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WHY WARN?—THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT IN BANKRUPTCY

Laura B. Bartell*

INTRODUCTION

The Worker Adjustment and Retraining Notification ("WARN") Act was enacted by Congress in 1988 to provide limited protections to workers whose jobs are suddenly and permanently terminated. The WARN Act generally precludes an "employer" from ordering a "plant closing or mass layoff" until the expiration of a sixty-day period after giving written notice of such proposed action. Pursuant to legislative directive, the Department of Labor ("Department") promulgated a final rule in 1989 interpreting the provisions of the statutory language. Although neither the WARN Act itself nor the final rule makes any reference to bankrupt employers, in the preamble to the rule the Department declined to exclude bankruptcy "fiduciaries" from the definition of "employer."

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2 See infra Part I.
4 Id. § 2107(a) (directing the Secretary of Labor to "prescribe such regulations as may be necessary to carry out this chapter . . . ").
5 54 Fed. Reg. 16,042 (codified at 20 C.F.R. § 639 (2001)).
Instead the Department suggested that "a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer... [but] where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer."6

This Article suggests that the distinction made by the Department rule, as implemented by the bankruptcy courts, is untenable as a matter of statutory interpretation, legislative history, and labor and bankruptcy policy. Part I of this Article discusses the background and language of the WARN Act. Part II looks at the Department rule and its provisions that might bear on a debtor in bankruptcy. Part III reviews the cases seeking to apply the WARN Act and its implementing rule. Part IV suggests that the Department's approach of making the WARN Act inapplicable to a fiduciary for a bankrupt debtor who has the "sole function" of "liquidat[ing]" the business demonstrates an inadequate grasp of the bankruptcy process. Although cogent arguments can be made to support excluding from the WARN Act all employment terminations ordered in bankruptcy, this Article concludes that the goals of the WARN Act would be better served by protecting employees who lose their jobs in bankruptcy to the same extent as they would be protected outside of bankruptcy and that Congress should so provide.

I. ENACTMENT OF THE WARN ACT

Legislative proposals designed to provide some sort of protection to workers subject to plant closings and layoffs date back more than twenty-five years.7 The bills generally addressed at least one of three areas. First, some required advance notice to

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6 Id. at 16,045 (April 20, 1989).
employees (and in some cases to federal or state officials) before an employer ordered a plant closing or permanent layoff of employees. Second, the bills often required consultation between employer and employees with respect to the proposed plant closing or layoff before it could be ordered. Finally, they provided for federally-funded and state-administered programs for worker adjustment through retraining and income support following a plant closing or layoff.

None of these proposals generated much support until 1982 when Congress enacted Title III of the Job Training Partnership Act of 1982 ("JTPA"), which gave states federal funds to aid dislocated workers through counseling, job placement assistance, and retraining. Although the Title III programs had some success—a General Accounting Office report on dislocated workers in 1987 determined that while sixty-nine percent of participants in Title III programs found new jobs—most dislocated workers received no assistance at all. By 1985, only seven percent of the dislocated workers were enrolled in Title III programs.

Advance notice and consultation remained even more contentious issues. In 1985, the House Education and Labor Committee reported out House Bill 1616, which would have required employers of fifty or more employees to provide at least ninety days notice to the affected employees before ordering a change in operations that could reasonably be expected to result in an employment loss of fifty or more employees at any site during any thirty-day period. In addition, the bill would have required good faith consultation between employer and employees before ordering the plant closing or layoff. The Republican administration opposed the bill, and in an effort to defer favorable consideration, the Secretary of Labor, William E. Brock, appointed a task force to evaluate the problems associated with plant closings. The

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8 Pub. L. No. 97-300 (codified at 96 Stat. 1322 (1982)). The JTPA was the first comprehensive federal program to assist displaced workers since the Manpower Development and Training Act of 1962, Pub. L. No. 87-415 (codified at 76 Stat. 23 (1962)).
10 S. REP. No. 100-62, at 7.
12 See Letter from William E. Brock, Secretary of Labor, to Rep. Marge Roukema of New Jersey, dated Nov. 8, 1985, included in 131 CONG. REC. H10,002, 10,003-04 (1985) (statement
administration's efforts were successful. Despite amendments on
the floor of the House that reduced the number of employers
covered by the bill, increased the exceptions, eliminated the
consultation provisions, and limited the remedies available, the bill
was narrowly rejected.\textsuperscript{13}

The Report of the Secretary of Labor's Task Force on
Economic Adjustment and Worker Dislocation\textsuperscript{14} was issued in
December 1986. It began by examining the nature and magnitude
of the problem of worker displacement, concluding that, although
displacement is an "inevitable consequence of a dynamic world
economy," it is a problem "of sufficient magnitude and urgency that
it demands an effective coordinated response with special priority by
both the public and private sectors."\textsuperscript{15} The Task Force then looked
at how the private and public sectors could meet the challenge of
displacement. It concluded that, with respect to private sector
initiatives, "clear notice in advance, the earlier the better, ... especially ... when notice is coupled with no loss of severance
benefits for early leaving and aggressive joint labor-management
outplacement effort" would be the most effective method of
accelerating worker adjustment.\textsuperscript{16} With respect to public assistance,
the Task Force concluded, after reviewing the practices in several
other industrialized nations, "that advance notification was a useful
and important first step in providing time for workers to find
alternative employment or training before layoff and in reducing
industry and community reluctance to accept change."\textsuperscript{17} Indeed,
the Task Force stated that it was "in agreement with other studies
that have concluded that advance notification is an essential
component of a successful adjustment program."\textsuperscript{18} However, the
Task Force could not agree on whether advance notice should be
legislatively mandated or merely voluntary.\textsuperscript{19}

\textsuperscript{13} 131 Cong. Rec. H10,487 (daily ed. Nov. 21, 1985). The vote was 203 in favor, 208
against with 23 not voting. \textit{Id.}

\textsuperscript{14} U.S. Secretary of Labor's Task Force on Economic Adjustment and Worker
Dislocation, Economic Adjustment and Worker Dislocation in a Competitive Society
(Dec. 1986).

\textsuperscript{15} \textit{Id.} at 16-17.

\textsuperscript{16} \textit{Id.} at 18-19.

\textsuperscript{17} \textit{Id.} at 20.

\textsuperscript{18} \textit{Id.} at 22.

\textsuperscript{19} \textit{Id.} at 23.
Within a year after the report's publication, both the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor reported out a bill intended to implement the recommendations of the Secretary of Labor's Task Force. Both bills proposed to replace Title III of JTPA with a new comprehensive readjustment program for displaced workers to provide more efficient and more timely delivery of services. Both bills also required employers to give advance notification of plant closings and mass layoffs to employees, state government, and local governmental officials.

Senate Bill 538 was favorably reported by the Committee on Labor and Human Resources with some modifications and was included as Part B of Title XXII of the proposed Omnibus Trade and Competitive Act of 1988. In an effort to garner support, some further changes were made to the provisions of Part B of Title XXII by Senator Howard Metzenbaum, the sponsor of Senate Bill 538, reducing the amount of notice required, decreasing the number of businesses covered, expanding the exceptions and exemptions, and eliminating any requirement that employers disclose financial information. An amendment to strike the provisions from the trade bill failed despite a veto threat from the administration.

Meanwhile, the House passed its own version of the trade bill, House Bill 3. Because the House Bill did not include the plant closing prenotification provisions, the Senate amended House Bill 3 to contain the Senate provisions as amended and then passed it. The House and Senate conferees on House Bill 3 included the Senate language on plant closings in their report (with some modifications), and both houses approved the conference report.

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20 The Senate Bill was S. 538, 100th Cong. (1988) and the House Bill was H.R. 1122, 100th Cong. (1987). Each was entitled the Economic Dislocation and Worker Adjustment Assistance Act.


22 S. 1420, 100th Cong. (1987).


24 See 133 CONG. REC. 19,142, 19,152 (1987). The vote was 40 in favor of striking the provisions and 60 against.


28 See 134 CONG. REC. H2375 (daily ed. April 21, 1988) (House approval by a vote of 312
As promised, President Reagan vetoed the bill, citing in particular the mandatory prenotification provisions as unacceptable. Although the House voted to override the veto, the veto was sustained in the Senate. Within days a new bill relating to prenotification of plant closings and layoffs was introduced in the Senate. Both houses passed the WARN Act less than a month after its introduction. President Reagan allowed the bill to become law without his signature on August 4, 1988, and it became effective six months later.

Because of its contentious legislative history, the WARN Act is a far less ambitious law than many of its supporters might have wished. The operative provision, § 2102, provides that an "employer shall not order a plant closing or mass layoff until the end of a sixty-day period after the employer serves written notice of such an order" on the affected employees or their representative and on state and local government officials.

The key terms used in the provision are all defined. "Employer" is defined as "any business enterprise that employs... 100 or more employees" who are either not part-time or who in the aggregate work at least 4,000 hours per week exclusive of overtime (the functional equivalent of 100 full-time workers working forty-hour work-weeks). "Plant closing" means

the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a

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29 See 134 CONG. REC. 8978 (1988) (Senate approval by a vote of 63 to 36).
31 See 134 CONG. REC. 10,152 (1988). The vote was 308 to 113 to override.
32 See 134 CONG. REC. 13,716 (1988). The vote was 61 to 37 to override.
33 Senate Bill 2527 was introduced on June 16, 1988 and reached the Senate floor on June 22, 1988. It was identical to the plant closing provisions that were included in the vetoed trade bill. See 134 CONG. REC. 15,514 (1988).
34 See 134 CONG. REC. 16,691 (1988) (Senate approval by a vote of 72 to 23); 134 CONG. REC. H5519 (daily ed. July 13, 1988) (House approval by a vote of 236 to 136).
37 See id. § 2101(a)(1). The complete text reads as follows:

(1) the term 'employer' means any business enterprise that employs--
(A) 100 or more employees, excluding part-time employees; or
(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime).
single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding part-time employees.\(^3\)

"Mass layoff" is "a reduction in force" other than by a plant closing which results in employment losses at a single site of employment during any thirty-day period for at least 500 employees (excluding part-time employees) or at least fifty employees if they constitute at least thirty-three percent of all employees at that site.\(^3\) In each case, if during a ninety-day period there are employment losses for two or more groups of employees at a single site of employment, each of which is small enough in number to fall below the statutory threshold for "plant closing" or "mass layoff" but which together would qualify, a plant closing or mass layoff is deemed to have occurred unless the employer demonstrates the employment losses are the result of "separate and distinct actions and causes and are not an attempt by the employer to evade the requirements" of the WARN Act.\(^3\)

"Employment loss" includes not only involuntary termination of employment but also a layoff exceeding six months or a reduction of work hours by more than fifty percent each month of a six-month period.\(^4\) The exclusions for part-time employees excluded employees who worked on average fewer than twenty hours per week or who were employed for fewer than six of the twelve months preceding the date prenotification was required.\(^4\)

\(^3\) See id. § 2101(a)(2).

\(^3\) See id. § 2101(a)(3). The definition reads in full:

(3) the term 'mass layoff' means a reduction in force which –

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for –

(i) (I) at least 33 percent of the employees (excluding any part-time employees); and

(ii) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees (excluding any part-time employees).

\(^4\) See id. § 2102(d).

\(^4\) See id. § 2101(a)(6). "[S]ubject to subsection (b) of this section, the term 'employment loss' means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period." Id.

\(^4\) See id. § 2101(a)(8).
Provisions limiting the applicability of the WARN Act proved essential to gaining support for the Act's passage. These limits are accomplished through three mechanisms. First, the WARN Act provides that an "employment loss" is not deemed to occur for an employee if an employer closes a site of employment or lays off the employee but, prior to the closing or layoff, offers to transfer the employee to a different site of employment within reasonable commuting distance with no more than a six-month break in employment (even if the employee declines) or offers to transfer the employee to a different site of employment even beyond reasonable commuting distance with no more than a six-month break in employment and the employee accepts. Congress believed such situations did not create a job loss of the type addressed by the statute.

Second, the normal sixty-day notification period is not applicable under three circumstances. The first, familiarly referred to as the "faltering company" exception, was inserted to address the concerns of legislators worried that the notice itself would trigger a business failure that might otherwise have been prevented. If an employer is required to give sixty-days prior notice of a closing, that notice itself could scare off potential credit sources, purchasers, or other business partners whose dealings with the employer might eliminate the need to engage in a plant closing or layoff, thereby ensuring the employer's failure when silence might have saved it. The exception was intended, however, to be "a narrow one" and
The WARN Act requires that the employer prove the specific steps it had taken to obtain financing or investment or new business that "would have enabled the employer to prevent or forestall the shutdown" and show the "reasonable basis" for its belief that the required notice would have prevented the employer from obtaining the funds or business that it had a "realistic opportunity" to obtain. 46

The second circumstance under which a full sixty-day prenotification is not required is when "the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 47 Known as the "unforeseeable business circumstances" exception, 48 the language was intended to address the situation in which "a principal client... suddenly and unexpectedly terminate[d] or repudiate[d] a major contract" or the employer sees "a sudden, unexpected and dramatic change in business conditions such as price, cost, or declines in customer orders." 49

Closely related to the second exception is the third, which excuses notice "if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States." 50

In all three circumstances that excuse a full sixty-day prenotification, an employer must give "as much notice as is practicable" and disclose why the full sixty-day notice was not provided. 51

The third way Congress limited the application of the WARN Act was to provide for two blanket exemptions. The first exemption renders the provisions inapplicable to closings of temporary facilities or if the closing or layoff is the result of "the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was

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51 See id. § 2102(b)(3).
limited to the duration of the facility or the project or undertaking.\textsuperscript{52} The second exempts a closing or layoff that "constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter."\textsuperscript{55}

If an employer violates its obligation to give prenotification of a plant closing or mass layoff, the employer is liable to each "aggrieved employee"\textsuperscript{54} for "back pay for each day of violation" and benefits for a maximum period of sixty days.\textsuperscript{55} The liability is reduced by "any wages paid by the employer to the employee for the period of the violation," any other voluntary payments made by the employer to the employee, or payments by the employer to a third party or trustee on behalf of the employee for the period of the violation.\textsuperscript{56} The Act gives the court discretion to reduce the employer's liability if the court believes that the employer's act or omission "was in good faith and . . . the employer had reasonable grounds for believing that the act or omission was not a violation of" the WARN Act.\textsuperscript{57}

II. DEPARTMENT REGULATIONS

Section 8(a) of the WARN Act\textsuperscript{58} directed the Secretary of Labor to prescribe regulations necessary to carry out the Act's provisions.

\textsuperscript{52} See id. § 2103(1).

\textsuperscript{53} See id. § 2103(2).

\textsuperscript{54} An "aggrieved employee" is defined as "an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 2102 of this title [29 U.S.C. § 2102], did not receive timely notice either directly or through his or her representative as required by section 2102 of this title." Id. § 2104(a)(7).

\textsuperscript{55} See id. § 2104(a)(1). The employer may also be liable to a unit of local government who fails to receive the required notice for a civil penalty not exceeding $500 for each day of violation. See id. § 2104(a)(5). In any suit seeking to enforce an employer's obligations, the prevailing party may be awarded a reasonable attorneys' fee. See id. § 2104(a)(6).

\textsuperscript{56} See id. § 2104(a)(2).


\textsuperscript{58} See Pub. L. No. 100-379, § 8(a), (codified at 29 U.S.C. § 2107(a) (1994)) ("The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this chapter. Such regulations shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this chapter.").
On December 2, 1988, the Employment and Training Administration of the Department published an interim interpretative rule for the WARN Act and requested comments on a proposed final rule in identical form which was published on December 5, 1988. The final rule was published on April 20, 1989.

The key provision bearing on the applicability of the WARN Act is the definition of "employer." Although the statutory definition in the WARN Act itself focused on the number of employees, it also described the "employer" as a "business enterprise" employing the requisite number of employees. "Business enterprise" was not defined and proved to be the source of many comments on the proposed rule.

Early commentators asked whether related but legally distinct entities (e.g., parent and subsidiary corporations or independent contractors and their business clients) should be considered independent employers or a single business enterprise; whether non-profit employers were covered; and whether "public and quasi-public" entities engaged in commercial activities could be considered "business enterprises." In its proposed final rule, the Department made clear that it interpreted the term "business enterprise" to exclude "regular Federal, State, and local government public services." However, that to the extent that public and quasi-public entities engaged in "business" (which the Department defined as "tak[ing] part in a commercial or industrial enterprise; supply[ing] a service or good on a mercantile basis; or provid[ing] independent management of public assets, raising revenue and making desired investments") and were "managed by a separately organized governing board with independent authority to manage its personnel and assets," they would be subject to the WARN Act. The Department stated, without explanation, that its rule "include[s] nonprofit organizations." It also included a detailed

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66 See id.
paragraph in the proposed final rule addressing whether independent contractors and subsidiaries should be treated as distinct employers from the contracting company or parent corporation, itemizing factors to be considered.\footnote{See id. at 49,077-78.}

When the final rule was published, the Department rejected any modification to the substance of its resolution of these issues.\footnote{Id. at 16,045.} But the Department did address for the first time a previously submitted comment suggesting that “[f]iduciaries’ in bankruptcy proceedings should be excluded from the definition of employer.”\footnote{Id. at 16,045.} The Department declined to change the rule to address this concern, noting that “adequate protections for fiduciaries are available through the bankruptcy courts.”\footnote{Id.} But the Department went on to distinguish between “a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors” (who, the Department suggested, does not have any obligation to provide notice under the WARN Act because “the fiduciary is not operating a ‘business enterprise’ in the normal commercial sense”) from other fiduciaries who “may continue to operate the business for the benefit of creditors” and who have obligations under the WARN Act “precisely because the fiduciary continues the business in operation.”\footnote{Id.}

Although this discussion is the sole reference to bankruptcy in the preamble to the final rule, and the rule itself does not include any reference to bankruptcy in its text, other provisions of the rule and analysis by the Department are directly applicable to financially troubled employers and might be relevant in determining the WARN Act’s applicability to bankrupt employers. The Department noted that several comments requested that an exception be

\footnote{Specifically, the Department declined to exclude independent state and local government agencies that perform business activities entirely from the scope of the WARN Act, although it added an exclusion for federally recognized Indian tribal governments, and made explicit its view that in closing banks under the deposit insurance laws the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation exercise “strictly governmental authority” and are thus not “employers.” 54 Fed. Reg. 16,042, 16,045 (Apr. 20, 1989). It also declined to modify its provision relating to independent contractors and subsidiaries, suggesting it was “intended only to summarize existing law,” and was “not intended to foreclose any application of existing law or to identify the source of legal authority for making determinations of whether related entities are separate.” Id.}
inserted for "government ordered closings." Although the Department declined to include such an exception, it suggested that "some government-ordered closings may constitute unforeseeable business circumstances to which reduced notice applies," in particular "those closings which are the direct result of governmental action and which occur without notice" such as "closing of a restaurant by a local health department or the closing of a nuclear power plant by the Nuclear Regulatory Commission." It contrasted those circumstances with closings that result from enforcement action against the employer for violations of safety or environmental standards that the employer is unable to remedy. Those closings "may result from a government action" but "are not government ordered." The key factor bearing on WARN Act liability in these cases was whether "the employer remains in control of its business." When, for example, the Federal Home Loan Bank Board orders the closing of a savings and loan institution and the Federal Savings and Loan Insurance Corporation "assumes control of the enterprise," ousting former management, no notice of subsequent layoffs need be given because "there is no employer."

In other respects, although the Department deleted a provision in the proposed final rule stating that the "unforeseeable business circumstances" exception was to be "narrowly construed" as unsupported by the legislative history, in fact the final rule confines the exception to very limited situations, specifically providing that the circumstance should be "sudden, dramatic, and unexpected." In such an event, the employer may give less than the statutory sixty days notice only if the employer reasonably could not foresee the event, and reasonableness is judged on an objective

72 Id. at 16,054.
73 Id.
74 Id.
75 Id.
76 Id. The Department also agreed with the FHLBB that when employees of a closed institution are rehired to work on winding up its affairs, at which time their jobs will terminate, they are considered workers on a temporary project who are not entitled to notice pursuant to 29 U.S.C. § 2103(1) (1994) and 20 C.F.R. § 639.5(c) (2001).
77 See supra text accompanying note 47.
79 See id. at 16,062; see also 20 C.F.R. § 639.9(b)(1) (2001). The phrase is derived from the Conference Report, H.R. CONF. REP. NO. 100-576, at 1049 (1988), where one example of an unforeseeable business circumstance was described as "a sudden, unexpected and dramatic change in business conditions, such as price, cost, or declines in customer orders."
basis, i.e., whether "exercis[ing] such commercially reasonable business judgment as would a similarly situated employer... predicting the demands of its particular market" the employer would have foreseen the event. The Department listed the following as likely to constitute unforeseeable business circumstances: "loss of or failure to award contracts, ... changes in prices and costs, declines in customer orders, ... loss of raw materials, loss of financing, ... [and] court decisions." The Department also suggested, in response to a comment aimed at persons or institutions acquiring ailing savings and loan institutions, that there may be circumstances in which "surprise discoveries of bad debts or assets may require covered employment actions to be ordered in less than sixty days and where the unforeseeable business circumstances exception will clearly apply."

Emphasizing in the final rule that the "faltering company" exception is to be "narrowly construed," the Department listed four separate elements that must be present to satisfy the exception. First, the "employer must have been actively seeking capital or business at the time that 60-day notice would have been required." In response to a comment, the Department rejected a broad reading of this requirement that would have included store-wide sales aimed at attracting customers, but did agree that "[i]f the store can show an unusually great effort to attract customers and... there was valid reason to believe that the customers would abandon the store if they knew it would close, the exemption would appear to apply." Second, "[t]here must have been a realistic opportunity to obtain the financing or business sought." Third, "[t]he financing or business must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown" "for a reasonable

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82 Id.
83 See supra text accompanying note 44.
84 See 20 C.F.R. § 639.9(a) (2001).
85 See id. § 639.9(a)(1). The rule itemizes various forms this capital or business may take, including "financing or refinancing through the arrangement of loans, the issuance or stocks, bonds, or other methods of internally generated financing; or ... additional money, credit, or business through any other commercially reasonable method." Id.
87 See 20 C.F.R. § 639.9(a)(2).
period of time.\textsuperscript{83} Fourth, the employer must "reasonably and in good faith . . . have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business."\textsuperscript{89}

With respect to the "natural disaster" exception,\textsuperscript{90} the Department listed "[f]loods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature" as among the forms of natural disaster that would qualify under the exception,\textsuperscript{91} but stated that the plant closing or mass layoff must be "a direct result of a natural disaster" to be excepted.\textsuperscript{92}

III. APPLYING THE WARN ACT IN BANKRUPTCY

Giving due consideration to the language of the WARN Act and the additional guidance provided by the Department rule, bankruptcy courts applying the WARN Act to bankrupt employers have divided the cases starkly around the temporal line of the bankruptcy filing.

On the one side are the employers (now debtors) who ordered a plant closing or mass layoff \textit{before} the bankruptcy filing. In these cases the courts have concluded that the obligation to provide notice was a prefiling obligation, and therefore the "employer" obligated to give notice could not have been a "fiduciary" whose failure to do so might be excused under the preamble to the Department rule. Similarly, the damages owing to employees who did not receive the obligatory notice are prepetition claims which may be entitled to priority as prepetition wage claims but are not administrative expenses.

On the other side are bankrupt employers whose plant closing or mass layoff commenced \textit{after} the bankruptcy filing. For them courts have concluded that WARN Act notice is required unless, looking at all the facts and circumstances, the bankruptcy court can

\textsuperscript{83} Id. § 639.9(a)(3).
\textsuperscript{89} Id. § 639.9(a)(4). This factor looks to whether the source of the new capital or business would be unwilling to provide it to a company whose financial troubles were public or whose workforce was seeking alternative employment. \textit{Id.}
\textsuperscript{90} \textit{See supra} text accompanying note 50.
\textsuperscript{91} 20 C.F.R. § 639.9(c)(1) (1994).
\textsuperscript{92} Id. § 639.9(c)(2). If the closing or layoff was an indirect consequence of the natural disaster, the rule suggests that there may be unforeseeable business circumstances excusing the full sixty days notice. \textit{Id.} § 639.9(c)(4).
conclude that the bankruptcy trustee (or the debtor in possession exercising the powers of the trustee) qualifies as a liquidating fiduciary. If notice is required, the damages owed to employees who did not receive notice constitute postpetition administrative expense claims.

This Part examines the cases falling on each side of the divide and addresses some of the problems created by the statutory and regulatory language.

A. The Prefiling Notification Obligation

Under the WARN Act, the definition of "plant closing" requires an employment loss for fifty or more employees during any thirty-day period. A "mass layoff" also looks at the number of employees suffering an employment loss over a thirty-day period. Although the determination of whether there has been a plant closing or mass layoff can be made only by looking backward in time for thirty days and counting heads, the obligation to provide notice is imposed in advance; the employer may not order a plant closing or mass layoff (i.e., begin causing the employment losses that will, thirty days thereafter, qualify as a plant closing or mass layoff) without providing the sixty days prior notice. Therefore, once it is determined that a plant closing or mass layoff within the meaning of the WARN Act has occurred within a thirty-day period, one can determine the moment the employer's obligation to provide notice accrued—sixty days before the first day of that period of employment losses unless a shorter period is permitted by one of the exceptions.

If the employer failed to comply with its WARN Act obligation prior to filing for bankruptcy protection, bankruptcy courts have had two distinct situations to analyze. The first is when not only the employer's obligation to give notice accrues prepetition, but the entire sixty-day period during which the employees would have been employed had appropriate notice been given occurs prepetition. Let us take a simple example. Assume we have a troubled

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93 See 29 U.S.C. § 2101(a)(2) (1994). The period may be expanded to 90 days if there are employment losses for two or more groups at a single site of employment which the employer fails to demonstrate are separate and distinct actions. See id. § 2102(d).

94 See id. § 2101(a)(3). This 30-day period is also subject to extension to 90 days. See id. § 2102(d).

95 See id. § 2102(a).
corporation called Famico, Inc. which manufactures specialized computer software and has 150 employees. Famico, without any precipitating cause that would qualify for the unforeseeable business circumstances exception and without giving prior notice to its employees, orders a plant closing or mass layoff, fails to pay the terminated employees the damages described in the WARN Act, and files for bankruptcy more than sixty days later. Pursuant to the WARN Act, Famico is liable to each aggrieved employee, thereby giving each such employee a "claim" in the company's bankruptcy case\(^{96}\) and rendering that employee a "creditor" of Famico.\(^{97}\) As such, the employee may file a proof of claim in Famico's bankruptcy case,\(^{98}\) and the claim is subject to the same treatment afforded any other prepetition unsecured claim against Famico's estate.\(^{99}\)

Alternatively, although the employer's obligation to give notice may have accrued prepetition (sixty days before the applicable period of employment loss commenced), the bankruptcy filing may occur during the sixty-day period. To modify our example, assume Famico, without giving prior notice to its employees, orders a plant closing or mass layoff, and files for bankruptcy ten days later without having paid the terminated employees the damages described in the WARN Act. In this case, Famico is still not a liquidating fiduciary at the time its obligation to give notice accrues, even if the subsequent bankruptcy filing is in chapter 7 or contemplates a liquidating

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\(^{96}\) A "claim" under the Bankruptcy Code, 11 U.S.C. § 101(5) (2000), includes a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." See, e.g., Snider v. Commercial Fin. Servs., Inc. (In re Commercial Fin. Servs., Inc.), 252 B.R. 516, 525 (Bankr. N.D. Okla. 2000) ("WARN Act claims against [the debtor], regardless of the procedural vehicle with which they are asserted, fall unambiguously within the Bankruptcy Code's definition of 'claim'.").

\(^{97}\) A "creditor" includes an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." See 11 U.S.C. § 101(10).

\(^{98}\) See id. § 501.

\(^{99}\) In one recent case, In re Blufflon Casting Corp., employees sought to escape their position as prepetition general unsecured creditors by invoking Indiana state statutes that provided employees statutory mechanics' liens and employee liens to secure claims for wages. 186 F.3d 857, 860 (7th Cir. 1999). The employees argued that because the WARN Act provided them a claim for 60 days of "back pay," they had validly secured that wage claim as provided by state law and thereby transformed their status to secured creditors. Id. The court rejected their lien, noting that Congress explicitly provided that the employees' claim for damages under the WARN Act was the exclusive remedy for any violation of the WARN Act and precluded the employees from using state statutory liens to secure WARN Act liabilities. See id. at 860-61. See generally David I. Cisar & Samuel C. Wisotzkey, WARN Act Pre-emption of State Law Helps Secured Creditors, 19 AM. BANKR. INST. J. 10 (2000).
chapter 11 plan. Therefore, Famico's failure to provide notice is not excused by the Department commentary.\footnote{See, e.g., Barnett v. Jamesway Corp. (In re Jamesway Corp.), 235 B.R. 329, 343-44 (Bankr. S.D.N.Y. 1999).}

But the status of the employees' claims is less clear. If, ten days prior to the bankruptcy filing, Famico had given notice that the actual plant closing or mass layoff would commence sixty days later, as the WARN Act requires, instead of ordering the plant closing or mass layoff to commence immediately, the aggrieved employees would have continued to work for Famico for fifty days after the bankruptcy case commenced. Thus, their claims for wages for that period would have constituted administrative expense claims,\footnote{Section 503(b)(1)(A) of the Bankruptcy Code provides for the allowance of certain administrative expense claims, including "wages, salaries, or commissions for services rendered after the commencement of the case." 11 U.S.C. § 503(b)(1)(A) (2000).} which are entitled to priority treatment.\footnote{Section 507(a)(1) of the Bankruptcy Code affords administrative expense claims allowed under § 503(b) first priority. Id. § 507(a)(1).} In addition, to the extent that the WARN Act damages are considered "wages, salaries, or commissions" earned "within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first," the employees would have a priority claim for the WARN Act damages with respect to the ten-day period preceding the filing to the extent of $4,650 for each individual.\footnote{See e.g., Int'l Bhd. of Teamsters, AFL v. Kitty Hawk Int'l, Inc. (In re Kitty Hawk, Inc.), 255 B.R. 428, 458-39 (Bankr. N.D. Tex. 2000); Barnett v. Jamesway Corp. (In re Jamesway Corp.), 235 B.R. 329, 347-48 (Bankr. S.D.N.Y. 1999).} Therefore, bankruptcy courts have had to grapple with the issue of whether an employee's WARN Act claims should be afforded the same priority that such employee's claim for postpetition or prepetition wages would have been assigned, or whether the statutory liability under the WARN Act constitutes a prepetition unsecured obligation without priority.

provide any postpetition services to the debtor because the loss of employment occurred one day before the petition was filed and therefore could not claim a § 507(a)(1) priority.\textsuperscript{106}

The same bankruptcy court went on to suggest that "[a]t most, the Union has unsecured claims against the Debtor that are entitled to a third priority under section 507(a)(3). To the extent the WARN Claims exceed the dollar limitations for a third priority, the claims are general unsecured claims against the Debtor."\textsuperscript{107} That analysis is consistent with the approach followed by all other courts examining the issue of prepetition violations of the WARN Act by employers who file for bankruptcy protection during the subsequent sixty-day period.\textsuperscript{108}

As an exercise in statutory interpretation, this approach is completely defensible. At the moment the employer orders a plant closing or mass layoff without giving the mandatory prior notification, under § 2104(a)(1) of the WARN Act the employer "shall be liable" to the aggrieved employees.\textsuperscript{109} This liability creates a non-contingent claim for damages "for the period of violation, up to a maximum of 60 days."\textsuperscript{110} That claim is not only established by a prepetition action of the employer (the order to close the plant or to lay off the workers) but is also measured by looking backward from the date of that action to determine how many days (out of the sixty immediately preceding that action) the employees worked.

\textsuperscript{106} See In re Kitty Hawk, 255 B.R. at 438. See also In re Jamesway, 235 B.R. at 348 ("We have already determined that Jamesway's obligation to give WARN notice to all plaintiffs arose [before the bankruptcy petition was filed]. As such, the plaintiffs' damages claims are not entitled to priority under §§ 503(b)(1)(A) or 507(a)(1) of the Bankruptcy Code.").

\textsuperscript{107} In re Kitty Hawk, 255 B.R. at 438.


\textsuperscript{110} Id. Although the intent of Congress with respect to the number of days for which employees are to receive payments is clear, its language is less than felicitous. The "violation" of the employer occurs on only one day, the day on which the employer orders the plant closing or mass layoff without having provided 60 days' prior notification. See id. § 2102(a) ("An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves notice of such an order . . ."). Reading the language of § 2104(a)(1) literally, the employees would be entitled to back pay only for the "day of violation" rather than for the number of days during the period beginning 60 days before the violation that precede any notice provided as required by the WARN Act.
without receiving the required sixty days notice, also a prepetition period. As an obligation that has no connection with postpetition acts of either the employer or the employees, it cannot be characterized as an administrative expense entitled to first priority treatment under § 507(b)(1).

However, this interpretation of the Code ignores an important normative issue. Should an employer be able to transform employee wage claims that would, if the employer operated in accordance with the requirements of the WARN Act, be first priority administrative expenses into prepetition unsecured claims entitled to a limited wage priority under § 507(a)(3) through an intentional violation of the WARN Act? One can certainly argue that Congress never contemplated that what it structured as a fully-compensatory remedy would be subject to circumvention by the illegal act of the employer, followed by a bankruptcy filing.

On the other hand, many other legal obligations of a bankrupt that in the ordinary course would have been paid at face value are, by virtue of the bankruptcy process, transformed into less valuable prepetition general unsecured claims. If Famico enters into a contract providing for payments to be made over time to a creditor (whether the creditor is a supplier or lender or employee), by breaching that contract prior to filing for bankruptcy and refusing to accept further goods or services from the creditor, Famico transforms what would have been an administrative expense claim in bankruptcy into a prepetition claim for damages caused by the breach. Indeed, for some contracts (executory contracts and unexpired leases) Famico is given the right in bankruptcy to breach them postpetition, but have that breach treated as if it were a prepetition default creating a prepetition claim.

All those creditors have legally enforceable claims, and all are worthy of

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111 See id. § 2104(a)(1)(A) (holding employer liable for back pay “for each day of violation”).

112 The employee is not only entitled to “back pay for each day of violation at a rate of compensation not less than the higher of (i) the average regular rate received by such employee during the last 3 years of the employee’s employment; or (ii) the final regular rate received by such employee” but is also entitled to “benefits under an employee benefit plan . . . including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.” See id. §§ 2104(a)(1)(A)-(B).

113 See 11 U.S.C. § 365(c) (2000) (allowing the trustee to reject any executory contract or unexpired lease) and id. § 502(g) (providing that a claim arising from such a rejection is treated “the same as if such claim had arisen before the date of the filing of the petition”).
sympathy and economic protection. But the rights of all prepetition creditors are subject to the operation of the Code which allows debtors to discharge prepetition debts for less than the full amount owed, subject to compliance with its provisions. When Congress wished to protect creditors from the effects of bankruptcy, it did so by excluding their prepetition claims from discharge. If Congress wishes to exclude prepetition WARN Act claims from discharge as well, it can do so. Until then, the characterization of such claims by the bankruptcy courts seems the correct one.

B. The Postfiling Notification Obligation

On the other side of the temporal divide is the employer who files for protection under the Code, and during the pendency of the bankruptcy case the trustee wishes to close one or more plants or engage in a mass layoff. Can it do so only in compliance with the WARN Act, that is, must it provide the affected employees sixty days prior notice of its action, thereby mandating that the actual terminations be delayed by as much as sixty days while the employees continue to collect wages as administrative expenses? The answer under current law appears to turn on whether the bankruptcy filing was in chapter 7 or chapter 11 or, more precisely, whether there is sufficient evidence that the trustee is seeking to liquidate the debtor's business rather than to operate it for the benefit of creditors.

As discussed in Part II, the commentary of the Department on its final rule suggested that "a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors... is not operating a 'business enterprise' in the normal commercial sense" and is therefore not an "employer" subject to the prenotification obligations of the WARN Act. The Department contrasted such fiduciaries with those who "may continue to operate the business for the benefit of creditors" who had to be considered a

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114 Only an individual debtor may obtain a discharge of debts in chapter 7. See id. § 727(a)(1).
115 For example, in a chapter 11 creditors are protected by the best interests test of 11 U.S.C. § 1129(a)(7)(A)(ii) (2000) from being required to accept less than those creditors would have received in a chapter 7 liquidation.
116 See, e.g., id. § 523.
117 See supra text accompanying notes 69-71.
118 See source cited supra note 36.
"business enterprise" and thus an "employer" within the meaning of the WARN Act.\textsuperscript{19}

The Department commentary has three major textual deficiencies. First, it demonstrates an inherent confusion between the "employer" and the representative of the "employer" who implements its legal obligations. Second, its treatment of bankruptcy "fiduciaries"\textsuperscript{20} fails to reflect the multiplicity of duties of a bankruptcy trustee, even in a chapter 7 or chapter 11 liquidation. Third, the test it proposed is difficult to administer and therefore unpredictable, costly, and harmful to the employees of chapter 11 debtors.

Even if the WARN Act is found to be applicable to a bankrupt employer under the Department test, a fourth issue exists – should the employee claims that arise as a result of a violation of the WARN Act be treated as first priority administrative expense claims, or should they be given some other status?

1. The "Employer"/Representative of the "Employer" Problem

Part of the Department's treatment of bankruptcy "fiduciaries" may be attributable to its confusion between the trustee and the debtor's business that becomes part of the bankruptcy estate. Let us return to our troubled computer software manufacturer Famico, Inc. Famico is owned by fifty shareholders and has 150 employees. It has a Board of Directors elected by the shareholders that manages the corporation.\textsuperscript{121} It also has corporate officers selected by the Board to carry out its directives.\textsuperscript{122} The "employer" of the 150 employees is Famico, not the directors, not the officers, not the shareholders. Outside of bankruptcy, WARN Act obligations are

\textsuperscript{19} See supra text accompanying note 72.

\textsuperscript{20} "Fiduciary" is not bankruptcy terminology. The term is used in only two sections of the Code, in the definition of "affiliate" in 11 U.S.C. § 101(2)(A)(i) (2000) and in the exceptions to discharge in 11 U.S.C. § 523 (2000). The Department probably used the word because it was used in the comment letter to which it was responding. See supra text accompanying note 69. Presumably the entity to which the comment was directed was the trustee in bankruptcy.

\textsuperscript{121} Management of a corporation is vested in its Board of Directors (or comparable body) pursuant to the state corporation law under which it is created. See, e.g., DEL. CODE ANN. tit. 8, § 141(a) (2000); N.Y. BUS. CORP. § 701 (McKinney 2001).

\textsuperscript{122} See, e.g., DEL. CODE ANN. tit. 8, § 142(a) (2000); N.Y. BUS. CORP. § 715(g) (McKinney 2001).
imposed on Famico, and they are effectuated (as are all other acts of
the corporation) through its officers and directors.

Now assume Famico files for bankruptcy. If the filing is under
chapter 7, an interim trustee will be appointed by the United States
trustee promptly thereafter, who may be replaced by an elected
trustee at the meeting of creditors held pursuant to § 341 of the
Code. Pursuant to § 323 of the Code, the trustee becomes "the
representative of the estate," which the Supreme Court has
analogized to the role played by management of a solvent
corporation. The role of the directors is limited to "turn[ing]
over the corporation's property to the trustee and to the
creditors." Thereafter they are "completely ousted" by the
trustee and the trustee "assumes control of the business." But
the employees of Famico still work for Famico, not for the trustee.
The trustee is the representative of the "employer" who is
responsible for ensuring its compliance with its legal obligations,
but the "employer" remains the debtor corporation. Therefore, the
issue under the WARN Act is not whether the trustee (the
liquidating fiduciary) is an employer, but whether Famico is.

Focusing on Famico, its chapter 7 filing does not result in any
immediate change in its business activities. The employees will
continue to come to work and manufacture and distribute the
computer software pursuant to prepetition contractual orders. Even
under the Department's definition of "business," the activities of
Famico at this stage of the chapter 7 case clearly qualify. When will
Famico cease to engage in a "commercial or industrial enterprise;
supply a service or good on a mercantile basis; or provide
independent management of... assets, raising revenue and making
desired investments"? Only when the trustee actually terminates
Famico's business operations by ceasing production, completing
the sale of any goods (including not only the inventory of software and
its component parts but also any equipment used in manufacturing

124 Id. § 702(b).
125 Id. § 323(a).
127 Id. at 352.
129 Weintraub, 471 U.S. at 352.
it which also falls within the definition of "goods"\textsuperscript{131}), and stops raising revenue (as by the sale of other assets or the assignment of contracts\textsuperscript{132}) or making investments. Until that time, which occurs when Famico is actually liquidated, Famico remains a business enterprise.\textsuperscript{135} In other words, although a liquidated debtor is not a business enterprise, a liquidating debtor is. At some point during that liquidation process, Famico will cease to be an "employer" not because it is not a "business enterprise," but because it will terminate its 150 employees. However, it is nonsensical to suggest that an act that triggers WARN Act liability for any business enterprise—the plant closing or mass layoff of employees without the required notification—is the same act that excuses a chapter 7 debtor from complying with the WARN Act because it divests the debtor of its status as an "employer."\textsuperscript{134} It is as if the ultimate liquidation of these debtors constitutes their ex post facto exoneration from WARN Act liability during the liquidation process. The term "business enterprise" used by Congress to impose WARN Act liability imparts no such exclusion.

Therefore, if the Department had properly focused on the employer rather than the bankruptcy "fiduciary" (who merely becomes the representative of the employer) and had looked at the activities of the bankrupt commercial enterprise, it would have properly concluded that the business enterprise remains an

\textsuperscript{131} See U.C.C. § 9-102(a)(33) (2000) (defining "equipment" as "goods other than inventory, farm products, or consumer goods").

\textsuperscript{132} In a chapter 7 case, if the trustee does not act to assume or reject an executory contract or unexpired lease of personal property of a debtor within sixty days after the order for relief (or such additional time as the court, for cause fixes), the contract or lease is deemed rejected. See 11 U.S.C. § 365(d)(1) (2000). Even in a chapter 7 case or a liquidating chapter 11 case a trustee may choose to assume a beneficial executory contract or lease in order to assign it either to minimize claims against the estate or to generate revenue. See id. § 365(f).

\textsuperscript{135} This conclusion is even more evident when the debtor files under chapter 11 of the Code rather than chapter 7. Because the chapter 11 trustee (or debtor in possession) is authorized to operate the debtor's business unless the court orders otherwise, 11 U.S.C. § 1108 (2000), the only clear evidence that the trustee has ceased doing so (and thus is no longer a "business enterprise") is when the chapter 11 debtor is liquidated.

\textsuperscript{134} See Karen Cordry, Missing the Forest for the Trees, 19 AM. BANKR. INST. J. 8, *8 (June 2000) (criticizing Official Comm. of Unsecured Creditors of United Healthcare Sys., Inc. v. United Healthcare System, Inc. (In re United Healthcare System, Inc.), 200 F.3d 170 (3d Cir. 1999), because it "boils down to saying that once a business shuts down, it is not subject to the WARN Act. In other words, the precise action that triggers liability—closing abruptly without compensation—also serves to eliminate that liability").
“employer” until the company ceases to engage in commercial activity, notwithstanding that the bankruptcy “fiduciary” is liquidating the company. In most cases that point will be reached when there are no more employees.

2. The “Sole Function” Fiduciary Problem

Even if one reads the Department commentary literally and focuses on the trustee rather than the debtor employer, there may be no “fiduciary” in bankruptcy “whose sole function” is liquidating the estate. The duties of trustees in bankruptcy, even in a liquidating case, extend far beyond mere liquidation. A chapter 7 trustee, whose first duty is to “collect and reduce to money the property of the estate for which such trustee serves,” has various other administrative responsibilities in connection with the case. Those duties may, in themselves, constitute doing “business” and render the supposed exclusion for bankruptcy fiduciaries inapplicable. Indeed, the Supreme Court has indicated “the


See id. §§ 704(2)-(9):

The trustee shall –

....(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate’s administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

157 The Department described the concept of doing business as including “taking part in a commercial or industrial enterprise; supplying a service or good on a mercantile basis; or providing independent management of... assets, raising revenue and making desired investments.” See 53 Fed. Reg. 48,884, 48,885 (Dec. 2, 1988). For example, the entire process of collecting hard assets and liquidating them involves supplying those assets “on a mercantile basis” and “raising revenue.” Id.
Bankruptcy Code gives the [chapter 7] trustee wide-ranging management authority over the debtor,” and the trustee “assumes control of the business.”

However, even assuming the Department would exclude these tasks of the trustee from the concept of “operating a ‘business enterprise’ in the normal commercial sense,” the chapter 7 trustee may engage in more conventional business activities. For example, the court has the ability to “authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.” Although the original purpose behind this provision was to permit the trustee to convert raw materials and components into finished inventory to increase the value obtainable upon their sale, it is also used when the value obtainable upon sale of the business as a going concern exceeds the liquidation value of the assets. Thus, even what is traditionally considered a chapter 7 liquidation may involve the trustee operating the business, rendering the bankrupt business a “business enterprise” that should, under the Department preamble, be subject to the WARN Act requirements.

Does this distinction make sense from a policy standpoint? In both situations the ultimate goal of the trustee is to liquidate the chapter 7 debtor’s business, obtaining the highest price possible for creditors. If the trustee operates the business for a short time, it does not do so as a “for-profit” entrepreneur; rather, it does so...
because the sale of the business as a whole will generate a better return than its dismemberment. To subject the trustee who chooses to sell the business as a going concern to legal requirements that are not imposed on the trustee who sells the business asset by asset ignores the substance of the former transaction—a liquidation. If the WARN Act does not apply to a liquidating fiduciary, then it should not apply to a chapter 7 trustee regardless of whether that trustee chooses to liquidate by selling individual assets or by operating the business temporarily and selling it as a going concern.

A chapter 11 trustee may have equally complicated obligations. A chapter 11 trustee performs many (although not all) duties of a chapter 7 trustee in addition to duties imposed solely under chapter 11. Because those duties are unique to the bankruptcy

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143 Pursuant to 11 U.S.C. § 1106(a)(1) the chapter 11 trustee is directed to “perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title.” These duties do not include the obligation to liquidate the property of the estate, ensure performance of the § 521(1) election, or investigate the financial affairs of the debtor. See supra note 136. However, the latter two functions are specifically addressed elsewhere. 11 U.S.C. § 1106(2)-(3) (2000).

144 Id. §§ 1106(a)(2)-(7):
(a) A trustee shall —

.... (2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor’s business, the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable —

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors’ committee or equity security holders’ committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor’s books and records and the availability of such information; and

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.
case, were those the only duties a trustee performed, the Department might not view the trustee as "operating a 'business enterprise' in the normal commercial sense." But the chapter 11 trustee is also given the power (although not the obligation) to engage in more conventional business operations. Unless otherwise ordered by the court, "the trustee may operate the debtor's business." Where the chapter 11 trustee (or the debtor in possession exercising the powers of the trustee) chooses to continue to operate the business, the Department commentary seems quite clear. It states that if the "fiduciary... continue[s] to operate the business for the benefit of creditors," then that fiduciary has WARN Act obligations.

The multiplicity of roles of the trustee in bankruptcy under chapter 7, as well as under chapter 11, suggests that the Department inaccurately assumed that the trustee's "sole function" in bankruptcy is to liquidate the estate. Even if a sole-function fiduciary exists (the chapter 7 trustee or the liquidating chapter 11 trustee), the applicability of the WARN Act should not turn on whether the trustee chooses to liquidate the business by sale of assets or by sale of the going concern. Thus, the Department commentary makes no sense, even on its own terms.

3. The Line-Drawing Problem

What if the debtor in possession or the independent trustee determines NOT to operate the business but decides to liquidate the business instead? The Department commentary seems to

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147 The "debtor in possession" is defined to be the "debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case." Id. § 1101(1).
148 See id. § 1107(a). The debtor in possession is precluded from performing the duties specified in §§ 1106(a)(2), (3), and (4), and has no right to compensation under § 330. Id.
149 54 Fed. Reg. 16,042, 16,045 (April 20, 1989) (codified at 20 C.F.R. § 639). The fact that an independent trustee replaces the debtor in possession "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management" or because the trustee's appointment was "in the interests of creditors," 11 U.S.C. §§ 1104(a)(1)-(2), should not affect the analysis. Such a trustee could be seen as a successor employer, comparable to an acquiror of the business through a sale or merger. The WARN Act itself provides that "[a]fter the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff." 29 U.S.C. § 2101(b)(1) (1994).
suggest that if the "sole function" of the debtor in possession or the independent trustee is "to liquidate a failed business for the benefit of creditors," it is not subject to the WARN Act because it is not operating a "business enterprise" and is thus not an "employer." But how does one ascertain that the chapter 11 trustee has become such a liquidating fiduciary?

In a chapter 7 case, if the trustee has not been authorized to operate the business of the debtor, the Department commentary suggests that the trustee should be deemed to be engaged in the sole function of liquidating the estate and is not an employer subject to WARN Act obligations. Only if the trustee has been authorized to operate the business is there an issue about whether the chapter 7 debtor has become a WARN Act employer and thus must give notice before engaging in a plant closing or mass layoff. Even if courts were to conclude that a chapter 7 trustee who operates the debtor's business is not entitled to the exemption provided by the Department commentary, because the trustee must obtain authorization to operate the business by court order, applicability of the WARN Act obligations could turn on the presence of such a court order, a readily-ascertainable standard.

Chapter 11 provides no such clear lines. As previously discussed, a chapter 11 trustee is statutorily authorized to operate the debtor's business but is not required to do so. Presumably, if (and only if) the trustee chooses to operate the business, the chapter 11 debtor should be subject to WARN Act obligations as an employer. Otherwise, the trustee should not qualify as an employer because the trustee is not operating a business enterprise. But how do we know what choice the trustee has made at any particular stage of a bankruptcy case, particularly when no court approval is required and when the trustee may change his or her mind?

151 Id.
153 See Cal. State Bd. of Equalization v. Goggin, 191 F.2d 726, 728 (9th Cir. 1951); In re Richter, 40 F. Supp. 758, 759-60 (S.D.N.Y. 1941).
To take an example, assume Famico files for bankruptcy under chapter 11 and functions as a debtor in possession exercising the powers of a chapter 11 trustee. After continuing all of its operations for one month, Famico decides that liquidation will achieve the highest return for its creditors. At that point Famico may seek to convert the chapter 11 case to a chapter 7. Upon such conversion, a chapter 7 trustee would be appointed and would clearly fall within the exclusion for liquidating fiduciaries so long as the trustee does not obtain court authorization to operate the business. But Famico believes that values will be higher if Famico conducts the liquidation itself and chooses to do so in chapter 11. Famico, therefore, intends to terminate all its employees. Can it do so without complying with the WARN Act because it is now a liquidating fiduciary?

Lacking the clarity of the chapter 7 court order, bankruptcy courts confronting liquidation under chapter 11 have searched for other adequate indicia of whether the debtor in possession continued to operate a business enterprise when it engaged in plant closings or mass layoffs purportedly pursuant to a chapter 11 liquidation. In *Official Committee of Unsecured Creditors of United Healthcare System, Inc. v. United Healthcare System, Inc. (In re United Healthcare System, Inc.)*, the Third Circuit noted the surrender of the debtor's certificates of need to the New Jersey Department of Health immediately prior to the bankruptcy filing and the discharge or transfer of all patients within two days after the filing. The court commented that by that time the employees "were no longer engaged in their regular duties but instead were performing tasks solely designed to prepare United Healthcare for liquidation." Under those circumstances the court found that "United Healthcare's actions from the time it filed its Chapter 11 petition throughout the proceedings clearly demonstrated its intent to

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155 A debtor has a right to convert a chapter 11 case to a chapter 7 unless it is not a debtor in possession, the case was originally commenced as an involuntary case under chapter 11, or the case was converted to chapter 11 other than on the debtor's request. *See* 11 U.S.C. §§ 1112(a)(1)-(3) (2000). A chapter 11 case may be converted to a chapter 7 by the court upon request of another party in interest "for cause." *See* id. § 1112(b).

156 A chapter 11 plan of reorganization may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." *See* id. § 1123(b)(4).

157 200 F.3d 170 (3d Cir. 1999).

158 Id. at 178.
liquidate;"\textsuperscript{159} therefore, it was not an "employer" subject to WARN Act obligations.\textsuperscript{160}

A similar analysis was suggested by the bankruptcy court in Bailey v. Jamesway Corp. (In re Jamesway Corp.),\textsuperscript{161} in which the debtor argued that its intention to liquidate was evident in various pleadings it filed with the court and orders it obtained from the court in the beginning of the case. The court declined to grant summary judgment with respect to Jamesway's status as a liquidating chapter 11 fiduciary, finding "the extent to which Jamesway operated its business prior to the time that its employees were discharged is a material issue of fact precluding summary judgment as to the 35 employees terminated post-petition."\textsuperscript{162} This case reaffirms the conclusion that each case must be examined on its own facts, but case-specific factual determinations, requiring judicial hearings, tend to be costly and time-consuming.

If the application of the concept of liquidating fiduciary is difficult, expensive, and time-consuming in the United Healthcare and Jamesway cases—where consistent evidence of the debtor in possession's intent to liquidate the entire operation was available early in the case—it becomes even more complicated when the facts are more ambiguous. For example, does it matter whether the debtor’s operations are continued for two days or two months? Although that time period may certainly be relevant if the trustee argues that it always intended liquidation, what happens if the trustee concedes that it originally intended to operate the business but its intent changed? Should the trustee’s subjective intent even matter? The Department never looks at the intent of the trustee, but at its "function in the bankruptcy process." Although the Department may have intended to focus on statutory functions, it certainly didn’t say so, and, as previously discussed, the statutory powers of chapter 11 trustees do not resolve the issue.

\textsuperscript{159} Id.
\textsuperscript{160} Id. at 179. Cf. Cain v. Inacomp Corp., 2001 WL 1819997 (Bankr. D. Del. 2001) (concluding that there was a material question of fact whether chapter 11 debtor was liquidating fiduciary at the time of employee terminations). See generally Gregory G. Hesse, More from the Labor Law Front, 19 AM. BANKR. INST. J. 12 (April 2000) (discussing United Healthcare and suggesting that it provides an argument parties can use to reduce WARN Act liability in a liquidation).
\textsuperscript{161} 1997 WL 327105 (Bankr. S.D.N.Y. 1997).
\textsuperscript{162} Id. at *13.
What if the chapter 11 trustee liquidates not all of the debtor's business operations but only the ones affected by the plant closing or mass layoff? The WARN Act applies to employment losses at a "single site of employment." With respect to a particular plant closing or mass layoff in bankruptcy, the chapter 11 trustee may argue that it has the sole function of liquidating that business for the benefit of creditors. Although this argument has implicitly been rejected by one court, why should it matter in applying the Department language on liquidating fiduciaries whether other operations conducted by other employees and subject to separate WARN Act obligations are not being liquidated?

If this argument is rejected and the Department's exception for the liquidating fiduciary is narrowly confined to those chapter 11 trustees who are liquidating the entire business, when does the liquidating fiduciary exception attach in the event of a "creeping" liquidation (in which one portion of the operations is closed down first, followed by another, and then another)? What evidence is necessary to establish that a partial liquidation in connection with operating the business for the benefit of creditors (to which WARN Act obligations may attach) has turned into a complete liquidation for their benefit (which is free from the WARN Act)?

Without statutory or regulatory guidance on when a fiduciary becomes a liquidating fiduciary, bankrupt employers, their creditors, and employees will be unable to determine whether and when notice must be given. Uncertainty invariably leads to increased cost and delay, two commodities a bankrupt case can ill-afford. The parties most hurt by that uncertainty tend to be the very parties the WARN Act was intended to protect, the terminated employees, because when their right to notice (and payment) is uncertain, they must pursue their claims through judicial process.

164 See Oil, Chem. & Atomic Workers v. Hanlin Group, Inc. (In re Hanlin Group, Inc.), 176 B.R. 329, 332 (Bankr. D.N.J. 1995) (finding that debtor that laid off employees at West Virginia plant approximately one month after filing "continued to operate the business as a whole for the benefit of all parties in interest" and was therefore subject to the WARN Act).
165 Because the only sanction for failure to comply with the WARN Act is the payment the employer would have had to make to the employees had the employer complied, the bankrupt employer (or its creditors) will always benefit financially from failure to give the WARN Act notice and terminating employees prior to the sixty days it would otherwise have to wait. See 29 U.S.C. § 2104(a)(1) (1994). The debtor will have the use of the money that would otherwise be paid to employees until such time as the claims asserted by the aggrieved employees are satisfied. And the employees may not have the knowledge or money to pursue
The Department regulation necessarily requires these fact-sensitive determinations and is, therefore, inherently flawed.

4. **Priority of Postpetition WARN Act Claims**

If the bankruptcy court concludes that the trustee should have given WARN Act notice of a postpetition plant closing or mass layoff, courts have uniformly awarded first priority administrative expense damages to the employees. However, the statutory language does not compel that statutory language.

Suppose, as in one of our hypotheticals, the trustee in bankruptcy for Famico orders a plant closing or mass layoff ten days after the bankruptcy filing without providing WARN Act notice and without any statutory exemption. Had the trustee chosen to provide sixty days prior notice on that tenth day, the employees would have continued to work for Famico until seventy days after the bankruptcy filing, and those postpetition wages would clearly have been entitled to a first priority administrative expense claim.

Instead, when the trustee violated the WARN Act, the estate of Famico became liable to the aggrieved employees for "each day of violation" during "the period of the violation" up to a maximum of sixty days. What is the "period of the violation"? If the trustee orders the plant closing or mass layoff on the tenth day after the bankruptcy filing, the moment that the WARN Act notice was required to be given was sixty days prior to that order, that is, the date that is fifty days prior to bankruptcy in our hypothetical. Under this analysis, fifty days of the sixty-day "period of the violation" occurred prepetition, and although the employees are entitled to administrative expense wages for the ten days they worked postpetition, damages for the remaining fifty days should be treated as prepetition claims, subject to possible priority under § 507(a)(3).

But this interpretation of the statute is inconsistent both with the theory underlying the WARN Act and its legislative history. WARN Act damages should provide "back pay" for a period during

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169 *Id.*
which it is assumed that the employees were not receiving pay in the first instance because the employer violated the WARN Act. This suggests that the "period of violation" is not the period commencing on the date on which the employer should have given notice to effectuate the ordered employment terminations in compliance with the WARN Act (in our hypothetical the date which is fifty days prior to the filing). Instead, it is a period following the ordered plant closing or mass layoff on which the employees did not have the opportunity to work with at least sixty days prior notice of the employment action. The legislative history supports this interpretation. In our hypothetical, this would suggest that the "period of violation" is in fact the sixty days after the ordered plant closing or mass layoff, all of which occur postpetition.

Even if the appropriate measuring period is postpetition, arguments have been made that the claims of the terminated employees should not constitute first priority administrative expense claims under § 503(b)(1)(A) of the Code. The argument has two prongs. First, it is argued that, although the WARN Act makes a violating employer liable to the aggrieved employees for "back pay," such back pay does not constitute wages within the meaning of § 503(b)(1)(A) of the Code. Courts have disagreed, concluding that the back pay awarded by the WARN Act is comparable to severance pay in lieu of notice and is clearly a component of employee compensation.

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170 See S. Rep. No. 100-62, at 24 (1987) ("damages are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff been deferred until the conclusions [sic] of the notice period"); H.R. Conf. Rep. No. 100-576, at 1052 (1988) ("Violation period' refers to the period of time after a shutdown or layoff in violation of this Act, and extends for the number of days that notice was required but not given.").

171 Section 503(b)(1)(A) defines the following to be administrative expenses: "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case...." 11 U.S.C. § 503(b)(1)(A) (2000).


The second prong argues that even if WARN Act back pay constitutes "wages," they are not wages "for services rendered after commencement of the case" as described in § 503(b)(1)(A). This argument has been rejected on the theory that the WARN Act makes the employer liable to the aggrieved employees whenever it orders a postpetition plant closing or mass layoff without complying with the notice requirements, and, because the act occurs postpetition, the "wages" must be earned at the same time. But the fact that liability for back pay accrues postpetition does not mean that the wages were "for services rendered after commencement of the case." Indeed, the employee claims are expressly measured by a period of time during which the aggrieved employees rendered no services whatsoever because they were terminated without proper notice. WARN Act damages simply do not qualify as wages "for services rendered after commencement of the case" under § 503(b)(1)(A) and judicial legerdemain will not make them so.

The characterization of WARN Act damages as administrative expenses is completely sustainable on other grounds. Section 503(a)(1)(A) includes as administrative expenses "the actual, necessary costs and expenses of preserving the estate." Those costs and expenses have consistently been interpreted to include all "costs ordinarily incident to operation of a business," including damages caused by the operation of the debtor's business postpetition. The illegal act of the trustee in bankruptcy (or the

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See In re Hanlin Group, 176 B.R. at 333-34.


Id.

Id.


See Reading Co., 391 U.S. at 485; Cumberland Farms, Inc. v. Fla. Dept. of Envtl. Prot., 116 F.3d 16, 20-21 (1st Cir. 1997); Al Copeland Enters., Inc. v. Texas (In re Al Copeland Enters., Inc.), 991 F.2d 233, 240 (5th Cir. 1993); Ala. Surface Mining Comm'n v. N.P. Mining Co., Inc. (In re N.P. Mining Co., Inc.), 963 F.2d 1449, 1458-1459 (11th Cir. 1992); Spunt v.
debtor in possession) that gives rise to the employee claims occurs during the postpetition operation of the debtor’s business. Therefore, those claims should be characterized as “actual, necessary costs and expenses of preserving the estate” and should properly be given first priority administrative claims status.181

IV. WHY (NOT) WARN IN BANKRUPTCY?

As discussed in Part III, application of the WARN Act in bankruptcy pursuant to the Department rule and its accompanying preamble turns on two key distinctions. The first is whether the ordered plant closing or mass layoff occurred prior to the filing of a bankruptcy petition.182 The second is whether the entity ordering the plant closing or mass layoff qualifies as a fiduciary “whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors” or is instead one who “continue[s] to operate the business for the benefit of creditors.”183 As previously suggested, the application of these bright line rules is fraught with interpretative difficulties. This Part suggests that the justification used by the Department for drawing these distinctions, as well as other possible rationales for excluding bankrupt employers from the operation of the WARN Act, are unsupportable as a matter of statutory interpretation and policy.

A. Statutory Interpretation

The underlying theory behind both of these distinctions is a simple one: there is something about a bankruptcy—in particular, a liquidating bankruptcy—that renders compliance with the provisions of the WARN Act unnecessary. The justification for this conclusion by the Department is straightforward. Premise 1: the WARN Act imposes prenotification obligations on an “employer.” Premise 2: an “employer” is defined in the WARN Act as any “business enterprise.” Premise 3: a liquidating fiduciary (or the

181 See In re Beverage Enters., 225 B.R. at 117; In re Hanlin Group, 176 B.R. at 334-35.
182 See supra Part III.
183 See 54 Fed. Reg. 16,042, 16,045 (April 20, 1989), and supra Part III.B.
185 See id. § 2101(a) (1).
Department's analysis. First, as previously discussed, even under its own interpretation of a "business enterprise" it is difficult to conclude that a bankrupt employer does not qualify as such, at least until the moment it actually liquidates its operations. Second, there is no indication in the WARN Act or in its legislative history that Congress intended the term "business enterprise" as a limiting term, designed to exclude employers from the scope of the legislation.

What did Congress mean by the term "business enterprise"? The phrase, which is not defined in the WARN Act, predates the enacted statute by many years. It was used in the definition of "employer" included in many of the plant closing bills introduced in both houses of Congress during the twenty-five years preceding enactment of the WARN Act. Yet the phrase prompted little

Supp. 2000) ("a person or an entity engaged in providing goods or services"); MINN. STAT. § 334.011 subd. 1 (West Supp. 1995) ("a commercial or industrial enterprise which is carried on for the purpose of active or passive investment or profit"); N.Y. PUB. LANDS LAW § 27(10) (McKinney 1993 & Supp. 2001) ("any lawful activity, except a farm operation, conducted primarily for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; for the sale of services to the public; or by a not-for-profit organization"); W. VA. CODE ANN. § 47-6-11 (Michie 1999) ("any activity that is engaged in primarily for the purpose of generating 'gross income'"); 22 P.R. LAWS ANN. § 10(k)(4) (1999) ("any legal activity whose principal purpose is: (a) the purchase and sale, manufacture, elaboration or marketing of products, merchandise or other personal property; or (b) the sale of services to the public; or (c) for a nonprofit organization").

See supra Part III.B.2. 195 See, e.g., H.R. 1616, 99th Cong. § 2(1) (1985) ("employer means any business enterprise that employs 50 or more employees"); H.R. 1122, 100th Cong. § 1 (1987) (proposed Section 351(1)), S. 538, 100th Cong. § 201(1) (1988) and S. 1420, 100th Cong. § 2202(a) (1987) (proposed Section 331(1)) ("The term 'employer' means any business enterprise in any State that employs—(A) 50 or more full-time employees; or (B) 50 or more employees who in the aggregate work at least 2,000 hours per week (exclusive of hours of overtime)"). In H.R. 76, 94th Cong. (1975) and H.R. 76, 94th Cong. § 2 (1975) (proposed Section 2301(a)), the pre-notification requirement was imposed on any "business concern" which intended to close or transfer all or part of the operations of a factory, plant or other single working place of that business concern. "Business concern" was defined as "any commercial or agricultural business enterprise employing at least fifty employees...." Id. (proposed Section 2102(3)). Although H.R. 5040, 96th Cong. (1979) and S. 1608, 96th Cong. §§ 4(a), 3(4) (1979) continued to impose a pre-notification requirement on certain "business concerns," id. § 4(a), the term "business concern" was redefined to mean "any person who directly or indirectly owns a controlling interest in, or controls, a commercial enterprise which has an annual gross volume of sales made or business done of not less than $250,000." Id. § 3(4). The same definition was used in H.R. 2847, 98th Cong. § 105(4) (1983), but without the annual gross volume of sales limitation. Id. § 103(4). In S. 1609, 96th Cong. § 3(2) (1979), the term "business concern" was defined to mean "any enterprise engaged for profit in manufacturing, mining, transportation or wholesaling including parent and subsidiary corporations together. Id. § 3(2). "Enterprise" was not defined.
debtor for which it acts) is not a "business enterprise." Conclusion: a liquidating fiduciary (or such debtor) is not subject to the WARN Act by process of statutory interpretation.

The problem with this analysis is that Premise 3 has no statutory basis. Congress did not define "business enterprise," and, as discussed in Part II,186 its failure to do so gave rise to many of the comments on the Department's proposed rule. Although the final rule also did not define "business enterprise," in specifying the activities of public or quasi-public entities that might subject them to WARN Act obligations, the Department stated that entities engage in "business" when they "take part in a commercial or industrial enterprise; supply a service or good on a mercantile basis; or provide independent management of public assets, raising revenue and making desired investments."187 By utilizing this definition of "business" the Department expressed its view that "regular Federal, State, and local government public services" were to be excluded from the WARN Act,188 as were liquidating bankruptcy fiduciaries,189 but not nonprofit organizations.190

The term "business" has no accepted legal definition.191 And there is nothing inherently irrational about the factors the Department proposed to determine whether "business" is taking place. Indeed, support for many of these factors can be found in case law,192 and statutory definitions.193 But there are two flaws in the

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186 See supra text accompanying notes 63-67.
193 See, e.g., 42 U.S.C. § 4601(7)(B) (1994) ("any lawful activity, excepting a farm operation, conducted primarily... for the sale of services to the public"); 25 U.S.C.A. § 4302(5) (2001) ("an entity organized for the conduct of trade or commerce"); FED. R. EVID. 803(6) ("'business'... includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit"); ALASKA STAT. § 09.65.260(t)(1) (Michie 2000) ("a person or a for profit or a nonprofit entity engaged in a trade, service, profession, or activity with the goal of receiving a financial benefit in exchange for the provision of services, goods, or other property"); ALASKA STAT. § 10.35.500(1) (Michie 2000) ("any commercial or industrial enterprise"); FLA. STAT. ANN. § 282.5002(1) (West
comment either in committee\textsuperscript{196} or on the floor of Congress.\textsuperscript{197} Looking at the use of the term in other statutes,\textsuperscript{198} as well as the limited comments provided by Congress, one can reasonably conclude that Congress intended to convey two ideas by use of the term. First, that the legal form of the business (whether sole proprietorship, corporation, partnership, association, or other organization) was irrelevant for purposes of the WARN Act. Second, that the entities subject to the WARN Act must be engaged in "business." Although the committee reports on earlier versions of plant closing laws suggested that this term was intended to exclude governmental employers and include non-profit organizations,\textsuperscript{199} the conference report on the bill that became the WARN Act contains no such direction. Instead, the conference report focused on whether the entity had "one or more sites of employment,\textsuperscript{200} that is, whether the entity was an employer in the

\textsuperscript{196} The committee report on H.R. 1616, 99th Cong. (1985), H.R. REP. NO. 99-336, at 12 (1985), seems to equate the term "business enterprise" with the term "business." In discussing the provisions of the bill, the committee report suggests the bill imposes requirements "on a business employing 50 or more employees." \textit{Id.} In its section-by-section analysis, the committee indicated that the definition of "employer" (i.e., "any business enterprise that employs 50 or more employees") "excludes governmental entities and wholly owned governmental corporations but includes non-profit employers." \textit{Id.} at 22. Exactly the same exclusion was specified by the House Committee on Education and Labor in its section-by-section analysis of the definition of "employer" in H.R. 1122, 100th Cong. (1987), H.R. REP. NO. 100-285, at 44 (1987). The Senate Committee on Labor and Human Resources provided no comment on the meaning of "employer" in its report on S. 538, 100th Cong. (1988), S. REP. NO. 100-62 (1987). However, the conference report on House Bill 3 provided brief commentary on the definition, stating, "The Conferees intend that a 'business enterprise' be deemed synonymous with the terms company, firm or business, and that it consist of one or more sites of employment under common ownership or control." H.R. CONF. REP. NO. 100-576, at 1046 (1988).

\textsuperscript{197} The only substantive discussion of the term "business enterprise" came in remarks of Representative DeLay opposing the passage of H.R. 1616, 98th Cong. (1985) in which he said that the term "includes private sector employers including railroads and airlines and, presumably, state and local governments, and even the Federal Government itself, at least when they are engaged in 'any business enterprise'." 131 CONG. REC. H9628 (daily ed. Nov. 1, 1985).

\textsuperscript{198} See, e.g., 22 U.S.C. § 3102(6) (1994) ("'business enterprise' means any organization, association, branch, or venture which exists for profit making purposes or to otherwise secure economic advantage, and any ownership of any real estate"); 42 U.S.C. § 7141(f)(2) (1994) ("a firm, corporation, association, or partnership"); Ethics in Government, § 102, 5 U.S.C.A. App. 4 § 102(a)(6)(A) (1994) ("any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States").

\textsuperscript{199} See supra note 196.

\textsuperscript{200} \textit{Id.}
normal sense of the word. Congress could not, of course, use the word "employer" instead of "business enterprise" because it was creating a definition of "employer" to include only those entities with 100 or more employees. But there is no indication in the statute or the conference report or any floor discussions on the bill that the term "business enterprise" was intended to be exclusive rather than inclusive, that it was intended to mean something other than an entity of whatever type that has employees. There is nothing in the WARN Act itself or its legislative history that supports the conclusion of the Department that a liquidating fiduciary (or a bankrupt employer engaged in a liquidation) is not a "business enterprise" subject to the WARN Act if it has the requisite number of employees. In the absence of a statutory exclusion, the language should be read to include liquidating employers unless such a reading would defeat the intention of the drafters.

B. Should Bankrupt Entities be Subject to the WARN Act?

Although Congress never explicitly (by statutory language) or implicitly (by legislative history) excluded liquidating fiduciaries or any other bankrupt employers from the operation of the WARN Act, the question remains whether it meant to do so. Although three arguments can be made that the WARN Act should not be applicable in bankruptcy, ultimately these arguments are unconvincing and the justifications for making the WARN Act applicable to bankrupt employers without distinction between those engaged in liquidation and those undergoing reorganization are compelling.

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201 A definition that uses the defined term is circular. See, e.g., Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (definition of "employee"); Shultz v. La. Trailer Sales, Inc., 428 F.2d 61, 63 (5th Cir. 1970) (definition of "mechanic"); Dickinson v. First Nat'l Bank in Plant City, Fla., 400 F.2d 548, 555 (5th Cir. 1968) (description of term "branch").

202 See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'... In such cases, the intention of the drafters, rather than the strict language, controls.") (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).


1. Who's in Charge?

The first reason one might offer for excluding bankrupt companies from the requirements of the WARN Act is that a bankrupt employer does not have the same degree of autonomy over employment decisions as an employer outside of bankruptcy. The operative section of the WARN Act provides that "[a]n employer shall not order a plant closing or mass layoff" without the required notice. Perhaps most plant closings and mass layoffs in bankruptcy occur not by order of the bankrupt employer but by order of a third party, whether that party is the trustee or the court, and therefore a literal reading of the statute excludes all such actions occurring in bankruptcy.

The Department commentary emphasized that "neither the [Federal Home Loan Bank] Board nor the [Federal Savings and Loan Insurance Corporation], which are exercising strictly governmental authority in ordering the closing [of an insolvent bank or savings and loan association], are to be considered as employers." Courts have agreed, even when the government, acting through the Federal Deposit Insurance Corporation, does not close the financial institution completely but instead operates a transition bridge bank prior to terminating some of the employees.

On the other hand, when the employer orders employment terminations, even when necessitated by third party action, the

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242 See Buck v. Fed. Deposit Ins. Corp., 75 F.3d 1285, 1292 (8th Cir. 1996). The court's conclusion is questionable. It demonstrates the same "employer"/employer representative problem discussed in Part III.B.1. The court in Buck failed to distinguish between the employer (the transition bridge bank) and the representative of the employer (the FDIC). Although the mass layoffs were ordered by the FDIC, the FDIC was acting as the representative of the employer (the bridge bank) and its governmental capacity should not have immunized the bridge bank, which was still the employer, from liability to the aggrieved employees. The court noted that, because the FDIC could have closed the banks without WARN Act obligations it should have been able to operate the banks for a transitional period without liability either because that was a "less drastic action." Id. at 1290. On that theory, a reorganizing bankrupt employer should not have WARN Act obligations because a liquidating fiduciary does not, and reorganization is a "less drastic action." Id.
243 There is some confusion over whether a plant closing or mass layoff that is ordered by a government agency or official other than a federal banking agency falls entirely outside the
employer is not relieved of WARN Act obligations. However, in yet another example of the “employer”/employer representative problem, courts have suggested that if the third party takes charge of the day-to-day operations of the business and therefore has ultimate autonomy over employment decisions, the third party may become the “employer” and be subject to the requirements of the WARN Act.

WARN Act as does a closing by the FDIC or whether it is merely subject to a potential defense under the “unforeseeable business circumstances” exception. In resisting a proposed amendment to the bill to exclude from the definition of “employer” any bank or savings and loan association that was in danger of closure by the FHLBB, Senator Proxmire analogized the closure of a bank by a federal banking agency to “the police closing down an illegal gambling operation, or the public health authorities closing down a restaurant violating the health code, or the sheriff carrying out an eviction. The plant closing provision on its face does not apply to such situations.” 134 CONG. REC. S15,996, 16,046 (daily ed. June 27, 1988). This would suggest that a closing ordered by the government is not subject to the WARN Act at all.

But Senator Kennedy, in commenting on a hypothetical posed by Senator Reid regarding the Nevada State Gaming Authority ordering an immediate shutdown of a gaming operation, stated that “in the case of an agency coming in and ordering an immediate shutdown with no warning, the employer could not have foreseen such an action” and should be protected by the unforeseeable business circumstances exception.

The Department, in attempting to reconcile these views in its final rule, declined to except all government-ordered closings from the WARN Act, suggesting that in some cases the unforeseeable business circumstances exception might apply. See 54 Fed. Reg. 16,042, 16,054 (April 20, 1989); (20 C.F.R. § 639.9(b)(1)). However, if “the previous ownership is ousted from control of the institution” and control is assumed by the government as is the case with the bank agencies, “there is no employer to give notice” and therefore the WARN Act does not apply. See 54 Fed. Reg. 16,042, 16,054 (April 20, 1989).

The tension between the two views can be seen by comparing the majority opinion in Hotel Employees and Rest. Employees Int'l Union Local 54 v. Elsinore Shore Assocs., 173 F.3d 175, 182 (3d Cir. 1999), where the court concluded that the closing of a casino by order of the New Jersey Casino Control Commission was not exempt from the WARN Act but was protected by the unforeseeable business circumstances exception, and the concurring opinion in which Judge Alito stated that he would have resolved the case by finding the WARN Act inapplicable to this government-ordered closing. Id. at 187-88.

See, e.g., Pearson v. Component Tech. Corp., 247 F.3d 471, 497 (3d Cir. 2001) (lender controlled employer’s stock, installed board of directors and chief executive officer, and later refused further financing); Adams v. Erwin Weller Co., 87 F.3d 269, 272 (8th Cir. 1996) (lender refused to advance more funds and called defaulted loans); Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Loan v. Weslock Corp., 66 F.3d 241, 244-45 (9th Cir. 1995) (assets surrendered to secured creditor in satisfaction of delinquent loan). Such a third-party action may, however, give rise to a defense under the unforeseeable business circumstances exception. See 20 C.F.R. § 639.9(b)(1) (2001).

See supra Part III.B.1.

See Pearson, 247 F.3d at 497 (“responsibility must have been for the ‘ordinary operation’ of the business”); Erwin Weller, 87 F.3d at 273 (employer-employee relationship would be demonstrated “by hiring, firing, paying, or supervising” any of the employees); Weslock, 66 F.3d at 245 (not an employer absent “some evidence showing... involvement in
Who has that sort of responsibility for the operations of a bankrupt employer? In a chapter 11 case the answer is generally the debtor in possession, exercising the powers of the trustee in bankruptcy.\textsuperscript{211} In all chapter 7 cases, and in chapter 11 cases in which a trustee has been appointed,\textsuperscript{212} it is the trustee in bankruptcy. Perhaps the trustee in bankruptcy (or the debtor in possession exercising its powers) could be characterized as exercising "strictly governmental authority" when ordering plant closings or mass layoffs, akin to the actions taken by the FDIC.

The problem with that argument is that the trustee in bankruptcy is not a representative of the government. Although the trustee may be appointed by the United States Trustee (an official of the U.S. Justice Department\textsuperscript{215},\textsuperscript{214} appointed by the bankruptcy judge,\textsuperscript{215} or elected by the creditors pursuant to the Code,\textsuperscript{216} the trustee is a private "disinterested person," not a government official.\textsuperscript{217} The trustee is a fiduciary for creditors (which may include the government, but need not) and for shareholders.\textsuperscript{218} Except in that capacity, the trustee does not represent the government and, in fact, is often in the position of pursuing actions against the government.\textsuperscript{219}

Equally troubling is the argument that the employer is relieved from WARN Act obligations if a court orders a plant closing or mass layoff. Although no provision of the Code precludes a debtor from


\textsuperscript{212} See id. § 1104(a).


\textsuperscript{215} See id. § 1104(a).

\textsuperscript{216} See id. §§ 702(b), 1104(b).

\textsuperscript{217} Only if no member of the panel of private trustees established under 28 U.S.C. § 586(a)(1) is willing to serve as interim trustee may the U.S. Trustee serve as interim trustee in a chapter 7 case, see 11 U.S.C. § 701(a)(2) (2000), and only if a trustee is not elected by creditors does the interim trustee serve as trustee in the case. See id. § 702(d). Similar provisions apply with respect to successor trustees. See id. § 703.


\textsuperscript{219} The United States government has relinquished its sovereign immunity with respect to such actions pursuant to 11 U.S.C. § 106(a) (2000).
terminating any or all of its employees without court approval, in most situations a decision to engage in such an action will be linked to another action that clearly does require such approval, such as the use, sale, or lease of property of the estate other than in the ordinary business, or the rejection of executory contracts and unexpired leases, or confirmation of a plan of reorganization. If the court approval itself rendered the WARN Act inapplicable, all plant closings or mass layoffs in bankruptcy would assuredly be implemented pursuant to court order, and the bankruptcy court would effectively be given the power to immunize all bankrupt estates from liability. Although one bankruptcy judge has concluded that an employer does not order the plant closing or mass layoff within the meaning of the WARN Act if it acts pursuant to order of the bankruptcy court, a bankruptcy court has no power to relieve a debtor from the obligations of federal law.

A more logical approach to court-ordered plant closings and mass layoffs in bankruptcy is that followed for employment actions outside of bankruptcy precipitated by third party action. As previously discussed, as long as the employer (rather than the third party) actually terminates the employees, even if that action was necessitated by order of a secured creditor or governmental agency, the WARN Act should apply. If the court order requires

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220 See id. § 363(b)(1) (providing that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary business, property of the estate").

221 See id. § 365(a) (providing that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor").

222 See id. § 1129 (specifying requirements for confirmation by court).

223 See In re Parke Imperial Canton, Ltd., 1994 WL 842777, at *7 (Bankr. N.D. Ohio 1994). The issue was raised in the context of a challenge by the debtor and the union representing its employees to confirmation of a plan of reorganization proposed by debtor's principal secured creditors. It was argued that the plan did not comply with 11 U.S.C. § 1129(a)(3) (requiring that the plan be "proposed in good faith and not by any means forbidden by law") because it provided for the business to close without WARN Act compliance. The court rejected the objection, noting that "[t]he court is rendering the final decision which orders the hotel to close, not the Debtor who is fighting to keep it open," and therefore the WARN Act notice requirement was not applicable. Id.


225 See supra text accompanying notes 205-06.
WARN Act

2002

WARN Act

287

closures on a schedule that does not permit sixty days prior notice to employees, the employer may be able to assert unforeseeable business circumstances to shorten its notice obligation, but the employer is not relieved of them altogether.

In sum, neither the involvement of the trustee in bankruptcy for a debtor employer nor the probable involvement of the bankruptcy court in implementing a decision to order a plant closing or mass layoff should have any bearing on the liability of the debtor employer to its aggrieved employees. In all cases it is the debtor employer who, through its authorized representative (either the trustee in bankruptcy or the debtor in possession), runs the business in the sense of hiring, paying, supervising, and firing employees. And whether or not those actions are approved by the bankruptcy court, the estate of the debtor employer should bear the burden of liabilities imposed by compliance with federal law in taking those actions.

2. Notice in Bankruptcy

The sole purpose behind the WARN Act is to provide employees of business enterprises that qualify as "employers" under its provisions prior notice of a potential action by their employer that would put them out of work. With such notice, it was thought, not only could they have time to seek alternative employment but the local municipal and state authorities could launch social programs to maximize the possibility of a "soft landing" for the terminated employees. A second justification that might be offered for finding bankrupt employers exempt from the WARN Act requirements is that WARN Act notice may not be necessary for employees of such employers because the bankruptcy process ensures that they (as well as the state and local officials)

226 Of course, under 29 U.S.C. § 2102 (b)(2) (1994), the employer may give less than sixty days notice only if the business circumstances causing the mass layoff or plant closing were not "reasonably foreseeable" 60 days prior to the action, and even then the employer must give "as much notice as is practicable." Id. § 2102(b)(3). The employment terminations must be reasonably foreseeable at least from the time application is made to the bankruptcy court for approval for the actions.


228 See, e.g., 54 Fed. Reg. 16,042, 16,059-61 (Apr. 20, 1989) (discussing 20 C.F.R. §§ 639.7(b)-(f)).
receive notice of potential plant closings and mass layoffs in other ways.

The first way employees receive notice that may, it could be argued, obviate any need for WARN Act notice is by the notice they receive of the bankruptcy filing itself. Perhaps the very fact that the employer has taken this legal step to protect itself from its creditors should alert employees to the possibility, if not the likelihood, that their jobs could be terminated. There are two obvious responses to this argument. First, if the filing is made under chapter 11, there is no reason to believe at the time of filing that any particular jobs will be lost because the debtor employer may choose to reorganize the business and retain many or all of its operations. Even if the employer files under chapter 7, the trustee may choose to liquidate the business by selling it as a going concern, which may not result in any loss of jobs. Second, even if it is clear to the trustee and the more sophisticated creditors that a new chapter 7 debtor will liquidate by selling assets, it is unreasonable to expect that the ordinary employee of a bankrupt concern understands the implications of a chapter 7 filing or the schedule of a liquidation. The filing of the bankruptcy petition (and any notice given thereof to the employees as creditors) provides notice of only one thing, the bankruptcy of the employer.229

A second point at which employees may receive a notice during a bankruptcy case that should lead them to believe that their jobs are insecure is when the employer files a motion to sell, lease, or otherwise dispose of assets at a particular facility, or seeks to reject or assume and assign a lease, or files a plan of reorganization that contemplates a plant closing or mass layoff. Perhaps because employees of a bankrupt employer receive this type of notice, they do not need a WARN Act notice to allow them to protect their interests. But this argument suffers the same deficiencies as the prior one. How the action described in such a motion will affect any individual employee’s job is uncertain merely from the motion itself. Employees may be transferred to other positions or hired by an assignee. And such a motion provides even less definite notice than a bankruptcy petition filing because it has no legal effect in itself until and unless it is granted by the court. For all of these

229 Cf. Martin C. Brook, What Happens When the WARN Act and the Bankruptcy Code Converge?, 24 EMPLOYEE REL. L. J. 103, 111 (1999) (discussing whether the filing of a chapter 7 petition should be considered an ordered plant closing or mass layoff).
reasons, a motion relating to a proposed debtor action cannot substitute for a WARN Act notice.

Even if one could conclude that either the filing of a bankruptcy petition or a motion to take action by the debtor requiring court approval provides employees with practical notice of a possible job loss, such de facto notice would not qualify as legal notice under the WARN Act. Although the WARN Act itself does not describe the notice that must be delivered by an employer prior to a plant closing or mass layoff in any detail, it does say that the employer "shall not order a plant closing or mass layoff" until sixty days after giving written notice "of such an order." Neither the bankruptcy petition, nor any motion filed by the employer during the course of the bankruptcy case, can be described as a notice of an ordered plant closing or mass layoff unless it is itself a WARN Act notice. The Department rule goes even further, specifying in some detail the required contents of a WARN Act notice. Employees of bankrupt employers receive nothing comparable and are entitled to nothing less.

3. Bankruptcy Operation

A final argument in favor of excluding bankrupt companies from the operation of the WARN Act might be that Congress could never have intended the WARN Act to apply in this context. Congress never addressed the situation in the legislation itself or in the legislative history, the statutory provisions do not mesh well with the operation of a bankruptcy case, and the penalty afforded aggrieved employees undermines the carefully constructed statutory priority scheme for claimants in bankruptcy by giving employees a "secret" priority claim to which they are not entitled. This argument too, is unconvincing.

Congress certainly did not discuss the application of the WARN Act to companies seeking the protection of the Code. Indeed, the only discussion of bankruptcy during the Congressional debates was

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220 The Department acknowledged this fact in its preamble to the final rule, but defended its decision to provide detailed notice requirements to meet the need to provide employees and public officials "information necessary for each of them to take responsible action." 54 Fed. Reg. 16,042, 16,059 (Apr. 20, 1989).


the argument of opponents of the proposed statute that its enactment would force more companies into bankruptcy because the mandatory prenotification would scare off creditors and suppliers to the affected employer.\textsuperscript{235}

On the other hand, there is no explicit exclusion for bankrupt employers included in the WARN Act, despite considerable focus on companies that were financially troubled in connection with the inclusion of the "faltering company" exception.\textsuperscript{234} As a matter of WARN Act policy, there is no reason to distinguish between an employer who is in bankruptcy and one who is not; the aggrieved employees are still being terminated and have the same need for notice in order to give them time to seek new jobs and adjust to their changed circumstances, and the local authorities still have the same concerns about the loss of jobs in their communities. Indeed, several of the specific examples cited by members of Congress speaking in support of plant closing bills over the years involved closings occasioned by bankruptcy.\textsuperscript{235} If providing prenotification outside of bankruptcy is likely to reduce the time of unemployment for those affected employees,\textsuperscript{236} thereby saving tax dollars in the form of unemployment compensation, food stamps, welfare payments, and lost income taxes, and increasing productivity, those results are equally likely to be true for prenotification by bankrupt employers. A terminated employee is equally out of a job whether the employer doing the firing is in bankruptcy or not. Congress provided no indication that one terminated employee should be entitled to less protection than the other.

There is also no doubt that the WARN Act operates a bit differently in bankruptcy in the sense that a person seeking to


enforce the liability of a bankrupt employer who fails to provide the required prenotification cannot enforce that liability against property of the estate because such an action would be barred by the automatic stay.\(^\text{237}\) Instead, the party to whom liability is owed will be entitled to a claim in the bankruptcy case which, as previously discussed, will be a first priority administrative expense claim\(^\text{238}\) and will be paid when and to the extent that other claims of similar priority are paid. But other rights to payment created by contract\(^\text{239}\) or by law\(^\text{240}\) are also transformed into bankruptcy claims, and that transfiguration does not render the contract or statute pursuant to which the rights arise inapplicable to bankrupt parties.

Although the provisions of the WARN Act were not drafted with the bankrupt employer in mind, they can be applied to the bankrupt employer without difficulty. A bankrupt employer (through its authorized representative, whether trustee in bankruptcy or as debtor in possession) is capable of providing the required prenotification of a proposed plant closing or mass layoff.\(^\text{241}\) The qualification to the term "employment loss" that excludes a plant closing or mass layoff when employees are offered transfers to nearby facilities\(^\text{242}\) can also operate in bankruptcy without modification. The provisions permitting reduction of the mandatory sixty-day period of notice can also be applied in
bankruptcy. For example, the "faltering company" exception allows an employer to shut down a single site of employment earlier than sixty days after notice is given if "the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business." Many actions by a bankrupt employer, such as the search for postpetition trade credit, requests for debtor-in-possession financing, or even negotiating to structuring a plan of reorganization that contemplates debt concessions and new money infusions, can be characterized as "actively seeking business or capital." Unforeseen business circumstances (such as dramatic changes in market conditions) that permit reduction in the sixty day notice period and natural disasters which excuse the giving of prior notice are equally applicable to bankrupt entities as those financially healthy. And the blanket exceptions for temporary projects and strikes or lockouts could also be invoked by bankrupt employers.

The final argument against the applicability of the WARN Act to bankrupt employers is that the priority of employee wage claims are specifically addressed in the Code, and applying the WARN Act in bankruptcy simply creates a "secret" priority claim that Congress never intended to provide. Allowing employees to recover on this claim in bankruptcy simply reallocates amounts that would otherwise be paid to unsecured creditors, making it less likely that they will obtain a reasonable recovery on their claims. And because

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243 Id. § 2102(b)(1).
244 See, e.g., In re Parke Imperial Canton, Ltd., 1994 WL 842777, at *7 (Bankr. N.D. Ohio 1994).
246 See 29 U.S.C. § 2102(b) (2) (B) (1994).
247 See id. §§ 2103(1) and (2).
248 Prepetition wage claims of employees are treated as third priority claims to the extent of $4,300 for each individual or corporation earned within ninety days before the date of the filing of the petition. See 11 U.S.C. § 507(a) (3) (2000). The $4,300 figure was automatically adjusted on April 1, 2001 to reflect changes in the Consumer Price Index since April 1, 1998. See id. § 104(b). Postpetition wages are treated as first priority administrative expense claims under id. §§ 507(a) (1) and 503(b)(1)(A).
holders of administrative expense claims must be paid in cash the allowed amount of those claims on the effective date of a plan of reorganization, increasing administrative expense claims by WARN Act liability simply makes successful reorganizations less feasible.

There are three responses to these points. First, there is nothing "secret" about the liability imposed on employers who violate the WARN Act. Although the WARN Act claims are not specifically itemized among priority claims in the Code, as previously discussed WARN Act liability has been analogized to wage claims the priority of which is specifically addressed in the Code, both for wages earned prepetition and those earned during the bankruptcy case. Second, because WARN Act liability attaches only if the bankrupt employer fails to give the required notice, the aggrieved employees have no greater claim (or any higher priority for that claim) than they would have received had the notice been given and they had been allowed to earn their regular wages for the sixty-day period. Those wage claims always are afforded first priority administrative expense status and come before unsecured creditors. If the size of administrative expense claims makes reorganization unlikely, there is no reason to single out WARN Act claims as the culprits. Finally, the WARN Act explicitly provides that "[t]he rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies." Therefore, even if the WARN Act provided claims to employees against their employers that supplemented those provided by the Code, Congress did not intend to supplant any rights employees were given under other laws when it enacted the WARN Act.

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219 Id. § 1129(a)(9)(A). The holder of an administrative expense claim can agree to different treatment of the claim. Id.


221 See id.

CONCLUSION

The WARN Act was in many ways a modest piece of legislation. But for those employees affected by a plant closing or mass layoff, the limited notice the WARN Act requires provides a modicum of financial and emotional security at a time of extreme stress.

The Department rule and analysis, which apparently exempts from liability under the WARN Act bankrupt employers who order plant closings and mass layoffs through the trustee in bankruptcy in a chapter 7 case or through the debtor in possession in a liquidating chapter 11 case, deny employees even that limited safety net. For the employee of the bankrupt company, the distinction between a liquidating employer and a reorganizing employer has no meaning. Employees of both types of bankrupt employers are equally concerned about their jobs, equally subject to financial hardship and mental and physical strain when they lose their paychecks, and equally in need of the limited protections the WARN Act affords.

More fundamentally, the Department approach treats employees of bankrupt companies as if they were different from—and entitled to less protection than—those of companies that are not in bankruptcy. The employee who is fired one day before a bankruptcy filing is entitled to the full protection of the WARN Act while an employee of the same company who is fired one day after bankruptcy is not. Such disparate treatment is not dictated by the language of the WARN Act and has no principled basis either in WARN Act policy or in that underlying the Code. Indeed, one could argue that the Code evinces a consistent policy of protecting the rights of employees over those of other creditors and against the debtor itself. Uniform treatment between those employees of

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253 See, e.g., Douglas G. Baird, Bankruptcy's Uncontested Axioms, 108 YALE L.J. 573, 588 n.46 (1998) (WARN Act's "scope was quite modest").

254 See Martin C. Brook. What Happens When the WARN Act and the Bankruptcy Code Converge?, 24 EMPLOYEE REL. L.J. 103, 119 (1999) (suggesting that the distinction "has the effect of discouraging WARN compliance because an unscrupulous or negligent employer can fail to give notice and leave it to the appointed Trustee to close the business and lay off the employees with no WARN obligation or liability").

255 See, e.g., 11 U.S.C. §§ 503(b)(1)(A) (2000) (making wages, salaries, or commissions for services rendered after commencement of the case administrative expense claims); 507(a)(1) (assigning first priority to administrative expense claims); § 507(a)(3) (assigning third priority to certain unsecured claims for wages, salaries, commissions and related liabilities earned within 90 days before the filing of the petition); § 507(a)(4) (assigning
liquidating and reorganizing bankrupts and between bankrupt employers and non-bankrupt employers is mandated not only by the language of the WARN Act but by the basic sense of justice that motivated Congress after so many years and such a difficult political struggle to enact it. The Department erred in creating distinctions without a difference. Congress should correct that error by providing clearly and without equivocation that the WARN Act means what it says and that all employees—even those of liquidating bankrupt employers—are entitled to share in its benefits.

Some have suggested that the Code has not gone far enough to protect the rights of employees and that additional mechanisms to facilitate their participation in bankruptcy cases should be instituted. For example, it has been suggested that the Official Bankruptcy Forms should be amended to include additional information about employment-related debts, including WARN Act claims. See NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS 502-03 (Oct. 20, 1997) (statement of Comm'r Babette Ceccotti). Other suggestions include encouraging participation by employees and unions in the official creditors' committee, id. at 503-05, and formation of an official employees' committee, id. at 505-06. It has also been suggested that employees should have automatic standing in bankruptcy cases to be heard on issues affecting their future employment. See Nathalie D. Martin, Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In, 59 OHIO ST. L.J. 429, 477-80 (1998).