew about it, relied upon it, and rendered services in that reliance. Gulf actually arranged with Thrifty to take over all of these employees, to offer them comparable jobs and benefits. There was no severance plan in the arrangement, Gulf taking the position that there was no severance plan to begin with if you were hired by the buyer.

It is not going to be known until the case is over whether Gulf even had a severance plan for this particular refinery, and, if so, whether it required payment to these employees even though they were hired by Thrifty. Gulf obviously thought it did not. It decided there was no liability here, and now they are fighting the case. It is a good illustration of the need for a very detailed investigation about employee communications, policies, and practices that might be turned into a severance pay plan. In that connection, the famous case of Blau v. Del Monte,113 is frightening to employers because there the Ninth Circuit found that a secret, unannounced severance program in the corporate policies was a covered plan and would require payment of severance pay.

Employers should also be cautious with respect to policies on vacation pay, sick pay, unfunded plans of deferred compensation such as golden parachutes, and various lesser plans for contingent compensation.114 The inquiry must also reach to other kinds of formal, funded plans such as ESOPs, stock bonus plans, and profit-sharing plans. For example, under an ESOP of a closely-held company planning to sell its business, the employees have the right to insist that the company buy their stock that is distributed upon plan termination, which may require cash that the company had not planned on.

The legal questions concerning retiree medical benefits are much like those confronting severance plans, namely: Was a promise ever

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113. 748 F.2d 1348 (9th Cir.), cert. denied, 474 U.S. 865 (1985).
114. Because Congress wanted to enact a comprehensive and nationally uniform scheme of employee benefit plan regulation with ERISA, the Act generally preempts state laws relating to the regulation of such plans. ERISA § 514, 29 U.S.C. § 1144 (1982). However, in some cases, employee benefits may be deemed to be provided apart from an ERISA-governed employee benefit plan and therefore may be subject to state regulation. See, e.g., Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987) (state mandated severance pay regulation not preempted); California Hosp. Ass'n v. Henning, 770 F.2d 856, 860-61 (9th Cir. 1985) (state regulation of vacation pay not preempted), cert. denied, 106 S. Ct. 3273 (1986).
made? What are its terms? Is it enforceable? Can it be modified or cancelled? They are very hard questions. The cases show little opportunity to cancel such plans in many instances.\textsuperscript{115} Some of the cases also suggest that these plans were adopted without much thought about shutting down or selling out.\textsuperscript{116}

**CONCLUSION**

In planning for the possibility of a future sale or shutdown, an employer ought to take a good, hard look at its severance plans, retiree medical plans, sick pay plans that cash out, vacation plans; and consider whether there is time in which to modify these plans to eliminate liability in the event of going out of business. Of course, a union will take the opposite approach to those same problems, in order to assure those rights so that in the event of dissolution, they can make a claim.

Employers frequently ask whether their plans can be terminated or modified prior to going out of business. In general, they may not. The courts have developed a variety of different concepts, all concluding that these plans create enforceable contractual rights if services have been rendered in reliance upon the existence of the plans, or if the plans are covered by collective bargaining agreements. These questions probably will be resolved under federal ERISA law, no matter which court they are brought in, because the concept of what is an employee benefit plan is very broad and elastic. And if there is a plan, then state law is preempted.\textsuperscript{117}


\textsuperscript{116} See, e.g., Musto, 615 F. Supp. 1483.

\textsuperscript{117} See, e.g., *Fort Halifax Packing*, 107 S. Ct. at 2224 (White, J., dissenting).