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WARN ACT(ION) IN A TIME OF CRISIS

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WARN ACT(ION) IN A TIME OF CRISIS
(Worker Adjustment and Retraining Notification Act)

Synopsis

This paper will analyze the Worker Adjustment and Retraining Notification Act ("WARN Act") through three separate prisms: (1) The aftermath of a modern day plant closing and how the specific employees and their representatives chose to respond to an alleged violation of the Act; (2) the conflict that exists in the Courts as to which of the multitude of tests is appropriate to determine the liability of an affiliated or subsidiary corporation under the Act; (3) how to reconcile a subsidiary's need to have clear direction concerning the law so they may be able to reasonably assess their potential liability when none of the current tests to date fully reflect the spirit of the WARN Act.

Introduction.

On December 1, 2008, Republic Windows and Doors, Inc., a Chicago based company closed its manufacturing plant and laid off all of its workers. On December 4, 2008, approximately 240 workers, supported by the United Electrical Workers Union, staged an unprecedented non-violent protest unparalleled in current American history. Three days after receiving termination notices, the workers (1) staged a takeover of a recently closed plant belonging to their previous employer, Republic Windows, Inc., a California based windows and doors manufacturing company ("Republic"), and (2) refused to leave until their employer agreed to pay them for accrued leave and vacation time. The termination notices demanded the immediate termination of all employees and more importantly Republic, further explained that
because the company’s financial lender, Bank of America, had eliminated its credit line, the plant would be unable to pay its employees any back pay, vacation pay or severance packages.

Events Requiring a WARN Notice.

The abrupt layoffs implemented by Republic were in violation of the WARN Act. The Act requires that employees or their representatives (e.g., labor unions) be given at least a sixty days notice (“60 day notice”) before a plant with one hundred or more employees closes its facilities or undergoes mass employee reductions. Notice must also be given to the State Dislocated Worker Unit, and to the appropriate local government. The purpose of the Act is to provide workers with time to adjust to their loss of employment, to seek and obtain alternative jobs, and where necessary, to seek retraining to allow successful competition in the job markets.

The WARN Act only requires covered employers to provide "affected employees" notice of a mass layoff. "Affected employees" include "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." Employees who have worked fewer than six of the last twelve months or who work an average of fewer than twenty hours per week are not covered.

According to the Act, a plant-closing event covered by WARN occurs with the permanent or temporary shutdown of a single site of employment or of one or more facilities or operating units within a single site of employment during any thirty-day period for fifty or more employees, excluding any part-time employees. A mass layoff occurs when there is a reduction in the workforce that is not the result of a plant closing but which results in an employment loss

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2 Id.
3 Id.
4 11 Lab. Law. 273- Labor Lawyer A WARN ACT ROAD MAP Fall/Winter, 1996.
5 Id.
6 48 Am. Jur. 2d Labor and Labor Relations § 240.
at the facility or the single site of employment that affects at one-third of the workforce and at least fifty employees or affects at least 500 employees.\(^7\)

Note where a plant closing or a reduction in force was planned or accomplished over time in multiple stages, more detailed rules apply. That is a plant closing or mass layoff will be deemed to have occurred if the incremental employment losses, in the aggregate, occurring at a single site of employment within any 90-day period exceed the minimum threshold number, even though no single reductions would cause such loss.\(^8\) For example, if an employer with 200 employees at a single site lays off twenty employees on four separate occasions within a 90-day period, a mass layoff under the Act will have occurred because more than a third of the employees were laid off within the statutory time period.\(^9\)

**Exemptions and Exceptions**

The WARN Act contains two exemptions to compliance. The WARN Act does not apply (1) to a plant closing or layoff at a temporary facility, or (2) when a plant closing or layoff constitutes a strike and/or lockout. In certain circumstances, the WARN Act notice is still required, but the employer is permitted to give less than the full 60-day notice. There are three exceptions that allow an employer to give a shortened notice: (1) the “faltering company”, (2) “unforeseeable business circumstances”, and (3) natural disasters.\(^10\) When the notice period is shortened pursuant to one of these exceptions, the employer must give as much notice as is practicable and provide a brief statement of the basis for reducing the notice period.\(^11\)

\(^7\) *Id.*

\(^8\) *Id.*

\(^9\) 11 Lab. Law. 273; *Labor Lawyer* A WARN ACT ROAD MAP Fall/Winter, 1996.

\(^10\) 48-DEC Fed. Law. 76.

\(^11\) *Id.*
The faltering business exception applies to plant closings but it does not apply to mass layoffs.\textsuperscript{12} In order to qualify for this exception: (1) an employer must have been actively seeking financing or refinancing, additional money, credit, or other business at the time the 60-day notice would have been required, (2) there must have been a realistic opportunity to obtain the financing or business sought, (3) the financing or the business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown and (4) the employer must have reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business.\textsuperscript{13}

The unforeseeable business circumstances exception applies to plant closings and mass layoffs. The plant closing and mere layoffs must be compelled by sudden, unexpected external changes or circumstances that immediately, materially, and adversely affect the employer's business.\textsuperscript{14} An employer may validly assert an unforeseeable business circumstances exception to the WARN Act unless the closing or layoff was not reasonably foreseeable sixty days in advance and within a fourteen-day window.\textsuperscript{15} Lastly, the natural disaster exception applies to plant closings and mass layoffs as a result of any form of natural disaster such as floods, earthquakes, droughts, storms, tidal waves and similar effects of nature.\textsuperscript{16} To qualify for this exception, an employer must be able to demonstrate that the closing or layoff is a direct result of a natural disaster.\textsuperscript{17} Where a plant closing or mass layoff is an indirect result of a natural disaster, this exception will not apply. However the unforeseeable business circumstances exception may be applicable.

\textsuperscript{12} 11 Lab. Law. 273- Labor Lawyer A WARN ACT ROAD MAP Fall/Winter, 1996.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
Although the WARN Act is federally mandated, a number of states have implemented similar local statutes. Thus, applicable state law where the affected employment sites are located must also be considered. Section 6 of the WARN Act provides that provisions are in addition to any rights or remedies available under a collective bargaining agreement or other local laws. Thus, more comprehensive or added protections can still be obtained in collective bargaining agreements or enacted by state or local governments.

(a) Employment Losses Defined

Section 2 of the Act defines a number of key terms that determine whether a job loss requires advance notice such as "employment loss," "mass layoff," and "plant closing." These key terms have specific definitions under the WARN Act that may differ from their everyday meanings. Not every job loss, layoff, or plant closing is covered by WARN. In order to decide whether a particular job loss is covered, two related definitions must apply. First, the job loss must amount to an "employment loss". Second, the employment loss must meet the definition of either a "plant closing" or a "mass layoff". An employment loss is either (1) an employment termination, other than a discharge for cause, voluntary leaving, or retirement, (2) a layoff of more than six months, or (3) a 50% or more reduction in hours of work during each month of a six-month period.18

In some cases, resignations or retirements may occur prior to a large layoff or a plant closing as employees seek new jobs in the area or accept employer incentives to retire. Section 2(a)(6) of the WARN Act does not spell out how "voluntary" is to be evaluated in this context.19 In particular cases, these job losses may be crucial in determining whether employment losses rise to the level necessary to require notice under the WARN Act.

The Department of Labor's regulations define "voluntary" in a restrictive fashion by analogizing it to the "constructive discharge" standard developed in case law under Title VII of the Civil Rights Act of 1964, the National Labor Relations Act (the “NLRA”), and the Age Discrimination in Employment Act (the “ADEA”). Certainly, the voluntariness of any leaving or retirement in the context of an announced plant closing or mass layoff is subject to question.

(b) Enforcement

The WARN Act is enforced by civil actions to collect back pay and civil penalties whenever an employer orders a plant closing or mass layoff without proper notice. Section 5(b) of the WARN Act limits enforcement of WARN Act violations to monetary remedies, and further states that the Act does not give federal courts authority to stop a plant closing or mass layoff. The WARN Act provides for reasonable attorneys' fees to the prevailing party. The lawsuit can be brought in any district in which the alleged violation occurred or where the employer transacts business. Standing lies with the aggrieved employees, the employees' union, or an aggrieved unit of local government, however the WARN Act permits a suit on behalf of "other persons similarly situated". Under Section 3 of the WARN Act an aggrieved employee is defined as an employee who did not receive timely notice.

(c) Remedies

Remedies under the WARN Act are strictly defined. (1) The maximum liability of an employer is the value of 60 days back pay and other benefits for each aggrieved employee. The

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22 Id.
23 Id.
24 Id.
25 Id.
employer’s maximum liability is reduced proportionately for every day of notice actually provided. The 60 day liability may be further reduced if the employee has worked less than 120
days for the employer. In addition, the employer’s liability may be reduced by any "voluntary
and unconditional payments" made by the employer to the employee for the period of the
violation that is "not required by any legal obligation." In contrast, payments made by the
employer due to the employment loss will not reduce the employer’s liability. For example,
contractual severance payment or supplemental unemployment benefits will not reduce the
amount for which an employer is liable because those are payments the employer is already
obligated to make. Also, payments to employees from third parties will not reduce liability. This
has been interpreted to mean that wages from other employers or unemployment insurance do
not reduce an employer’s liability. The local government unit is entitled to a civil penalty
remedy of $500 a day for a violation which can be avoided if the employer pays each aggrieved
employee the full amount owed within three weeks from the date the employer ordered the
shutdown or layoff.

Although the penalties against an employer may be harsh, the WARN Act gives the
District Courts the authority to reduce the back pay liability or civil penalty, (discussed above) if
the employer proves that its violation of the Act was in good faith and that it had reasonable
grounds for believing it was not violating the Act.

Conflicting Standards of Subsidiary/Affiliated Liability under the WARN ACT

28 Id.
FOUL? AN ANALYSIS OF THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN)
ACT IN PRACTICE Richard W. McHugh.
Though fairly straight forward and applied strictly, the WARN Act has caused conflicting court opinions, particularly in the areas where multiple entities control a single company or the company that is conducting the closing or layoffs is a subsidiary of a larger company. Issues remain as to whether a parent company can be held liable for its subsidiary’s violation of the WARN Act.

The WARN Act states that an affiliated company can be held responsible if it fails to give the notice required under the WARN Act. However, the law is very unsettled as to what test should be used to establish liability. The threshold inquiry is whether the affiliated company is an employer within the meaning of the WARN Act. Presented with this issue, courts have applied a variety of tests, such as the federal common law of piercing the corporate veil, the single-employer analysis, and the five factors set forth in the Department of Labor’s regulations (“DOL factors”) interpreting the WARN Act. The application of these tests, however, can produce conflicting results. The corporate veil-piercing test and the single-employer tests, also referred to as single business enterprise test are applied by the courts when there is (1) common ownership, (2) common management, (3) centralized control of labor relations, (4) functional integration of operations which focus on whether two nominally independent enterprises really constitute on integrated enterprise.\(^{30}\) The DOL factors are applied if any of the following exist: (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source, or (5) dependency of operations.\(^{31}\)


\(^{31}\) Id.
The Eighth and Ninth Circuits, for example, have applied what can be characterized as a "business enterprise test" to determine if a lender can be an employer. The Third Circuit, on the other hand, has rejected this and other approaches and applied instead the DOL factors to answer the same question. The Fifth Circuit recently followed the Third Circuit's analysis. Because there is no consistent test used to determine if an affiliated company is an employer under the WARN Act, a uniform and consistent set of guidelines needs to be established to prevent affiliated companies from inadvertently subjecting themselves to liability and to protect employees from overly aggressive affiliated companies.\textsuperscript{32} The Third Circuit Court of Appeals observed in 2001, "the intersection of the regulatory factors and supplementary information has created considerable confusion among courts searching for a single test to determine the status of affiliated corporations."\textsuperscript{33}

A. The Application of Multiple Tests: Alter Ego, Single Employer, and DOL Factors

In the early 1990s, two district courts considered the liability of parent corporations when WARN Act notices were not given to employees of their subsidiaries. Both of these courts employed a complicated, multilayered analysis to determine the liability of affiliated companies.

In *Local 397, International Union of Electric, Electrical Salaried Machinists and Furniture Workers v. Midwest Fasteners, Inc.*, plaintiff employees sought to hold parent companies liable for its wholly owned subsidiary's failure to give notice under the WARN Act or, in the alternative, to hold the parent companies directly liable under the WARN Act.\textsuperscript{34} Understanding that "no court has decided the issue currently presented," the court applied three

\textsuperscript{32} 41 AMBLJ 313, THE PERILS OF CONTROL: AFFILIATED LIABILITY UNDER THE WARN ACT.
\textsuperscript{33} Pearson v. Component Technology Corp., 247 F.3d 471 (2001)
tests to determine corporate liability for the subsidiary's failure to give WARN Act notice: the alter ego doctrine; the single-employer doctrine; and the DOL five-factors.

Each yielded different conclusions. Applying the alter ego doctrine as it has developed in the Third Circuit in United States v. Pisani, the court considered numerous factors such as: gross undercapitalization, whether the subsidiary received frequent capital infusions from its parent companies, nonpayment of dividends, malfeasance of some officers and directors, and failure to observe corporate formalities. Under this test, the court held that the parent company "could not be held liable for the WARN Act violation."36

Next, the court in NLRB v. Browning-Ferris Indus. Inc., used the single-employer doctrine in an attempt to determine if "the two nominally independent enterprises, in reality, constitute only one integrated enterprise."37 Under the single-employer theory, the court considered four factors: common ownership or financial control, common management, centralized control of labor relations, and functional integration of operations. Under this second test, the court found that the parent and its subsidiary "could be considered a single enterprise."38

In an attempt to resolve the conflict between these two tests, the court in Midwest Fasteners applied a third test, the “DOL factors”: (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies arising from a common source, and (v) the dependency of operations.39 The court found that the parent companies shared common ownership, common officers and/or directors, and that the parent

37 NLRB v. Browning-Ferris Indus. Inc., 691 F.2d 1117 (3rd Cir.).
38 Id.
was "making significant policy decisions affecting the labor force."\textsuperscript{40} Considering exercise of control to be the "most compelling factor," the court proceeded to find that a "substantial degree of control" was exercised over the subsidiary.\textsuperscript{41} Ultimately, the court concluded that inasmuch as the WARN Act was enacted by Congress to ameliorate the harm that allegedly took place in this case, "[t]he true wrongdoer should not escape liability simply because corporate formalities are observed."\textsuperscript{42} The court held that the parent companies may be held liable for the alleged violation of the WARN Act violation.\textsuperscript{43}

Even though it was unnecessary for the court in \textit{Midwest Fasteners} to consider whether the parent companies could be held directly liable for the alleged WARN Act violation, the court stated it was "appropriate to relate that a significant factor in its decision to hold the parents liable was the involvement of the parents in the decision to close" the plant.\textsuperscript{44} The court made that decision because two directors of the plant ultimately made the decision to cease operations and shut down the corporation. Those directors subsequently "reconstituted themselves" as directors of the parent corporation. The court held that the parent "exercised de facto control of the operations of the subsidiary."\textsuperscript{45} Therefore, the court granted plaintiffs' motion for summary judgment as to the liability of the parent companies.

Subsequent to the \textit{Midwest} decision a district court in the Central District of California in \textit{Wholesale and Retail Food Distributors Local 63 v. Santa Fe Terminal Services, Inc.} also considered whether a parent corporation and its wholly owned subsidiary should be treated as separate entities under the WARN Act. In \textit{Santa Fe Terminal}, the parent’s subsidiary entered

\textsuperscript{40} Id.  
\textsuperscript{41} Id.  
\textsuperscript{42} Id.  
\textsuperscript{43} Id.  
\textsuperscript{44} Id.  
\textsuperscript{45} Id.
into a service agreement under which it performed ramping and de-ramping of rail freight. The parent corporation terminated the service agreement and the subsidiary gave a non-WARN Act conforming notice that it was permanently laying off the employees.\footnote{Wholesale and Retail Food Distributors Local 63 v. Santa Fe Terminal Services, Inc. 826 F. Supp. 329 (1993).} The plaintiffs were all employees of the subsidiary. The employees asserted that the parent and subsidiary constituted a single employer. Both the employees as plaintiffs and the employers as defendants each cited to the single-employer analysis in \textit{Midwest Fasteners}. The court stated that, "the single-employer theory and WARN regulations are similar, California corporate law presents substantive distinctions."\footnote{Id.} Based on the holding in \textit{Midwest Fasteners} and the DOL regulations and comments, the court found that "California corporation law, as well as the provisions of WARN must be applied to determine" if the companies at issue constitute a single employer.\footnote{Id.}

First, the court in applying the WARN Act factors, held for the plaintiffs that there existed between the entities a common ownership, an overlap in management, and common personnel policies (the benefit programs were controlled by the parent corporation).\footnote{Id.} With respect to the five DOL factors, the court noted that "discipline and labor relations at the plant level were separate and distinct" and that the entities "operated independently."\footnote{Id.} Without specifically stating which party prevailed under the DOL factors, it went on to analyze the facts before it under California's alter ego doctrine, concluding that the entities did not constitute a single employer. The court reasoned that, "because plaintiffs do not contend that [the

\footnote{46 Wholesale and Retail Food Distributors Local 63 v. Santa Fe Terminal Services, Inc. 826 F. Supp. 329 (1993).} 
\footnote{47 Id.} 
\footnote{48 Id.} 
\footnote{49 Id.} 
\footnote{50 Id.}
subsidiary] is [the parent corporation’s] alter ego, it would appear that [the entities] cannot be deemed a single employer as a matter of law."\(^{51}\)

Note that the court rejected the plaintiffs' assertion that such a finding would result in inequity, stating that the mere fact that the subsidiary "may be unable to satisfy a judgment is not the controlling factor in resolving the issue."\(^{52}\) Rather, the court stated that, "deciding whether parent corporations are to be considered separate from their subsidiaries, the federal courts generally respect corporate separateness unless to do so would work an injustice."\(^{53}\)

**B. The Business Enterprise Test: Eighth and Ninth Circuits**

After the decision *Midwest Fasteners*, the Eighth and Ninth Circuits declined to follow the multi-test approach applied in *Midwest Fasteners* and *Santa Fe Terminal*. Instead the courts applied a business enterprise test. In *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corporation*, the Ninth Circuit considered whether under the WARN Act, a secured lender may be held directly liable under the WARN Act to its debtors' employees.\(^{54}\) Here the debtors defaulted on their loan and the lender took physical possession of its debtors' assets pursuant to financing agreements. Looking at the "simplicity of the definition" of employer under WARN Act, which "emphasizes its apparent breadth," the Ninth Circuit stated that "the crucial question is not the status of the defendant's legal relationship to the business but, instead, if at the time of the plant closing or mass layoff the defendant is responsible for operating the business as a going concern."\(^{55}\)

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\(^{51}\) Id.
\(^{52}\) Id.
\(^{53}\) Id.
\(^{54}\) *Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corporation*, 66 F.3d 244 (1995).
\(^{55}\) Id.
The court ruled that a lender who exercises control over collateral securing a delinquent loan could be held liable if it continues the business in operation.\textsuperscript{56} Pointing to the commentary appended to the Department of Labor's final regulations acknowledging that where a fiduciary in a bankruptcy proceeding "may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation." Stated another way, the court concluded that WARN's obligations indeed can apply to a secured creditor, but only if the creditor operated the debtor's asset as a 'business enterprise' in the 'normal commercial sense.'\textsuperscript{57} Moreover, the court concluded that WARN Act liability is not triggered, however, "where the creditor does no more than to exercise that degree of control over the debtor's collateral necessary to protect the security interest, and acts only to preserve the business asset for liquidation or sale."\textsuperscript{58}

The Court held that the creditor was not a WARN employer, for two reasons. First, it was reasoned that there was no indication the lender was responsible for operating the Weslock facility during the days in question as a business enterprise for commercial purposes.\textsuperscript{59} Second, the court reasoned that the lender's vice-president did not participate in decisions concerning the plant's commercial output, the marketing of the plant's product, or the plant's employment practices. In applying the CERCLA as an analogous situation for imposing liability, the court held that the plaintiff's employees needed to show the lender was involved in the "functional operations of the Weslock facility"; conclusionary characterizations of control were not sufficient. The court was looking for factual evidence of control over the operations of the

\textsuperscript{56} Id.  
\textsuperscript{57} Id.  
\textsuperscript{58} Id.  
\textsuperscript{59} Id.
plant. In connection with that inquiry into control, it is interesting to note that, instead of looking to the DOL factors to make its determination, the Ninth Circuit cited to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as an analogous situation for imposing liability.\footnote{\textit{41 AMBLJ 313, THE PERILS OF CONTROL: AFFILIATED LIABILITY UNDER THE WARN ACT}. (Under CERCLA, for a defendant to be defined as an "operator," it "must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management." Without elaboration, the court then held that the lender's "management was consistent with the type of control a secured creditor may exercise over a defaulting debtor to protect collateral securing a loan.")}

Although the primary issue in \textit{Weslock} was whether the creditor exercised control over the debtor, the employees argued that, in the alternative, the court should impose liability under a joint-employer rule. The court addressed this alternative argument in a footnote and rejected the employees' contention stating that this argument failed for the same reason that the entity was not a single employer. The court concluded that the level of the creditor's involvement in the debtor's business "did not exceed the limits permitted a secured creditor who acts primarily to protect its security interest."\footnote{\textit{Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corporation, 66 F.3d 244 (1995).}} Although the court did not make any legal distinction between a single employer and a joint employer, ultimately, the Ninth Circuit affirmed the district court decision granting summary judgment in favor of the creditor.\footnote{\textit{Id.}}

After the \textit{Weslock} decision, the Eighth Circuit considered whether a commercial lender was obligated to comply with the WARN Act notice requirements when its insolvent borrower closed a plant. In \textit{Adams v. Erwin Weller Co.}, a creditor made a series of secured loans to a borrower which included a loan to purchase a bottle manufacturing plant.\footnote{Adams v. Erwin Weller Co., 87 F.3d 269 (1996).} Ultimately the borrower experienced financial difficulties and became insolvent even though "the parties
worked conscientiously to revive borrower's fortunes.\(^{64}\) After the creditor refused to extend additional credit and “called in” the defaulted loans, the insolvent borrower closed its manufacturing plant without giving its employees advance notice as may be required under the WARN Act.\(^{65}\)

As in Weslock, the Eighth Circuit was asked to determine the circumstances in which a secured lender can be held directly liable as an employer under the WARN Act. Agreeing with the Ninth Circuit that "WARN's obligations can apply to a secured lender," the court stated that "when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business" the "degree of control necessary to support employer responsibility under WARN will be achieved."\(^{66}\) Quoting Weslock, the Eighth Circuit adopted the business enterprise test set forth by the Ninth Circuit.

In adopting the Eighth Circuit rejected the employee's interpretation of the WARN Act’s parameters for liability. The Court stated that the "mere fact that the loan documents give some control over the borrower to protect the lender's security interest does not automatically make the lender a WARN employer."\(^{67}\) Moreover, a creditor does not have to "timidly sit on the sidelines and watch its loan unravel and its security erode."\(^{68}\) Rather the court opined that a lender can choose to "restrict its borrower's financial and business activities, monitor the borrower's business doings, and participate in the borrower's management, all to protect the lender's investment and the collateral in securing the loan."\(^{69}\) This list of activities, especially

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\(^{64}\) Id.
\(^{65}\) Id.
\(^{66}\) Id.
\(^{67}\) Id.
\(^{68}\) Id.
\(^{69}\) Id.
participating in the borrower's management, seems to run contrary to the business enterprise test as defined by the Ninth Circuit.

In an attempt to provide some parameters for lenders, the court further stated that lenders can be held liable under the WARN Act only when it "becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business."\(^{70}\) "Assuming responsibility" seems to take the business enterprise test a step further than the Ninth Circuit, where the focus was on control, as opposed to responsibility. It is noteworthy to point out that another important finding in Adams pertains to control over the employees. The court held that the lender’s exercise of limited control did not rise to the level necessary to be an “employer” under the WARN Act, even though the lender never assumed an employer-employee relationship by hiring, firing, paying, or supervising any of the borrower’s employees.\(^{71}\)

C. DOL Factors: Third and Fifth Circuits

In 2001, the 3\(^{rd}\) Circuit contended with the issue. The court gave extensive consideration to all previous tests in its decision in Pearson v. Component Technology Corp. In Pearson, employees brought suit against a secured creditor and the debtor/employer for alleged violations of the WARN Act for failure to provide a sixty-day notice of a plant closing.

From the beginning, the court recognized the existence of the DOL factors and the Department of Labor statement explaining its intention “that jurisprudence under the WARN Act should not deviate from 'existing law' with regard to liability for affiliated corporations.”\(^{72}\) The court noted that "the law is presently unsettled as to the proper test for liability under the

\(^{70}\) Id.
\(^{72}\) Id.
WARN Act, and as to the significance of the WARN Act’s purposes of an affiliated corporation's status as ‘lender’ or ‘parent.”

In reaching its decision, the Pearson court reviewed three ways to impose liability on affiliated corporations: (1) traditional veil piercing theories, (2) the integrated enterprise test, and direct liability. The court acknowledged that lines separating ‘parents’ from ‘lenders’ are sometimes difficult to define and therefore courts should apply the same test for liability regardless of corporate labels. The court used the DOL factors in its conclusion. The DOL factors primarily focus on the nature and degree of control possessed by one corporation over another, in particular those circumstances relevant to labor relations.

In applying the DOL factors to determine whether the affiliated companies constituted a single employer under the WARN Act. The court ruled that merely creating an issue of fact with respect to one of the DOL factors (i.e. common ownership) will not presumptively meet the burden of proof with respect to the DOL factors test. That is proof of a relationship between the parent corporation and the CEO of the subsidiary is not sufficient enough to prove the parent exhibited “pervasive control” over the debtor.

Later, the Fifth Circuit followed the analysis in Pearson when it decided, Administaff Companies, Inc. v. New York Joint Board, Shirt & Leisurewear Division. Rejecting a joint-employer test typically used in NLRA cases, the court held that a company hired to provide "personnel management, payroll, and administrative services for other businesses, essentially operating as an off-site human resources department" was not liable as an employer under the

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73 Id.
74 Id.
75 Id.
76 Id.
77 Id.
WARN Act.\textsuperscript{79} In reaching its decision, the court applied the DOL factors. The court held that it was "undisputed that Administaff had no role in or even advance knowledge" of the decision to close the plant.\textsuperscript{80} And it reasoned that the plain language of the WARN Act, which only holds "an employer who orders a plant closing or mass layoff liable.\textsuperscript{81}

\textbf{D. A Hybrid Approach}

A hybrid approach to the question of liability of an affiliated company was taken in \textit{United Automobile, Aerospace & Agricultural Implement Workers of America Local 157 v. OEM/Erie Westland, LLC.}\textsuperscript{82} In reaching its conclusion, the court cited Weslock and Adams for the proposition that the crucial inquiry as to WARN Act violations is to determine "if at the time of the plant closing or mass layoff the defendant is responsible for operating the business as a going concern."\textsuperscript{83} Instead of using the general business enterprise test from those cases, however, the court cited the DOL factors.\textsuperscript{84} This analysis is much more akin to the approach taken in Pearson. Inasmuch as the court found "several of the indicia" of single-employer status, including common ownership, nonfunctioning of officers and directors, and evidence of \textit{de facto} control, summary judgment was denied.\textsuperscript{85}

\textbf{Public Pressure}

On December 10, 2008 the laid-off workers who had taken over the Chicago area plant of Republic Windows ended their six-day sit-in after they were notified that Bank of America had agreed to their demands and had reached a settlement with Republic to extend their line of credit

\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} United Automobile, Aerospace & Agricultural Implement Workers of America Local 157 v. OEM/Erie Westland, LLC 203 F.Supp 2d 825(2002).
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} 41 AMBLJ 313, THE PERILS OF CONTROL: AFFILIATED LIABILITY UNDER THE WARN ACT.
so that the company could pay the workers their accrued vacation time and back pay. The workers’ protest was broadcast via news channels across the nation and almost overnight the workers plight became a symbol for the hundreds of thousands of Americans recently affected by the current economic crisis. The pressure on Bank of America reached an apex when the Governor of Illinois, Rod Blagojevich threatened to suspend all business with Bank of America until they resolved the issue with the workers.\textsuperscript{86} Bank of America subsequently approved $1.35 million in loans to pay those obligations and another $400,000 came from J.P. Morgan Chase. Bank of America was under no obligation to capitulate to the company or the workers; however the bank was pressured into a settlement.\textsuperscript{87}

**Conclusion**

A uniform federal standard articulating the circumstances in which an affiliated company can be held liable for failing to comply with the WARN Act may clarify the existing conflict in the courts about what standard should be used to determine if an affiliated company is an employer within the meaning of the WARN Act. To date, the case law leaves affiliated companies without any clear sense of their liability.

Contrary to the position taken by the courts, the focus should be on control of the corporation and its labor and not integration of its personnel or oversight of its revenues. In order to remain consistent with the broad remedial purposes of the WARN Act, any affiliated company which exercises control over another company should fall within the parameters of the WARN Act.\textsuperscript{88} The court’s analysis should encompass elements from all tests used by the courts to

\textsuperscript{86} WASHINGTONPOST.COM, *Governor Supports Workers at Factory*, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/12/08/AR2008120803409.html

\textsuperscript{87} CNN.COM, *Chicago Workers End Window Plant Sit-In*, available at http://www.cnn.com/2008/US/12/10/illinois.labor.protest/

\textsuperscript{88} 41 AMBLJ 313, *THE PERILS OF CONTROL: AFFILIATED LIABILITY UNDER THE WARN ACT*
determine if the affiliated company is controlling the enterprise and, accordingly, if it is ultimately responsible for a mass layoff or plant closing.

To make such a determination, the courts should look at control and not whether affiliates are integrated as a single employer. Keeping true to the established standard set forth by the NLRA, the focus whether the WARN Act is violated is whether an affiliated company's acts were a substantial or motivating factor in causing a mass layoff or plant closing. That way such factors by the courts would put an affiliated company on notice that its may trigger liability under the WARN Act. Furthermore, a part of their inquiry, courts should use the five DOL factors in order to determine which entity may be liable for the practice-giving rise to a WARN Act violation. If the moving party can prove, that an affiliate’s acts were a substantial or motivating factor which caused or resulted in a mass layoff or plant closing, it has established a prima facie case a WARN Act violation. The burden of proof should shift to the defendant to show that there would have been a mass layoff or closing even without its involvement. If the defendant is unable to meet its burden, it should be deemed to be a WARN Act employer such that it must be held to the notice requirements of the WARN Act. Applied by courts, an analysis should make clear the apparent confusion as a result of applying multiple tests by providing more concrete guidelines to affiliates and allow courts to analyze the DOL factors strictly.