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Phillip Blumberg
University of Connecticut School of Law

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UNITED STATES REPORT

by Phillip I. Blumberg*

INTRODUCTION

This paper reviews the American experience with respect to the rights of workers affected by such major employment developments as bankruptcy, sale or merger, enterprise or plant closings, relocations and mass layoffs. The labor movement in the United States has made only limited progress toward protecting workers and their employment rights in the event of such major developments in the workplace. Regarding solvency concerns, employee protection—where it exists at all—is found almost entirely in union representation and union collective bargaining agreements rather than in statutory or administrative regulation. Even in these limited cases, protection is spotty. First, only a minority of collective agreements restrict employer discretion in these areas. Second, the labor relations laws impose no general restriction on employer decision-making in such matters; and the laws only require that in cases where a union has been designated as the bargaining representative, employers bargain over the effects of such decisions on employees.2

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1. The National Labor Relations Act [NLRA] sets forth the procedure for designation of a union as the exclusive bargaining representative of workers in a particular bargaining unit. This requires designation by a majority of the workforce or in a supervised representation election. 29 U.S.C. § 159(a) (1982).

2. The NLRA requires an employer to bargain with the union certified as the exclusive bargaining representative of employees in a designated bargaining unit over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(a)(5), (d) (1982). Such matters constitute mandatory subjects of bargaining. Other matters pertaining to the employment relationship, not in violation of statutory policy, may be included in collective agreements by the employer and the union; these are permissive subjects of bargaining. Matters in violation of statutory policy are illegal subjects of bargaining. See I A.B.A. SEC. LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW ch. 18 (C. Morris 2d ed. 1983) [hereinafter DEVELOPING LABOR LAW].

The determination of the scope of managerial discretion included within the statutory definition of mandatory subjects of bargaining is the crucial question with respect to sale or merger, plant closings, or relocation.
In the absence of restrictions in isolated collective bargaining agreements or under the labor relations laws, employers are to a large extent free to make decisions without labor approval or even consultation. In the absence of a recognized union, employer freedom in this area is unrestricted, except in the case of certain regulated industries, primarily transportation, which for decades have been the subject of extensive federal legislation that includes labor matters.³

In addition to the labor relations laws, other American statutes provide limited protection for workers in their employment relationships. In the case of insolvency, the bankruptcy laws contain special recognition of workers' interests in the liquidation or reorganization of a bankrupt concern. Similarly, the Employee Retirement Income Security Act (ERISA) contains extensive provisions for the protection of workers' and retirees' rights under employer-pension plans.

I. INSOLVENCY

A. The Bankruptcy Code

The Bankruptcy Code (the Code)⁴ provides for the filing of voluntary and involuntary petitions in bankruptcy against any debtor by three or more creditors. Voluntary petitions must be filed in "good faith" but require no proof of insolvency.⁵ In the case of involuntary petitions, relief requires proof that "the debtor is generally not paying

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⁵ See In re Victory Constr., Inc., 3 Collier Bankr. Cas. 2d 655 (Bankr. C.D. Cal. 1981) (construing 11 U.S.C. § 301 (1982)); 2 W. COLLIER, BANKRUPTCY § 301 (15th ed. 1987) [hereinafter COLLIER]. Voluntary filings have occurred in the case of debtors facing potential major tort product liability, such as Johns-Mansville Co. (asbestos) and A.H. Robbins Co. (Dalkon Shield). This paper is not concerned with such voluntary petitions.
such debtor's debts as such debts become due. . . .

Proceedings may involve the liquidation of a debtor and distribution of its assets to creditors (Chapter 7) or the reorganization of the debtor for continuing operations (Chapter 11).

The areas of greatest concern to workers of a bankrupt employer arise under the provisions of § 507(a) of the Code dealing with priorities of creditor claims, including wage and pension claims, and of § 365 (as affected by § 1113) of the Code dealing with the rejection of executory contracts, including collective-bargaining agreements.

In recent years, the treatment of collective-bargaining agreements in employer bankruptcy proceedings has become one of the most controversial areas in American labor law. 


1. Priorities: The Statutory Structure

In liquidation cases and, with limited exceptions, in reorganization cases, the Code provides for seven priorities in the allocation of assets available for the payment of unsecured claims for all purposes; the following priorities are particularly noteworthy:

The first priority concerns administrative expenses or the "actual, necessary costs ... of preserving the estate," including "wages ... for services rendered after the commencement of the case." Such expenses as workers' wages and pension contributions for periods after the filing of the petition are included within this section.

The third priority relates to "wages ... including vacation, severance and sick leave pay" earned in the 90 days prior to the commencement of the case (or the cessation of the debtor's business, if earlier) up to a maximum of $2,000 per individual.

The fourth priority is for claims "for contributions to employee benefit plans" arising from services rendered in the 180 days prior to the commencement of the case (or the cessation of the debtor's business, if earlier) to the extent of $2,000 per person covered by the plan, less the aggregate amount paid to such persons under the third priority, plus the amount paid by the debtor's estate for the benefit of such employees under any other benefit plan.

Such priorities control the distribution of assets in liquidation or the terms of the reorganization plan. A plan may not be approved unless, among other things, each claimant receives consideration with a present value at least equal to the amount the claimant would receive in liquidation under Chapter 7.

In the typical case, where net assets available for distribution or allocation to unsecured creditors are insufficient for payment-in-full of all unsecured claims, the statutory priorities effectively determine which claims will be paid. Accordingly, they play an important role.

2. Priorities: Worker Claims in Bankruptcy

Complex issues arise in bankruptcy with respect to the status of worker benefits other than wages; these include such matters as sever-

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ance pay, employee benefit-fund payments, and pension-contribution liability.\textsuperscript{11}

a. Wages, Vacation, Severance, and Sick-Leave Pay

The Code expressly provides that "wages" include not merely wages, but also "vacation, severance, and sick leave pay."\textsuperscript{12} Hence, claims for such items arising prior to the commencement of bankruptcy proceedings qualify for the third bankruptcy priority accorded to "wages."\textsuperscript{13} However, questions ensue when such payments are made by the debtor or the trustee after the commencement of the proceedings. Such a situation is presented when severance pay is distributed by a trustee after the commencement of the proceedings and based on the length of employment including pre-bankruptcy service. All courts agree that the relatively small portion accrued after the commencement of the proceedings constitutes either an administrative expense entitled to first statutory priority, or "wages" entitled to third statutory priority.\textsuperscript{14}

b. Employee-Benefit-Plan Payments

Such payments expressly qualify for the fourth statutory priority, which includes all claims for pre-petition payments and for post-petition payments related to pre-petition events. However, where required as part of continued performance under continuing collective-bargaining agreement, employee-benefit-fund payments after bankruptcy have been held to be administrative expenses entitled to the first statutory priority; this view persists even where such payments are measured by

\textsuperscript{11} See Haggard & Pulliam, supra note 7, at 229-45; Pension and Welfare Benefits supra note 9; Novikoff & Polebaum, supra note 9.


\textsuperscript{13} See In re Northwest Eng’g Co., 863 F.2d 1313 (7th Cir. 1988) (vacation pay “earned” in the 90 days prior to the petition filing date so long as right to receive such amount has vested).

\textsuperscript{14} Compare In re Pacific Far E. Line, Inc., 713 F.2d 476, 478 (9th Cir. 1983); In re Health Maintenance Fund. v. System Bd. Adjustment 94 Bhd. Ry., Airline, S.S. Clerks, 680 F.2d 619 (9th Cir. 1982); In re Pub. Ledger, 161 F.2d 762, 771 (3rd Cir. 1947) (denying administration expense priority) with In re W.T. Grant Co., 620 F.2d 319 (2d Cir. 1980), cert. denied, 446 U.S. 983 (1980); Straus-Duparquet, Inc. v. Local 3 Int'l Brotherhood of Elec. Wkrs., 386 F.2d 649 (2d Cir. 1967) (allowing administrative expense priority). Thus, in Mammoth Mart, the court held that where the severance pay is determined by length of service, any portion attributable to service prior to filing is not entitled to first priority. In re Mammoth Mart, Inc., 536 F.2d 950, 955 (1976).
pre-bankruptcy hours of service, so long as not related to length of service.\textsuperscript{15}

c. Pension-Fund Liability

Pension-fund contribution liability presents by far the most complex problems. Almost all American workers and their benefits are covered by the federal pension program known as Social Security.\textsuperscript{16} Although financed by payroll taxes imposed on employers and employees, this is a governmental program and is substantially unaffected by the insolvency of an employer.

In addition, there are non-governmental pension programs. Some are programs unilaterally adopted by employers; others are established and maintained as a result of collective bargaining between employers and unions. In 1984, there were approximately 47.5 million employees or approximately 42 percent of the workforce participating in non-governmental pension programs. Approximately 67 million employees or 60 percent of the workforce were participants in non-governmental health insurance plans.\textsuperscript{17}

In addition to the contractual pension obligations arising under a collective-bargaining agreement or a non-governmental pension plan, the Employee Retirement Income Security Act (ERISA),\textsuperscript{18} imposes numerous statutory obligations intended to assure adequate funding of such plans.\textsuperscript{19} The three principal types of ERISA obligations presenting problems under the Bankruptcy Code relate to contribution liability, withdrawal liability and termination liability.

In all, there are six categories of pension claims and pension claimants — depending upon the nature of the claim, the party with

\textsuperscript{15} In re Pacific Far E. Line, Inc., 713 F.2d 476 (9th Cir. 1983).
\textsuperscript{16} 42 U.S.C. § 301 (1982).
\textsuperscript{17} See \textsc{Statistical Abstract of the United States}, Table No. 686 (1987).
\textsuperscript{19} ERISA is a particularly complex statute, and any comprehensive explanation is beyond the scope of this paper. In summary, ERISA divides employer pension liabilities into three groups: a pension plan relating only to one employer (termed "single employer plan"); a pension plan embracing several employers but not arising under collective bargaining agreements (termed a "multiple employer plan"); and a pension plan embracing several employers arising under a collective bargaining agreement (confusingly termed a "multi-employer plan"). Statutory liability varies sharply depending on the nature of the plan. Statutory contribution liability (as distinct from contractual contribution liability) involves all plans. 29 U.S.C. § 1145 (1982).

the claim and the basis for the claim. These include: (a) A pension fund's claim for an employer's failure to comply with statutory minimum-funding standards; (b) A pension fund's claim for an employer's failure to comply with contractual funding obligations owing to the fund; (c) The claim of a union or of employees for an employer's failure to comply with contribution obligations contained in a collective-bargaining agreement or an employment agreement; (d) Statutory excise tax claims of the Internal Revenue Service for the tax liability automatically imposed in the event of any accumulated funding deficiency; (e) The claim of the Pension Benefit Guaranty Corporation (PBGC, the governmental agency implementing ERISA) for statutory termination of an underfunded single-employer fund; (f) The claim of the PBGC or of a union for statutory withdrawal of an employer from an underfunded multi-employer fund (under the statutory program, multi-employer funds include only plans established by a collective bargaining agreement).

i. Pension Plan Minimum Funding Contribution Liability

Along with other health and welfare contributions, post-petition pension contribution obligations are deemed administrative expenses entitled to the first priority. Even where such contributions are measured by reference to time worked prior to bankruptcy, such payments qualify in full as administrative expenses. The courts note that the obligation accrued after the filing, that the hours worked pre-filing were not consideration for the payment but only a measure and, finally, that the payments are not due to employees but to the plan and, therefore, do not resemble wages.

Pre-petition contribution obligations are "employee benefit plan contributions," qualifying for the fourth priority. They do not qualify as "wages" entitled to the third priority.

20. See Novikoff & Polebaum, supra note 9, at 405-06.


ii. Multi-employer Pension Plan Withdrawal Liability

ERISA imposes liability on employers withdrawing from union-sponsored pension plans involving more than one employer (called “multi-employer plans”) for their pro rata share of unfunded vested benefits.23 The Act further provides that in the event of dispute, the amount of withdrawal liability is to be determined by arbitration. However, the courts are in dispute whether this statutory requirement is applicable in the event of the employer’s bankruptcy.24 Similarly, the courts are in disagreement whether a withdrawal liability claim is entitled to priority as an administrative expense. Some courts uphold such a priority for the portion of the withdrawal liability attributable to post-petition employment.25 Others reject such priority in toto.26 Pre-petition withdrawal liability is not entitled to any priority. Since it does not involve a “contribution,” it does not constitute an “employment-benefit plan contribution” qualifying under the fourth priority.27

iii. Single-Employer Pension Fund Termination Liability

Under ERISA, the PBGC guarantees the payment of certain vested benefits28 in the event of the termination of a single-employer plan with assets insufficient for the guaranteed benefits.29 ERISA provides that in such event, the employer, as well as all members of a group under common control of which the employer is a member, is

27. The PBGC guarantees the payment of vested pension benefits under most defined benefit pension plans. It does not cover defined contribution plans. (Defined benefit programs reflect an undertaking to provide pension payments in defined amounts. They are to be distinguished from defined contribution plans, in which the undertaking is to make payments to individual accounts according to a specified formula, but there is no undertaking as to the amount of the ultimate benefits to be paid)
liable to the PBGC for the total amount of the unfunded benefit liabilities to plan participants and beneficiaries. The priority status of the PBGC termination liability claim is not clear. One bankruptcy court has held that the PBGC claim is not an administrative expense entitled to the first priority, but rather, was analogous to a pre-petition tax claim entitled to seventh-priority status. The PBGC has a secondary claim where liability is limited by the 30 percent net worth limitation to the difference between 75 percent of unfunded guaranteed benefits and 30 percent of net worth. Unlike the primary claim, this claim is not analogous to a tax lien and would, therefore, appear to be a general unsecured claim without priority.

B. Disaffirmance of Collective Bargaining Agreements

The continued effectiveness of a pre-existing collective-bargaining agreement after the bankruptcy of an employer which continues operations subsequent to the institution of reorganization proceedings presents a major conflict between the objectives of the national labor relations laws encouraging collective bargaining and the bankruptcy laws seeking to conserve the debtor's assets. The conflict is not limited merely to policy but extends to the express provisions in the statutes.

Section 365 of the Code authorizes the bankruptcy trustee, with court approval, to reject any executory contract of the debtor. On the other hand, the National Labor Relations Act (NLRA) makes unilateral rejection of a collective-bargaining agreement an unfair labor practice and specifies an elaborate procedure for modification of an agreement. The lower federal courts have disagreed on the standard to determine the circumstances under which a bankruptcy court could reject an unexpired collective-bargaining agreement binding the debtor under § 365. Some decisions authorize rejection only where "necessary" to prevent collapse of the debtor and immediate liquidation.

30. 29 U.S.C. § 1362 (1982 & Supp. 1988). The statute originally limited liability to the lesser of the amount by which funded benefits exceeded available assets or 30 percent of the net worth of the employer. When this limitation was deleted, the Act authorized the PBGC to accept a 50 percent deferral of the liability for any year in which the person liable can show an absence of pre-tax profits.

31. See Novikoff & Paulbaum, supra note 9, at 421, 437.


35. See supra notes 1-2 and accompanying text.


37. See Railway, Airline & S.S. Clerks v. REA Express, Inc., 523 F.2d 164, 167-69 (2d Cir.
Other opinions utilize a standard more favorable to the debtor, approving rejection when supported by “a careful balancing of the equities on both sides” even though not “necessary” to avoid liquidation. 38

In the Bildisco case,39 the Supreme Court by a vote of 5 to 4 endorsed the less stringent balancing standard. It held that rejection required only a showing that the collective agreement “burdens” the debtor’s estate and that “after careful scrutiny, the equities balance in favor” of rejection. In addition, the Court required a showing that the employer had made reasonable efforts to renegotiate the agreement and that such efforts “are not likely to produce a prompt and satisfactory conclusion.”40

In permitting a unilateral modification of a collective-bargaining agreement for the benefit of the employer in bankruptcy, the Court was approving an action expressly forbidden by the national labor laws in other situations.41

The Congress promptly responded by enacting § 1113 of the Code, restricting a debtor’s ability to reject a collective agreement.42 Section 1113 protects all provisions in the collective-bargaining agreement. It has been held not to distinguish between mandatory and permissive subjects of bargaining43 and to protect retirees as well as employees.44

Among other things, § 1113 provides for the following:

(1) It requires the debtor or its trustee to make a proposal to the union based on the most recent information, providing “for those necessary modifications in the employees’ benefits and protections that are necessary to permit the reorganization of the debtor and assuring that all creditors, the debtor and all affected parties are treated fairly and equitably.” The proposal must be accompanied by “such relevant information as is necessary to evaluate the proposal.”

(2) The debtor or its trustee is required to meet with union repre-

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40. Id. at 525-526.
43. See HAGGARD & PULLIAM, supra note 7, at 73-121.
sentatives “to confer in good faith in attempting to reach mutually satisfactory modifications” of the agreement.

(3) To approve rejection, the court must find (i) that such a proposal has been submitted; (ii) that the union has refused to accept it without “good cause;” and (iii) that “the balance of the equities clearly favors rejection.” Section 1113 also specifies accelerated times for a hearing and a decision.

Furthermore, § 1113(e) provides that during the period in which the agreement continues in effect and after notice and hearing, the court may authorize interim changes in an agreement in employee wages, benefits and protections “if essential to the continuation of the debtor’s business, or in order to avoid irreparable damage to the estate.”

The full implications of § 1113 are far from clear. In Wheeling-Pittsburgh, the Court of Appeals for the Third Circuit held that the test of “necessary” in § 1113(b) was more stringent than simply enabling the debtor to cut labor costs. It read “necessary” in § 1113(b) as equivalent to “essential” in § 1113(e) and held that the section was concerned with the short-term objective of preventing liquidation, rather than “the general long term viability of the Company.” In Carey Transportation, and Royal Composing Room, the Court of Appeals for the Second Circuit reached a contrary conclusion, holding that modification need not be restricted to the “absolutely minimal” and that the guiding objective was the long-term financial condition of the debtor, rather than the short-term standard used in Wheeling-Pittsburgh. This conflict has not yet been resolved. In the meantime, the threat of reorganization proceedings in bankruptcy and possible disaf-


46. A number of bankruptcy courts have disagreed, construing “essential” in § 1113(e) as a more demanding standard than “necessary” in § 1113(b). It has been held to require a more immediate level of economic emergency. See In re Royal Composing Room, Inc., 15 Collier Bankr. Cas. 2d (MB) 1 (S.D.N.Y. 1986), aff'd, 848 F. 2d 345 (2d Cir. 1988); In re Salt Creek Freightways, 12 Collier Bankr. Cas. 2d (MB) 42 (D. Wyo. 1985); In re Russell Transfer, Inc., 12 Collier Bankr. Cas. 2d (MB) 717 (W.D. Va. 1985).

47. 791 F.2d at 1089.


firmance of the collective agreement is a new factor affecting the balance in labor relations.

C. Role of the Union in Bankruptcy

The role of the union in bankruptcy depends upon the nature of the claim at issue. Where the union is a party to the establishment by the employer of a pension plan or where a collective-bargaining agreement with the union is involved, the union is a claimant in its own right and has standing in the bankruptcy proceedings. Thus, a union may resist an attempt to disaffirm a collective-bargaining agreement or may assert a claim for unpaid pension contributions due under an agreement to which it is a party, even where such contributions are payable to the pension fund, not the union. Where, however, the union is not such a participant or signatory, it is not a "creditor" and thus, lacks standing to file a "claim" or participate in the proceedings. Even where recognized as the exclusive-bargaining representative for purposes of the national labor relation laws, the union has no standing in the bankruptcy court to assert its members' claims notwithstanding the labor-related matters.

There is even some question whether the workers covered by the plan in question are entitled to participate in the proceedings, or whether the trustees of the pension or benefit fund are the only ones with standing.

Creditor's committees play an important role under the Code, particularly in the preparation of the reorganization plan in Chapter 11. To qualify for appointment on the creditors' committee, the union must establish that it is a "creditor" with a "claim," which in turn requires a showing of a "right to payment." In situations wherein an employer's


52. See In re Continental Airlines Corp., 64 Bankr. 874, 877-881 (S.D. Tex. 1986). Although unions have successfully filed contribution claims on behalf of employees to require employers to fulfill their funding obligations, these involve cases in which the obligations in question arose under a collective bargaining agreement to which the union is a party. E.g., In re Shearon, 10 Bankr. 626 (D. Neb. 1981); In re Schatze Fed. Bearings Co., 5 Bankr. 543, 548 (S.D.N.Y. 1980). Similarly, although a union, as well as the PBGC, may assert a claim for employer liability for withdrawal from a multi-employer plan, the employer's pension obligations in such cases again arise under a collective bargaining agreement to which the union is a party.


pension obligation, although arising under a collective bargaining agreement with the union, provides for payments to a pension fund, not the union, there are theoretical difficulties in establishing the union’s “right to payment” as required by the statute. Moreover the union’s continued representation of employees, assuring their continued employment, may constitute a disqualifying conflict of interest in such matters as whether creditors would be better served by reduction in the workforce or by liquidation. Nevertheless, the appointment by the bankruptcy court of a union representative to a Chapter 11 creditors’ committee has been approved. However, the issue is still not entirely free of doubt.

II. SALE OR MERGER

In cases where a union has been recognized as the bargaining representative of the affected workforce, the sale or merger of a business presents two major issues under the labor relations laws: (a) the extent to which the labor laws limit the employer’s managerial discretion in so far as it affects workers; and (b) the obligations of a successor purchaser or acquiring employer, including such matters as the extent to which the purchaser or employer is bound by provisions of any collective bargaining agreement or obligated to bargain with the union.

A. Labor Obligations of the Seller

Most of the litigation in this area has involved the obligations of the successor employer; there is only limited authority providing guidance on the labor obligations of the seller. Thus, in First National Maintenance the Supreme Court expressly reserved decision on whether an employer must bargain over the sale or merger of a business. With respect to the sale of a plant, however, the National Labor Relations Board [NLRB] (“the Board”) has held that an employer may unilaterally decide upon the sale of a plant—as distinct from its relocation—without any obligation to bargain over the decision. The

56. See HAGGARD & PULLIAM, supra note 7, at 247-65.
58. Local 864, UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972), enforcing, 191 N.L.R.B. 951 (1971). The Court of Appeals for the Eighth Circuit has stated that “the board admits there is no duty to bargain over the decision to sell the business.” See Kirkwood Fabricators Inc. v. NLRB, 862 F.2d 1303, 1306 (8th Cir. 1988).
employer is required to bargain only with respect to the effects of the decision on the workers.\textsuperscript{59} Similarly, the Court of Appeals for the First Circuit has held that an employer need not bargain with a union on a decision to merge.\textsuperscript{60} It should be noted, however, that this case arose under the Railway Labor Act; hence, it is not clear whether this construction of the allied statute also applies to the NLRA.\textsuperscript{61}

B. Successor Liability: Labor Obligations of the Purchaser or Successor of An Acquired Business

1. Successorship Liability Generally

For many purposes other than labor law, American law distinguishes sharply as a conceptual matter among various methods of accomplishing the sale, merger or other disposition of a business. In the event of a sale of the shares of the corporation conducting the business, the corporate employer continues without change of form with the same assets and liabilities. Similarly, in the event of a statutory merger, the surviving corporation succeeds to all the assets and assumes all the liabilities of the merged corporation by operation of law. However, in the event of a sale of assets and good will, the entity to which the assets and good will are transferred typically is not subject to the seller's obligation unless they are expressly assumed. While inroads to the traditional doctrine have occurred in the area of torts and generally through the development of the "de facto" merger doctrine, the traditional view still largely applies to contracts generally, including individual employment contracts.

\textsuperscript{59} Effects bargaining is required both in connection with partial closings, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) or complete closings. Kirkwood Fabricators Inc. v. NLRB, 862 F.2d 1303, 1306 (8th Cir. 1988).


\textsuperscript{61} The court even held that the employer need not bargain over the effects of the merger, but there was no showing that the impact on employment or benefits of the workforce was significantly affected by the merger. 473 F.2d at 557-60.
2. Successor Liability under the Labor Laws

In contrast to the general law, a very different body of law has developed in labor relations with respect to successor liability under the National Labor Relations Act (NLRA). The NLRB and the courts have developed a functional standard reflecting economic realities, rather than legal forms or concepts, to determine when a collective-bargaining agreement or union representation continues in force after a sale or merger, whatever the technical form through which accomplished.

The Board has formulated a well-developed jurisprudence of "successorship" to determine when a new entity acquiring a business or utilizing the labor force, or equipment, or other elements of a predecessor company becomes liable for labor obligations under a pre-existing collective agreement or an obligation to bargain. Under the labor laws, successorship liability arises when there has been such continuity in the workforce, in supervision, and in the processes of production that there has been "substantial continuity of identity in the business enterprise."

In the application of the "continuity of identity" standard, the labor laws sharply distinguish between transactions involving related parties and those involving unrelated parties. Furthermore, reflecting fundamental concepts of contract and corporation law, the legal consequences for labor relations purposes are affected to some degree by the form in which the transaction is accomplished. The sale of stock presents somewhat different issues than a transfer accomplished through the sale of assets.

62. A comparable development has also occurred with respect to product liability claims, particularly where the original manufacturer has gone out of business. See P. Blumberg, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 13.05 (1987).

63. See supra notes 1 and 2, and accompanying text. The NLRA and its companion statute, the Labor-Management Relations Act [LMRA], also known as the Taft-Hartley Act, comprise the national labor relations laws governing collective bargaining agreements in the United States.

64. See generally Gorman at ch. 24 (1979); Developing Labor Law, supra note 2, at 1129; Anderson; Siebert & Webber, Joint Employer, Single Employer, and Alter Ego, 3 Labor L. 873, 877-880 (1987); Note, Bargaining Obligations after Corporate Transformations, 54 N.Y.U. L. Rev. 624 (1979).

a. Unrelated Purchaser

i. Sale of Stock

Where the transaction is accomplished through a sale of the stock of the corporation conducting the business, corporation law and contract law provide a preliminary answer. The legal identity as a juridical person of the employer has not changed. Under traditional concepts, a change of stock ownership accomplishes neither change in the entity nor any release in and of itself, from the entity's contractual obligations.66

Under the labor laws,67 these general rules of law resting on traditional conceptual analysis are only the starting point. They do not finally determine the labor obligations of the purchasing company. Although the fact that the same entity is continuing is of some importance, it may yield in special circumstances where the change in stock ownership has resulted in a fundamental change in the employment relationship or continuity of the labor force and operations. In such circumstances, labor law doctrines will prevail over the traditional conceptual analysis, and the employer will no longer be obligated under the pre-existing collective bargaining agreement.68

ii. Sale of Assets

Where there has been a sale of assets, the acquiring corporation is a different legal entity, and it is not bound by the terms of the seller's collective bargaining agreement. In Howard Johnson, the Supreme Court refused to impose a duty to arbitrate upon the purchaser of the assets and business of a unionized concern under the seller's collective bargaining agreement where the purchaser hired only nine of the seller's 53 employees. In the absence of significant continuity of the workforce performing similar work, the employer was held not to be a successor for labor law purposes even though it was continuing the previous business at the same location with the acquired assets. The Court

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recognized the new employer’s freedom to select the workforce and lack of any continuing obligation under the prior labor agreement so long as the employer was not motivated by anti-union considerations.  

However, if the continuity-of-identity standard is satisfied, the acquiring corporation, even in transactions involving the purchase of assets, may be required to bargain with the union previously recognized as the exclusive bargaining representative for the workers affected, or obligated to arbitrate under an arbitration provision in the predecessor’s collective agreement. The necessary continuity involves such matters as the extent to which the new employer maintains the same operations; uses the same plant; employs mostly the same workforce; maintains the same jobs under the same working conditions; employs the same supervisors; uses the same machinery, equipment, and methods of production; or provides the same product or services. The continued appropriateness of the bargaining unit or of any hiatus in operations must also be considered. Depending on the extent to which such factors are present, the new employer may be required to bargain with the previously recognized union. However, it will not be bound by the prior collective-bargaining agreement.

iii. Merger

Under traditional corporation law, the surviving corporation in a merger by operation of law succeeds to all the assets and assumes all the liabilities of the disappearing corporation. As in the case of a sale

72. It is generally stated that the successor’s obligation arises only when the old employees constitute a majority of the workforce. See, e.g., 1 DEVELOPING LABOR LAW, supra note 2, at 713-16. It is not entirely clear whether the majority in question relates to the predecessor workforce or to the successor workforce. Compare Howard Johnson Co. v. Detroit Joint Exec. Bd., Hotel & Restaurant Employees, 417 U.S. 263 (1974) (referring to predecessor employees in suit on the contract under § 301) with NLRB v. Burns Int’l Security Serv. Inc., 406 U.S. 272, 281 (1972) (referring to successor employees in unfair labor practice proceeding). As suggested by Professor Silverstein, the Supreme Court has held that a majority of the initial workforce that is “substantial and representative” is sufficient, although less than a majority of the ultimate workforce. Fall River Dyeing & Finishing Co. v. NLRB, 107 S.Ct. 2225 (1987). See Silverstein, supra note 68, at 163 n.42.
73. 1 DEVELOPING LABOR LAW, supra note 2, at 726 (1983).
75. See 15 W. Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7088, 7121
of stock, this corporation law concept may yield to labor law doctrines. In *Wiley*, the Supreme Court faced a merger in which the surviving corporation integrated the approximately 40 employees of a unionized-acquired corporation into its own 300-employee, non-union workforce. The issue was whether under the arbitration clause agreement of the acquired corporation's collective bargaining agreement, the surviving corporation was obligated to arbitrate the extent to which the old agreement applied to the retained employees. The Supreme Court held that the acquiring corporation was bound to arbitrate, relying essentially on the continuity of employment in substantially unchanged positions, rather than the form of the transaction.

iv. Other Successors

The Supreme Court decision in *Burns* involved the labor obligations of a firm that had replaced a unionized concern in providing security protection services for an industrial producer. The Supreme Court held that the new concern was free to choose its own workforce and to set the terms of employment without regard to the prior collective bargaining agreement or the union. However, when the new concern had hired the former employees to perform essentially the same work, the new concern was obligated to bargain with the union. This duty arose because of the continuity of the workforce and of the employment relationship.

In cases involving acquisitions of businesses without continuity of ownership such as was involved in *Burns* and *Howard Johnson*, the Court appears to have imposed severe limits on the application of successorship liability in order to encourage the mobility of capital and the efficient functioning of the business-acquisition market.

b. Related Purchasers

Where the new and old employers are interrelated and have substantially identical management and stock ownership as well as the other continuity factors considered in connection with unrelated purchasers — such as substantially identical business purposes, equipment and customers — the two are regarded as alter egos of each other, or essentially the same entity, for labor law purposes. The transaction is

(1983).


78. See Silverstein, *supra* note 68.
deemed no more than a change of the form in which the same enterprise is being conducted; the new employer is termed no more than “a disguised continuance of the old employer” and a “disguise intended to evade” the labor laws. In such cases, the “alter ego” employer is bound by the existing agreement. This “alter ego” doctrine is the ultimate extension of successor liability.

III. PLANT CLOSINGS, MASS LAYOFFS, AND PLANT RELOCATIONS

In recent years, plant closings and mass layoffs have become a matter of sharply increased concern in the United States. A Bureau of Labor Statistics survey found that over two million workers lost jobs from plant closings from 1979 to 1984. Nevertheless, the restrictions are still minimal on management decision-making in this area or the imposition of employer liability for severance pay or other allowances for affected workers. Collective bargaining agreements which involve unions sufficiently powerful to be able to include such provisions provide an exception. Other restrictions on management discretion arise from two sources: national and state legislation, and collective bargaining agreements with the labor relations laws governing such agreements.

79. Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942).
81. There is a significant difference in the consequences of a successorship finding where there has been no continuity of ownership and an alter ego finding. In the former, the successor is not necessarily bound by the prior collective bargaining agreement. NLRB v. Burns Int'l Security Servs., Inc., 406 U.S. 272, 287-88 (1972). A further finding must be made as to the appropriateness of the bargaining unit before §§ 8(a)(1) and (5) are violated. See South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 803-05 (1976) (per curiam); NLRB v. Lantz, 607 F.2d 290, 297 (9th Cir. 1979). Under an alter ego finding, however, the successor is regarded as the same employer, and the bargaining issue does not arise; the alter ego is bound by the outstanding agreement. See NLRB v. Scott Printing Corp., 612 F.2d 783, 789-90 (3rd Cir. 1979) (Slaviter, J., dissenting); Slicker, A Reconsideration of the Doctrine of Employment Successorship - A Step Toward a Rational Approach, 57 MINN. L. REV. 1051, 1064 (1973); Comment, Double-Breasted Operations in the Construction Industry: A Search for Concrete Guidelines, 6 U. DAYTON L. REV. 45, 47 (1981).

82. See N.Y. Times, May 10, 1988, at A30, col. 3.
83. Affected workers receive normal unemployment compensation benefits.
A. National and State Legislation

Although plant shutdowns and relocations have been an issue of increasing concern on the American political scene, only the most limited federal and state legislation has thus far been enacted to deal with the problem. Although powerful, the pressures to protect or restrict the extent of injury to the workers and the communities affected by such events have thus far been counterbalanced by an even stronger reluctance to impose additional costs on business that would result in an even less competitive national or state economy.

1. National Legislation

As a result of extensive shutdowns and plant relocations, particularly in the Middle Western United States where such industries as steel and automobiles have been affected, concern with the problem has been a matter of considerable importance in national politics for more than a decade.84 A Census Bureau survey as analyzed by the Bureau of Labor Statistics85 discloses that in the period from 1979 to 1984 a total of 11.5 million workers lost jobs because of shutdowns or relocations, that nearly half those affected were employed in manufacturing industries,86 and that the affected areas were centralized in the Middle West. Responding to such national concern, over President Reagan's attempted veto, the Congress in the summer of 1988 overwhelmingly enacted the Worker Adjustment and Retraining Notification Act.87 The new statute includes provisions for advance notification of plant closings and mass layoffs. Although the new law is widely applicable, covering all American employers with 100 employees or more, its sub-


Thus, in 1973 and in subsequent sessions of Congress, there were proposals for a National Employment Priorities Act dealing with, among other things, plant closings. The 1977 bill would have required two years notice of a contemplated closing or transfer of all or part of an establishment. H.R. 76, 95th Cong., 1st Sess. (1977).


86. This is even more significant in view of the fact that manufacturing constitutes less than 20 percent of United States employment. Id. at 155. The survey also concludes that almost 50 percent of such displaced workers who lost jobs in manufacturing will be unable to find employment in their former industries, and most can expect to find only lower-paying jobs in service industries. Id. at 157.

stantive provisions are minimal.

The law provides only that 60-day advance notice\textsuperscript{88} be given to union representatives or, in the absence of a union, to workers, and to state and local governmental officials when any permanent or temporary shutdown occurs, resulting in loss of employment for 50 people for 30 days or a mass layoff for six months for either one-third of the workforce or 500 workers. The law imposes no restrictions on any kind of managerial discretion with respect to such decisions and no employer obligations of any kind with respect to severance pay or other worker benefits. As a precatory matter, the law expresses the sense of the Congress that even where not required to do so, employers "should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce."\textsuperscript{89} It also provides for retraining and counseling for affected employees. Penalties for employer non-compliance are relatively modest, not exceeding 60 days back pay for workers and $500 per day of violation for failure to notify local officials, for a maximum of 60 days.

2. State Legislation

In contrast to the inaction of the federal government, approximately a dozen states, particularly in New England, have enacted statutes dealing with plant closings and shutdowns. All are limited in their scope,\textsuperscript{90} typically focusing on prior notice.\textsuperscript{91} Maine, Connecticut and Massachusetts are three such states.

a. Maine

The Maine statute enacted in 1979 applies in cases of the termination (defined as a "substantial cessation") of operations or a relocation of "all or substantially all" operations to a new location more than 100 miles distant, whether inside or outside of Maine. It imposes upon employers the obligation to pay severance pay equal to one week's pay for each year of employment to each affected worker employed for three years or more. In addition, employers are required to give 60 days' no-

\textsuperscript{88} The law contains liberal reductions of the notification period in cases where notice would impede an employer's efforts to obtain additional capital or business or of unforeseeable circumstances. H.R. No. 3 100th Cong. 2d Sess. § 6403(b).

\textsuperscript{89} Id. at §§ 6403, 6407.

\textsuperscript{90} Hansen concludes that most of the legislation is considered "ineffective." Hansen, supra note 83, at 162.

\textsuperscript{91} See M. Shershin, Plant Closings: Recent Developments, in THIRD ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 31, 42 (1987).
tice to the state, the local municipal government and to workers of the proposal in order to relocate or terminate.\textsuperscript{92}

b. \textit{Connecticut}

The Connecticut statute enacted in 1983 provides only for employer payment of group health insurance premiums for 90 (subsequently increased to 120) days for employees affected by a permanent plant closing or relocation of operations to a location outside Connecticut. It contains no provisions for prior notice of the decision or severance pay.\textsuperscript{93}

c. \textit{Massachusetts}

The Massachusetts statute enacted in 1984 provides for reemployment assistance, including counseling and training, and continuation of health insurance. It also contains a provision for \textit{voluntary} advance notification by employers as well as some incentives encouraging employers to provide such notice.\textsuperscript{94}

Thus, it is apparent that notwithstanding the extensive political debate, the American legislative response to the problem has thus far been insignificant. Widespread recognition of the hardship imposed on workers and on communities, particularly where the employer has been a principal employer in the area, has thus far not outweighed the concern that imposition of restrictions on employers would render the jurisdiction less competitive, encourage loss of existing enterprise, discourage new enterprise and thus ultimately lead to lower levels of economic activity and employment. On the state level, there is a concern with becoming less competitive with other states. More recently, the country as a whole has become concerned with its relative competitive position with other nations.

B. \textit{Collective Bargaining and the National Labor Relations Laws}

With statutory protection so limited, union strength, such as it is, represents the only realistic source of worker protection against plant


The Act applies to establishments employing 100 workers or more. It excludes relocation or termination "necessitated by a physical calamity" and employees covered by a contract containing severance pay provisions or accepting employment at the new location.


closings and mass layoffs. This arises on two levels. In those cases where unions have been recognized as the exclusive-bargaining representative of the workforce, the national labor relations laws as construed by the NLRB and the courts impose significant restrictions on employer decision-making in this area, requiring collective bargaining over certain decisions and over the effects of other decisions. In addition to the obligation to bargain, in those cases where bargaining has previously resulted in a collective-bargaining agreement, the terms of the agreement may deal expressly with such matters or their consequence.

1. National Labor Relations Act

The application of the national labor relations laws mainly reflects an adherence to the desirability of laissez-faire economics and a reliance on the marketplace to impose controls on managerial decisions with respect to major changes in the conduct of a business. The courts are firm in protecting unilateral management decision-making in those areas regarded as the “core of entrepreneurial control” that involve economic profitability apart from the employment relationship. This “core” concerns “[D]ecisions concerning the commitment of investment capital and the basic scope of the enterprise.”

a. Closing or Relocation

Consistent with such principles, the Supreme Court has held that an employer may unilaterally decide to close its entire business for any reason, including anti-union animus.

In First National Maintenance, the Court more recently held that an employer may unilaterally decide to close part of its business so long


96. The National Labor Relations Act, among other things, provides for the right of workers to organize into unions, specifies the procedure for designation of a union as the exclusive bargaining unit, and requires the employer to bargain with such union. See 29 U.S.C. §§157-59 (1982).

97. Professor Silverstein has noted that a few state statutes impose more stringent obligations in these areas upon those employers not subject to the NLRA. E.g., CAL. LAB. CODE § 1127 (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 149 § 179C (West 1982). See Silverstein, supra note 68, at 156 n.14.

98. See Silverstein, supra note 68, at 157-74.


as the motivation is economic.\textsuperscript{101} The Act neither requires any prior notice of the decision, nor bargaining with respect to it. The employer is lawfully free to reach it without union participation or consultation of any kind.

The standard applied to such unilateral employer determinations is whether the employer decision to relocate or close a part of the business is related to overall considerations such as a "fundamental change in the nature or direction of the business." In such cases, the employer has no obligation to bargain over the decision; however, if it reflects anti-union motivation,\textsuperscript{102} the employer action clearly constitutes an unfair labor practice. Furthermore, the Board for many years also concluded that if the decision turned on labor costs, an employer's refusal to bargain was an unfair labor practice. In other words, the crucial factor for the Board is whether the decision is motivated by economic considerations, on the one hand, or labor-related considerations on the other. If it is reflecting a "change in the nature or direction of the business" and including a response to a new technology, the employer is free to proceed unilaterally. However, in a recent decision, the Court of Appeals for the Fourth Circuit challenged the Board's approach, holding that in the absence of anti-union animus, an employer's decision to close one of its plants based on increasing production costs including labor costs was not subject to mandatory bargaining under the Act.\textsuperscript{103}

Also consistent with the philosophy to protect unilateral management decision-making regarding economic profitability, the Board has held that an employer had no duty to bargain with the union over a decision to discontinue a research and development activity at a New Jersey plant and transfer it to a Connecticut plant.\textsuperscript{104}

Although the employer may be free to decide such issues unilaterally, the labor relations laws impose certain minimum requirements on employers in plants with a union recognized as the exclusive bargaining representative. In such cases, the employer must bargain with the union with respect to the economic effects of the decision on the workers af-

\textsuperscript{101} First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).
\textsuperscript{103} Arrow Automotive Indus., Inc. v. NLRB, 853 F.2d 223 (4th Cir. 1988).
\textsuperscript{104} Otis Elevator Co., 269 N.L.R.B. 891 (1984). The employer contended that the functions of the two plants overlapped, that the New Jersey facility was outdated, and that technological advances would be advanced by consolidation at the newer and larger Connecticut research center. See I Developing Labor Law, supra note 63, at 293 (Supp. 1982-85).
fected, both in the case of a partial closing\textsuperscript{108} and in the case of a closing of the entire business.\textsuperscript{106} This doctrine even applies when the decision in question has been made by a bankruptcy trustee.\textsuperscript{107}

These requirements relate exclusively to procedures \textit{after} the employer has made its decision. They do not in any way restrict the decision-making discretion of management or impose any substantive obligations in the event of a managerial decision resulting in shutdown or layoff\textsuperscript{108} (in the absence of relevant provisions in an applicable collective bargaining agreement).\textsuperscript{109}

b. \textit{Subcontracting}

Decisions with respect to the subcontracting of industrial operations also present difficult issues. Subcontracting has been held to require mandatory bargaining in cases where it has a direct impact on the workforce, such as where the decision turns on labor costs or where employment or overtime is affected;\textsuperscript{110} however where subcontracting reflects a decision concerning the scope of business, as when an employer is faced with a heavy increase in orders, there is no bargaining requirement.\textsuperscript{111}

2. \textbf{Collective Bargaining Agreements}

Collective bargaining agreements may provide further protection to covered workers with respect to plant closings, mass layoffs and plant relocations. Depending on the relative strength of the employer and the union in the industry in question, the collective bargaining agreement may deal with such matters, restrict employer decision-making, or provide for union participation or consultation in such decisions. At best, however, the protection provided by the terms of such collective agreements is spotty and limited.

\begin{enumerate}
\item First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). Under American law, the employer must bargain in good faith until negotiations reach an impasse. There is no obligation to conclude an agreement.
\item Kirkwood Fabricators, Inc. v. NLRB, 853 F.2d 1303 (8th Cir. 1988).
\item First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).
\item If the agreement imposes limitations on the employer, a failure to comply with such provisions constitutes an unfair labor practice under § 8(b) of the NLRA. 29 U.S.C. § 158(b) (1982). It is also a breach of contract enforceable under § 301 of the Labor Management Relations Act. 29 U.S.C. § 185 (1982).
\item Ausable Communications, 273 N.L.R.B. 1410 (1985).
\end{enumerate}
A older survey cited in a Columbia Law Review article disclosed that only about 21.5 percent of all the collective-bargaining agreements studied contained some restriction of management’s right to close or relocate a plant; another older study found that only about 25 percent of agreements contained provisions dealing with subcontracting. In contrast, most recent American agreements contain provisions preserving the right to decide such matters as mergers, plant relocations and shutdowns.

Even where collective bargaining agreements do not deal directly with such matters, the labor arbitration process may result in limitations on managerial discretion. Arbitrators may find implied obligations that regulate managerial discretion in these areas and require a demonstration of employer “good faith” or “fair dealing;” some rational basis for the management decision must be evident, relating to efficiency of operations and reflecting a concern for employee interests and expectations.

CONCLUSION

Neither the national labor relation laws nor other statutes, federal or state, assure unions or workers a right of participation in major decisions that affect the enterprise, in spite of their dramatic impact on the workforce. Nor do such statutes generally impose any significant employer obligations by way of notice or severance pay or other benefits that might offset in some degree the shock of such developments on the affected workers. Employers are largely free to reach such decisions without labor participation.

With statutory protection so limited, where there is no union representation workers are substantially without voice or protection in these matters. Although labor unions represent the only effective protection for workers, they still have had only moderate impact in this

115. Professor Silverstein points out: “there is nothing in the NLRA or its legislative history to suggest that Congress intended to redefine property rights to the extent necessary for labor to share authority over decisions involving the scope or nature of the enterprise.” She contrasts this experience with other statutes, which she describes as “social” legislation, such as ERISA and the railroad transportation statutes, in which the federal government acts as a guarantor of the economic interests of labor. See Silverstein, *supra* note 68, at 175.
area.

Depending on their relative economic strength, some unions have been able to restrict employer discretion by including provisions in the collective bargaining agreement dealing with job security. These may restrict the employer's decision or the manner of reaching the decision or the consequences of the decision. Moreover, where a union has been designated as the bargaining representative, the labor relations laws require employers to bargain with employees over the effects of such decisions.

The significance of even such restricted labor protection is undermined by the diminishing strength of the American labor movement. Collective bargaining agreements in the United States cover only a small minority of the workforce. In 1985, union membership included only about 17 million persons, which is approximately 17 percent of the employed civilian workforce. Moreover, if national, state, and local government employees are excluded (since they are almost never involved in such problems as plant shutdowns and relocations), collective agreement coverage amounts to only 11 million members, merely 13 percent of the non-governmental workforce.\[116\]

Although this number is relatively small, it is somewhat more significant than it appears. Service employees are less affected by plant shutdowns and relocations, and might well be excluded. In addition, collective-bargaining agreements as well as union representation benefit non-union workers and union members alike in the plants in question. Even after such adjustments, however, it is apparent that only a relatively small portion of the national workforce has the protection of union representation. Thus, the great majority of American workers would appear fundamentally unprotected in this area.

The surprising growth of employee stock ownership plans provides one hopeful note. Employee acquisition of distressed plants as an alternative to shutdown has become a not uncommon response to such employer decisions in both solvent and insolvent firms. Such programs preserve employment at least for some period. At the same time, they typically involve employee acceptance of substantial reductions in wage levels by the workforce in an effort to enable the plant to compete more effectively. The extent and experience of employee acquisitions to date is both limited and mixed, and it is too early to conclude whether this alternative represents an effective solution to the problem.

The United States is firmly committed to a market economy. Although there is sharply increased political tension between the protection of workers and the impact of market forces on employers, the traditional structure of industry is substantially unchanged. American labor relations continue in their unique pattern. Employee protection — where it exists at all — is found almost entirely in collective-bargaining agreements and union representation, rather than in statute or administrative regulation.117

Appendix A

PROPOSED STUDY ON THE PROTECTION OF WORKERS' RIGHTS IN THE EVENT OF INSOLVENCY AND BUSINESS REORGANIZATION

A. Insolvency

1. Definitions of insolvency, as applied to corporate bodies, individuals and other legal persons.

The American bankruptcy law has two definitions of insolvency: "equity" insolvency and "bankruptcy" insolvency. For purposes of determining when an involuntary bankruptcy petition may be dismissed, the Bankruptcy Code utilizes the "equity" standard, requiring proof that "the debtor is generally not paying such debtor’s debts as such debts become due ..."118 For other purposes, the Code utilizes the "bankruptcy" standard defined in § 101(31) as a situation wherein the sum of an entity’s "debts is greater than all of such entity’s property, at a fair valuation."119

a. What categories of insolvency are known in your legal system?

In numerous areas of the law, the occurrence or existence of insolvency gives rise to the application of legal doctrines for the protection of creditors. For example, the state corporation laws uniformly prohibit further corporate distributions to shareholders. The fraudulent conveyance laws generally prohibit transfers of the insolvent’s assets except in exchange for "reasonably equivalent value" or "fair consideration" assets. State insolvency laws provide for procedures for the administration of the insolvent’s affairs.

The bankruptcy laws permit a creditor to institute involuntary proceedings in bankruptcy. Such proceedings, however, may be dismissed


in the absence of equity insolvency. The debtor itself, even though still solvent, may institute voluntary proceedings in bankruptcy where undertaken in good faith. Such federal bankruptcy proceedings may contemplate either liquidation (Chapter 7) or corporate reorganization (Chapter 11).

In the event of insolvency, proceedings may also be instituted under equity jurisprudence or state insolvency laws leading to the appointment of a receiver. However, if federal bankruptcy proceedings are instituted, they automatically preempt many state proceedings.

The federal bankruptcy proceedings may contemplate either liquidation (Chapter 7) or reorganization (Chapter 11) in the case of corporations.

b. What measures are there (e.g. receivership in English law) that have as their objective the protection of secured creditors in the event of the debtor's insolvency?

The appointment of a receiver to administer property and prevent waste, or to realize on collateral for a secured creditor is an established feature of American equity jurisprudence. Receivers also continue to play a role in state insolvency law in connection with the administration of an insolvent's estate.

Under the Bankruptcy Code, state insolvency proceedings are automatically stayed with the institution of voluntary or involuntary bankruptcy proceedings in a federal court and the federal court acquires jurisdiction, notwithstanding the existence of a state receiver appointed under a state insolvency law. Further, the bankruptcy trustee can avoid any lien imposed in favor of a state insolvency receiver and require a state receiver to turn over to the trustee any debtor property being administered by it.

The Code expressly forbids the appointment of a receiver in a bankruptcy case. This reflects the view that the provisions of the Code that provide for the appointment of trustees for bankrupt estates eliminate any need for receivers. Thus, the Code also provides for the

appointment of an interim trustee at the outset of a liquidation proceeding with a function described at the time of adoption as "similar to that of a receiver under current law." However, notwithstanding this provision, federal courts under their equitable powers may still appoint receivers to perform limited functions with respect to an asset of the bankrupt's estate, provided these actions are not inconsistent with the trustee's general responsibilities in administering the estate.

Receiverships also survive in connection with civil enforcement proceedings under such federal statutes as those concerned with securities law or small business investments.

2. Give an indication of the pattern and incidence of insolvency within your legal system in recent years. This account should include statistical information on the size and type of businesses most affected, and information on important legal developments that have taken place in this period.

See Appendix B.


a. What effect does insolvency have on the continuation of the individual employment relationship, that is, the contract of employment?

Under § 365 of the Code, the trustee, with court approval, may disaffirm any executory contract, including an individual employment contract. Section 1113 limiting the application of § 365 in labor matters applies only to collective bargaining agreements.

b. What priority, if any, do employees of an insolvent employer have over other creditors (secured and unsecured) for the payment of wages due, holiday pay, notice pay and other employment rights?

There is no priority of any kind over secured creditors. For priorities of employees over general unsecured creditors in the distribution or allocation of assets available for unsecured creditors, see supra sec. I-
A1 (Statutory Priorities).

c. Is such a priority unqualified, or is it subject to financial (or other) limitations?

The priority serves only to determine the order of distribution of those assets of the bankrupt available for distribution (or allocation in a reorganization plan) to general unsecured creditors.


a. What is the effect of insolvency on existing collective agreements?

See supra sec. I-B (Disaffirmance of Collective Bargaining Agreements).

b. Do trade unions representing workers in the insolvent undertaking have any part to play in the legal insolvency procedures?

Trade unions have standing to participate only with respect to matters for which they are "creditors." To have standing, the claim must arise under a collective bargaining agreement or plan to which the union is a party or under an unpaid pension plan or benefit plan. The union has no standing to assert claims on behalf of its members. See supra sec. I-C (Role of the Union in Bankruptcy).

5. What protection, if any is accorded to persons who have loaned money to the insolvent employer in order to cover the payment of wages or other employment-related expenses?

Section 507(d) of the Code expressly denies any priority for persons with subrogated claims, including wages and pension plan contributions qualifying for third and fourth priorities under the statute.\(^\text{133}\)

6. Protection by the state for the employees of insolvent undertakings.

a. In the event of the employer being unable to meet employment-related claims made by workers or trade unions, what provision does the state make to ensure payment is forthcoming?

Pension contributions aside, there are no provisions of this kind under American law, except with regard to amounts withheld from payments of employees' wages for remittance to the Internal Revenue Service for application against the wage-earners' income taxes. With

respect to pensions, ERISA provides for a federal corporation, and PBGC guarantees vested pension obligations under defined benefit plans. The PBGC is financed by employer payments supplemented by governmental funding. See supra sec. I-A2(c)(3) (Single-Employer Pension Fund Termination Liability).

Two states, New York and Wisconsin impose liability on corporate shareholders for a corporate employer's unpaid wages. A number of states, including Illinois and Pennsylvania, make non-payment of wages a minor criminal offense on the part of the corporate officers involved.

b. Is there a state-guaranteed fund to which employees can have recourse? Where such a fund exists, how is it financed?

See preceding answer.


a. To what extent are the entitlements of employees to pension and Social Security benefits protected when their employer becomes insolvent?

For pension benefits, see the response to question A-6a, supra. Social Security benefits are paid directly by a governmental agency. They are financed by taxes imposed on employers and employees, but the payment of benefits is not affected by an employer's insolvency, except to the very limited extent to which the total amount of the benefits is affected by the employer's delinquency with respect to tax payments currently due.


135. The Pension Benefit Guaranty Corporation [PBGC], a federal agency, assures payment of such pensions to covered workers. In case of most defined benefit plans, delinquent employers, and their controlling shareholders, are liable to the PBGC for pension funding deficiencies in the event of termination of a plan up to a maximum of 30 percent of their net worth. Employees are also liable for the pro rata share of the unfunded vested employee benefits on withdrawal from a multi-employer plan.


B. Business Reorganization

1. What are the principal means recognized for the transfer of undertakings in your legal system?

   The American legal system provides for an extensive number of techniques to accomplish transfer of a business or elements thereof. This may be accomplished by sale or exchange of stock, sale of assets, merger, and, in special cases, through franchises, licenses or leases.

   a. Is it important for legal reasons to distinguish between acquisition of control by share purchase and acquisition by purchase of the assets of an undertaking?

      Under American law, there are dramatically different conceptual treatments of a transfer of shares, involving no change in the juridical person owning and conducting the enterprise, and a transfer of the constituent assets of an enterprise. The form of the transaction plays an important role in determining the legal consequences of the transfer. In labor relations, however, this is only the starting point in the analysis, and the normal conceptual consequences may, in selected cases, yield to more urgent considerations of the national labor relations law. See supra sec. III-B2 (Collective Bargaining Agreements).

   b. What in practice are the most common forms of transfer?

      When one corporation acquires a business or when two corporations combine, the precise form in which the transfer or combination is accomplished reflects an exquisite calculus involving a sensitive balancing of critical elements arising under the tax laws (under which certain forms are not subject to taxes and may preserve tax loss and tax credit carrybacks and carryovers), the corporate law (with respect to approval by shareholders and the right of dissenting shareholders to demand payment in cash), the securities law (with respect to solicitations of approval from shareholders and the registration of new securities where involved in the transaction), and the common law (with respect to such matters as exposure to liabilities and possible non-assignability of licenses, contracts, and the like where such matters are of business importance).

      Transfers are frequently accomplished through mergers—often the merger of the acquired company into a subsidiary of the acquiring company. Transfers through acquisition or exchange of shares of stock or of assets, however, are also common. There is no particular form
that may be termed predominant.

2. Indicate the consequences which transfer has on the workers' rights.

Is provision made by law for the automatic continuation of the contract of employment (and associated rights), or for the transfer of rights guaranteed by collective agreements?

*See supra* sec. II (Sale or Merger).

3. What specific protections does the state envisage for workers' rights in the event of transfer?

Taking the EEC Directive on Transfer of Undertakings (OJ 1977 L61/26) as a guide, to what extent in theory and practice are its contents reflected in the rules of your legal system?

Except in the case of certain regulated industries, particularly in the transportation field, American law makes no provision whatsoever for the protection of individual workers' rights in the event of transfer. Contractual obligations may bind the transferee under common law principles or under corporate law principles governing formal and "de facto" mergers.

The picture is quite different with respect to collective bargaining agreements. The labor relations laws have an elaborate body of law which provides limited protection for workers with respect to the impact of transfers upon collective bargaining agreements and a union's right to negotiate as the exclusive bargaining representative of the workforce of a bargaining unit. *See supra* sec. II-B (Successor Liability: Labor Obligations of the Purchaser or Successor of An Acquired Business).

4. Where a business is reorganized to take account of changed needs (e.g. the introduction of new technology, or new working patterns), what protection is given to workers who are required to work under new conditions?

American law provides no protection for individual workers. The labor relations laws, however, provide a measure of protection insofar as workers covered by a collective bargaining agreement or represented by a union qualifying as the exclusive bargaining agent are concerned. In such cases, an employer's changes in operations or their structure, including changes resulting from new technology or new working pat-
terns, are mandatory subjects of bargaining.\(^{138}\) Either failure to bargain or a unilateral change constitutes an unfair labor practice.\(^{139}\)

Where the response to new technology takes the form of work subcontracting or a partial closing, a different standard may apply. See supra sec. III-B (Collective Bargaining and the National Labor Relations Laws).

C. Reform

1. In the light of the above survey of practice, what changes do you see as desirable within your legal system in order to make better provision for the protection of workers’ rights in the event of insolvency and business reorganization?

One much discussed area is the desirability of increased protection of workers and affected communities from the consequences of plant shutdowns and relocation. This is emerging as one of the leading political issues on the American labor agenda.

Another important area of labor concern is the wide power of the bankruptcy court, even after the enactment of § 1135 of the Bankruptcy Code to disaffirm a collective bargaining agreement. Some courts have construed the statute to permit disaffirmance even though not required for the short-term survival of the firm. This interpretation represents a subordination of worker interests to improvement of the earning power of the firm in order to improve the position of creditors generally. Accordingly, it represents a choice of political values that is highly unpalatable from the labor point of view.

Yet a third area of labor concern is further encouragement of employee stock ownership as an alternative, thus permitting the employer to dispose of an operation while making it possible for workers to continue the business and maintain employment.

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139. 29 U.S.C. §§ 158(d) and 159(a) (1982) ("conditions of employment").
### Appendix B

**Statistical Abstract of the United States (1987)**

#### NO. 863. INDUSTRIAL AND COMMERCIAL FAILURES—NUMBER AND LIABILITIES: 1960 TO 1985

Excludes failures prior to 1975, Alaska prior to 1976, Commercial and industrial failures only through 1983, excluding failures of banks, railroads, real estate, insurance, holding, and financial companies, steamline ships, travel agencies, etc. Data for 1984-85 based on expanded coverage and new methodology and are therefore not generally comparable with earlier data. See also Historical Statistics, Colonial Times to 1970, series V 20-30.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>Total number of failures</th>
<th>Number of new incorporations</th>
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<td>(1,000)</td>
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<td>14,621 15,017  916  581  250,030  799,779</td>
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<tr>
<td>M.E.</td>
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<td>2,595 105  80  18,5  7,0  20,6  2,480  2,050  335  266  123,8  84,2</td>
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<tr>
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<td>3,542 102  60  12,3  111  2,661  7,072  246  235  947  3,467  19,8</td>
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<tr>
<td>S.</td>
<td>1,940</td>
<td>1,742 58  38  13,1  4,1  4,1  2,147  4,142  91  75  27,7  22,7</td>
</tr>
<tr>
<td>L.A.</td>
<td>1,419</td>
<td>1,851 115  683  266,2 357,3  748,7  1,516,2  2,086  1,986  3,670  3,660</td>
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<tr>
<td>T.</td>
<td>2,247</td>
<td>3,417 104  58  18,1  5,1  3,417  8,888  2,045  1,945  3,543  3,543</td>
</tr>
<tr>
<td>S.</td>
<td>6,116</td>
<td>11,208 328  308  71,4  286,2  2,531  6,771  2,771  2,123  4,047  4,047</td>
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<tr>
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<td>7,063 2,356 1,566 709,0 1,209,2  4,142  8,449  4,142  2,045  4,045  4,045</td>
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<td>6,287</td>
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<td>S.</td>
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<td>8,816 853 1,236 326,0 679,6  2,045  2,045  2,045  2,045</td>
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<td>T.</td>
<td>8,013</td>
<td>8,816 853 1,236 326,0 679,6  2,045  2,045  2,045  2,045</td>
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<td>S.</td>
<td>8,013</td>
<td>8,816 853 1,236 326,0 679,6  2,045  2,045  2,045  2,045</td>
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1. Preliminary.  
2. See headnote and footnotes 1 and 4, Table 663.  

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Statistical Abstract of the United States (1987)


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<td>17,742</td>
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<td>24,696</td>
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<td>1,021</td>
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<td>4,700</td>
<td>4,380</td>
<td>3,700</td>
<td>3,500</td>
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<td>3,200</td>
<td>2,698</td>
<td>3,729</td>
<td>5,193</td>
<td>6,280</td>
<td>1,001</td>
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<tr>
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<td>3,520</td>
<td>3,200</td>
<td>2,698</td>
<td>3,729</td>
<td>5,193</td>
<td>6,280</td>
<td>1,001</td>
<td>1,001</td>
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<td>1,000</td>
<td>1,504</td>
<td>2,356</td>
<td>3,940</td>
<td>6,277</td>
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<tbody>
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Source: Dun & Bradstreet Corporation, New York, N.Y., Monthly Failure Report

No. 887. Bankruptcy Petitions Filed, by Type of Bankruptcy and Chapter of the Bankruptcy Code: 1975 to 1985

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<td>19,094</td>
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[For years ending June 30]

- Represents zero. X Not applicable. 1 For the first three months of 1980 the judiciary operated under the Bankruptcy Act and for the last nine months under the new bankruptcy code established by the Bankruptcy Reform Act of 1978. Includes only those petitions filed under the new bankruptcy code. 2 Includes five Section 204 cases filed under the Reform Act in 1980 and 1 in 1981 which are not included in the subsections of voluntary/involuntary. 3 Chapter 7, liquidation of non-exempt assets of businesses or individuals. 4 Chapter 9, readjustment of debts of a municipality. 5 Chapter 11, individual or business reorganization. 6 Chapter 13, readjustment of debts of an individual with regular income. 7 U.S.C., Section 404, cases ancillary to foreign proceedings.

### NO. 888. BANKRUPTCY PETITIONS FILED AND PENDING: 1905 TO 1985

[In thousands. For fiscal years ending in year shown, see text, section 10. Covers all U.S. bankruptcy courts. Bankruptcy petitions "Filed" means the commencement of a proceeding through the presentation of a petition to the clerk of the bankruptcy court; "Pending" is a proceeding in which the administration has not been completed.]

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