WARN: JUDICIAL TREATMENT OF EXEMPTIONS, EXCLUSIONS, AND EXCUSES

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INTRODUCTION

The Worker Adjustment and Retraining Notification Act ("WARN" or the "Act")[1] became law in 1988. In broad outline, the statute requires that covered employers[2] notify affected employees[3] and local governmental units[4] sixty days

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1. 29 U.S.C. §§ 2101–2109 (1994).

2. An "employer" is defined as any "business enterprise" that employs either:

prior to a plant closing or mass layoff, as defined in the Act.[5] If the required notice is not given, the employer is liable to affected employees for back pay and benefits for the period of violation.[6]

As an initial matter in applying WARN, there must be a determination of whether there has been a WARN event, i.e., a "plant closing" or "mass layoff."[7]

"(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," excluding overtime. *Id.* § 2101(a)(1) (1994). A "part-time employee" is one "who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required." *Id.* § 2101(a)(8).

3. "Affected employees" are "employees who may reasonably be expected to experience an employment loss as a consequence of a plant closing or mass layoff." *Id.* § 2101(a)(5). An "employment loss" is "(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period." *Id.* § 2101(a)(6).

4. *Id.* § 2102(a)(2) (1994).

5. The phrasing of the statute (i.e., "an employer shall not order a plant closing or mass layoff") suggests that an employer is prohibited from taking action unless the required notice is given. *Id.* § 2102(a). However, the statutory remedies are exclusive and the federal courts are denied the authority to enjoin a plant closing or mass layoff. *Id.* § 2104(b) (1994).

6. The statute refers to "back pay for each day of violation." *Id.* § 2104(a)(1)(A). There is presently a conflict among the circuits as to whether payment is required for each calendar day or each work day in the period. *Compare* United Steelworkers of Am. v. North Star Steel Co., 5 F.3d 39 (3d Cir. 1993) (calendar days), *cert. denied*, 114 S. Ct. 1060 (1994), *with* Saxion v. Titan-C-Manufacturing, Inc., 86 F.3d 553 (6th Cir. 1996) (work days); Frymire v. Ampex Corp., 61 F.3d 757 (10th Cir. 1995) (work days), *cert. dismissed*, 116 S. Ct. 1588 (1996); *and* Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275 (5th Cir. 1994) (work days), *cert. denied*, 115 S. Ct. 933 (1994).

7. A "plant closing" is:

> 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....

29 U.S.C. § 2101(a)(2). A "mass layoff" is defined as a reduction in force that:

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

Id. § 2101(a)(3). To further complicate matters, employment losses for two or more groups at a single site, each of which is below the WARN minimum, must be aggregated if they occur within a 90-day period unless the employer can demonstrate that the losses "are the result of separate and distinct actions and causes" and are not an attempt to evade WARN.

Those events are defined with reference to whether there has been a threshold number or percentage of employment losses at a "single site of employment."[8] These determinations may require fairly complicated calculations and examination of the case law.[9]

The inquiry, however, does not end there. The basic purpose of WARN is to protect workers by requiring at least sixty days notice of mass dislocations from employment. Advance notice is intended to provide affected workers with time to adjust and seek other employment or retraining, and to allow the relevant governmental entity to prepare to address such needs.[10] The concept of a federal plant closing statute, however, was a controversial one.[11] Strong concerns were expressed about the effects of imposing notice requirements and liability on employers. Would the statute, for instance, unfairly penalize employers if the suddenness of events did not permit the required notice? Would WARN unduly hamper employers' efforts to save failing businesses? Would employers be liable for technical terminations of employment, even if there were no actual breaks in employment?

Many of these concerns were directly addressed in specific provisions of the statute.[12] Thus, even if an ostensible WARN event has occurred, the employer may have no liability for the event, or may have that liability reduced or even eliminated, if: (1) the event is an "exemption" from WARN coverage; (2) the result of the event is an express or implied "exclusion" from the definition of an "employment loss"; (3) the employer is, by interpretation of the statute, exempted from liability for the event; (4) the employer has an "excuse" for giving fewer than sixty days notice under one of the defenses set forth in the statute; or (5) the employer is allowed a reduction or elimination of liability by reason of its "good faith."[13]

Id. § 2102(d).

8. *Id.* § 2101(a)(2)–(3).

9. *See generally* Ethan Lipsig & Keith R. Fentonmiller, *A WARN Act Road Map*, 11 LAB. LAW. 273, 286–96 (1996).

10. *E.g.*, 134 CONG. REC. S8543 (daily ed. June 24, 1988) (statement of Sen. Metzenbaum); 134 CONG. REC. S8374 (daily ed. June 22, 1988) (statement of Sen. Byrd); 133 CONG. REC. S9392 (daily ed. July 8, 1987) (statement of Sen. Kennedy).

11. For discussions of the background of the enactment of WARN and its legislative history, see Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 BERKELEY J. EMPL. & LAB. L. 1, 4–16 (1993); Jessica L. Stein, *The Worker Adjustment Retraining* [sic] *and Notification Act (WARN): What Is the Meaning Behind the Language?*, 19 SETON HALL LEGIS. J. 648, 648–58 (1995); Christopher P. Yost, *The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?*, 38 CATH. U. L. REV. 675, 677–82, 688–92 (1989).

12. Senator Metzenbaum characterized these exceptions as having been "added to this legislation at the request of business or on their behalf." 134 CONG. REC. S8669 (daily ed. June 28, 1988).

13. WARN liability may also be offset by payments of wages and payments to

Thus on its face, WARN reflects the tension between an underlying worker-protective purpose and competing concerns for business. Indeed, the statute has been described as "riddled with exceptions and ambiguities"[14] and "a watering-down of a settlement of a compromise."[15] In addition, the statute is not a model of clarity and precision in legislative drafting. Rather, WARN has been described as a "clumsily drafted and unduly confusing statute"[16] and "imprecise, vague [and] difficult to interpret."[17]

Given these attributes, judicial interpretation of WARN is a significant factor in the statute's effectiveness. Indeed, some senators predicted that the major beneficiaries of the Act would be the labor bar, because a flood of litigation would be necessary to resolve the questions raised by the statute.[18] While courts have been required to determine basic issues of procedure and coverage,[19] the more crucial area is the treatment of the exemptions, exclusions, and excuses. Early commentators questioned whether the courts would interpret these provisions narrowly, in light of the worker protection objective or whether the courts would

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benefit plans for the period of violation. 29 U.S.C. § 2104(a)(2)(A), (C) (1994). *E.g.*, Washington v. Aircap Indus. Corp., 860 F. Supp. 307, 313 (D.S.C. 1994).

Liability is also reduced by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(2)(B) (1994). However, the rights and remedies given by WARN "are in addition to, and not in lieu of, any other contractual or statutory rights and remedies" employees may have. *Id.* § 2105 (1994). Thus, if the payments are found to have been required by a contractual or statutory obligation, there will be no offset to WARN liability. *E.g.*, Frymire v. Ampex Corp., 61 F.3d 757 (10th Cir. 1995) (pay in lieu of notice policy), *cert. dismissed*, 116 S. Ct. 1588 (1996); Ciarlante v. Brown & Williamson Tobacco Corp., 12 Indiv. Empl. Rts. Cas. (BNA) 308 (E.D. Pa. 1996) (ERISA "salary continuation" plan); Tobin v. Ravenswood Aluminum Corp., 838 F. Supp. 262, 273 n.17 (S.D. W. Va. 1993) (employer's letter promising severance pay to workers hired as replacements for strikers); Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 778 F. Supp. 297, 309–11 (E.D. La. 1991) (ERISA severance plan payments and payments for unused vacation time required under state law), *aff'd in part on other grounds and rev'd in part on other grounds*, 15 F.3d 1275 (5th Cir. 1994), *and cert. denied,* 115 S. Ct. 933 (1995). Where payment of severance is at the employer's discretion, however, severance payments made will reduce the amount owed. *E.g.*, Jones v. Kayser–Roth Hosiery, Inc., 748 F. Supp. 1276, 1288–89 (E.D. Tenn. 1990).

14. John F. Meyers, *Notice of Plant Closings and Layoffs—Significant Case Developments*, 18 EMPL. REL. L.J. 297, 297 (1992).

15. Wilson McLeod, *Judicial Devitalization of the WARN Act?*, 44 LAB. L.J. 220, 221 (1993).

16. *Id.* at 220.

17. Lipsig & Fentonmiller, *supra* note 9, at 273.

18. *E.g.*, 134 CONG. REC. S8539 (daily ed. June 24, 1988) (statement of Sen. Hatch); 134 CONG. REC. S8452 (daily ed. June 23, 1988) (statement of Sen. Hatch); 133 CONG. REC. S9423–24 (daily ed. July 8, 1987) (statement of Sen. Chafee).

19. WARN does not, for instance, have its own statute of limitations. The Supreme Court has determined that the courts should apply the most analogous state statute of limitations. North Star Steel Co. v. Thomas, 515 U.S. 29, 31 (1995).

interpret these limitations expansively, contracting WARN's reach and serving business interests.[20]

More than eight years after the enactment of WARN, the body of case law is large enough to begin answering these questions. This article examines the cases construing each of the exemptions, exclusions, and excuses embodied in WARN. Because the courts have frequently had to consult the legislative history, regulations,[21] and commentary from the Department of Labor ("DOL"),[22] these sources are also examined where pertinent to issues raised in the cases. The Article concludes that, in general, the courts have been mindful of the statute's remedial purpose and have construed these exceptions in a manner consistent with the presumption that notice should be the norm, not the exception.

I. EXEMPTIONS FROM WARN COVERAGE

Two types of circumstances are identified as "exemptions" from WARN coverage: (1) temporary employment and (2) strikes and lockouts.[23] Although the exemptions address different situations, each concerns the reasonable expectations of employees regarding continuing employment.

A. Strikes and Lockouts

Under this exemption, WARN does not apply to a plant closing or mass layoff that "constitutes a strike or constitutes a lockout not intended to evade the requirements" of WARN.[24] In addition, WARN notice is not required "when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act."[25] The legislative history and the regulations make clear that this provision does not eliminate the requirement of notice for nonstrikers.[26] In effect, then, the statute says that an employee who goes on strike should have no expectation of WARN notice for the break in employment resulting from the strike or for any termination that results from his or her lawful replacement during the strike.

The one reported case interpreting this exemption, *Teamsters National Freight Industry Negotiating Committee v. Churchill Truck Lines, Inc.*,[27] has

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20. *E.g.*, McLeod, *supra* note 15, at 220, 228–29; Yost, *supra* note 11, at 703.

21. 20 C.F.R. pt. 639 (1997).

22. The DOL responded to comments on the interim regulations and explained changes to the final regulations in Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16,042 (1989).

23. 29 U.S.C. § 2103 (1994).

24. *Id.* § 2103(2) (1994).

25. *Id.* (referring to 29 U.S.C. §§ 151–169 (1994)).

26. 134 CONG. REC. S8666–69 (daily ed. June 28, 1988); 20 C.F.R. § 639.5(d) (1997); *see also* Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. at 16, 057.

27. 935 F. Supp. 1021 (W.D. Mo. 1996).

extended the exemption beyond what the statute provides. A strike by the majority of Churchill's workers halted revenue producing trucking operations at all of its terminals. Three days after the strike began, Churchill's board met and recommended to its parent company that all operations be completely and permanently closed. The recommendation was based on the president's predictions that the strike would last one month, nonstrikers would have to be paid if their services were going to be retained, and the strike would cost $400,000 to $500,000 per week, resulting in the permanent loss of fifteen to twenty percent of the customer base. The parent company accepted the recommendation. Notice to the union was given by letter dated the same day, and the trucking operations ceased two days later.

The court held that no WARN notice was required because of the strike exemption[28] and that, in any event, shortened notice would also have been excused under the unforeseen business circumstances defense. The court reasoned that the strike exemption exacts a "less onerous burden" than the defense, and requires neither foreseeability nor direct causation.[29] In the court's view, the exemption applies as long as the closing was "related" to the strike. Striking employees, the court stated, lose the protection of WARN and "are shouldered with some of the responsibility for their decision to strike."[30] The court found that the evidence at trial did not support the union's contentions that the closing had been planned in advance of the strike, that the closing was unrelated to the strike and that the strike was used as a pretext to evade WARN's notice requirements.[31] Rather, the decision to close "was the direct result of the strike and it would not have been made but for the strike."[32]

Although the finding of no liability in *Churchill* may have been justified under the unforeseen business circumstances defense,[33] the court's interpretation of the strike exemption is at odds with the terms of the statute and the legislative history. The statute does not exempt a closing that is "related to" or even "caused by" a strike.[34] Indeed, the Senate rejected a broader exemption that would have

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28. Notice to nonstrikers was apparently not at issue because the plaintiff union represented only the striking workers. *Id.* at 1022.

29. *Id.* at 1026.

30. *Id.*

31. The evidence cited included the facts that Churchill had been party to and adhered to the collective bargaining agreement for many years, that it had expended over $1.5 million in new equipment in the preceding year, that it continued to solicit new business during negotiations for the collective bargaining agreement, and that it paid licensing fees covering the entire year. *Id.* at 1024.

32. *Id.*

33. *See infra* notes 293–97 and accompanying text.

34. The *Churchill* court apparently relied on language in the regulations in concluding that the closing only needs to be "related to" a strike. The regulations state that "[a] plant closing or mass layoff at a site where a strike or lockout is taking place which occurs for reasons *unrelated* to a strike or lockout is not covered by this exemption." 935 F. Supp. at 1025 (quoting 20 C.F.R. § 639.5(d)) (emphasis added). It does not follow,

eliminated the requirement of WARN notice if the plant closing or mass layoff were "due, directly or indirectly, to a strike."[35]

A more basic problem with the *Churchill* analysis is that it assumes that a permanent shutdown of operations may "constitute" a strike. Although the exemption refers to a "plant closing,"[36] the definition of a "plant closing" includes both permanent and temporary shutdowns.[37] A strike might result in a temporary shutdown of the employer's operations, and therefore, a "plant closing."[38] A permanent shutdown, however, a decision that rests with the employer, cannot be said to "constitute" a strike. In addition, a permanent shutdown implies termination of employment, which a strike itself is not. Thus, a "closing" that "constitutes" a strike should not be read to include a permanent, rather than a temporary, shutdown.

That conclusion is supported by the legislative history. Although debate on this exemption primarily focused on the replacement of strikers rather than on the termination of their jobs,[39] comments during that discussion indicate an understanding that other breaks in employment resulting from a strike were not exempted. For instance, Senator Spector, in summarizing the exemption's anticipated reach, stated that "[i]f the employer, for example, is driven to his knees as a result of what has happened and there are going to be layoffs, then the 60-day provision applies under the act."[40]

There is no indication, then, that Congress intended to completely deny WARN protection to workers who have gone on strike, which is what the *Churchill* court did. Rather, employees assume the risk of extended separation from

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however, that any closing "related" to a strike is exempted.

35. 134 CONG. REC. S8663, 8666–69 (daily ed. June 28, 1988). Arguing for its passage, Senator Quayle distinguished this amendment from a previous one that "dealt with notice that would be given to the strikers themselves once economic workers [sic] replace those strikers." By contrast, in his view, the amendment that was not adopted

> goes to any plants that may be closed or layoffs [sic] because of a strike. For example, if an employer is being struck by a certain bargaining unit, and that employer because of that strike would have to lay off or close a plant because of that strike, he or she should not be required to give that notice because of the strike. That is a clear-cut example of what this amendment does.

Id. at S8666. This example would appear to cover the *Churchill* situation if one assumes the example refers to strikers as well as nonstrikers.

36. 29 U.S.C. § 2103 (1994).

37. 29 U.S.C. § 2102 (a)(2) (1994).

38. *See* 134 CONG. REC. S8667 (daily ed. June 28, 1988) ("[S]trikers themselves do not have to receive 60 days notice when their strike is what shuts down the plant.") (statement of Sen. Metzenbaum).

39. *See* 134 CONG. REC. S8610–21 (daily ed. June 27, 1988).

40. 134 CONG. REC. S8620 (daily ed. June 27, 1988); *see also id.* at 8614 ("If [strikers] have been replaced they would not need to get notice. If they have not been replaced then they have the rights of all other employees, and they would be entitled to know.") (statement of Sen. Metzenbaum).

employment—and lose the protection of WARN for that separation—when they go on strike. In addition, they assume the risk of termination of their employment without WARN notice only to the extent that the employer is allowed, under the labor laws, to replace them. WARN does not go beyond that.

B. Temporary Employment

The second provision exempts a plant closing that results from the closing of a "temporary facility" or a plant closing or mass layoff that results from the completion of a particular project or undertaking.[41] In either case, the employees must have been hired with the understanding that the duration of their employment was limited to the duration of the facility, project, or undertaking.[42] The regulations provide that the understanding may be based on "employment practices of an industry or locality" or on writings, such as employment contracts or collective bargaining agreements.[43] Thus, the exemption does not require notice of a WARN event when the employment is temporary and understood to be so at the time of hire.

At least three cases have considered this exemption. Two dealt with purportedly "seasonal" employees. In *Washington v. Aircap Industries Corp.*,[44] the employer's practice had been to lay off some workers during the summer because of the cyclical nature of its manufacture of lawn mowers. In June of the year in question, the employer "laid off" the vast majority of its employees, notifying them that their layoffs would exceed six months.[45] The facility was eventually closed.[46]

The employer asserted that WARN did not apply because its workers were "seasonal," a term the court described as "misleading."[47] As the court pointed out, WARN contains no exemption for "seasonal" workers, although it does exempt temporary employees. The employer argued that a reference in the regulations to "seasonal industries"[48] indicated that such industries were not within WARN's coverage. The court noted, however, that the same regulation goes on to explain that even seasonal businesses may have "permanent" employees, not exempted from WARN, because they "work on a variety of jobs and tasks continuously through most of the calendar year."[49] Thus, the court explained, although a business might be "'*seasonal*,' the pivotal question is still whether the work is *temporary*."[50]

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41. 29 U.S.C. § 2103(1) (1994).
42. *Id.*
43. 20 C.F.R. §639.5(c)(2) (1997).
44. 831 F. Supp. 1292 (D.S.C. 1993).
45. *Id.* at 1293.
46. Washington v. Aircap Indus. Inc., 860 F. Supp. 307, 310 (D.S.C. 1994) (damages decision).
47. 831 F. Supp. at 1296.
48. 20 C.F.R. § 639.5(c)(3) (1997).
49. 831 F. Supp. at 1297 (quoting 20 C.F.R. § 639.5(c)(3) (1997)).
50. *Id.*

The court found that the employer's facility was not a temporary one and that the employees "were hired for the 'year,'" not for discrete projects.[51] Moreover, even as to those employees who had been laid off and rehired in previous years, the employer failed to meet its burden of showing that it had "affirmatively informed employees of the temporary nature of their employment at the time of hire."[52] Accordingly, the plant closing was not exempted from WARN coverage.

Marques v. Telles Ranch, Inc.[53] involved agricultural workers, a group more traditionally regarded as "seasonal." The court held that the defendants' termination of their own lettuce harvesting operations[54] was a WARN event because the defendants had failed to prove that the employees knew, at the time they were hired, that their employment was temporary. The court noted that seniority status had been given after a probationary period and maintained from season to season.[55] In addition, a handbook was distributed to employees describing rights, such as a medical plan that could be continued during the off-season, vacation pay, and paid holidays.[56] Moreover, at the end of every season, each employee had been given a "layoff slip" that gave a date to call for information regarding the start of the next season.[57] Under these circumstances, the court concluded, "the actions of Defendants and the benefits provided by Defendants in the aggregate would lead an employee to believe that he or she was hired for more than just one season."[58]

In each of these cases, then, the court did not allow an expansive interpretation of the exemption that would have limited WARN coverage. Rather, each court properly looked to the reasonable expectations of the employees that they would return to work after any "seasonal" layoff.

A different type of temporary employment—a hiring hall arrangement—was at issue in *New Orleans Clerks Local No. 1497 v. Ryan–Walsh Inc.*[59] The employer, Ryan–Walsh, had provided stevedoring, terminal, and float crane services in the Port of New Orleans. It was a member of the New Orleans Steamship Association ("NOSSA"), through which it hired longshoremen pursuant to collective bargaining agreements between NOSSA and various unions. Longshoremen were paid centrally, with one check representing the total time

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51. *Id.*
52. *Id.* at 1299.
53. 867 F. Supp. 1438 (N.D. Cal. 1994).
54. The employers had decided to contract out their harvesting to another company the following year. *Id.* at 1440.
55. *Id.* at 1444.
56. *Id.*
57. *Id.*
58. *Id.*
59. 10 Indiv. Empl. Rts. Cas. (BNA) 1061 (E.D. La. 1995).

worked for any member employer during the pay period. Benefits and grievances were also handled by NOSSA.[60]

Ryan–Walsh gradually reduced its operations in New Orleans, eventually terminating nine salaried and hourly nonbargaining unit employees and reducing its use of longshoremen.[61] The court concluded that the longshoremen had suffered no WARN "employment loss,"[62] and that, in any event, the temporary employment exemption applied.

The stipulated facts indicated that the work of most longshoremen varied according to the work available. Depending on the type of ship, a "gang" might have priority to work on subsequent days if unloading the particular ship required more than one day, but it would have no claim of priority for the next ship. The court concluded, in effect, that the longshoremen worked on a series of temporary employments for the various stevedores. That is, the employment was "comprised of the loading or unloading of particular vessels and [was] complete with the vessel's departure."[63] Although not discussed by the court, the second prong of the exemption, the employees' understanding of the temporary nature of the employment, could presumably be found from the practices of the stevedoring industry in that location.

In applying the temporary employment exemption, the court did not specifically discuss certain longshoremen who "were assigned to 'permanent' gang rosters or were otherwise considered 'regulars' of Ryan–Walsh."[64] These regulars could work for other stevedores if their "designated stevedore" had no work, and even "regular" gang foremen could work for other gangs if they were not leading their own gang.[65] The available records indicated that these regulars "promptly" went to work for other stevedores.[66] Since the court gave only a limited description of their relationship with Ryan–Walsh, it is not possible to determine if the exemption was properly applied to these employees. For instance, the opinion does not indicate if the regular gang members had priority on Ryan–Walsh jobs, were expected to work for Ryan–Walsh if work was available, or performed the majority of their work for Ryan–Walsh. Such facts might suggest that those workers were closer to an example given by the DOL of a "core staff" retained by a shipbuilder, which moves from project to project.[67] The DOL concluded that although the projects might be classified as temporary, the employees might not be classified as temporary, as they would not have the understanding that they were hired for a

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60. *Id.* at 1062–63.

61. *Id.* at 1062. Suit was brought on behalf of the longshoremen and the clerical staff. *Id.* Terminations of clerical workers were too few to constitute a WARN event.

62. *See infra* notes 127–31 and accompanying text.

63. 10 Indiv. Empl. Rts. Cas. at 1064.

64. *Id.* at 1063.

65. *Id.*

66. *Id.* at 1065.

67. Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16,042, 16,056 (1989).

specific project.[68] In the DOL's example, however, unlike the Ryan–Walsh situation, the employer kept the employees on the payroll between projects. Retention on the payroll would be evidence of an understanding on both sides that the employment relationship was ongoing. If Ryan–Walsh "regulars" were expected to work for Ryan–Walsh if work were available, that fact might indicate a similar understanding.

Presumably, the *Ryan–Walsh* court did not address these issues because it concluded that the employees had not suffered employment losses. In a future case, these questions may have to be explored.

II. EXCLUSIONS FROM THE DEFINITION OF EMPLOYMENT LOSS

Congress clearly intended that WARN would apply (absent exemptions or excuses) when employees suffer long term or permanent breaks in their employment. Conversely, WARN should not apply if they do not. Thus, a critical issue in WARN's application is the determination of whether an event has resulted in employment losses.

Sales and relocations or consolidations of all or part of a business are expressly addressed under the heading "Exclusions from definition of employment loss."[69] The case law demonstrates that there may be other situations that result in employees experiencing technical terminations of their employment, but no long-term or permanent breaks before reemployment with the same or a successor company. A number of cases, using what one court has described as a "practical, effects-driven analysis of whether a break in employment actually occurred,"[70] have identified what might be described as implied exclusions from the definition of employment loss.

A. Relocation or Consolidation

In the case of a closing or layoff resulting from a consolidation or relocation, an employee will not be considered to have suffered an employment loss if: (1) the employer offers a transfer, with no more than a six month break in employment, to a site that is within a reasonable commuting distance, or (2) regardless of distance, if the employee accepts the offer to transfer within thirty days.[71]

Although the statute does not define "relocation" or "consolidation," the regulations provide that these terms mean "that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of

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68. *Id.*

69. 29 U.S.C. § 2101(b) (1994).

70. Martin v. AMR Servs. Corp., 877 F. Supp. 108, 113 (E.D.N.Y. 1995), *aff'd sub nom.* Gonzalez v. AMR Servs. Corp., 68 F.3d 1529 (2d Cir. 1995).

71. 29 U.S.C. § 2101(b)(2) (1994).

employment and that transfer results in a plant closing or mass layoff."[72] The Sixth Circuit recently considered whether a plant closing came within this provision in *Saxion v. Titan-C-Manufacturing, Inc.*[73]

In *Saxion*, the Titan-C plant had been closed ten days after the employees were given notice of the closing. At the time they were notified, the employees were also given a letter confirming the closing and purporting to offer them jobs, at equal wages, benefits, and seniority, at the Titan-S facility, which was apparently a corporate affiliate of Titan-C.[74] Before and after the letter was distributed, however, the employees were orally told that such positions were not guaranteed and would be at decreased wages, benefits, and seniority. Seventeen of the former employees subsequently secured employment at Titan-S.[75]

Titan-C contended that it had no WARN liability because it had relocated its business and offered to transfer its employees to another facility.[76] The court, however, found no evidence in the record that Titan-C's business had been relocated to Titan-S. Moreover, evidence presented after the conclusion of the trial on liability[77] indicated that the plant had been closed because Titan-C had lost a customer that accounted for ninety percent of the plant's business.[78] As a result of the closing, the remaining business was then transferred to Titan-S. The court concluded that the statutory exclusion could "only apply where the closure was the result of the transfer, not the other way around."[79] Since any transfer of the employer's business resulted from the closing of the facility, the court held, the employer had not shown that there was a relocation within the meaning of the statute. Accordingly, the court did not reach the issue of whether the district court had correctly concluded that the offers of employment were not valid.

Although the result in *Saxion* may be correct, the Sixth Circuit's focus on the timing of the decisions seems misguided. The fact that the employer first determined that the plant would close and then decided to transfer its remaining

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72. 20 C.F.R. § 639.3(f)(4) (1997).

73. 86 F.3d 553 (6th Cir. 1996).

74. The opinion refers to it as "a separate corporate entity." *Id.* at 555.

75. It is not clear precisely how many employees were terminated, as the number of employees was one of the contested issues. Although the employer contended that on average there were fewer than 100—and that WARN did not, therefore, apply—it did not count employees on temporary or sick leave or on vacation. The court credited the plaintiffs' evidence that there were 143 employees in the two months preceding the closing. *Id.* at 557.

76. The opinion does not discuss whether the Titan-S facility was "within a reasonable commuting distance" of Titan-C.

77. At trial, the district court had ordered a bifurcation of the liability and damage issues because of a misunderstanding about the scope of the issues to be considered. 86 F.3d at 555.

78. *Id.* at 557. Because this evidence was offered after liability had been determined, the Sixth Circuit held that the defendant could not avail itself of the unforeseeable business circumstances defense. *Id.* at 558 n.1.

79. *Id.* at 558.

business should not preclude application of the exemption. The real issues were whether, as a result of these events, there were bona fide job opportunities at the other site for a sufficient number of employees and whether they received valid offers for these positions.[80] If so, those employees did not suffer an employment loss and WARN was not implicated. From the facts given, however, it appears that this was not the case and, therefore, WARN liability was properly imposed.

B. Sale of a Business

When a business is sold, there may be a range of results. The seller's employees may simply become the purchaser's employees, with no loss of working days and no change in terms and conditions of employment. Such a situation is presumably not one that WARN was intended to cover.[81] On the other hand, hundreds of employees may lose their jobs as a result of the sale or may suffer the types of reductions in hours[82] that would qualify as employment losses.

Earlier versions of the bill provided that a sale of all or part of an employer's business would be exempt from WARN if the purchaser agreed in writing to hire all or substantially all of the seller's employees, with no more than a six month break in employment.[83] Thus a sale was exempted from WARN coverage if the parties provided beforehand that no mass dislocation of workers would result from the sale.

The rather peculiarly constructed final congressional enactment does not require any arrangement between the purchaser and seller and does not exempt a sale of a business per se.[84] Rather, the sale may result in no WARN event because

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80. In *Carpenters District Council v. Dillard Department Stores, Inc.*, 790 F. Supp. 663 (E.D. La. 1992), *aff'd in part on other grounds and rev'd in part on other grounds*, 15 F.3d 1275 (5th Cir. 1994), *and cert. denied*, 115 S. Ct. 933 (1995), the court used the regulations regarding transfer to determine whether certain employees had received and declined job offers and had, therefore, voluntarily terminated their employment. Although the court quoted the statute and used the standards expressed in the regulations, there was no discussion of whether there had been any transfer of the business from the sites that had been closed in connection with a merger. *Id.* at 668–72.

81. *See* 20 C.F.R. § 639.6 (1997) ("Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.").

82. 29 U.S.C. § 2101(a)(6)(C) (1994).

83. *E.g.*, 133 CONG. REC. S9385 (daily ed. July 8, 1987).

84. 29 U.S.C. § 2101(b)(1) (1994) provides that:

> In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this

there are insufficient employment losses. The statute accomplishes this indirectly, by providing that any person who is an employee of the seller as of the effective date of the sale is considered to be an employee of the purchaser immediately after that date.[85] Thus if an employee simply moves from employment with the seller to employment with the purchaser, he or she will be deemed to have suffered no employment loss.

Assuming a WARN event has occurred, there is an additional issue of who, as between the seller and the purchaser, is responsible for giving WARN notice and, therefore, is liable if notice is not given. The statute assigns the responsibility for giving notice to the seller for a WARN event that occurs "up to and including the effective date of the sale" and to the purchaser for an event that takes place thereafter.[86] One set of commentators has noted that what this division of responsibility means in practice is "problematical."[87] As these commentators observe, the case law to date has not explicitly dealt with this issue.[88]

Headrick v. Rockwell International Corp.,[89] exemplifies the type of situation that Congress undoubtedly intended to put outside of WARN's reach. Rockwell had transferred its Management and Operating Contract with the Department of Energy to another company, a transaction that the court found to constitute a sale.[90] The purchaser had agreed to assume all of Rockwell's employer

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chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

85. *Id.* Part-time employees are excluded.

86. *Id.*

87. Lipsig & Fentonmiller, *supra* note 9, at 301.

88. *Id.* at 302. The authors suggest two possible interpretations. A "functional interpretation" would shift responsibility to the purchaser if employees work for the seller through the close of business immediately before the effective date of the sale and are laid off in connection with the sale, even if they are formally laid off by the seller before the sale. Such an interpretation would place responsibility with the entity that makes the decision to retain or terminate the employees. *Id.* at 301–02. A "formalistic interpretation" would place responsibility with the purchaser only if the employees remain employed by the seller after the effective date and are then laid off on account of the sale. *Id.* at 301. Given the potential problems of interpretation, the authors suggest that purchasers and sellers expressly provide for indemnification for WARN liability in the sales agreement. *Id.* at 303.

89. 24 F.3d 1272 (10th Cir. 1994).

90. *Id.* at 1281. The plaintiffs argued that the transfer was not a sale of a business under WARN because the business was operated under a government contract and could not, therefore, be sold. The court rejected that argument, concluding that under "basic common law principles," the transaction—"a transfer of property for real consideration"—was a sale. *Id.*

Other courts have considered whether a transaction was a sale under this provision. In *Oil, Chemical & Atomic Workers International Union v. CIT Group/Capital Equipment Financing, Inc.*, 898 F. Supp. 451 (S.D. Tex. 1995), the secured lenders of a bankrupt employer purchased the assets of the employer at a foreclosure sale but had notified the examiner in bankruptcy prior to the sale that they did not intend to retain any employees.

responsibilities, agreed with the union to assume or honor the collective bargaining agreement and offered employment to all of Rockwell's salaried workers on the same terms they had enjoyed with Rockwell. No plaintiff "lost a single day's wages or any accrued seniority."[91]

Almost two years later, however, the plaintiff employees claimed that they were entitled to WARN remedies.[92] The district court concluded that each employee had experienced a technical employment "termination," but that Congress had not intended that WARN cover such an "ephemeral" termination.[93] The Tenth Circuit, however, found the sale of business provision dispositive. In the court's view, "Congress explicitly stated that employees who find themselves transferred from one company to another because of a sale simply are not to be held by any court to have suffered a remediable 'employment loss.'"[94]

The employees were not as fortunate in *Hotel Employees Union, Local 274 v. Stadium Hotel Partner.*[95] In that case, the sale of a hotel resulted in the termination of all employees represented by the plaintiff unions. The court held that the purchaser had no liability under WARN because it was never the "employer" of the terminated employees. The basis for this conclusion, however, was collateral estoppel on that issue, based on findings adverse to the plaintiffs in prior administrative and judicial proceedings involving other labor law issues.[96]

Apart from the issue of collateral estoppel, it does not appear that WARN liability could properly have been imposed on the purchaser.[97] The opinion

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The employees argued, inter alia, that the lenders became employers under WARN's sale provision. The court disagreed, finding that applying WARN to a sale of the assets of a business "would lead to anomalous and surely unintended results." *Id.* at 457.

In *International Alliance of Theatrical & Stage Employees v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 514 (1995), the dissent argued that the sale appeared to be one of assets without a transfer of liabilities and that, therefore, the purchaser was not excluded from WARN liability because the purchaser "hired" the majority of the seller's employees. *Id.* at 1471. The majority concluded, however, that the asset sold was the business of the seller and that the sale provision applied. *Id.* at 1467; *see infra* notes 101–08 and accompanying text.

In *Carpenters District Council v. Dillard Department Stores, Inc.*, 790 F. Supp. 663 (E.D. La. 1992), *aff'd in part on other grounds and rev'd in part on other grounds*, 15 F.3d 1275, *and cert. denied*, 115 S. Ct. 933 (1995), the court held that a merger was not a sale because it did not result in a sale of the employer's business or assets, but only a change in the ownership of its stock. *Id.* at 666. As a result, the court did not allocate liability between the two companies based on when the terminations occurred. *See infra* note 168.

91. 24 F.3d at 1274.

92. The plaintiffs also unsuccessfully asserted claims for severance pay, under ERISA and common law, and for accrued vacation pay. *Id.* at 1274.

93. *Id.* at 1280.

94. *Id.*

95. 10 Indiv. Empl. Rts. Cas. (BNA) 1064 (E.D. Pa. 1995).

96. *Id.* at 1067.

97. The unions had dismissed both the seller and the hotel management firm from the suit. *Id.* at 1065.

indicates that at some point prior to entering into the sales agreement, the purchaser had refused to assume the collective bargaining agreement. The employees were terminated by the seller "shortly before" the sale became effective, although it is not clear whether this was on the effective date of the sale. Whatever the precise time of the termination, it was undoubtedly clear to the seller that the purchaser did not intend to retain the employees and that a WARN event would, therefore, occur. Although the statute may not be entirely clear, it seems likely that Congress did not intend to permit a seller to unilaterally avoid WARN responsibility; a seller should not be able to shift responsibility to the purchaser simply by refraining from giving notice of termination until the effective date of the sale or shortly thereafter.

Other cases fall between the extremes of *Headrick* and *Stadium Hotel*. In *Alter v. SCM Office Supplies, Inc.*,[98] some of the seller's employees were hired by the purchaser. The plaintiffs claimed that both the purchaser and the seller were liable under WARN. The seller, however, was in bankruptcy, and all proceedings against it had been stayed. Accordingly, only the potential liability of the purchaser was considered.

The purchaser argued that there was no actual employment relationship from which the plaintiffs could have been terminated because on the date of the sale the seller had notified all employees that their employment was terminated as of that date. The court reasoned that WARN's sale of business provision created a "fictional" employment relationship with the purchaser on the date of sale, from which WARN liability could arise.[99] However, the court concluded that the purchaser was not liable because the WARN threshold of fifty employment losses had not been met.[100]

Whether WARN applies when the purchaser offers different terms and conditions of employment than those given by the seller was the issue in *International Alliance of Theatrical Employees v. Compact Video Services, Inc.*[101] A few days before the closing of the sale, the seller notified the employees that after the sale they would no longer be employed by the seller. Prior to the closing, the purchaser notified all but five of the employees that they would be employed by the purchaser. Many of the employees, however, took pay cuts and lost benefits.

In the plaintiffs' suit against the seller, the court concluded that the purchaser would be responsible for any WARN liability because the sale provision

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98. 906 F. Supp. 1243 (N.D. Ind. 1995).

99. *Id.* at 1248–49.

100. *Id.* at 1251. Although more than 50 of the seller's employees did not secure employment with the purchaser, the court determined that fewer than 50 of them had suffered employment losses. In reaching this result, the court excluded, as voluntary departures, those who did not apply for employment and an employee who refused to take a drug test. Also excluded were a former employee found to be unavailable for work due to disability and employees who were part-time within the meaning of the statute. In addition, four employees who were terminated when they failed their drug tests were deemed to have been discharged "for cause." *Id.* at 1249–51.

101. 50 F.3d 1464 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 514 (1995).

"allocates notice responsibility to the party who actually makes the decision that creates an 'employment loss.'"[102] The court found, however, that there was no employment loss because the employees had merely been shifted from one employer to another as a result of the sale.[103]

Citing the legislative history, the plaintiffs contended that the sale provision only excluded liability if there were no significant changes in the employment.[104] The changes in the terms of their employment, the plaintiffs argued, constituted employment losses. The court rejected this position, finding that a reduction in pay and benefits was not within the stated definition of employment loss.[105] The court noted that the express inclusion in the definition of certain reductions in hours was persuasive evidence that WARN does not apply to other modifications of employment.[106]

In both *Compact Video* and *SCM Office Supplies*, the courts implicitly decided that the employees of a seller who must apply for employment with the purchaser and are "hired" at the purchaser's discretion do not suffer an employment loss.[107] The contrary view, urged by the dissent in *Compact Video,* is that a hiring within the purchaser's discretion is not simply a change in the identity of the employer.[108] Rather, in such circumstances, the termination by the seller constitutes a true employment loss, which is no less a loss because the employee subsequently secures a job with the purchaser. Ultimately, the issue is whether WARN protects employees who are at risk of long term breaks in employment or only those who actually suffer such breaks. The cases appear to take a result-oriented approach, at least when the subsequent employer is the purchaser. Such an approach is not ruled out by the literal terms of the statute and is arguably consistent with WARN's focus on the effects of employment dislocations. Indeed, it could be argued that Congress was not concerned with the details of whether a purchaser wishes to screen its future employees or to consider its employment needs, so long as the purchaser hires a sufficient number of the seller's employees to avoid the unannounced mass dislocations WARN was enacted to address.

The result-oriented approach, however, is not without limits. At least one court has concluded that obtaining employment with a company to whom the former employer has subcontracted the work does not eliminate the original employer's WARN liability. In *Kalwaytis v. Preferred Meal Systems, Inc.,*[109] the

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102. *Id.* at 1468.

103. *Id.* at 1467–68.

104. *Id.* (citing 134 CONG. REC. 16,026 (1988) ("It would seem fairly obvious that *if the business continues on as before with no significant changes of any kind,* that there would be no need to go through the formal notification process.") (emphasis in original)).

105. *Id.* at 1468 (citing 29 U.S.C. § 2101(a)(6) (1994)).

106. *Id.* at 1468–69.

107. *Id.* at 1469–71 (Ferguson, J., dissenting); Alter v. SCM Office Supplies, 906 F. Supp. 1243,1247–48 (N.D. Ind. 1995).

108. 50 F.3d at 1469–71 (Ferguson, J., dissenting).

109. 78 F.3d 117 (3d Cir. 1996), *cert. denied,* 117 S. Ct. 73 (1996).

employer "laid off" eighty-five employees. The employees were informed that the employer would no longer be performing the work for which the employees would normally have been recalled later, since the employer had subcontracted with another entity for that work. The employees were advised to apply to the subcontractor for employment.[110] The subcontractor ultimately hired fifty-four of the employees. Had the transaction been a sale, there would presumably have been no WARN event, since fewer than fifty employees "lost" employment. The court, however, declined to "explore the analogies" to *Headrick* and *Compact Video*,[111] and the employer was, therefore, not allowed to benefit from the fact that its terminated employees found employment elsewhere.

C. Implied Exclusions

The statute deals expressly with employment loss in the context of relocations and consolidations and more or less expressly as to sales. The case law demonstrates, however, that there are other situations that call into question whether a technical termination of an existing employment relationship comes within either the letter or spirit of a WARN employment loss.

In an early case, *UMW v. Harman Mining Corp.*,[112] the court considered whether employees who exercise bumping rights suffer an "employment loss." The employer had eliminated fifty-seven positions at one of its facilities. However, fourteen of those employees exercised bumping rights, resulting in the termination of fourteen bumpees at another facility. The court concluded that the WARN threshold of fifty employees had not been met because only forty-three workers at the first site were terminated. The court found that the plain language of the statute indicated that the bumpers had suffered no employment loss. The court reasoned that the statute delineates certain events as employment losses and bumping to another position is not among these events. Therefore, bumping to another position was not intended to be considered an employment loss.[113] Thus, in the view of the

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110. The employees were initially told that the subcontractor had an "immediate offer of employment." In a follow up letter, however, the employees were advised that any offer of employment would be at the discretion of the subcontractor, which had also placed ads in the local papers seeking applicants. *Id.* at 119.

111. *Id.* at 120. The court also rejected the argument that the employer and subcontractor constituted joint employers on the grounds that the employer had provided no evidence other than the union's assertion of joint employer status in an unresolved National Labor Relations Board proceeding. *Id.* at 119–20.

112. 780 F. Supp. 375 (W.D. Va. 1991).

113. *Id.* at 377–78. As to the 14 bumpees at the second site, the court concluded that they were not to be counted in determining employment losses for the first site. The court referred to the definition of employment loss as well as an example given in the DOL discussion. In discussing whether notice to bumpees was required, the DOL stated that

> if an employer closes an operating unit which employs 55 workers and, because of crossplant bumping rights, 6 workers at another site lose their jobs, (and if these facts can be accurately predicted 65 [sic] days in advance of the closing date) the plant closing threshold has not been met

Harman Mining court, a change to a different position within the employer's operation, even if as a result of a layoff or termination from an existing position, is not an employment loss.

Other courts have taken a similarly functional view of employment loss. In *Moore v. Warehouse Club, Inc.*,[114] the defendant announced the closing of one store and invited the employees to apply for employment at its other stores. In determining whether at least fifty employees had suffered an employment loss, the court considered two employees who had accepted positions with another of defendant's stores on the same day as the closing and "transferred to this store without a break in employment."[115]

The court began with the statutory definition of "employment loss"[116] and noted that the statute does not define "employment termination." The court took the dictionary definition, "'[t]o discontinue the employment of,'" as the ordinary meaning of termination. The court also noted that certain employees are excluded from those employees considered to have suffered an employment loss, quoting the relocation and consolidation exclusion as an example.[117]

The plaintiffs argued that the relocation exclusion required that the offer of transfer be made "prior to" the plant closing, not on the same day. In the court's view, the plaintiffs had not focused on the "critical issue" of whether the two employees had suffered an employment loss and, therefore, had overlooked both the underlying purpose of WARN and basic principles of statutory construction.[118] If there was no employment loss, there was no need to provide time for retraining and reemployment. Nor was there a need to interpret any exclusion to employment loss when employment loss was "inapplicable to the facts."[119] The two transferred employees suffered no employment loss. "Rather, they continued to be employees of Warehouse Club, albeit in different positions at another location. The plant closing, therefore, had no effect on their employment status and WARN's notice provisions have no application as to them."[120]

In *Gonzalez v. AMR Services Corp.*,[121] the Second Circuit endorsed the district court's "'practical, effects-driven analysis of whether a break in

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at the first site.

Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16,042, 16,047 (1989). The DOL went on to note, however, that an action at one site may trigger a WARN event at another site. *Id.*

114. 992 F.2d 27 (3d Cir. 1993).

115. *Id.* at 29.

116. 29 U.S.C. § 2101(a)(6) (1994).

117. 992 F.2d at 29–30 (citing 29 U.S.C. § 2101(b)(2) (1994)).

118. 992 F.2d at 30.

119. *Id.* at 30.

120. *Id.* at 30.

121. 68 F.3d 1529 (2d Cir. 1995), *aff'g* Martin v. AMR Servs. Corp., 877 F. Supp. 108 (E.D.N.Y. 1995).

employment actually occurred.'"[122] In *Gonzalez*, the employer had eliminated a department and notified the employees that they had been "surplussed." Meeting the fifty employment losses threshold would have required inclusion of eighteen employees who had been placed in other positions pursuant to the employer's reduction in force policy. Those employees experienced no gap in pay; they were laid off as of May 31, paid through Friday, June 4, and began new jobs the following Monday, June 7.[123]

Citing *Moore* and *Headrick*, the district court in *Martin* regarded the essential issue to be "whether, as a practical matter, a break in employment actually occurred."[124] Absent such a break, the court concluded, there is no need for the protection offered by the statute: time for retraining or reemployment.[125] At worst, the transferred employees had faced a risk of being laid off if they were unable to transfer to other positions by utilizing the reduction in force policy. Since the employees were able to transfer, their employment was continuous and, the court found, they did not experience employment losses.[126]

New Orleans Clerks Union Local No. 1497 v. Ryan–Walsh, Inc.,[127] did not involve a transfer to a new position with the same employer, but rather the withdrawal of one of a pool of employers. At issue was whether longshoremen who worked for various stevedores under a hiring hall arrangement suffered employment losses when one stevedore reduced its operations at the port.[128] The court cited *Martin*, *Moore*, and *Headrick* in concluding that there was no WARN event. The court found that the longshoremen "pursue[d] short-lived opportunities to work for the various...stevedore-members and follow[ed] the work from one stevedore to the next."[129] Even as to longshoremen who had been "regulars" of Ryan–Walsh, the available records indicated that they "promptly" went to work for other stevedores at the port."[130] Thus, the court concluded, "[a]s a practical matter these workers suffered no loss of employment."[131]

The above cases implicitly conclude that WARN's application does not depend on the nature of the event but rather on its consequences. Thus, an event that is nominally a closing or reduction in force will not be a WARN event if it does not result in a mass dislocation of workers from their employer, or, as in *Ryan–Walsh*, from the pool of employers. Although the statute expressly denominates only certain events as exclusions from employment loss—sales,

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122. *Id.* at 1531 (quoting *Martin*, 877 F. Supp. at 113).
123. *Id.* at 1530.
124. 877 F. Supp. at 112–13.
125. *Id.* at 113.
126. *Id.* at 117.
127. 10 Indiv. Empl. Rts. Cas. (BNA) 1061 (E.D. La. 1995).
128. As discussed *supra* notes 59–66 and accompanying text, the court also concluded that the employer was exempt from liability under the temporary employment exclusion.
129. 10 Indiv. Empl. Rts. Cas. at 1063.
130. *Id.*
131. *Id.*

relocations, and consolidations—those choices may simply reflect the specific circumstances considered by Congress. The exclusion of other events that result in only technical terminations of employment is consistent with the congressional intent underlying the express exclusions.

III. EXEMPTIONS FROM (AND INCLUSIONS IN) LIABILITY FOR A WARN EVENT

In some circumstances, an employer has no control over a decision to terminate operations or over a decision that ultimately results in a WARN event. WARN does not expressly provide that an employer is exempted from responsibility in either situation. However, based on the legislative history of WARN, the case law has allowed a limited exclusion for certain government-ordered closings. The issue of control has also been critical in extending liability to entities other than the nominal employer.

A. Exemptions

The question of potential WARN liability when a governmental entity shuts down a business was discussed at two points during the congressional debates. In the first, Senator Reid inquired about the application of WARN when a state gaming authority exercised its power to close a business.[132] In response, Senator Kennedy referred to the unforeseeable business circumstances defense and opined that "in the case of an agency coming in and ordering an immediate shutdown with no warning, the employer could not have foreseen such an action."[133]

A more extended discussion occurred over a proposed amendment that would have excluded from the definition of an "employer" any bank or savings and loan association that, in the judgment of the relevant federal agency, was "in danger of closing."[134] Concern was expressed that if such an institution was shut down, it would be liable under WARN because the unforeseeable business circumstances defense would not apply if the institution had been insolvent for some time.[135] The response was that WARN would not apply to such a closure,

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132. 133 CONG. REC. S9436 (daily ed. July 8, 1987).

133. *Id.*

134. 134 CONG. REC. S8621 (daily ed. June 27, 1988).

135. *Id.* at S8622. An additional concern was whether potential WARN liability would interfere with the ability of the relevant agencies to effect takeovers by healthy institutions. The thrust of the response to that issue was that WARN would not be implicated since most branch offices of financial institutions had fewer than 50 employees and in the usual takeover, purchasers generally do not lay off central office employees en masse. *Id.* at S8623–25. Although Senator Gramm argued that WARN would tend to impede the merging of operations, Senator Metzenbaum responded that employees were no less entitled to notice of closing or layoff because their employer was a financial institution. *Id.* at S8624.

since it would be the government, not the employer, that was ordering the closing and subsequent termination of employees. An analogy was drawn to police closing an illegal gambling operation, a health department closing a restaurant, and a sheriff carrying out an eviction.[136] The amendment was not adopted, and thus the statute contains no express reference to government-ordered closings.

Similarly, the regulations do not provide a blanket exemption for government-ordered closings, although they do note that a government-ordered closing of an employment site without notice might be an unforeseeable business circumstance.[137] In this context, the DOL distinguished between a closing ordered by, for example, a health department or the Nuclear Regulatory Commission, and actions by agencies such as OSHA or the EPA. The DOL observed that in the latter situations, where notice of violation is usually given in advance and the agency does not actually order the closing, the unforeseeable business circumstances defense might not apply.[138] The DOL distinguished all these examples, in which the employer can remedy the condition and reopen, from the "absolute" closing of a financial institution, where the ownership of the business is "ousted from control" and there is no employer to give notice.[139]

In another comment, the DOL agreed that an applicable regulatory agency ordering the closing of a financial institution is not an employer and, therefore, is not liable under WARN.[140] Some of the additional comments, however, leave open the possibility that there may be liability if the institution does not remain closed. For instance, the DOL stated that employees of a financial institution, who were rehired with the understanding that their employment would end when the affairs of the institution were wound up, would fall within the temporary projects exception.[141] In discussing the sale provision, the DOL referred to the Federal Home Loan Bank Board taking over a bank while concurrently seeking a merger candidate or new owners. The DOL concluded that the new owner would stand in the position of a purchaser under the sale provision.[142]

The first reported case involving a financial institution was clearly within the scenarios considered by Congress and the DOL. In *Office & Professional Employees International Union v. Federal Deposit Insurance Corp.*,[143] terminated employees of a closed bank sought, inter alia, to impose WARN liability. Although

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136. *Id.* at S8623.

137. 20 C.F.R. § 639.9(b)(1) (1997). The DOL declined the invitation to create such an exception, based on the lack of statutory language to support it. Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16,042, 16,054 (1989).

138. Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. at 16,054.

139. *Id.*

140. *Id.* at 16,045.

141. *Id.* at 16,056.

142. *Id.* at 16,053.

143. 138 F.R.D. 325 (D.D.C. 1991).

the court did not cite to the legislative history or the DOL discussion, it echoed that language in dismissing the WARN count. The court held that:

> When the federal authorities take over the bank and shut it down, there is no employer to give notice. The former bank owners do not own the bank; nor did they close the bank. Moreover, the federal government is precisely not an employer if it is shutting the bank down.[144]

In *Buck v. Federal Deposit Insurance Corp.*,[145] however, the two failing banks were not closed. The FDIC had determined that the least costly resolution was the formation of a bridge bank to acquire the assets and liabilities while an acquisition candidate was sought. The employees of both banks were retained by the bridge bank. Five months later, the successful bidder purchased certain assets and assumed certain liabilities of the bridge bank and offered employment to approximately two-thirds of the employees of the bridge bank. Suit was brought against the FDIC, as receiver of the bridge bank, by former employees who were not offered employment by the purchaser.

The plaintiffs conceded that WARN would not have applied if the FDIC had closed the banks. The court concluded that Congress must have intended that the FDIC would be able to take less drastic action, such as forming a bridge bank, without incurring liability. The court stated that the legislative history demonstrated that "Congress understood that the WARN act did not cover the actions of the FDIC in resolving bank failures."[146]

The latter conclusion is somewhat broader than its support. Congress (as well as the DOL) appears to have considered some, but not all, of the situations that may occur in the salvage of a failing institution. It appears fairly clear that financial institutions were to be exempted from liability when the agency ordered the closing. On the other hand, both the legislative history and the DOL comments suggest that the termination of employees after an acquisition may trigger WARN liability. The issue of an interim institution does not appear to have been specifically considered. Nonetheless, it does not appear that either Congress or the DOL anticipated that liability would be imposed against the assets of a bank closed by the government, as the plaintiffs sought to do in *Buck*.

The other reported case dealing with a government-ordered closing concerned a hotel and casino owned by defendant Elsinore Shore Associates.[147] After an extended period of oversight and after appointment of a conservator, the state Casino Control Commission ordered the closing of the casino. Initially, the

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144. *Id.* at 327.

145. 75 F.3d 1285 (8th Cir. 1996).

146. *Id.* at 1291.

147. Hotel Employees Int'l Union Local 54 v. Elsinore Shore Assocs., 768 F. Supp. 1117 (D.N.J. 1991), *rev'd on motion for reconsideration sub nom.* Finkler v. Elsinore Shore Assocs., 781 F. Supp. 1060 (D.N.J. 1992).

court granted the defendant's motion for summary judgment.[148] The court concluded that, although the employer had implemented the closing, the Commission, not the employer, had ordered it. The court found that the plain language of the statute, the legislative history, and the DOL commentary indicated that WARN should not apply in such circumstances.[149]

A few months later, however, on motion for reconsideration, the court reversed its own ruling and concluded that there was no blanket exemption for government-ordered closings.[150] Revisiting the DOL commentary and the legislative history, the court concluded that the interpretation consistent with these discussions was that government closings of financial institutions are exempt, but other government closings are not, unless they are "absolute," that is, the owners are ousted from control.[151] Since the owners of the casino were not ousted from control, but rather proceeded with a sale of the assets, the closing was not exempt from WARN.[152] The court did, however, leave open the possibility that the employer might demonstrate that the closing was an unforeseeable business circumstance.[153]

Thus, with respect to government-ordered closings, the case law to date has allowed only a narrow exclusion from responsibility. At least one court has concluded that lack of control over the decision to close does not relieve an employer of liability in other contexts. In *Local 217, Hotel & Restaurant Employees Union v. MHM, Inc.*,[154] the owner of a hotel, rather than the defendant management firm, had ordered the cessation of the hotel's operations. The management firm argued that it was not the "employer" for purposes of WARN "because it could not control either the timing or the substance of [the owner's] decisions regarding the continuation of the hotel's operations."[155] The Second Circuit rejected this argument, finding that such a circumstance was not a reason to "ignore the plain import of the statutory language" and to allow the management firm, which "bargained with, hired, fired, supervised, paid and ultimately laid off the employees" to avoid liability under WARN.[156] Thus, the employer's inability to control the closing did not provide a basis for an exemption from WARN liability.

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148. 768 F. Supp. 1117. In a prior decision on a motion to dismiss the complaint, the court held that the conservator appointed by the Commission had not succeeded to the employer's obligations under WARN and, accordingly, a claim had been stated against the employer. Hotel Employees Int'l Union Local 54 v. Elsinore Shore Assocs., 724 F. Supp. 333 (D.N.J. 1989).

149. 768 F. Supp. at 1123–27.

150. 781 F. Supp. 1060.

151. *Id.* at 1065.

152. *Id.* at 1066–67.

153. *Id.* at 1066.

154. 976 F.2d 805 (2d Cir. 1992).

155. *Id.* at 808.

156. *Id.* The court went on to say that the defendant "voluntarily exposed itself to the obligations imposed by WARN" by failing to secure contractual arrangements that would have either required sufficient notice from the owner or indemnity for WARN

B. Inclusions

Given the fact that an employer implementing a plant closing or mass layoff may have limited assets, it is not surprising that plaintiffs have attempted to extend WARN liability to entities other than the nominal employer. While the statute does not directly address this issue, the regulations, in defining who the employer is, acknowledge the possibility that parent companies and contracting companies may share WARN liability for their subsidiaries and independent contractors.[157] While suggesting some factors to be considered in such a determination,[158] the DOL disclaimed any intent to create a new body of law. The DOL purported to "summarize existing law developed under State Corporation Law" and federal labor and benefits statutes.[159]

In *Local 397, International Union of Electronic Workers v. Midwest Fasteners, Inc.*,[160] the court examined the issue of a parent company's WARN liability from three perspectives: (1) so-called "federal common law alter ego doctrine";[161] (2) the "single employer" theory under federal labor statutes;[162] and (3) the factors enumerated by the DOL.[163] The court determined that the employer would not be liable under the alter ego test, but might be liable under the single employer theory because of the functional integration of its operations. Ultimately, however, the dispositive factor was the court's conclusion that the parent had exercised de facto control over the decision to close the plant. Thus, although corporate formalities were observed, the court found that the parent was "manipulating the decisionmaking of the subsidiary" and as the "true wrongdoer should not escape liability."[164]

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liability. *Id.* Other courts have rejected arguments by plaintiffs that similar facts in their litigations precluded application of the unforeseen business circumstances defense, noting that *MHM* did not expressly discuss the availability of that defense. *E.g.*, International Bhd. of Teamsters v. American Delivery Serv. Co., 50 F.3d 770, 777 (9th Cir. 1995); Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc., 826 F. Supp. 326, 333 (C.D. Cal. 1993). While the criticism of that dicta as applied to the defense is well placed, the Second Circuit's comment does underscore the reality that employers in the position of MHM should be cognizant of potential WARN liability in structuring their contractual arrangements.

157. 20 C.F.R. § 639.3(a)(2) (1997).

158. Those factors are: "(i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations." *Id.*

159. Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16,042, 16045 (1989).

160. 779 F. Supp. 788 (D.N.J. 1992).

161. *Id.* at 792–96.

162. *Id.* at 796–98.

163. *Id.* at 798–800.

164. *Id.* at 800.

Two cases subsequent to *Midwest Fasteners* used a similar analysis but did not find the requisite degree of control to impose liability on the parent.[165] In *International Brotherhood of Teamsters v. American Delivery Service Co.*,[166] the Ninth Circuit noted *Midwest Fasteners, Santa Fe Terminal Services*, and *Florence Mining*, but concluded that it would be "unduly complicated" to consider the factors separately under each body of law when "the basic point of the inquiry is clear."[167] In the view of the Ninth Circuit, the essential issue was whether the parent "structured its relationship with [its subsidiary] in such a fashion as to control [the subsidiary] and, at the same time avoid [the parent's] obligation under federal law."[168] As to that issue, the court identified disputed issues of fact precluding summary judgment.[169]

Plaintiffs have attempted to extend liability based on "control" beyond the parent/subsidiary relationship to creditors who make decisions that result in WARN events. Courts that have considered the question have held that a secured creditor does not become an employer within the meaning of WARN simply because the exercise of its rights leads to a WARN event for its debtor's employees. In *Chauffeurs Union Local 572 v. Weslock Corp.*,[170] the Ninth Circuit stated that the "crucial question" was whether, at the time of the closing "the defendant [was] responsible for operating the business as a going concern."[171] Under such a test, the court stated, a creditor could be held to be an employer under WARN. In the case before it, however, the court found no evidence that,

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165. United Mine Workers v. Florence Mining Co., 855 F. Supp. 1466 (W.D. Pa. 1994) (finding that evidence indicated that any de facto control of mining company by utility companies ended prior to relevant time period, when operating agreement was terminated); Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc., 826 F. Supp. 326 (C.D. Cal. 1993) (finding that subsidiary operated independently).

166. 50 F.3d 770 (9th Cir. 1995).

167. *Id.* at 776.

168. *Id.* at 776; *see also* Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 790 F. Supp. 663 (E.D. La. 1992), *aff'd in part and rev'd in part*, 15 F.3d 1275 (5th Cir. 1994), *and cert. denied*, 115 S. Ct. 933 (1995). The district court originally treated the transaction as a sale and would have assigned liability between the buyer and seller according to whether the layoffs were prior to or after the sale date. Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 778 F. Supp. 297, 303 n.3 (E.D. La. 1991). In a later opinion, the court concluded that the transaction was a merger in which the former employer became a wholly owned subsidiary of the acquiring corporation. 790 F. Supp. 663, 667. The merger agreement gave the acquirer the power to control the employer's board, and, indeed, the defendants had stipulated that the acquirer was responsible for the decisions to close the sites, to terminate employees, and whether to issue WARN notices. *Id.* at 666. Accordingly, the court concluded that the acquiring company and the employer were jointly liable. *Id.* The Fifth Circuit affirmed as to this issue. 15 F.3d at 1282 n.12.

169. 50 F.3d at 776. The court also determined that the issue of control by the parent would affect the availability of the unforeseeable business circumstances defense, since the alleged circumstance was the cancellation of the contract with the parent. *Id.* at 777; *see* discussion *infra* notes 252–58 and accompanying text.

170. 66 F.3d 241 (9th Cir. 1995).

171. *Id.* at 244.

prior to accepting the surrender of the debtor's assets after refusing to advance further funds, the creditor had operated the business. Rather, the creditor had done no more than exercise the kind of controls a lender might exert over a defaulting debtor.[172]

The Eighth Circuit reached a similar conclusion in *Adams v. Erwin Weller Co.*[173] Neither the financial control exerted by the lender nor the alleged "influence" over the management of the company was found sufficient to impose WARN liability on the creditor.[174]

In sum, the courts to date have strictly limited an employer's exemption from liability based on lack of control over a decision resulting in a WARN event. Conversely, the possibility of liability for other entities who control such decisions has been established.

IV. EXCUSES FOR A SHORTENED NOTICE PERIOD

WARN specifies three situations in which an employer's failure to give the full sixty days notice will be excused. First, a plant closing may be ordered on fewer than sixty days notice if the employer is a faltering company.[175] Second, a plant closing or mass layoff may be ordered on shortened notice if it is caused by business circumstances not reasonably foreseeable as of the time that notice would have been required.[176] Third, no notice is required if the closing or mass layoff is due to a natural disaster.[177] A number of cases have considered the first two affirmative defenses, but to date there are no reported cases on the third defense.

A. A Threshold Issue: Adequacy of the Statement of Reasons

The statute provides that an employer relying on one of the three defenses "shall give as much notice as practicable and at that time shall give a brief statement of the basis for reducing the notification period."[178] A recent case has given the latter clause heightened significance, holding that an adequate "brief statement" is a requirement for asserting these defenses. In *Grimmer v. Lord Day & Lord*,[179] the defendant law firm distributed a notice to employees on September 1,

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172. *Id.* at 245.

173. 87 F.3d 269 (8th Cir. 1996).

174. *See also* Oil, Chem. & Atomic Workers Int'l Union v. CIT Group/Capital Equip. Fin., Inc., 898 F. Supp. 451 (S.D. Tex. 1995). The court held that lenders who acquired the assets of a bankrupt in a foreclosure sale did not become employers of the bankrupt's employees by virtue of having chosen "to create [a] situation which resulted in the termination of employment" for the plaintiffs. *Id.* at 455. The court's treatment of the sale provision is discussed *supra* at note 90.

175. 29 U.S.C. § 2102(b)(1) (1994).

176. *Id.* § 2102(b)(2)(A) (1994).

177. *Id.* § 2102(b)(2)(B) (1994).

178. *Id.* § 2102(b)(3) (1994).

179. 937 F. Supp. 255 (S.D.N.Y. 1996). The author was formerly a partner in the

which stated that their employment would terminate on September 30. The notice further provided that "[t]he Firm was not able to give greater advance notice of this termination since this termination arises from unforeseeable business circumstances."[180] The former employees brought a class action against the firm under WARN. In its answer, Lord Day asserted both the faltering company and unforeseeable business circumstances defenses. The employees, however, sought partial summary judgment striking those defenses on the ground that the firm had failed to include "a brief statement of the facts constituting the basis for giving shortened notice."[181] The court agreed with the plaintiffs' position and granted the motion.

In reaching this conclusion, the court referred to two other reported decisions discussing the adequacy of the "brief statement."[182] One opinion, referred to in a footnote in *Grimmer*,[183] does not report the actual wording of the notice but simply states that the notice had provided the reason for the necessity to close, that is, that the company had been unsuccessful in turning around its negative cash flow position.[184] The other case, *Alarcon v. Keller Industries, Inc.*,[185] was in an unusual posture because the plaintiffs had stipulated both that the faltering company and unforeseeable business circumstances defenses applied and that notice had been given as soon as practicable. Therefore, the only issue was whether the statement adequately set forth the basis for the shortened notice period.

The employer, Keller, had been experiencing financial difficulties, had sought new business and had sought potential buyers for the division at its lender's insistence. While negotiations with one such candidate were proceeding, the lender notified Keller that it would no longer provide financing. Three days later, Keller notified its employees that their jobs would be terminated the next day. The letter to the bargaining representative stated that:

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defendant firm, but has no interest in the outcome, having left the firm before the events at issue occurred.

180. *Id.* at 256.

181. *Id.*

182. *Grimmer* did not cite two other cases that discussed this point. In *United Paperworkers International Union v. Alden Corrugated Container Corp.*, 901 F. Supp. 426 (D. Mass. 1995), the court concluded that the employers had failed to prove either defense. In addition, the employers had failed to give any written notice of the plant closings and, accordingly, had failed to give a brief written statement of reasons. In dicta, the court opined that "it appears likely that this failure alone would constitute sufficient grounds to deny the applicability" of the defenses. *Id.* at 440. Similarly, in *Carpenters District Council v. Dillard Department Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 933 (1995), the Fifth Circuit suggested that the lack of the brief statement would have made the defense unavailable. The court noted that even if the employers had "fallen within the scope" of either defense, they had failed to provide the brief statement. *Id.* at 1282 n.12.

183. 937 F. Supp. at 257 n.1 (citing *In re* Old Electralloy, 162 B.R. 121 (Bnkr. W.D. Pa. 1993)).

184. 162 B.R. at 126.

185. 27 F.3d 386 (9th Cir. 1994).

> The operating performance of the furniture division has been disappointing and the substandard working capital required of business does not make it a viable entity.
>
> In an attempt to save the jobs of the Furniture Division employees, Keller pursued several options for possible purchase, but was unable to secure a qualified buyer. Further, Keller was unable to find parties interested in supplying the enormous working capital for such a high risk and under performing business....
>
> Please consider this letter to be your official notice required by the federal plant closing law, and specifically, by 2102 Section 3(b)(1) of the Worker Adjustment and Retraining Notification Act of 1988.[186]

The court noted that the statute, the regulations, and the legislative history give no guidance as to the contents required or the purpose served by the brief statement. The court opined that the purpose "must have been to provide employees with information that would assist them in determining whether the notice period was properly shortened."[187] The court concluded that an employer "must give some indication of the factual circumstances that made an exception to the statutory notice requirement applicable, providing an adequate, specific explanation to affected workers."[188] Applying this standard to the notice given in the case before it, the court found that the statement, including the reference to the specific statutory section, satisfied the standard with respect to the faltering company defense.[189] As to the unforeseeable business circumstances defense, however, the court questioned whether the notice was adequate. Although the notice referred to the inability to secure working capital, it did not mention that the lack of working capital was due to an unforeseeable event. Since the plaintiffs had conceded that the defense applied, the court declined to decide whether giving the

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186. *Id.* at 388.

187. *Id.* at 389.

188. *Id.* at 390. In reaching this conclusion, the court referred to a portion of the legislative history, which notes that the statement "should 'explain[] why earlier notice [was] not ... given.'" *Id.* at 389 (quoting H.R. CONF. REP. No. 100–576 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 2082 (alteration in the original)). Turning to the dictionary for the meanings of "basis" and "explain," the court concluded that the statement must "set forth the underlying factual events which led to the shortened period, thereby allowing workers to understand the employer's situation and its reasons for shortening the notice period." *Id.* The court also found that the brief statement is an "element" of a WARN notice. According to the court, this was suggested by the language of the regulations, which provides that the statement is "in addition to the other elements." *Id.* (quoting 20 C.F.R. § 639.9 (1997)). As an element of the notice, the brief statement was, therefore, subject to the statute's general requirements that all notice be "specific" and based on the "best information available." *Id.* at 389–90 (citing 20 C.F.R. §§ 639.7(a)(1), (4) (1997)).

189. *Id.* at 390–91.

underlying circumstances, without indicating how they led to shortened notice, was sufficient.[190]

The *Grimmer* court accepted the reasoning of *Alarcon* and also found another purpose for requiring the brief statement: to "focus[] employers on the statutory conditions that must be met to reduce the notice period" and, therefore, to discourage employers from attempting to invoke exceptions that do not apply.[191] Because Lord Day's notice did not set forth *any* facts, the firm was precluded from using the defenses. The court also rejected Lord Day's argument that, under the regulations, WARN violations should not be found on the basis of minor or inadvertent errors.[192] Lord Day's statement did not contain "errors" of fact but rather failed to give facts.[193]

The result in *Grimmer* is not mandated by the terms of the statute and the result appears rather harsh when compared to decisions in which courts have concluded either that defective notice did not amount to a violation of WARN or that any violation was committed in good faith.[194] These more lenient decisions concerned the requirements of identifying the particular employees who would suffer employment losses and the anticipated dates those losses would occur. These requirements go to the heart of WARN's purpose: providing definite notice to employees about their future status. The same cannot be said about the "brief statement" requirement, which, at most, informs employees about whether shortened notice is justified. Thus, it seems inappropriate for an employer, such as the firm in *Grimmer*, to suffer harsher consequences for failing to meet a less significant requirement.

The *Grimmer* result is also based on rather questionable assumptions. It seems unlikely that a brief statement of facts will do more than provide employees with an initial road map for discovery. Only the most trusting of employees (or their counsel) will simply assume that the facts stated are true and dispositive of

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190. *Id.* at 391.

191. Grimmer v. Lord Day & Lord, 937 F. Supp. 255, 257 (S.D.N.Y. 1996).

192. *Id.* at 257 (citing 20 C.F.R. § 639.7(a)(4) (1997)).

193. *Id.* at 257–58. Lord Day also argued that the motion should be denied because it acted in good faith. The court held, however, that the good faith provision is to be applied only after a violation has been found. Therefore, evidence of good faith might justify a reduction of liability but would not preserve the defenses to that liability.

194. *E.g.*, Saxion v. Titan-C-Manufacturing Inc., 86 F.3d 553, 561 (6th Cir. 1996) ("[N]either the Act nor the regulations suggest that defective notice is automatically to be treated as though no notice had been provided at all."); Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1287 n.19 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 933 (1995) (same); Oil, Chem. & Atomic Workers v. American Home Prods. Corp., 790 F. Supp. 1441, 1451–53 (N.D. Ind. 1992) (holding that notice that failed to give 14-day window in which terminations would occur did not satisfy the employer's WARN obligations, but applying good faith defense to relieve employer of liability); UAW, Local 1077 v. Shadyside Stamping Corp., 6 Indiv. Empl. Rts. Cas. (BNA) 1640, 1644–46 (S.D. Ohio 1991) (discussing but not deciding whether defects in notice rendered notice "ineffective," but applying good faith defense to eliminate any WARN liability).

whether the defense has been properly invoked. It is also unlikely that employers who have even the most tenuous hope of avoiding liability will refrain from invoking the defenses because they must sketch out a few facts. Indeed, some of the cases discussed below demonstrate that providing the "brief statement" prevents neither employee challenges nor unwarranted assertions of the defenses. A more likely effect of the *Grimmer* approach is that employers who receive inadequate advice from counsel may be penalized because they cannot avail themselves of a defense that would otherwise be available.

B. The Faltering Company Defense

Shortened notice may be excused if the employer is a "faltering company." By its terms, the defense applies only to plant closings and not to mass layoffs.[195] To avail itself of this defense, the employer must prove that at the time notice would have been required under WARN: (1) the employer was actively seeking capital or business; (2) the capital or business, if obtained, would have enabled the employer to avoid or postpone the closing; and (3) the employer reasonably and in good faith believed that giving the sixty day WARN notice would have prevented the employer from obtaining that capital or business.[196]

The regulations, relying primarily on the Conference Report, further define the defense. The regulations conclude that the defense is to be narrowly construed.[197] In addition, there must have been a "realistic opportunity" for the employer to obtain the financing sought;[198] the employer must be able to "objectively demonstrate" its reasonable belief that potential financing or new customers would not have been available if notice of a shutdown had been given;[199] and the actions are to be judged from a company-wide basis rather than "looking solely at the financial condition of the facility, operating unit or site to be closed."[200] The faltering company defense has been raised in few reported cases and has been successful in even fewer.

In re Old Electralloy[201] was decided in the context of a Chapter 7 proceeding. The employees were notified of the plant closing on the day it occurred, and the Chapter 7 filing was made a week later. Apart from a discussion of the steps taken to secure capital, the court's consideration of the elements of the defense was rather cursory. According to the court, the company had not discussed closing the plant prior to the date of closing and had simply "r[u]n out of cash."[202] There was no way, the court stated, that "the Debtor's officers could have or

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195. 29 U.S.C. § 2102(b)(1) (1994).
196. *Id.*
197. 20 C.F.R. § 639.9(a) (1997); *see* H.R. CONF. REP. No. 100–576 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 2081.
198. 20 C.F.R. § 639.9(a)(2) (1997).
199. *Id.* § 639.9(a)(4).
200. *Id.*
201. 162 B.R. 121 (Bnkr. W.D. Pa. 1993).
202. *Id.* at 125.

should have foreseen the precise date of a fatal cash flow deficiency sixty days in advance."[203] Moreover, requiring sixty days notice would have been "unreasonable...since that would have foreclosed the possibility of staying open."[204]

The court's apparent failure to fully examine the elements of the defense may, perhaps, be explained by three factors. First, the court had already determined that there was no WARN event because fewer than fifty employees had suffered an employment loss during the relevant period.[205] Second, the court concluded that the employer would have been entitled to elimination of any WARN liability under the good faith provision.[206] Finally, the court was influenced by the fact that any liability would ultimately have been borne by the creditors, as the company was in liquidation.[207]

Whatever the reason, the court's cursory application of the defense is unfortunate. If there is one clear message from the legislation, it is that an employer must take its employees' interests into account. Even when a business is in dire financial circumstances, the employer is excused from giving sixty days notice only if realistic efforts to save the business were being made and WARN notice would have impeded those efforts. Not requiring proof of these elements does violence to the defense. Moreover, it is inconceivable that Old Electralloy's management could not have foreseen that its cash would run out at some point, whether or not it could have precisely forecasted the exact day on which this would occur. WARN simply does not permit an employer to avoid liability by sticking its head in the sand.[208]

Other courts have looked more closely at the elements of the defense. In *United Paperworkers International Union v. Alden Corrugated Container*

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203. *Id.*

204. *Id.* at 125–26.

205. *Id.* at 124.

206. *Id.* at 126. The court also gave only superficial consideration to the requirements of the good faith provision. *See infra* note 307.

207. 162 B.R. at 126. Indeed, the court characterized monetary liability under WARN as "a penalty imposed upon the employer." *Id.* Thus the court concluded that the creditors, rather than the employer, would suffer this "penalty" if WARN liability were imposed. WARN payments to employees, however, are not a form of penalty but rather a substitute for the time employees would have to adjust if the full 60 days notice had been given. That the company is in bankruptcy does not change the impact of a closing on the employees and, therefore, should not effect the liability *vel non* of the employer. Indeed, other courts have concluded that WARN claims of former employees of Chapter 7 debtors are entitled to priority under 11 U.S.C. § 507(a)(3) (1994). *See In re* Riker Indus., Inc., 151 B.R. 823 (Bnkr. N.D. Ohio 1993); *In re* Cargo, Inc., 128 B.R. 923 (Bnkr. N.D. Iowa 1992); *see also In re* Hanlin Group, Inc., 176 B.R. 329 (Bnkr. D.N.J. 1995) (reaching the same conclusion in a Chapter 11 proceeding).

208. Indeed, other courts have concluded that an employer in exigent financial circumstances should have foreseen that it would be forced to close. *See infra* notes 280–83 and accompanying text.

Corp.,[209] for instance, the court determined, after a trial on stipulated facts, that the employers[210] could not avail themselves of the defense.[211] The court found an absence of proof as to each element of the defense. There was no evidence of what steps had been taken to obtain new business, whether the business sought would have postponed the closing, or whether giving WARN notice would have compromised these opportunities. The court also considered, but did not decide, whether seeking a sale constituted seeking capital within the requirements of the defense.

In *Wallace v. Detroit Coke Corp.*,[212] the court found that several issues of material fact precluded summary judgment for the employer on the faltering company defense.[213] One issue was whether four coke plants were operated as a single employer and, therefore, whether the employer's financial condition should be viewed in the context of the entire operation. The plaintiffs presented evidence of commingling of assets, centralized control of labor, and examples by plaintiffs' expert of "substantial financial arrangements" within the company.[214] Plaintiffs' expert also asserted that the employer had not been seeking capital in a "commercially reasonable" way. Specifically, the expert said that the employer had sought funds from only one source and had offered no new sources of collateral, despite being aware that its financial condition made it unattractive to lenders. Moreover, the employer had sought only one-third of the amount of its projected need.[215]

The court also noted that the employer had been seeking to sell the plant, which the court deemed to be "an option not covered under" the faltering company defense.[216] On this issue, the court cited *Local 397, International Union of Electronic Workers v. Midwest Fasteners, Inc.*,[217] in which the court held that coordinating a sale of the business is not an action that allows an employer to utilize the defense.[218] The *Midwest Fasteners* court reasoned that if Congress had intended to include attempts to sell the business, a sale would have been among the

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209. 901 F. Supp. 426 (D. Mass. 1995).

210. The court concluded that two subsidiaries owned by a common holding company were a single business enterprise because of common ownership, interlocking directors and cross-collateralization of loans. *Id.* at 436–39.

211. The court also concluded that the employers were not entitled to either the unforeseeable business circumstances defense or a reduction of liability for good faith. *See infra* notes 282–83, 333 and accompanying text.

212. 818 F. Supp. 192 (E.D. Mich. 1993).

213. The employer's motion for summary judgment on the unforeseeable business circumstances defense was also denied. *See infra* notes 280–81 and accompanying text.

214. 818 F. Supp. at 197.

215. *Id.* at 198 n.2.

216. *Id.* at 197.

217. 763 F. Supp. 78 (D.N.J. 1990) (denying motion for preliminary injunction prohibiting employer from dissipating its assets).

218. *Id.* at 83. Although some efforts to seek financing sources had been made, those efforts had apparently ended at the time WARN notice would have been required. *Id.* at 80.

examples mentioned in the legislative history.[219] The fact that sales were specifically addressed in another provision also suggested to the court that Congress "did not overlook the possibility that a sale might affect a plant closing."[220]

Unlike *Old Electralloy*, *Midwest Fasteners*, *Detroit Coke*, and *Alden Corrugated Container* are more consistent with congressional intent that the defense be construed narrowly. In each of these cases, the court properly required proof of each element of the defense and did not permit the employer to be excused from compliance simply because it was in poor financial health.

None of the cases, however, gave any extended analysis to the question of whether seeking a sale should qualify as seeking capital. Although a sale is not expressly mentioned in the legislative history or regulations, a sale does have the potential to preserve jobs. A sale agreement might, for instance, be structured to require assurances from the purchaser that the facility would remain open or require the purchaser to assume any WARN liability. If there is a realistic opportunity to accomplish what obtaining capital or new business might accomplish—preserving jobs—it is difficult to see why efforts to sell a business should not qualify for the defense. This interpretation would not be precluded by the existence of the sale provision. The sale provision comes into play only when a sale has actually occurred, which is presumably not the case if the faltering company defense is being invoked.

The employer in *Carpenters District Council v. Dillard Department Stores, Inc.*[221] did seek to assert the faltering company defense, although the transaction, a merger, had been consummated. However, in connection with the merger, two sites were closed and employees were terminated. Thus, the employer was not seeking to resolve its difficulties in a manner that would have preserved the jobs in question. The Fifth Circuit, therefore, found no "causal connection" between the employer's search for a new line of credit and the closings, and the employer was denied the benefit of the defense.[222]

C. The Unforeseeable Business Circumstances Defense

An employer may give fewer than sixty days notice of a plant closing or mass layoff "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

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219. *Id.* at 83. As noted by the court, the Conference Report mentions employer efforts "to obtain a loan, to issue bonds or stock, or to secure new business." H.R. CONF. REP. No. 100-576 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 2082.

220. 763 F. Supp. at 83.

221. 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 933 (1995).

222. *Id.* Moreover, giving WARN notice would not have jeopardized the employer's plans, since the acquiring company intended to and did close the facilities involved.

required."[223] This provision generated a good deal of discussion in the Senate. The comments included objections to the perceived ambiguity of the standard, with its inherent potential for litigation,[224] and discussions of whether particular circumstances would be deemed foreseeable.[225]

Notwithstanding these comments, the statute does not delineate events that constitute unforeseeable business circumstances, and the DOL expressly declined to promulgate a regulation identifying certain events as unforeseeable per se.[226] Both the Conference Report and the regulations, however, give examples of situations that may give rise to this defense. Examples include: natural disasters;[227] sudden and unexpected terminations or repudiations of major contracts; sudden, unexpected and dramatic economic changes such as price, cost, and declines in orders; strikes at major suppliers; and government-ordered closings.[228] In addition, in response to comments, the DOL concluded that this defense should not be construed narrowly, unlike the faltering company defense.[229]

The reported cases include some of the given examples, as well as others not specifically mentioned. In most of these cases, there was extensive inquiry into the underlying facts, focusing on one or both of the two key elements of the defense: causation and foreseeability.

1. Cancellation of a Major Contract

The reported cases demonstrate a spectrum of "foreseeability" along which cancellation of a contract may fall. At one end, the cancellation may be abrupt and without warning. For instance, in *UAW, Local 1077 v. Shadyside Stamping Corp.*,[230] the employer was notified in September 1988 that one of its primary customers would be withdrawing its work starting in February 1989. Another major customer gave notice, in March 1989, that it was canceling one of its purchase orders. Notice to the union of the cancellations and the projected layoffs was provided within a few days of each event. The first notice was given

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223. 29 U.S.C. § 2102 (b)(2)(A) (1994).

224. *E.g.*, 133 CONG. REC. S9401 (daily ed. July 7, 1987) (statement of Sen. Thurmond); *id.* at S9424 (statement of Sen. Chafee).

225. *E.g.*, 133 CONG. REC. S9414 (daily ed. July 7, 1987) (statement of Sen. Quayle).

226. Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16,042, 16,062 (1989).

227. Shortly before the Senate bill was passed, an amendment was adopted which treats natural disasters separately. 134 CONG. REC. S8686 (daily ed. June 28, 1988). As enacted, the statute requires *no* notice if the WARN event is "due to a natural disaster." 29 U.S.C. § 2102(b)(2)(B) (1994).

228. H.R. CONF. REP. No. 100–576 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 2082; 20 C.F.R. § 639.9(b)(1) (1997).

229. Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. at 16,061.

230. 6 Indiv. Empl. Rts. Cas. (BNA) 1640 (S.D. Ohio 1991), *aff'd*, 947 F.2d 946 (6th Cir. 1991).

five months before the first layoffs were implemented. There was apparently no real dispute that the cancellations were unforeseen and the cause of the layoffs and that notice had been given as soon as practicable. Thus, the court was not called upon to make these factual determinations in applying the defense. Rather, the issue, which was not resolved, was whether the notices were ineffective because they did not specify the job titles or names of workers who would be laid off or the exact dates of the layoffs.[231]

The customer decisions in *Shadyside Stamping* were apparently unexpected. However, a cancellation may be preceded by indications of the customer's dissatisfaction, attempts to salvage the situation, and even a default by the employer that would entitle the other party to cancel. Under such circumstances, the primary issue to be determined is whether the employer acted reasonably in not foreseeing that the cancellation would occur.

Jones v. Kayser–Roth Hosiery, Inc.[232] was such a case. In December 1988, the employer, Kayser–Roth (KR), a hosiery manufacturer, began to experience problems with the quality and completeness of shipments to its primary customer, J.C. Penney (JCP). These problems persisted and resulted in significant complaints from JCP, a series of customer audits of the products, meetings with JCP and withdrawal of portions of the business. On May 25, 1989, KR was informed that JCP had decided to withdraw the major line supplied by KR, bringing the total JCP business lost to ninety-five percent. That decision was confirmed on May 26, and KR was given a phase out schedule on June 8. KR requested and was given a meeting with JCP senior management on June 21. At the meeting, JCP informed KR that the May decision was final and would not be reversed. Notice was given to employees on June 26 that the plant would close on September 8. Many employees, however, were terminated on the day that notice was given.[233]

KR argued that the unforeseeable business circumstances defense excused its failure to give sixty days notice. The plaintiffs argued that: (1) the withdrawal of the JCP business was not the cause of the closing; (2) the cancellation was foreseeable sixty days before the event occurred; and (3) in any event, KR did not give as much notice as was practicable.

On causation, the plaintiffs' position was that the plant was reaching the end of its useful life and that the withdrawal of the JCP business was simply the "last straw."[234] The court, although noting long running concerns with overcapacity

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231. Because the events in this case occurred before the final regulations became effective, the court adopted the DOL's suggestion that substantial compliance would be sufficient. *Id.* at 1645 (citing 53 Fed. Reg. 48,885 (1988)). While the court did not resolve the issue of whether there had been such compliance, the court found that the employer was entitled to be relieved of any liability under the good faith provision. *Id.* at 1646–48; *see infra* notes 310–13 and accompanying text.

232. 748 F. Supp. 1276 (E.D. Tenn. 1990).

233. *Id.* at 1283.

234. *Id.* at 1285.

at the plant, credited the evidence that the employer was trying to keep the plant open and had made substantial efforts to save the JCP account.[235] The loss of that account, which represented forty percent of the production, but the majority of the profit, made it no longer economically feasible to keep the plant open.[236]

On foreseeability, the court found that KR could not have reasonably foreseen losing the JCP account on April 26, which was sixty days before the first notice should have been given. The court noted that the relationship between KR and JCP was one that had extended over a period of at least thirty years. Notwithstanding the problems, the court found that KR had not been given a specific deadline for correcting the problems and there was no indication that JCP expected an immediate turnaround. Indeed, there were some indications that JCP was willing to allow KR until at least July to turn the situation around and had been favorably impressed with KR's efforts in that regard.[237]

The court did conclude, however, that the employer had committed a WARN violation. KR had been informed in May, thirty days before notice was given, that it had lost all but an insignificant part of the JCP business. The court held that KR should have known then that the plant would have to be closed. The subjective belief of KR's management, that the decision was not firm and could be reversed, was "not relevant to the duty to give notice" and was not "commercially reasonable."[238] Thus, the "sudden, dramatic and unforeseen" event was JCP's May decision, not its later refusal to reconsider that decision.[239] Accordingly, the employer was found to have been in violation from two days after the May decision until the date the notice was actually given in June.

International Association of Machinists v. General Dynamics Corp.[240] and *Loehrer v. McDonnell Douglas Corp.*[241] each concerned the same joint contract to build aircraft for the U.S. Navy. Several months before the actual cancellation, problems had developed and the contractors had told the government they would not be able to absorb the projected cost overruns.[242] The contractors failed to deliver the first plane on schedule, and the navy served notice that the contract was in jeopardy.[243] Prior to the cancellation, there were several months of communications between the contractors and government officials, "which varied from contentious to conciliatory."[244] Finally, on December 14, 1990, the Secretary of Defense directed the navy to show cause by January 4, 1991, why the contract should not be canceled. The navy, in turn, notified the contractors that unless

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235. *Id.* at 1286.
236. *Id.*
237. *Id.* at 1288.
238. *Id.*
239. *Id.*
240. 821 F. Supp. 1306 (E.D. Mo. 1993).
241. 98 F.3d 1056 (8th Cir. 1996).
242. 821 F. Supp. at 1308.
243. *Id.*
244. 98 F.3d at 1057.

specified conditions were cured by January 2, 1991, the contract might terminate.[245] Despite negotiations, the contract was canceled for default on January 7, 1991.

In both cases, the courts concluded that the failure to give sixty days notice[246] was excused under the unforeseeable business circumstances defense. Apparently, neither set of plaintiffs contested whether the terminations had been caused by the cancellation. Both courts judged foreseeability with reference to what the *McDonnell Douglas* court called the "rather unique, politically charged area of defense contracts."[247] The Eighth Circuit noted that in the months preceding the cancellation, there had been expressions of support for the program in Congress and by navy officials.[248] There was testimony in *General Dynamics* that in defense contracting, overruns and slippages are "not uncommon" and actual cancellations are rare.[249] Both courts concluded that a defense contractor exercising reasonable business judgment would not necessarily have concluded that the contract would be canceled.[250]

It is obviously possible to criticize the determinations in these three cases.[251] Certainly there were facts in each case that would justify a conclusion that the employer should have foreseen the cancellation before it did. On the other hand, the results can also be defended by focusing on the particular contexts—the thirty-year relationship in *Jones* and the politics and past history in the aircraft cases. The necessary absence of any bright line may mean that a decision about whether an event was reasonably foreseeable will frequently be one about which reasonable minds may differ.

An additional question as to foreseeability may arise when the party who canceled the contract was a parent corporation. In *International Brotherhood of*

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245. 821 F. Supp. at 1310.

246. Both employers had issued what was described as conditional WARN notice in December, following the navy's notice, which informed employees that their employment might be terminated if the contract were terminated. 821 F. Supp. at 1310; 98 F.3d at 1059. Nonconditional notices were given on January 10. The two plaintiffs in *McDonnell Douglas* had not been given conditional notice, but rather received notice on January 14 and 15 of layoffs effective January 25 and 29, respectively. As the court concluded, however, the regulation authorizing conditional notice makes such notice optional and provides that failure to give conditional notice cannot be the basis for imposing liability. *Id.* at 1063 n.9; *see* 20 C.F.R. § 639.7(3) (1997); Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 16,042, 16,059 (1989).

247. 98 F.3d at 1062; *accord* 821 F. Supp. at 1312 (the "unique context" of defense contracting).

248. 98 F.3d at 1062.

249. 821 F. Supp. at 1310.

250. *Id.* at 1312; 98 F.3d at 1062 ("Placing some emphasis on this underlying context," the employer's conduct was "in accord with what would be expected from a reasonable defense contractor.").

251. *See, e.g.*, McLeod, *supra* note 15, at 222–23 (criticizing the result in Jones v. Kayser–Roth Hosiery, Inc., 748 F. Supp. 1276 (E.D. Tenn. 1990)).

Teamsters v. American Delivery Service Co.,[252] the Ninth Circuit found that issues of fact precluded summary judgment on the issue of whether the parent and subsidiary constituted a "single employer" and were thus jointly liable under WARN.[253] Resolution of the single employer issue was also necessary to determine if the unforeseen business circumstances defense applied. As the court stated, "Presumably, one integrated business entity cannot suddenly lose a major contract with itself."[254]

In *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc.*,[255] the plaintiffs argued that the parent corporation's decision could not have been unexpected since two of the subsidiary's directors, as directors of the parent company, made the decision to cancel the contract, and three of them made the decision to award it to another company. The court rejected this argument, stating that, despite the interrelationships, the evidence at trial supported the subsidiary's position that it did not know that the contract would be canceled.[256]

In its separate consideration of the parent's liability, the court found that the subsidiary maintained independent operations and that the parent did not exercise de facto control over the subsidiary.[257] Accordingly, the court concluded that the parent and subsidiary did not constitute a single employer.[258] Had the court reached the opposite conclusion, the result as to foreseeability would presumably have been different.

2. Government-Ordered Closings

As discussed in Part III, *supra*, neither the statute nor the regulations exempt closings ordered by a governmental entity from the definition of a WARN event. To date, only closings of financial institutions have been held to be exempt.[259] Even if such a government-ordered closing is not exempt, however, it may still constitute an unforeseeable business circumstance. For instance, in the *Elsinore Shore Associates* litigation,[260] the court ultimately concluded that even if the employer could not show that the closing was one in which the employer was ousted from control and, therefore, exempt from WARN liability, it might still show that the closing had not been foreseeable.[261]

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252. 50 F.3d 770 (9th Cir. 1995).

253. *Id.* at 776; *see supra* notes 166–69 and accompanying text.

254. *Id.* at 778.

255. 826 F. Supp. 326 (C.D. Cal. 1993).

256. *Id.* at 332. The court did find, however, that the employer had failed to give written, rather than telephonic, notice as soon as practicable. Accordingly, the employer was held to have been in violation of WARN for six days. *Id.* at 333.

257. *Id.* at 335.

258. *Id.*

259. *See supra* notes 143–53 and accompanying text.

260. Finkler v. Elsinore Shore Assocs., 781 F. Supp. 1060 (D.N.J. 1992). For a discussion of *Finkler*, see *supra* notes 147–53 and accompanying text.

261. 781 F. Supp. at 1066.

In *Bradley v. Sequoyah Fuels Corp.*,[262] the Nuclear Regulatory Commission ("NRC") did not take the formal step of ordering a shutdown of the employer's nuclear processing plant but likely would have if the employer had not agreed to do so. The shutdown was part of a sequence of events leading to the decision to close the plant, events which the court found to be unforeseeable.

The initial event was a sudden and unexpected leak of a toxic and lethal gas. The NRC was notified by telephone, and the employer agreed to shut down the plant until approval to reopen was given by the NRC.[263] A few days later, the employer concluded that the plant would not be able to reopen for at least nine months and, indeed, might never reopen, given its past problems with the NRC. The employer was already in poor financial health because of an earlier NRC-ordered shutdown, during which no employees had been laid off, but no revenues had been generated. The employer determined that it could not continue operations without an advance of funds, which its parent company declined to provide. Accordingly, the employer decided not to restart operations.[264]

Although there was some dispute as to the root cause of the accident, the court found that any negligence on the part of the employer would not have made the release of gas reasonably foreseeable. Rather, the court concluded, that event, as well as the indefinite shutdown, the inability to generate revenues during the shutdown, and the parent's refusal to make further advances, were all "sudden and unforeseeable" events.[265]

The plaintiffs also disputed causation. Several months prior to the shutdown, the employer had begun negotiating with a competitor to form a partnership, a deal that was executed after the decision to close was made and on the same date that the employees were notified of the plant closing. The terms of the arrangement discussed would have resulted in "mothballing" most of the employer's plant. The plaintiffs argued that the employer had used the accident as an excuse to evade WARN notice for a closing that had actually been contemplated for several months.[266] The court dismissed this argument in a footnote, finding that the consummation of the deal was "tenuous" after the accident and that there was no evidence that the employer had tried to "manufacture" a defense.[267]

Despite the coincidence of timing, permitting the defense was proper. Certainly if all that had transpired was the formation of the partnership followed by a plant closing without sufficient notice, the employer would have been liable under WARN. However, regardless of the employer's prior intentions, the accident and its effects were unforeseeable business circumstances within the meaning of the defense.

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262. 847 F. Supp. 863 (E.D. Okla. 1994).
263. *Id.* at 865.
264. *Id.* at 865–67.
265. *Id.* at 869.
266. *Id.* at 866.
267. *Id.* at 870 n.13.

3. Sudden Economic or Financial Changes

As noted, the legislative history and the regulations both suggest that certain economic or financial changes may be unforeseeable within the meaning of WARN. In *Chestnut v. Stone Forest Industries, Inc.*,[268] the alleged unforeseeable event was a precipitous drop in the price for southern yellow pine lumber, the primary product of the defendant lumber mill. The plaintiffs contended that the employer anticipated, or should have anticipated, the WARN event. Specifically, the plaintiffs contended that the employer knew, five or six months prior to the layoffs, that unless the economic downturn that had begun months earlier were to reverse, changes in the workforce would have to be made. Moreover, the plaintiffs argued, "it was unreasonable for management to push ahead toward the brink of economic failure...when it knew that conditions for the plant were, and had been so dismal, and...that its forecasting methods were, and had been, routinely overly optimistic."[269]

In response, the employer argued that it did not anticipate a major economic downturn, pointing to its increased production a few months earlier and its prediction that prices would increase. In defense of that prediction, the employer identified the factors it had considered.[270] The plaintiffs, however, pointed to factors that the defendant's prediction failed to take into account.[271]

The court declined to decide whose predictors were more valid or reasonable. Relying on the regulations,[272] the court concluded that the employer was not required to accurately predict "general economic conditions" that might also affect the demand for its product but was only required to prove that it exercised "commercially reasonable business judgment."[273] Such commercially reasonable business judgment, the court found, was to be determined by reference to "what a similarly situated employer would do in predicting the demands of its particular market."[274]

On that issue, the employer had offered the testimony of a competitor, who had made similar predictions of price increases and had also increased production during the same period in anticipation of those increases.[275] The plaintiffs did not rebut this testimony, but offered their own economics expert.

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268. 817 F. Supp. 932 (N.D. Fla. 1993).

269. *Id.* at 935.

270. These factors were the so-called "spring effect" (i.e., seasonal increases in demand for building supplies); decreased supplies of lumber from the Northwest and other regions because of environmental initiatives; and the competitive advantage over Canadian lumber because of an export tax then in effect. *Id.* at 935–36.

271. These included the overbuilding in the 1980's, the decline in housing starts over the preceding three years, and the negative effects of the savings and loan crisis on housing starts. *Id.* at 936.

272. 20 C.F.R. § 639.9 (1997).

273. 817 F. Supp. at 936.

274. *Id.*

275. *Id.*

Based on his trend analysis, the plaintiffs' expert characterized the defendant's predictions as "little more than wishful thinking."[276] The court, however, concluded that there was no evidence that similarly situated employers used macroeconomics to make their predictions and that, in any event, nothing in the statute "requires an employer to use the most sophisticated means available to predict the demands of his market."[277] Thus, the court found that the employer "had conducted itself as would a similarly situated lumber mill operator under similar circumstances."[278]

The plaintiffs also contended that the employer should have realized that at some price point there would have to be mass layoffs or a plant closing. The court concluded, however, that the employer did not act unreasonably because the average price had moved up after an initial drop. Even if the employer had acted unreasonably, the court concluded, WARN does not require an employer to give notice at "the initial signs of a declining market *on the chance* that the price of its product will at some later point drop dramatically."[279]

Chestnut highlights some potential issues in applying the defense to changed economic conditions. The court used the "similarly situated employer" standard suggested by the regulations but, in effect, based its determination on the actions of only one other employer. One can envision future challenges as to who is similarly situated and as to how wide the inquiry should be. The comparison group was particularly important in *Chestnut* because the court rejected the contention of the plaintiffs' expert that both employers had acted unreasonably.

The determination of foreseeability may be easier when the claimed event concerns the employer's own financial circumstances rather than external economic factors. There have been at least two cases in which the employer asserted both the faltering company and the unforeseeable business circumstances defenses, notwithstanding the inherent conflict between these two defenses. The unforeseeable business circumstances defense necessarily requires an event that is not only dramatic, but unexpected. The predicates of the faltering company defense, however, are that the employer has recognized its precarious condition and has made attempts, albeit unsuccessful, to avoid a WARN event. Thus, it is unlikely that both defenses would apply.

In *Wallace v. Detroit Coke Corp.*,[280] the particular event claimed to be unforeseen was the refusal of another company to make a payment of $459,000 to the employer. The employer, however, had planned for closing before the payment had been refused and, in any event, had determined that $15 million would be

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276. *Id.* at 936–37.

277. *Id.* at 937.

278. *Id.*

279. *Id.* The only language the court found which touched on such a possibility was the provision in the regulations regarding conditional notice. As the court observed, conditional notice would not have been appropriate since a price movement is not a definite event, the occurrence or nonoccurrence of which will necessarily result in a plant closing or mass layoff. *Id.* at 937–38 (citing 20 C.F.R. § 639.7 (1997)).

280. 818 F. Supp. 192 (E.D. Mich.1993).

needed in order to avoid closing. Thus, the court found that there were material issues of fact as to whether the refusal of payment was an unforeseen event that caused the closing.[281]

In *United Paperworkers International Union v. Alden Corrugated Container Corp.*,[282] the claimed unforeseen event was the lender calling its loan. Prior to that event, the employers had suffered several years of increasing losses. The companies were in workout mode with their lender, and suppliers had refused to provide materials except on a C.O.D. basis. The court concluded that the calling of the loan was "neither unforeseen or sudden but rather the culmination of the continuing and admittedly worsening financial devastation" suffered by the employers.[283]

In each of these cases, the court rejected the employer's attempt to characterize the last step in its financial demise as an unforeseeable circumstance. By contrast, in *Jurcev v. Central Community Hospital*,[284] the employer, although in poor financial health, arguably could not have foreseen the final event—the refusal of a foundation to provide further funding.

Several years prior to the events in question in *Jurcev*, the employer, a hospital, had established a tax-exempt foundation to which it had transferred its entire investment portfolio. The hospital's financial condition was such that it depended on subventions from the foundation to cover operating losses and to allow the hospital to remain in operation.[285] These subventions eventually invaded the principal of the foundation's assets. The foundation's board was advised in February 1990 about the invasions of principal and that its counsel and accountants were of the opinion that this circumstance might jeopardize the foundation's tax-exempt status and violate the fiduciary duties of the foundation's directors.[286] Counsel also advised the board that the foundation should not make any further subventions until repayment, replenishment, or a favorable IRS ruling was obtained. Accordingly, the foundation's board voted to halt further subventions, and the hospital's board was so informed at a meeting held later the same day. At that meeting, the hospital's administrator reported that, with its current resources, the hospital could only operate for another two weeks. The hospital's board

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281. *Id.* at 198. The court also denied the defendant's motion for summary judgment on the faltering company defense. *See supra* notes 212–16 and accompanying text.

282. 901 F. Supp. 426 (D. Mass. 1995).

283. *Id.* at 443. The employers were also denied the benefit of the faltering company defense. *See supra* notes 209–11 and accompanying text; *see also In re* Riker Indus., 151 B.R. 823, 827 (Bnkr. N.D. Ohio 1993) ("[A]lthough [the] Debtor's closing resulted from the loss of financing,...withdrawal of that financing should have been anticipated by [the] Debtor as it was, no doubt, aware of its precarious financial condition.").

284. 7 F.3d 618 (7th Cir. 1993).

285. *Id.* at 620–21.

286. *Id.* at 621.

decided to close in March 1990, and following the meeting, it began notifying employees of the upcoming closing following the meeting.[287]

The plaintiffs argued that the hospital should have been able to determine from the financial statements that the principal had been invaded in October 1989. The statements, however, were not available until after the closing had occurred, because the hospital was on a June 30th fiscal year. Moreover, the evidence indicated that none of the members of either board knew before February 1990 that invasion of the principal presented a problem.[288] Under these circumstances, the court was justified in concluding that the foundation's decision to discontinue funding was not foreseeable.[289]

4. Other Circumstances

As discussed in Part I.A, *supra*, the statute exempts a plant closing or mass layoff that constitutes a strike or a lawful permanent replacement of economic strikers.[290] The regulations also note that the unforeseeable business circumstances defense may apply if there is a strike at an employer's major supplier[291] or if a strike at the employer's facility results in a WARN event for nonstriking workers at the same or other sites.[292] What result, however, if the striking employees are terminated, rather than replaced, because of a strike? In *Teamsters National Freight Industry Negotiating Committee v. Churchill Trucking Lines, Inc.*,[293] the court held that the unforeseeable business circumstances defense applied. In its analysis of the strike exemption,[294] the court concluded that the strike caused the decision to close because the company had determined that remaining open during the strike would result in millions of dollars of losses and permanent erosion of its customer base.[295] Applying the defense, the court found that the strike was unforeseeable. The court noted that there had been no strikes in the industry for

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287. *Id.*

288. *Id.* at 626.

289. *Id.* at 627. Causation was also disputed by the plaintiffs. Specifically, the plaintiffs argued that the hospital should have realized that the advice of counsel and the accountant was "erroneous" and should have challenged the decision not to make further subventions. The court concluded, however, that the hospital could not have compelled the foundation to continue the funding, even given the common directors. *Id.* at 624.

The plaintiffs also argued that the hospital had not shown causation because it had not shown that it could not have stayed open for 60 days, i.e., the full WARN notification period. The court concluded that neither WARN nor the regulations require such a showing. *Id.* at 624–25; *accord* Loehrer v. McDonnell Douglas Corp., 98 F.3d 1056, 1061 n.7 (8th Cir. 1996); Teamsters Nat'l Freight Indus. Negotiating Comm. v. Churchill Truck Lines, Inc., 935 F. Supp. 1021, 1026 (W.D. Mo. 1996).

290. 29 U.S.C. § 2103(2) (1994); *see supra* notes 24–40 and accompanying text.

291. 20 C.F.R. § 639.9(b)(1) (1997).

292. *Id.* § 639.5(d) (1997).

293. 935 F. Supp. 1021 (W.D. Mo. 1996).

294. *See supra* notes 27–32 and accompanying text.

295. 935 F. Supp. at 1024–25.

many years, despite previous impasses in negotiations and strike authorizations.[296] No one, the court stated, including the union officials, could have "accurately or reasonably forecast a strike until the final vote was taken, and certainly not sixty days prior to the closing."[297]

Other cases have presented somewhat unusual claims. For instance, in *Carpenters District Council v. Dillard Department Stores, Inc.*,[298] the defendants claimed that their merger was an unforeseeable business circumstance. The merger required SEC approval of the registration statement followed by shareholder approval. The defendants argued that because they could not be certain when and if those approvals would have taken place, the merger was unforeseen.[299] The court, however, refused to equate uncertain with unforeseen, and gave the argument the short shrift it deserved.[300]

In *Parsley v. Kunja Knitting Mills*,[301] the employer claimed that "numerous unforeseen circumstances" had caused it to close its operations. These included the arrest of its four top managers, a continuing government investigation into criminal charges, and the resultant attrition of its customer base. The court concluded, however, that the arrests "did not occur 'out of the blue'" but were the culmination of an investigation that had begun eight months before and had included a raid on the employer's premises.[302] The employer had been aware of and cooperated in the investigation. In fact, the defendants had "planned around" the investigation, refusing to take delivery of new machinery in case the plant had to be closed.[303] Thus, the loss of customers was "not sudden and inexplicable, but gradual and linked chiefly to [the defendant's] legal woes."[304]

On the whole, employers have been fairly successful in asserting the unforeseeable business circumstances defense. The cases do not, however, appear to reflect a bias toward business, but rather acknowledge that Congress did intend to provide some measure of protection to employers for unforeseen events. Because the availability of the defense necessarily rests on the particular circumstances in which the employer found itself, any given case is unlikely to provide much guidance for the decision of a future case. Congressional concerns about the necessity for litigation may, therefore, have been well founded. Case by case determinations appear to be an unavoidable consequence of the defense.

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296. *Id.* at 1027.
297. *Id.*
298. 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 933 (1995).
299. *Id.* at 1281–82.
300. *Id.*
301. 7 Indiv. Empl. Rts. Cas. (BNA) 225 (D.S.C. 1991) (finding, on consideration of a motion for preliminary injunction, that defendant was unlikely to prevail on the merits of the defense).
302. *Id.* at 228.
303. *Id.* at 229.
304. *Id.* at 228.

V. REDUCTION OR ELIMINATION OF LIABILITY FOR GOOD FAITH

Despite a finding that a WARN violation has occurred, an employer who has failed to prevail on any other defense may still have its WARN liability reduced or even eliminated if it "proves to the satisfaction of the court that the act or omission that violated [WARN] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation" of WARN.[305]

Early commentators expressed concern about whether this provision would be applied routinely to eliminate or reduce liability in cases where liability was not exempted, excluded, or excused under other provisions of WARN.[306] To date, however, few cases have allowed a reduction of liability on this basis.[307]

Although some courts have apparently conflated the elements, the courts that have expressly delineated the requirements have stated that an employer must show both a subjective intent to comply with the statute and the objective reasonableness of its application of the statute.[308] In the cases in which the employer has prevailed, the dispositive factor appears to have been the reasonableness of the employer's position, given the difficulties in applying the statute and regulations.[309]

In *UAW, Local 1077 v. Shadyside Stamping Corp.*,[310] for instance, the events took place before the final regulations went into effect. Although the court did not resolve the issue of whether the defective notice substantially complied with the requirements of the interim regulations,[311] the court concluded that the employer had reasonable grounds for its belief that the contents of the notice were sufficient. The court noted that the statute does not specify the required contents of

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305. 29 U.S.C. § 2104(a)(4) (1994).

306. McLeod, *supra* note 15, at 224–25 (predicting that good faith might become the "catch-all" excuse for employers who did not meet requirements of other provisions); McHugh, *supra* note 11, at 68–69 (advocating repeal or modification of good faith provision).

307. *In re Old Electralloy*, 162 B.R. 121 (Bnkr. W.D. Pa. 1993), is aberrational in that the good faith provision (as well as the faltering company defense) was applied with only the most cursory discussion and with little regard for the stated requirements. *See supra* notes 201–07 and accompanying text. In concluding that the employer's liability should be eliminated under the good faith provision, the court stated only that there had been no "secret plans" to close the facility and that the debtor contacted counsel in order to make sure that it complied with WARN. 162 B.R. at 126.

308. *E.g.*, Saxion v. Titan-C-Manufacturing, 86 F.3d 553, 561–62 (6th Cir. 1996); Frymire v. Ampex Corp., 61 F.3d 757, 767–68 (10th Cir. 1995), *cert. dismissed*, 116 S. Ct. 1588 (1996); Washington v. Aircap Indus., Inc., 860 F. Supp. 307, 315–17 (D.S.C. 1994).

309. One commentator has suggested that the inclusion of the good faith provision may reflect congressional recognition of "the inherent difficulties in complying with WARN." Meyers, *supra* note 14, at 307.

310. 6 Indiv. Empl. Rts. Cas. (BNA) 1640 (S.D. Ohio 1991), *aff'd*, 947 F.2d 946 (6th Cir. 1991).

311. *See supra* note 231 and accompanying text.

the notice and that the interim regulations were not widely known at the time in question.[312] The court also found that the employer had demonstrated its good faith by notifying the employees within one week of the cancellation of a purchase order from a major customer, and five months before the scheduled layoffs.[313]

The potential difficulty in discerning the statute's application and requirements has also influenced other decisions. In *Oil, Chemical & Atomic Workers International Union, Local 7–515 v. American Home Products Corp.*,[314] the employer gave notice in November that the plant would be completely shutdown by the last quarter of the following year. The notice included a tentative schedule identifying the quarter in which the employer expected to terminate each job grouping. The employer did not, however, provide later notices, at least sixty days in advance, specifying the fourteen day periods in which each group of employees would be terminated. The court concluded that the employer had violated WARN by not giving later notices.[315] However, the court also concluded that difficulties in ascertaining this requirement made the employer's failure to comply reasonable.[316]

In *Frymire v. Ampex Corp.*,[317] the Tenth Circuit held that the district court abused its discretion in failing to reduce the employer's WARN liability. The court affirmed the district court's determination that the two facilities at issue each constituted a single site of employment. Had the employer's position been correct—that the two facilities were a single site of employment—the terminations would not have met the "mass layoff" threshold of thirty-three percent of the employees suffering an employment loss and WARN notice would not have been required.[318]

The Tenth Circuit noted that the "'single site' determination has proven to be an elusive concept" and that in the case before it, "reasonable minds could come to an entirely different conclusion."[319] The court concluded that the employer's position, informed by consultation with counsel, was a reasonable one.[320] The court also found that the employer had shown good faith by consulting with counsel, giving notice of the impending layoffs months in advance, and making severance payments.[321]

Despite the complexities of the statute, positions found to be without any support have failed to meet the "reasonableness" prong of the statute. Thus, one

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312. 6 Indiv. Empl. Rts. Cas. at 1647.
313. *Id.* at 1646–48.
314. 790 F. Supp. 1441 (N.D. Ind. 1992).
315. *Id.* at 1451.
316. *Id.* at 1452–53.
317. 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 116 S. Ct. 1588 (1996).
318. *Id.* at 764–65. Because fewer than 500 employees were terminated, the event did not meet the alternative threshold for a mass layoff.
319. *Id.* at 768.
320. *Id.*
321. *Id.* at 768–71; *see infra* notes 325–27 and accompanying text.

court has found an employer's claimed exemption for "seasonal" employees unreasonable, since neither the statute nor the regulations contain such an exemption.[322] Excluding employees on temporary or sick leave or on vacation from the calculation of those who would experience an employment loss has also been found unreasonable.[323] Further, even if there are questionable issues, an employer's resolution of all such issues in its favor has undermined its claimed good faith.[324]

Courts have also considered what conduct should be taken into account in determining good faith. In *Frymire*, the employer had made over a half-million dollars of severance payments.[325] These payments did not qualify as offsets against the employer's liability, under section 2102(a)(2)(B), because the court found that there was a contractual obligation to make the payments.[326] The Tenth Circuit, however, regarded the payments as an indication of good faith and directed the district court to give "some consideration" to this fact in determining the amount of the reduction.[327]

In *Jones v. Kayser–Roth Hosiery, Inc.*,[328] however, the court, concluded that the employer's conduct after committing a WARN violation is irrelevant because the statute speaks only of whether the violation was committed in good faith. Thus, the employer's payments of severance and its regular contribution to United Way were found to have no bearing on the issue of good faith.[329] The court also found that the employer's delay in providing notice militated against application of the good faith defense.[330] Delay in giving notice has also been cited by other courts refusing to apply the defense.[331]

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322. Washington v. Aircap Indus. Inc., 860 F. Supp. 307, 317 (D.S.C. 1994); *see supra* notes 44–52 and accompanying text.

323. Saxion v. Titan-C-Manufacturing, Inc., 86 F.3d 553, 561–62 (6th Cir. 1996); *see also* United Steelworkers of Am. v. North Star Steel Co., 817 F. Supp. 522 (M.D. Pa. 1992) (refusing to apply good faith provision where employer could not show reasonable grounds for believing that failure to give any notice did not violate WARN).

324. *E.g.*, Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1287 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 933 (1995).

325. 61 F.3d at 769. According to the dissent, almost half of the employees received more in severance than they would have been entitled to under WARN. *Id.* at 776. (Kelly, J., dissenting opinion).

326. *Id.* at 770.

327. *Id.*

328. 748 F. Supp. 1276, 1291 (E.D. Tenn. 1990).

329. *Id.* at 1291; *see also* Oil, Chem. & Atomic Workers Int'l Union v. American Home Prods. Corp., 790 F. Supp. 1441 (N.D. Ind. 1992). In determining whether there was good faith, the court declined to consider any conduct "unrelated to the notice required" by WARN. *Id.* at 1452. In light of the acrimony that is reported to have surrounded this closing, the court's approach apparently redounded to the employer's benefit. *See* McLeod, *supra* note 15, at 223–27.

330. 748 F. Supp. at 1291–92.

331. *E.g.*, Local 1239, Int'l Bhd. of Boilermakers v. Allsteel, Inc., 11 Indiv. Empl. Rts. Cas. (BNA) 1348, 1350 (N.D. Ill. 1996); Washington v. Aircap Indus. Inc., 860 F. Supp. 307, 316 (D.S.C. 1994); Wholesale & Retail Food Distrib., Local 63 v. Santa Fe

The fact that counsel was consulted has not been enough, by itself, to convince courts of either good faith or the reasonableness of the employer's position. Thus an "off the cuff" consultation was unpersuasive on these issues.[332] Indeed, where questions as to WARN's application were complex, a "rather simplistic opinion of labor counsel" has been found to be an indication that good faith and reasonableness were lacking.[333]

In sum, despite early expressions of concern, courts have used the good faith provision sparingly and primarily where the violation was found to be a reasonable but incorrect interpretation of the statute or regulations. Most courts have adhered to the language of the statute, focusing on whether the violation was committed reasonably and in good faith, rather than on other conduct of the employer. Reduction of liability on this basis has, to date, been the exception rather than the rule.

CONCLUSION

A significant body of case law under WARN has developed in the years since its enactment. Early concerns notwithstanding, it cannot be said that the courts have allowed the statute to be eviscerated by the various exemptions, exclusions, and excuses. The courts have largely construed the express exemptions to coverage narrowly, and in a manner that gives effect to the reasonable expectations of employees as to continuing employment. Courts have also declined to imply a broad exemption for employers who do not control the decision that results in a WARN event. In addition, in the parent/subsidiary context, courts have been willing to look beyond the form to extend liability to a parent that controls its subsidiary's decision. While courts have found exclusions from employment loss other than those expressly set forth in the statute, those "implied" exclusions appear to be consistent with congressional concern with actual rather than technical breaks in employment.

The excuses to WARN liability provide the greatest potential for defeating the statute's underlying objective. Yet with few exceptions, courts have not permitted employers to avoid liability with conclusory assertions. To the contrary, most determinations have been informed by fairly thorough examinations of the facts. Thus, on the whole, the courts appear to have adhered to the basic presumption that sixty days notice of mass layoffs and plant closings should be given, unless the statute clearly provides otherwise.

Terminal Servs., Inc., 826 F. Supp. 326, 336 (C.D. Cal. 1993); Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1276, 1292 (E.D. Tenn. 1990).

332. *Washington*, 860 F. Supp. at 318.

333. United Paperworkers Int'l Union v. Alden Corrugated Container Corp., 901 F. Supp. 426, 443 (D. Mass. 1995).