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The Liquidating Fiduciary: A Hidden Exception to WARN Act Liability

John-Ethan Gionis

THE LIQUIDATING FIDUCIARY: A HIDDEN EXCEPTION TO WARN ACT LIABILITY

I. INTRODUCTION

A. *The WARN Act: An Overview*

The WARN Act[1] was enacted in 1988 following some highly publicized nationwide plant closings.[2] Its purpose, according to the Department of Labor ("DOL"), is to:

> provide[] protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.[3]

In other words, the Act's purpose is to provide employees with sufficient notice to afford them enough time to prepare for pending unemployment.[4] The Act attempts to achieve this goal by requiring employers to give written notice to its employees at least sixty days prior to either a plant closing or mass layoff.[5] While this requirement is generally applicable in most situations, the Act explicitly provides several statutory exceptions, which are further discussed below.

While the WARN Act is a federal statute, it has several state counterparts which also impose employee layoff and plant closing

1. *See generally* Bankruptcy Code, 11 U.S.C. § 101-1532 (2012) [hereinafter Code]; *see* Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09 (2006) [hereinafter WARN Act or WARN].
2. Ethan Lipsig & Keith R. Fentonmiller, *A Warn Act Road Map*, 11 LAB. LAW. 273 (1996).
3. 20 C.F.R. § 639.1(a) (2012).
4. BROOK BOYD, HIRING AND FIRING § 9.03 (2009), *available at* LEXIS.
5. *Id.*

notification requirements.[6] These statutes, which are modeled after the federal WARN Act, are sometimes referred to as mini-WARN Acts.[7] In fact, the standards imposed by some of these state statutes are even more stringent than those imposed by the federal WARN Act itself.[8]

i. Requirements Under the WARN Act

Under the WARN Act, it is generally required that employers give employees at least sixty days' notice before closing down a plant or instituting a mass layoff.[9] In several situations that are accounted for in the language of the Act, however, notice is expressly not required.[10] These provisions are known as the statutory exceptions to WARN Act liability.[11]

Generally, the reach of WARN Act liability spans to cover any "business enterprise"[12] conducting either a plant closing or mass layoff, and that employs (1) 100 or more employees, not counting part-time employees;[13] or (2) 100 or more employees, counting part-time

6. *Id.*

7. *See id.* States that have these mini-WARN Acts include California, Connecticut, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Tennessee, South Carolina, and Wisconsin. *See* CAL. LAB. CODE §§ 1400 -1408 (West 2011); CONN. GEN. STAT. ANN. § 31-51n-o (West 2011); HAW. REV. STAT. §§ 394B-1 - 394B-13 (1993); ILL. COMP. STAT. ANN. (65/10) (West 2011); KAN. STAT. ANN. § 44-616(West 2009); ME. REV. STAT. ANN. tit. 26, § 625-B (2007)); MD. CODE ANN. LAB. & EMP. §§ 11-301 - 11-304 (West 2002); MASS. GEN. LAWS ANN. 151A §§ 71A – F (West 2004); MINN. STAT. ANN. § 116L.976 (West 2005); N.J. STAT. ANN. § 34:21-2 (West 2011); N.Y. LAB. LAW § 860 (McKinney Supp. 2013); OR. REV. STAT. ANN. §§ 285A.510–16 (West 2007); TENN. CODE. ANN. §§ 50-1-601 – 04 (2008); S.C. CODE ANN. § 41-1-40 (1986); WIS. STAT. ANN. § 109.07 (West 2002).

8. *See e.g.*, N.Y. LAB. LAW § 860 (McKinney Supp. 2013). This New York Mini-WARN statute states that "[a]n employer may not order a mass layoff, relocation, or employment loss, unless, at least ninety days before the order takes effect, the employer gives written notice of the order . . . ." *Id.* at § 860-b. The federal WARN Act, on the other hand, requires only sixty days' notice. 20 C.F.R. § 639.1.

9. *See* 29 U.S.C. § 2102 (2006).

10. *Id.* § 2103.

11. *Id.*

12. *Id.* § 2101(a). The term "business enterprise" is seemingly the most glaring reason that there is such tension between the Bankruptcy Code and the WARN Act. While the reasons for this are discussed in more detail later on in this piece, it is important to note that the WARN Act sets forth the term "business enterprise" as a description of what constitutes an "employer" for purposes of WARN Act liability. Thus, the general idea that lends in favor of the liquidating fiduciary exception is that when a company is acting as a liquidating fiduciary for bankruptcy purposes, it sheds its title as an employer and therefore escapes the scope of the WARN Act. *Id.*

13. PETER LAREAU, LABOR AND EMPLOYMENT LAW § 264.03(2) (2012), *available* at LEXIS. Part time employees are defined as "employee[s] who [are] employed for an average of fewer than 20 hours per week or who ha[ve] been employed for fewer than 6 of the 12 months preceding the date on which notice is required." 29 U.S.C. § 2101(a)(8). It is important to note that "the definition

employees, as long as their aggregate hours worked in a week equals greater than 4,000.[14] The Act defines the terms "plant closing" and "mass layoff" as follows.

> "[P]lant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a 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 any part-time employees . . . "[M]ass layoff" means a reduction in force which
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> (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
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> (i)(I) at least 33 percent of the employees (excluding any part-time employees); and
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> (II) at least 50 employees (excluding any part-time employees); or
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> (ii) at least 500 employees (excluding any part-time employees)[.][15]

In determining whether an employer has enough employees to actually trigger the WARN Act, employees are counted as of the date when WARN Act notice was first required.[16] This only holds true, however, when the resulting number is representative of the "ordinary or average" number of employees working at the company.[17] Also included in this number are workers who have been only temporarily laid off or are "reasonably expected" to be called back to work at some time in the future.[18] The term "employment loss," as used in subsection (B) of section 2101(a)(1) set forth above is defined in section 2101(a)(6).[19] According to this definition, an employment loss is established when there is a (1) termination of employment "other than a discharge for cause, voluntary departure, or retirement[;]" (2) a layoff

of part-time employees thus includes many "seasonal" employees." LAREAU, at § 264.03(2) (2012).

14. *Id.* at 264.03(1).
15. 29 U.S.C. § 2101(a)(2)-(3).
16. 20 C.F.R. § 639.5 (a)(2) (2012).
17. *Id.*
18. *Id.*
19. *See* 29 U.S.C. § 2101(a)(6).

that is meant to last for longer than 6 months;[20] or (3) a reduction in work hours by more than fifty percent "during each month of any six month period[.]"[21] When two separate groups of employees lose employment at a single site of employment, moreover, and each group is comprised of too few a number of employees to trigger WARN Act liability, the employment loss might still be considered either a plant closing or mass layoff when the aggregate number of employees from the separate groups exceeds the minimum requirement, and each of the employment losses occurred within a 90-day period.[22] Under the WARN Act, employers can rebut these "aggregate" claims only by demonstrating that "the employment losses [were] the result of separate and distinct actions and causes and [were] not an attempt by the employer to evade [WARN] requirements."[23] Importantly, the Code of Federal Regulations (C.F.R.) indicates that the 90-day rule requires employers to "*look ahead* 90 days and behind 90 days to determine whether employment actions, each of which separately would not trigger WARN coverage, would in the aggregate meet the minimum numbers for a plant closing or mass layoff."[24] Courts have held, however, that "[l]ayoffs that are occasioned by a continuing and accelerating economic demise are not the result of separate and distinct causes."[25]

Once an employer ascertains that it has triggered WARN Act notice obligations, the next step is to actually notify the affected employees.[26] Section 2101(a) lays out the employers' notice procedure, and states that

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20. It is important to note, however, that § 2102(c) also discusses what constitutes an employment loss. This section states that a

> layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless (1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and (2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

Id. § 2102(c).

21. *Id.* § 2101(a)(6).

22. *Id.* § 2102(d).

23. *Id.*

24. LAREAU, *supra* note 13, at 264.03(2) (emphasis added) (citing 20 C.F.R. 639.5(a)(ii)).

25. *Id.* (quoting Hollowell v. Orleans Regional Hospital, 217 F.3d 379 (5th Cir. 2000)).

26. The term "affected employees" is defined in §2101(a)(5) as "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5) (2006). According to the DOL, moreover, the term "affected employees" includes "managerial and supervisory employees, but does not include business partners." 20 C.F.R. § 639.3(e). It also does not include employees compensated by another employer but working at the facility in question. *See* Bradley v. Sequoyah Fuels Corp., 847 F. Supp. 863, 868 (E.D. Okla. 1994). The DOL still suggests that every employee be given notice, even if not explicitly required under the Act. *See* 20 C.F.R. § 639.6(b).

notice must be provided in writing.[27] It also mandates that the written notice be served to:

> (1) each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee;[28] and
>
> (2) the State or entity designated by the State to carry out rapid response activities under section 2864(a)(2)(A) of this title, and the chief elected official of the unit of local government within which such closing or layoff is to occur.[29]

The C.F.R. also lays out several separate rules governing proper notice depending on whether it is given to an individual or an individual's representative. According to 20 C.F.R. 639.7(c), WARN notices to representatives must contain:

> (1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;
> (2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
> (3) The expected date of the first separation and the anticipated schedule for making separations;
> (4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.
> The notice may include additional information useful to the employees such as information on available dislocated worker assistance[30], and, if the planned action is expected to be temporary, the estimated duration,

27. 29 U.S.C. § 2101(a).

28. Employees who are already on layoff and have a reasonable expectation to be recalled when the employer decides to order a mass layoff or plant closing are also entitled to notice. LAREAU, *supra* note 13, at § 264.03(7) (citing Kildea v. Electro-Wire Products, Inc., 144 F.3d 400, 405 (6th Cir. 1998)) (holding that an objective standard must be used in determining when a reasonable expectation exists, and that said standard is "whether a "reasonable employee," in the same or similar circumstances as the employees involved in the case at hand, would be expected to be recalled.").

29. 29 U.S.C. § 2101(a).

30. Employers may, in the alternative, give notice to the state dislocated worker unit and the chief elected official may by providing, in writing, "the name and address of the site involved, the name and telephone number of the company official to contact for further information, the expected date of the first separation and the number of affected employees." LAREAU, *supra* note 13, at § 264.03(8).

if known.[31]

Furthermore, under DOL Regulations, notice to each employee who does not have a representative must be "written in language understandable to the employees"[32] and must contain:

> A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
> (2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
> (3) An indication whether or not bumping rights exist;
> (4) The name and telephone number of a company official to contact for further information.[33]

ii. Employee Remedies for WARN Act Violations

The WARN Act provides that employers who violate its provisions "shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff."[34] Liability consists of back pay for each day of the employer's violation of the Act.[35] The amount of back pay that the employer owes each employee, moreover, is defined as "not less than the higher of" (1) the average rate of pay that the employee received during the last three years of employment; and (2) the final regular rate that the employee received prior to either the plant closing or mass layoff.[36] Employers are also liable to employees for benefits under employee benefit plans, which include medical expenses that arose "during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred."[37] The liability is calculated "up to a maximum of 60 days," and is never calculated to be more than "one-half the number of days the employee was employed by the employer."[38] The amount for which an employer is liable under the Act is reduced by (1) all wages that the

31. 20 C.F.R. § 639.7(c) (2012).
32. *See e.g.*, Nagel v. Sykes Enters., 383 F. Supp. 2d 1180, 1196 (D. N.D. Aug. 25, 2005).
33. 20 C.F.R. § 639.7(d).
34. 29 U.S.C. § 2104(a)(1).
35. *Id.* § 2104(a)(1)(A).
36. *Id.* § 2104(a)(1)(A)(i)-(ii).
37. *Id.* § 2104 (a)(1)(B).
38. *Id.*

employer paid the employee during the violation period;[39] (2) "voluntary and unconditional payments" by the employer that are not required under law;[40] and (3) payments by the employer to a trustee or third party "on behalf of and attributable to the employee for the period of the violation."[41]

Therefore, while the WARN Act does offer guidance as to how to calculate an employee's wages for purposes of WARN Act violations,[42] it does not specify the hours per day by which to multiply those wages. Courts have generally held, however, that "liability is based on workdays within the sixty day notice period",[43] and therefore typically multiply employees' hourly rates by eight hours to calculate appropriate levels of back pay.[44]

Unions are also allowed to bring actions against employers for WARN Act violations.[45] As part of the costs of bringing such an action, prevailing parties may be awarded attorney's fees.[46] WARN Act remedies are exclusive, and the Act therefore does not authorize courts to enjoin plant closings or layoffs.[47]

iii. Exceptions to WARN Act Liability

The above overview focuses mostly on circumstances under which employers are subject to the WARN Act, and are therefore required to notify employees of pending mass layoffs or plant closings. This section, however, concentrates more on the main focus of this note: exceptions to WARN Act liability.

39. *Id.* § 2104 (a)(2)(A).

40. *Id.* § 2104 (a)(2)(B). Moreover, employers are not credited for payments required under any preexisting severance pay plans, or for severance payments provided in exchange for release of claims agreements. LAREAU, *supra* note 13, at § 264.03(10).

41. 29 U.S.C. § 2104(a)(2)(C).

42. *See supra* note 36 and accompanying text.

43. LAREAU, *supra* note 13, at § 264.03(10) (citing UMW v. Eighty-Four Mining Co., 2005 U.S. App. LEXIS 25039 (3d Cir. 2005)). However, there is some inconsistency regarding whether the relevant standard should be based on working days or calendar days. *See* Marques v. Telles Ranch, Inc., 131 F.3d 1331, 1334 (9th Cir. 1997) (holding that seasonal workers suffered "employment loss" in April when they were not recalled, instead of in November when their seasonal work usually ended).

44. BOYD, *supra* note 4, at § 6 (citing Washington v. Aircap Industries, 860 F. Supp. 307, 312-313 (D. S.C. 1994). Notably, some courts have held that tips, holiday pay and overtime pay should all be included when calculating back pay. *See* UMW v. Martinka Coal Co., 45 F. Supp. 2d 521, 527-28 (N.D. W. Va. 1999).

45. 29 U.S.C. § 2104 (a)(5).

46. *Id.* § 2104(a)(6).

47. *Id.* § 2104(b).

There are several exceptions to WARN Act liability.[48] Indeed, three of these exceptions can be found in the text of the Act itself.[49] The fourth exception, however, is not codified in the WARN Act, and is therefore seemingly lesser known than its explicitly stated counterparts.[50] The remainder of this section will first provide an overview of the exceptions that are contained within the WARN Act. It will then introduce and provide a primer of the fourth exception to WARN Act liability – the liquidating fiduciary exception.[51]

1. The Faltering Company Exception

The faltering company exception is the first exception to WARN Act obligations that is specifically listed in the text of the WARN Act.[52] It serves to reduce the length of the notification period during which employers are required to notify employees of pending layoffs or plant closings.[53] The exception states that

> [a]n employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required 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.[54]

According to the C.F.R., the faltering company exception applies only to plant closings, and not mass layoffs.[55] Moreover, it states that the exceptions should be "narrowly construed."[56] The C.F.R. then goes on to list four requirements that must be met for an employer to qualify for the faltering company exception.[57] The first is that the employer must have been "actively seeking capital or business at the time that 60-

48. *See id.* §2102(b).
49. *Id.*
50. Preston M. Strosnider & Gershom R. Smith, *The WARN Act Exception You've Never Heard of*, HR ADVISOR, 13 (November/December ed. 2008).
51. *Id.*
52. 29 U.S.C. § 2102(b)(1).
53. *Id.*
54. *Id.*
55. 20 C.F.R. § 639.9(a) (2013).
56. *Id.*
57. *Id.*

day notice would have been required."[58] The second mandates that there must have been "a realistic opportunity to obtain the financing or business sought."[59] The third requires a showing that the sought-after financing or business, if obtained, would have enabled the employer to "avoid or postpone the shutdown."[60] And finally, the fourth requires that the employer must have "reasonably and in good faith" believed that giving the required notice "would have precluded the employer from obtaining the needed capital or business."[61] To satisfy this good faith requirement, an employer must "objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given . . . ."[62]

2. The Unforeseeable Business Circumstances Exception

The unforeseeable business circumstances exception is the second exception expressly stated in the Act.[63] It, like the faltering company exception, reduces the length of the notification period during which employers are required to notify employees of pending layoffs or plant closings.[64] The exception states that "[a]n employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been

58. *Id.* § 639.9(a)(1). This, according to the C.F.R., means that the

> employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.

Id.

59. *Id.* § (a)(2).

60. *Id.* § (a)(3). That is, the employer must be able to "objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time." *Id.*

61. *Id.* § (a)(4).

62. *Id.* This requirement can be satisfied if the employer shows that the financing or business source would not choose to do business with (1) a troubled company; or (2) a company whose workforce would be looking for other jobs. It is also important to note that actions of an employer relying on this exception will be "viewed in a company-wide context." *Id.* (stating that "a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.").

63. 29 U.S.C. 2102(b)(2)(A) (2006).

64. *Id.*

required."[65] While this exception, standing alone, seems to lack sufficient guidance for consistent application, the C.F.R. again helps to add some clarity. The C.F.R. starts by providing that the "unforeseeable business circumstances" exception applies only to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.[66] According to the C.F.R., an "important indicator" that a business circumstance is not reasonably foreseeable is that "the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control."[67] As such, the "test" for determining foreseeability is focused primarily on the employer's business judgment.[68]

3. The Natural Disaster Exception

The natural disaster exception is the third and final exception that is expressly stated in the WARN Act.[69] This exception, unlike the first two, completely relieves, rather than delays, the employers' obligations to provide notice to employees.[70] It states that "[n]o notice under this Act . . . shall be required 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."[71] The exception is, however, qualified by §2102(b)(3), which requires that an employer relying on section 2102 to except itself from giving WARN notice "shall give as much notice as is practicable . . . ."[72] According to the C.F.R., the natural disaster exception applies to both plant closings and mass

65. *Id.*

66. 20 C.F.R. § 639.9(b) (2013).

67. *Id.* § 639.9(b)(1). This subsection also provides several examples and provides that

> [a] principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

Id.

68. *Id.* § 639.9(b)(2). "The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services." *Id.*

69. 29 U.S.C. 2102(b)(2)(B) (2006).

70. *See id.*

71. *Id.*

72. *Id.* § 2101(b)(3). This section also requires that employers give a brief statement of the basis for reducing the notification period. *Id.*

layoffs due to "any form of natural disaster".[73] This seems to set forth a proximate cause standard by which employers bear the responsibility of demonstrating that the plant closing or mass layoff was a "direct result of a natural disaster."[74] Where a plant closing or mass layoff occurs as an "indirect result of a natural disaster," however, the exception does not apply. Rather, under these circumstances, the C.F.R. recommends that employers attempt to seek relief using the unforeseeable business circumstances exception provided under subsection (b).[75]

II. THE LIQUIDATING FIDUCIARY EXCEPTION: RECONCILING THE WARN ACT AND THE BANKRUPTCY CODE

The issue this section aims to analyze is whether an employer that is a debtor in possession ("DIP") in a Chapter 11 bankruptcy proceeding is a liquidating fiduciary or a business enterprise. Because the WARN Act applies only to business enterprises, the more specific issue is whether a company that has attained liquidating fiduciary status is exempt from WARN Act liability due solely to the fact that it is no longer operating as a business. The answer, of course, is "it depends." But when courts hold that an employer is relieved of all WARN Act obligations due to the fact that it was not acting as a business enterprise at the time of the challenged layoffs or plant closings, the situation is classified as what is colloquially referred to as the liquidating fiduciary exception to WARN Act liability.[76] Interestingly, unlike the exceptions listed above, the liquidating fiduciary exception does not appear anywhere in the text of the WARN Act.[77] Rather, it is judicially created and based almost entirely on courts' interpretations of the DOL's final regulation carrying out provisions of the WARN Act.[78] To date, however, only a handful of courts have addressed issues relating to the liquidating fiduciary exception, and the line distinguishing a liquidating fiduciary from a business enterprise is still relatively obscure.[79] There

73. 20 C.F.R. § 639.9(c). Any form of natural disaster is a broad rule, and 20 C.F.R. 639.9(c)(1) lists several specific natural disasters as examples as those that qualify. This section provides that "[f]loods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision." *Id.*

74. *Id.* § 639.9(c)(3).

75. *Id.*

76. 54 Fed. Reg. 16042, 16045 (April 20, 1989) (to be codified at 20 C.F.R. pt. 639).

77. *See generally* 29 U.S.C. §§ 2101-2109 (2006).

78. 54 Fed. Reg. at 16042, 16045.

79. *See generally* Official Comm. of Unsecured Creditors of United Healthcare Sys. v.

are, however, several cases that have helped shed some light on the defining characteristics of liquidating fiduciaries and business enterprises. Of these, the most notable are *In re United Health Care System,*[80] a Third Circuit case from 1999, and *In re Jamesway Corporation,*[81] a case from the Bankruptcy Court for the Southern District of New York decided in the same year. Both of these cases are discussed at length below.

A. *Relevance of the Liquidating Fiduciary Exception*

The decisions in *United HealthCare* and *Jamesway* are important not only because of the impact they have on WARN Act claims against Chapter 11 debtors in possession, but also because of the potential impact they might have on a company's decision to schedule its layoffs and plant closings to take place before rather than after the employer files a petition for bankruptcy.[82] Generally, courts that have considered the exception have found that an employee's successful WARN Act claim against an employer is given third priority status in a bankruptcy case.[83] Traditionally, this equaled up to $4,300 for the employee, and, under the Code, the remainder of the claim is considered a general unsecured claim.[84] Unsecured claims typically entitle employees to no priority, and are often paid at pennies on the dollar.[85] On the other hand, when the firing or plant closing takes place after the bankruptcy petition is filed, courts have generally held that an employee's WARN Act claim against an employer is given first priority administrative expense status, which typically entitles the claimant to satisfaction of its full claim before any payment is made to unsecured creditors.[86]

Based on these rules, it seems logical that employers who are considering filing for Chapter 11 would be better off conducting their layoffs pre-petition rather than post-petition in order to pay the least

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United Healthcare Sys., Inc.; Med. Staff (*In re* United Healthcare Sys. Inc.), 200 F.3d 170 (3d Cir. 1999).

80. *Id.*

81. Barnett v. Jamesway Corp. (*In* re Jamesway Corp.), 235 B.R. 329 (Bankr. S.D.N.Y. 1999).

82. Jeffrey Klein, *WARN Act Obligations In Chapter 11 Bankruptcies*, WEIL, GOTSHAL & MANAGES (Apr. 3, 2000), http://www.weil.com/news/pubdetail.aspx?pub=3819.

83. *Id.*; *see also* Oil, Chemical & Atomic Workers v. Hanlin Group, Inc. (In re Hanlin Group, Inc.), 176 B.R. 329, 333-34 (Bankr. D.N.J. 1995) (citing In re Cargo Inc., 138 B.R. 923, 927 (Bankr. N.D. Iowa 1992) (WARN wages are earned at the time the employment is terminated).

84. *See* Klein, supra note 82.

85. *Id.*

86. *Id.*

possible amount of money to employees with potential WARN Act claims against them. But now, in light of *United HealthCare* and *Jamesway*, it is possible that employers, under certain circumstances, might be wise to instead delay their layoffs or plant closings until after filing a petition in bankruptcy in hopes of completely relieving themselves of WARN Act liability by qualifying as liquidating fiduciaries instead of business enterprises.[87]

Of course, the most effective way to avoid WARN Act liability is simply to comply with the provisions of the WARN Act by giving proper notice to employees before conducting layoffs or plant closings. But there are certain situations where corporate employers considering Chapter 11 bankruptcy are experiencing such extreme financial trouble that it is impossible or at least impracticable to give their employees the full notice required under the WARN Act.[88] It is under these circumstances that the liquidating fiduciary exception, as interpreted by the courts in *United HealthCare* and *Jamesway*, can affect an employer's decision to layoff its employees or shutdown its plants before, rather than after, filing a petition in bankruptcy.[89]

B. *The DOL Commentary: Liquidating Fiduciary vs. Business Enterprise*

In May 1989, the DOL published a final regulation carrying out the provisions of the WARN Act.[90] In its analysis of the final rule and comments, the DOL shed some light on the definition of an employer as provided under section 2101(a)(1) of the WARN Act.[91] The Act defines an employer as 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 hours of overtime)."[92] As the WARN Act itself is seemingly devoid of any guidance on how to treat entities that have filed for bankruptcy, the DOL attempted to clarify the issue in its commentary. There, it stated:

> [a]nother commenter suggested that "fiduciaries" in bankruptcy

87. *Id.*
88. *Id.*
89. *Id.*
90. 54 Fed. Reg. 16042 (April 20, 1989) (to be codified at 20 C.F.R. pt. 639).
91. *Id.*; 29 U.S.C. §2101(a)(1) (2006).
92. 29 U.S.C. §2101(a)(1).

> proceedings should be excluded from the definition of employer. Since adequate protections for fiduciaries are available through the bankruptcy courts, the Department does not think it appropriate to change the regulations to address this situation. Further, DOL agrees 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 because the fiduciary is not operating a "business enterprise" in the normal commercial sense. In other situations, 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 precisely because the fiduciary continues the business in operation.[93]

Therefore, according to the DOL, a company that is operating for the *sole purpose* of liquidating as part of a bankruptcy proceeding is not subject to WARN Act requirements.[94] The logic, it seems, is that a business doing nothing but liquidating for the purpose of paying its creditors cannot be considered a "business enterprise," and therefore, by definition, cannot qualify as an employer under the WARN Act.[95] It therefore follows that a business that is no longer acting in a business capacity is not responsible for its failure to provide notice prior to the liquidation process, even if the business in question is the same as the business that formerly employed the terminated workers.[96] It is the above quoted DOL language that courts have relied upon in attempting to develop and understand the scope and application of the liquidating fiduciary exception to WARN Act liability.[97] The first seminal liquidating fiduciary case that held in favor of the employer was *In re United Health Care System*,[98] a Third Circuit ruling that outlined a sliding-scale test in determining whether the employer's activities constituted those of a business enterprise or a liquidating fiduciary.[99]

C. *In Re United Healthcare*

In *In re United Healthcare*, the Court of Appeals for the Third Circuit held that an employer that filed a Chapter 11 petition in bankruptcy was no longer an employer within the meaning of the

93. 54 Fed. Reg. at 16042, 16045.
94. *See id.*
95. Strosnider & Smith, *supra* note 50, at 15.
96. *See id.*
97. *Id.*
98. *Id.*
99. *Id.*

WARN Act, and was therefore not subject to WARN Act liability.[100] The case arose when the Official Committee of Unsecured Creditors of United HealthCare System, Inc. (the "Committee") appealed a judgment by the district court which held that United Healthcare's ("United") former employees were entitled to WARN Act back pay with first priority administrative statuses.[101]

United was a New Jersey corporation that provided hospital and healthcare services in Newark, New Jersey.[102] In 1993, United began to experience financial difficulties, and in 1996 it began to suffer "substantial operating losses" and encounter "trouble maintaining essential supplies."[103] In an attempt to improve its financial condition, United sought partnership and merger agreements, but was unable to find a favorable deal.[104] Despite this failure, United's management believed that United would be able to keep its doors open.[105] In 1996, United's board of directors approved, in good faith, the 1997 budget, projecting positive revenues, and even a year-end surplus.[106] Immediately following this approval, however, the board commenced discussions with potential purchasers and partners.[107] While on the verge of finding a purchaser, United's only secured creditor, Daiwa Healthco-2 L.L.C., ("Daiwa") warned United that recent financial reports had caused it to doubt that United was in fact financially viable.[108] United, in an attempt to allay Daiwa's fears, claimed that the information in the financial report was incorrect due to a computer error.[109] Unsatisfied with this excuse, Daiwa, on February 3, suspended all of its funding to United.[110] As a result, United could no longer meet its operating expenses, and was forced to close its emergency room and decrease its patient base.[111] Then, ten days later, Daiwa issued a notice of default thereby completely terminating United's funding.[112] On the same day, Blue Cross terminated the health insurance that United provided for its

100. Official Comm. of Unsecured Creditors of United Healthcare Sys. v. United Healthcare Sys., Inc. (*In re* United Healthcare Sys. Inc.,), 200 F.3d at 179 (3d Cir. 1999).
101. *Id.* at 171-72.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

employees.[113]

Unable to continue its operations or meet its daily expenses, United decided to hear merger proposals from four New Jersey healthcare providers.[114] One of the potential partners, St. Barnabas, proposed to purchase a portion of United's assets and subsequently terminate all operations.[115] Primary Healthcare was another potential partner, as it offered to maintain United's operations and retain the majority of United's employees.[116] While United's medical staff, of course, voted for the Primary Healthcare plan, the board instead chose to pursue the St. Barnabas plan, and shut down the hospital.[117] On February 18, United surrendered its certificates of need, and filed a voluntary Chapter 11 petition in bankruptcy.[118] On the same day, United also provided its employees with the proper sixty days WARN Act notice.[119] At that point, because all of United's patients had already been either transferred to St. Barnabas or sent home, United's employees were unable to perform their normal duties.[120] Instead they were charged with tasks such as cleaning the hospital, taking inventory, and preparing the company's assets for sale.[121]

On March 4, the Committee filed a motion with the bankruptcy court requesting an order that United immediately terminate all of its employees.[122] On March 6, before the court ruled on the motion, United complied with the Committee's request and "informed 1,200 of its 1,300 employees that they were no longer to report to work."[123] The parties thereafter stipulated before the bankruptcy court that the February 19 post-petition WARN Act notice created a $7.3 million payroll obligation for the sixteen days that the laid-off employees actually worked after the WARN Act notice was given.[124] The parties could not agree, however, as to whether the employees were entitled to back pay for the remaining 44 days, and if so, whether they were entitled to administrative claim status under of the Bankruptcy Code.[125]

113. *Id.* at 173.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 173.
123. *Id.*
124. *Id.*
125. *Id.* at 173-74.

The Committee argued that the employees were not entitled to back pay because United "ceased to be an "employer" subject to the WARN Act once it surrendered its certificates of need."[126] The Committee also argued that even if United remained an employer, it was excused from providing notice under two of the WARN Act's listed exceptions: the "faltering company" exception and "unforeseeable business circumstances" exception.[127] Finally, the Committee argued that if the laid off employees were entitled to back pay under the WARN Act, they only held unsecured claims, rather than administrative claims, that were limited to $4,000 per employee under § 507(a)(3)[128] of the Bankruptcy Code.[129]

The bankruptcy court rejected these arguments and held that the employees were entitled to back pay and should be granted administrative claim status.[130] The court held that United remained an employer post-petition because it continued to employ 1,300 people for 16 days after filing for bankruptcy.[131] The court, in making its decision, relied upon the DOL commentary, stating that "where the fiduciary may continue to operate the business for the benefit of the creditors, the fiduciary would succeed to the WARN obligations of the employers precisely because the fiduciary continues the business in operation."[132] On appeal, the district court affirmed without explanation, stating that United was an employer for sixteen days after filing its petition in bankruptcy.[133] The Committee then appealed to the Court of Appeals for the Third Circuit.[134]

The Court of Appeals, applying plenary review, reversed the District court's decision, and framed the issue as follows: "whether the Bankruptcy Court and the District Court correctly concluded [that]

126. *Id.* at 174.

127. *Id.*

128. This section is now 507(a)(4), and caps unsecured claims at $10,000 rather than $4,000. 11 U.S.C. § 507(a)(4) (2012).

129. *In re United,* 200 F.3d at 174.

130. *Id.*

131. *Id.*

132. *Id.*at 174-75. The court also rejected the Committee's arguments regarding the exceptions that are listed in the WARN Act. The court stated that the "unforeseeable business circumstances" exception did not apply because "there were "months of warning signals" that placed the board of directors on notice that "United was in financial extremis."" *Id.* The court also stated that the "faltering business" exception did not apply because United's ""deep, long-term and critical" financial problems prevented it from reasonably believing new capital or business would allow it to remain open." *Id.*

133. *Id.* at 175.

134. *Id.*

United Healthcare continued as an "employer" within the meaning of the WARN Act after filing for Chapter 11 bankruptcy, and was therefore subject to the WARN Act notification requirements when it furloughed its 1,200 employee on March 6, 1997."[135] The court, characterizing this as an issue of statutory construction, first analyzed the language of the WARN Act itself.[136] It found, however, that the language defining an employer is general and of no significant help in determining whether an employer is subject to WARN Act obligations.[137] While the court recognized that United undoubtedly employed the requisite number of employees, it found that it was unclear whether United remained a business enterprise after it surrendered its certificates of need, stopped treating patients, and entered bankruptcy to liquidate, rather than reorganize, because each of these activities "precluded [United] from performing the everyday business functions of a hospital and health care service."[138] The court also acknowledged the flip side of this point, stating that despite those events United remained a corporation that employed a substantial number of people for 16 days after filing for bankruptcy.[139] Still, the court was unable to adequately rely on the WARN Act's plain language and therefore shifted its analysis to a consideration of agency regulations and relevant jurisprudence.[140] Referring to the DOL commentaries,[141] the court decided that, in determining whether an entity is an employer, the proper standard is "whether the entity was "engaged in business" during the time prior to the plant closing or mass layoff,"[142] and the relevant issue is whether United, as a debtor in possession, was "operating as an ongoing business enterprise," or was merely "engaged in the liquidation of assets."[143] Disagreeing with the bankruptcy court's finding that United remained an

135. *Id.*

136. *Id.* at 176.

137. *Id.* The WARN Act language that the court analyzed was, "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 . . . ." *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 176-77.

141. "The term "employer" incudes public and quasi-public entities which engage in business (i.e., take part in 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) . . . ." *Id.* at 177.

142. *Id.*

143. *Id.* The court derived this issue from the portion of the DOL commentary that states, "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 [WARN] notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense." *Id.*

employer when, as a "debtor in possession," it employed the "debtor's" 1,300 employees to continue work on a daily basis, the court decided to apply a sliding scale test.[144]

III. HOLDING: APPLICATION OF THE SLIDING SCALE TEST

In re United Healthcare stands for the general proposition that the determination of whether a bankrupt entity is an employer under the WARN Act depends on "the nature and extent of the entity's business and commercial activities while in bankruptcy, and not merely on whether the entity's employees continue to work "on a daily basis.""[145] In a not-so-successful attempt to clarify this rule, the court opined that "the more closely the entity's activities resemble those of a business operating as a going concern, the more likely it is that the entity is an "employer,"" and "the more closely the activities resemble those of a business winding up its affairs, the more likely it is the entity is not subject to the WARN Act."[146]

Applying this sliding scale test, the court concluded that United was operating as a business liquidating its affairs rather than as a business operating as a going concern. In making this determination, the court found it relevant that on February 18, United surrendered its certificates of need, and, on February 19, filed its petition in bankruptcy with the intent to liquidate its assets and cease to exist.[147] Sometime between February 18 and 21, United's employees were no longer engaged in regular duties, but were instead working solely to prepare United for liquidation.[148] During the same period of time, United discharged or transferred all of its patients and stopped accepting new patients.[149] Taking all of this into account, the court found its analysis consistent

144. While it is a somewhat outdated principle in bankruptcy law, some courts have recognized the fictional distinction between a debtor and a debtor in possession. *See e.g. In the Matter of Pease*, 195 B.R. 431, 433 (D. Neb. 1996) ("The Chapter 11 debtor is a separate and distinct entity from the pre-bankruptcy debtor because before the bankruptcy case is filed, the debtor does not hold the rights of a debtor in possession and does not hold fiduciary duties to creditors").

145. *In re United*, 200 F.3d at 178.

146. *Id.*

147. *Id.* The court recognized that while United filed for Chapter 11, which is ordinarily used to reorganize, rather than Chapter 7, which is ordinarily used to liquidate, United's actions from the time it filed its Chapter 11 petition throughout the proceedings clearly demonstrated its intent to liquidate. Relevant to this determination was the court's statement that "[h]ad United Healthcare's conduct and activities demonstrated a bona fide effort toward reorganization, the evidence may have shown that United Healthcare was an "employer" subject to the WARN Act." *Id.*

148. *Id.*

149. *Id.*

with the legislative purpose of the WARN Act, and referred to previous Third Circuit cases in which courts held that:

> WARN's notice period was designed to allow workers to "adjust to the prospective loss of employment, to seek and obtain retraining that will allow [them] to successfully compete in the job market." The thrust of WARN is to give fair warning in advance of prospective plant closings. It would appear, therefore, that if an employer knew of a . . . closing and failed to notify its employees, the WARN Act would apply.[150]

Applying this standard to United, the court found that there was no evidence that United knew in advance that it would be forced to close its doors, and concealed that fact from its employees.[151] Rather, United made repeated good-faith efforts to stay financially viable in hopes of allowing its employees to keep their jobs.[152] United also willingly informed its merger partner that it was experiencing financial difficulties.[153] The court ultimately found determinative that, because United was merely preparing for liquidation[154] and did not file for bankruptcy "in an effort to avoid its WARN Act responsibilities,"[155] it did not continue as an employer "when it assumed the role of fiduciary following the filing for bankruptcy," and was therefore not subject to WARN Act liability.[156]

In re United Healthcare is the seminal example of a successful application of the liquidating fiduciary exception. *In re Jamesway*,[157] on the other hand, is a clear example of when the exception does not apply.

A. *In re Jamesway*

In *In re Jamesway*, the Bankruptcy Court for the Southern District

150. *Id.*

151. *Id.*

152. *Id.* at 178-79.

153. *Id.* at 179.

154. *Id.* The court also considered the fact that the actual bankruptcy plan that United filed along with its petition indicated that United planned to sell its goodwill to St. Barnabas and that United itself would cease to exist. *Id.*

155. *Id.*

156. *Id.* Perhaps germane to court's precedential relevance, footnote 10 states: "[w]e express no opinion on whether United incurred WARN liabilities at some point prior to the filing of its petition and whether the United employees have WARN claims entitled to priority under *Section 507(a)(3)*." *Id.*

157. Barnett v. Jamesway Corp. (*In re Jamesway Corp.*), 235 B.R. 329 (Bankr. S.D.N.Y. 1999).

of New York held that an employer was subject to WARN Act liability where the WARN Act violations took place prior to filing a petition in bankruptcy.[158] The case arose when Jamesway fired 260 of its 550 full-time employees between October 12 and November 11, 1995.[159] Six days after it had already started terminating its employees, Jamesway filed for Chapter 11 bankruptcy.[160] The employees sued Jamesway claiming that Jamesway violated the WARN Act when it fired the employees without giving advance notice of the terminations.[161] The parties agreed that, for purposes of the WARN Act, and at all relevant times, Jamesway was an "employer;" the plaintiffs were "affected employees;" and Jamesway's terminations constituted either a "plant closing" or "mass layoff."[162] The parties also agreed that Jamesway had not given any of the plaintiffs the required sixty–day notice of termination.[163]

Jamesway first argued that it was not required to give WARN notice because it ceased operating due to "not reasonably foreseeable business circumstances"[164] and/or because it was a "faltering company."[165] While Jamesway contended that it gave the employees "as much notice as was practicable" before firing them, it conceded that it did not give notice to the employees that it fired between October 12 and October 18, 1995.[166] Jamesway also contended that it gave adequate notice to the employees that were fired after October 18 because several of Jamesway's security guards distributed and posted WARN notices around the corporate headquarters, all on the day that Jamesway conducted the terminations.[167] For several reasons, the court found that

158. *Id.* at 346.

159. *Id.* at 335.

160. *Id.*

161. *Id.*

162. *Id.* at 337.

163. *Id.*

164. *Id.* To qualify for this exception, an employer that shut down an employment site before the conclusion of the 60-day period must show that it 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." *Id.*

165. *Id.* To qualify for this exception, an employer that ordered a plant closing or mass layoff before the conclusion of the 60-day period must show that the closing or layoff was "caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." *Id.*

166. *Id.*

167. *Id.* at 337-38.The court disregarded this contention, noting that Jamesway produced no evidence to show that the security guards either posted WARN notices or disseminated them to any of the employees; Jamesway produced no evidence that any of the employees actually received a

Jamesway failed to give WARN notice to *any* of the employees prior to firing them,[168] and that Jamesway's grasping-at-straws contention that it gave "after the fact" WARN notice held no merit.[169]

As a secondary argument, Jamesway contended that it was exempt from WARN Act requirements and that the employees' complaint should have been dismissed because by the time Jamesway filed for bankruptcy on October 18, it was already a liquidating fiduciary.[170] Jamesway admitted that it did not give the proper WARN Act notice

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copy of the purported notice (In fact, at least two of the employees denied receiving it); and Jamesway failed to produce an actual copy of the notice, and never even attempted to prove its contents. *Id.* Citing 20 C.F.R. § 639.7(d), the court noted that the specific notice requirements under the WARN Act were not satisfied. *Id.* at 340. That section states, as follows:

> Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain: (1) A statement as to whether the planned action is permanent or temporary and, if the entire plant is to be closed, as statement to that effect; (2) The expected date when a plant closing or mass layoff will commence and the expected date when the individual employee will be separated; . . . (4) The name and telephone number of a company official to contact for further information.

Id. at 340. Jamesway's letters did not satisfy WARN requirements because they inaccurately advised that Jamesway would terminate 50 employees on October 13, while Jamesway actually fired 144 employees. *Id.* at 341. The letters also omitted the name and phone number of a company official and failed to identify the job titles that would be affected by the employment decision. *Id.*

168. *Id.* at 338. The court, in a footnote, acknowledged the fact that notice must be served "pursuant to "any reasonable method of delivery."" *See* 20 C.F.R § 639.8, provided that the selected method is "designed to insure receipt of notice [at] least 60 days before separation . . . (e.g., first class mail, personal delivery with option signed receipt) . . . ."" *Id.* at 338. The employees also contended that even if the security guards did post or disseminate the notices, the court must grant them judgment on their complaint because even those acts would not satisfy the WARN Act's notice requirements. *Id.* The court, however, declined to address this issue because of Jamesway's outright failure to show that the guards posted or disseminated any notices that complied with the WARN Act. *Id.*

169. *Id.* at 339. Jamesway contended that it gave the employees "after the fact" WARN notice for three reasons. First, it was uncontested that On October 27, 1995, Jamesway sent a letter and check for the full amount due to each of the non-union employees that were fired on or after October 12 for accrued vacation, severance, and medical reimbursement. *Id.* at 338. Second, it was uncontested that on November 17, Jamesway sent another letter to each of those employees explaining the procedure for paying mitigated severance to those who had not yet found new jobs. *Id.* And finally, it was uncontested that in December 1995, Jamesway sent letters to the same employees regarding Jamesway's pension plan. *Id.* at 339. The court found that these claims held no merit even assuming that the "not reasonably foreseeable business circumstance," or "faltering company" exceptions applied because the WARN Act only allows for "after the fact" notice when a natural disaster causes the plant closing or mass layoff. *Id.* Finally, the court found it relevant that Jamesway was aware of its WARN obligations, was capable of complying with them, and still failed to do so. *Id.* at 343. Jamesway conceded that by September 29, it had already started to consider filing for Chapter 11, and that the purpose of filing might be to liquidate the company. *Id.* at 342. Jamesway clearly knew of the WARN Act requirements, and even considered giving early notice to its employees in anticipation of the terminations. *Id.*

170. *Id.* at 337.

during its pre-petition terminations, but again contended that the post-petition firings were preceded by the proper employee notifications because Jamesway's security guards posted WARN notices at its corporate headquarters on the same day as the layoffs.[171] Jamesway's main contention was that:

> [I]mmediately subsequent to the commencement of its [non-bankruptcy] liquidation and shutdown, and the resultant termination of its employees, [Jamesway's] efforts were geared [solely] towards finalizing and planning, documentation and other advance activities necessary to file its liquidating chapter 11 case so that its liquidation could proceed in an orderly manner.[172]

Once it began the Chapter 11 liquidation, Jamesway argued that it became the liquidating fiduciary of a failed business and therefore did not succeed to the notice obligations of the pre-bankruptcy entity.[173] In response, the employees contended that Jamesway was not a liquidating fiduciary at the time of the firings because it "continued its normal business operations until at least November 3, 1995 by conducting post-petition going out of business sales at its store location.[174] The court found, however, that even if Jamesway was a liquidating fiduciary, there was no reason to make a determination because Jamesway was nevertheless liable under the WARN Act.[175]

The court went on to deny Jamesway's access to the liquidating fiduciary exception for several additional reasons. Jamesway admitted the fact that its directors voted to liquidate the company and authorized Jamesway to file a liquidating Chapter 11 case.[176] It also conceded that when it fired the employees, it did so to further its liquidation efforts.[177] By that time, Jamesway had already identified all of the plaintiffs as employees who would lose their jobs in the pending liquidation, and had even created a schedule for conducting the layoffs.[178] The court found that the plaintiffs were clearly owed notice of the layoffs because they

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171. *Id.* at 337-38.

172. *Id.* at 338.

173. *Id.* at 343 (citing *Fed. Reg.* 16,045 (1989)) ("[A] bankruptcy fiduciary whose sole function is to liquidate a failed business for the benefit of creditors does not succeed to the former employers' WARN obligations").

174. *Id.* at 343

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

were "affected employees" under the WARN Act.[179] That is, they were employees who "may [have] reasonably [been] expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by the employer."[180] Ultimately the court held that, at the time Jamesway failed to give proper notice, Jamesway became liable to the employees under the explicit language of the WARN Act, and that the subsequent bankruptcy petition did not relieve it of its WARN Act obligations to those employees.[181]

Interestingly, in its final attempt to circumvent WARN Act liability, Jamesway argued that the employees' complaint should be dismissed because the company acted in "good faith with reasonable grounds for believing that it was not violating the [WARN] act."[182] Jamesway supported this contention by arguing that it relied in good faith on the advice of its counsel, and determined that its acts were in line with the requirements set forth in the WARN Act.[183] The court rejected this argument for several reasons including the fact that Jamesway had produced no evidence to show that it had any good faith belief that the letters it provided its employees satisfied the WARN Act's requirements.[184] In fact, after considering circumstantial evidence, the court was persuaded that Jamesway might not have had a subjective belief that it was complying with the WARN Act at all.[185] The circumstantial evidence was based on the fact that Jamesway was aware of its WARN notice obligations prior to terminating any of the plaintiffs, and it was capable of providing WARN notice but failed to do so.[186]

Furthermore, Jamesway argued that once it filed its petition in bankruptcy on October 18, it believed that it was not subject to any ongoing obligations to give notice under the WARN Act.[187] Jamesway, however, provided no rationale for that understanding, or any support that it had any role in Jamesway's decision to decide not to give its post-petition employees the required WARN Act notice before firing them.[188]

179. *Id.* at 342-43.

180. *Id.* citing 29 U.S.C. § 2101(a)(5) (2006); *see also* 20 C.F.R. § 639.6(b) (2013).

181. *Id.* at 343-44.

182. *Id.* at 344 (citing 29 U.S.C. §2104(a)(4) (2006)) (stating that if an employer can prove, to the satisfaction of the court, that the act or omission violated was in good faith, the court may reduce the liability or penalty).

183. *Id.* at 345.

184. *Id.*

185. *Id.* at 346.

186. *Id.*

187. *Id.*

188. *Id.* "Good faith requires an honest intent to ascertain the requirements of the statute and to act accordingly." *Id.* (citing Washington v. Aircap Industries, 860 F. Supp. 307, 315-16 (D. S.C.

The court also declined to consider the fact that Jamesway assisted the terminated employees after Jamesway filed for bankruptcy, finding that "Jamesway's post-termination conduct has no bearing on whether it possessed a good faith belief that its acts satisfied its WARN notice obligations at the time notice was required to be given."[189] Finally, the court found that even if Jamesway had a good faith belief in its counsel's advice that the letters complied with the WARN Act because Jamesway fell within the "faltering company" or "not reasonably foreseeable business circumstance" exceptions, this belief was "clearly unreasonable."[190] The "statutes, regulations, and case law" that were available to Jamesway when it ordered the employee terminations all stated in clear terms that employers must provide to the employees basic WARN notice and a brief statement of why reduced notice is necessary in order to qualify for the exceptions listed in the WARN Act.[191]

B. *Where do United Healthcare and Jamesway Leave Us?*

Based on the holdings in *United Healthcare* and *Jamesway*, the general rule appears to be that employers are only eligible for the liquidating fiduciary exception when they conduct their layoffs or plant closings post-petition.[192] That is, a pre-petition employer that decides to initiate a mass layoff cannot successfully use the liquidating fiduciary exception because the very fact that the employer has not yet filed a liquidating Chapter 11 bankruptcy petition means that the employer is not legally recognized as a liquidating fiduciary.[193] Rather, a pre-petition employer is considered to be engaged in the continuing operation of its business as a business enterprise, and is therefore subject to WARN Act obligations under the language of 29 USCS § 2101(a).[194] Even post-petition employers, it appears, are sometimes outside the scope of the liquidating fiduciary exception even though they are acting solely as fiduciaries in the process of winding up the employer's

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1994); *see also* Carpenter's Dist. Council v. Dillard Dep't. Stores Inc., 15 F.3d 1275, 1287-88 (5th Cir. 1994); United Paperworkers v. Alden, 901 F. Supp. 426, 443 (D. Mass. 1995); Local 1239 v. Allsteel, Inc., 955 F. Supp. 78, 81 (N.D. Ill 1996) ("good faith intent to comply with the WARN Act requires requisite notice, and not waiting until the plant closing or layoff is likely. Instead the employer must give the notice when the plant closing is foreseeable").

189. *Id.*

190. *Id.* at 347.

191. *Id.*

192. *See supra* note 86 and accompanying text.

193. *Id.*

194. *Id.*

business affairs. These circumstances of course include employers that filed their bankruptcy petitions with the intent to reorganize rather than liquidate their businesses because these employers would not be able to contend that they were operating as liquidating fiduciaries when the challenged layoffs took place. Furthermore, under *In re Jamesway*, it seems that even a post-petition employer that is attempting to liquidate its assets might still be barred from asserting the liquidating fiduciary exception if the bankruptcy petition was filed in bad faith in order to circumvent WARN Act obligations.[195]

While there is currently a dearth of case law to aid in sharpening the lines of the liquidating fiduciary exception, there may be some helpful new interpretations on the horizon. One example is a WARN Act class action case from the Southern District of New York involving the prestigious ex-law firm, Dewey & LeBoeuf LLP.[196]

III. *IN RE DEWEY & LEBOEUF*: CURRENT APPLICATION OF THE EXCEPTION

As with any underdeveloped legal issue, it will be interesting to see how the liquidating fiduciary exception changes shape as it gets sifted through different circuits and applied to different sets of facts. In February 2013, the Bankruptcy Court for the Southern District of New York came across a potential liquidating fiduciary exception issue in a WARN Act class action case against the infamous Dewey & LeBoeuf LLP Chapter 11 bankruptcy filing.[197]

In re Dewey & LeBoeuf is currently in the pleading stage of trial.[198] The case involves a motion to dismiss filed by the debtor – Dewey & LeBoeuf ("Dewey").[199] While the court ultimately denied the motion, finding that the liquidating fiduciary exception is not determinative on a motion to dismiss, it did recognize that "[Dewey] may ultimately prevail on the liquidating fiduciary affirmative defense."[200]

The case arose on May 7, 2012 when Vittoria Conn was fired from her job at Dewey's New York office.[201] On May 10, 2012, Conn, on

195. *In re Jamesway Corp.*, 235 B.R. at 346.
196. Conn v. Dewey & Leboeuf LLP, (*In re* Dewey & Leboeuf LLP), 487 B.R. 169 (Bankr. S.D.N.Y. 2013).
197. *Id.* at 171.
198. *Id.* at 180.
199. *Id.* at 169.
200. *Id.* at 171.
201. *Id.*

behalf of herself and all others similarly situated, filed an action against Dewey in the District Court for the Southern District of New York seeking relief for alleged violations of the WARN Act.[202] The complaint specifically alleged that the plaintiffs were terminated without cause as part of mass layoffs or plant closings, and were not given the required WARN notice.[203] On May 28, 2012, Dewey filed a Chapter 11 bankruptcy petition with the Bankruptcy Court for the Southern District of New York, and, on December 14 of the same year, filed its motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[204]

One of Dewey's primary arguments in favor of dismissal is that no substantive WARN Act violation could possibly have taken place because Dewey falls within what the court recognized as the "so-called liquidating fiduciary principle."[205] The court noted that "case law establishes that defendant may only be liable under the WARN Acts if it is an "employer" operating a "business enterprise.""[206] Dewey contended that it no longer fit those requirements once it terminated the employees, and that it therefore is not liable under the WARN Act.[207] In opposition, however, Conn pointed out that Dewey failed to deny that the complaint contains the requisite "short and plain statement of facts setting forth a claim for relief,"[208] and that a motion to dismiss under Rule 12(b)(6) is therefore inappropriate.[209] Dewey argued that, even if the complaint does state a proper claim for relief, Dewey "did not meet the definition of "employer" under the WARN Acts" at the time of the layoffs because "it was no longer operating in an ordinary business sense when it laid off its employees."[210] In response, Conn argued that even if Dewey was not operating in an ordinary business sense at the time of the layoffs, the liquidating fiduciary exception is inappropriate because it only applies to claims for terminations that occurred *after* the petition was filed, and in this case the layoffs took place entirely pre-petition.[211]

Interestingly, the court disagreed and cited *In re Healthcare* for the

202. *Id.*

203. *Id.* The class action complaint alleged violations of the Federal WARN Act (60 days' notice), the New York WARN Act (90 days' notice), and the California WARN Act (60 days' notice). *Id.* at 171-72.

204. *Id.* at 172.

205. *Id.* at 173.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 174-75.

211. *Id.* at 175.

proposition that "not all cases applying the [liquidating fiduciary] principle involve post-petition terminations, and the petition date is not determinative of the outcome in all cases."[212]

Ultimately, however, the court held that "no case law supports granting a motion to dismiss based on the liquidating fiduciary principle where the terminations occurred pre-petition *and* there is a factual dispute whether the debtor was operating as a going concern at the time of the terminations."[213] In this case, Conn's complaint stated a plausible claim for relief,[214] and because all factual allegations must be accepted as true on a motion to dismiss, the court did not have the authority to resolve the factual issue of whether Dewey was operating as a liquidating fiduciary at the time of the layoffs.[215]

A. *Potential Effect of* In re Dewey & LeBoeuf

It seems that one of the most significant parts of *In re Dewey* is not its rejection of the liquidating fiduciary exception on a motion to dismiss, but rather the court's statement that "the Debtor may ultimately prevail on the liquidating fiduciary [exception as an] affirmative defense."[216] This appears to be express acknowledgment and encouragement by a well respected bankruptcy court that Dewey has an actual chance of circumventing its WARN Act obligations under the liquidating fiduciary exception in a case where the employer's layoffs took place pre-petition.[217] If Dewey does, in fact, raise the liquidating fiduciary exception as an affirmative defense, the court will have to conduct a very close factual inquiry to determine whether Dewey, in its final days as a pre-petition employer, found itself so geared towards winding up its affairs that it actually ceased to operate as a business

212. *Id.* at 175. This assertion is interesting for several reasons. First, the court is noting a possible expansion of the liquidating fiduciary exception, which is typically understood to apply only to cases involving *post-petition* layoffs. *Id.* Second, the court cites *In re Healthcare* to support this point, even though that case represents the successful application of the liquidating fiduciary exception under circumstances where the layoffs took place *post-petition*. *Id.* The contradiction is difficult to reconcile at this point; the court is either recognizing a possibility that an employer does not have to be in bankruptcy to be a liquidating fiduciary, or, in the alternative, simply misapplying *In re Healthcare*. *Id.*

213. *Id.* at 176 (emphasis added).

214. *See id.* at 176. Dewey terminated the employees within one month before the Chapter 11 filing, and failed to comply with the WARN Act's notice requirement. *Id.* at 171-72, 174.

215. *Id.* at 171-72, 174.

216. *Id.* at 171.

217. *Id.*

enterprise, and instead became a pre-bankruptcy liquidating fiduciary.[218]

Under those circumstances, struggling employers from around the country would be wise to actively track the court's analysis. A decision out of the Southern District of New York on a case as widely recognized as Dewey's will be sure to have a significant impact on employers, whether struggling or healthy, trying to figure out when to fire employees or close plants. If the court ultimately finds that Dewey is not liable for failing to satisfy its WARN Act obligations, and therefore that it was a liquidating fiduciary before ever filing for bankruptcy, it could potentially mark the beginning of a slew of liquidating fiduciary affirmative defense claims to allegations of WARN Act violations, and therefore an impetus to start developing this legal issue.

IV. CONCLUSION

With the looming uncertainty of today's economic climate, it is more important than ever to understand the implications of layoffs, plant shutdowns, and bankruptcy filings. This is especially true when the implications are viewed in relation to each other. The general premise is that employers considering mass layoffs or plant shutdowns might well benefit from the currently developing law surrounding the WARN Act, or, more specifically, the liquidating fiduciary exception to WARN Act liability. While current case law on the subject is relatively sparse, the decisions in *United HealthCare* and *Jamesway* serve as reliable starting points. These cases are significant not only because of the impact they have on WARN Act claims against Chapter 11 debtors in possession, but also because of the impact they might have on employers' layoff and plant closing decisions. That is, an analysis of the courts' interpretations of the liquidating fiduciary exception can offer an extraordinary amount of insight to employers deciding whether to conduct their layoffs or plant closings before or after filing for bankruptcy.

Moreover, based on future findings of the Bankruptcy Court for the Southern District of New York in *In re Dewey* (where the employees are alleging that Dewey violated the WARN Act pre-petition), the impact of the liquidating fiduciary exception could soon be gaining even more traction. So far, *In re Dewey* has only produced the unsurprising rule that liquidating fiduciary defenses to WARN Act liability, which require fact intensive analyses, do not apply to employers in the motion to dismiss stage of trial, where factual allegations are necessarily accepted

218. *Id.* at 175.

as true. But based on the Bankruptcy Court's treatment of the liquidating fiduciary exception, and its overt acknowledgment that the liquidating fiduciary exception, if raised as an affirmative defense, could potentially spell a victory for Dewey, the court's ultimate decision on the merits could largely develop the scope of the liquidating fiduciary exception as we currently know it.

John-Ethan Gionis *

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