Health Care/Labor & Employment

Hemorrhaging Hospitals: Labor Issues in the Health Care Insolvency E.R.

Scott B. Davis
Grant Thornton LLP; Charlotte, N.C.

David M. Fusco
Schwarzwald McNair & Fusco LLP; Cleveland

Sharon L. Levine
Lowenstein Sandler LLP; Roseland, N.J.

Nancy A. Peterman
Greenberg Traurig, LLP; Chicago

HEMORRHAGING HOSPITALS:

LABOR ISSUES IN THE HEALTHCARE INSOLVENCY E.R.

I. INTRODUCTION

Distressed healthcare companies must contend with the interests of several different constituencies, including secured creditors, unsecured creditors, regulators, vendors, patients and, last but certainly not least, employees. Because labor is a critical resource in the healthcare industry, employees and labor unions have the potential to become vocal and important stakeholders in a healthcare restructuring.[1]

Labor unions can exert leverage over a chapter 11 case in a number of ways. At the most basic level, a labor union can hold the same rights as any other unsecured claimholder in the bankruptcy, with the difference being that the union's claim may be very large.[2] This will often secure the union a seat on the official committee of unsecured creditors, providing it an important role in the progression of the chapter 11 case.

In addition, the union may have other forms of leverage not available to other large unsecured creditors. It may hold statutory rights under the National Labor Relations Act and other various labor laws. In addition, the Bankruptcy Code itself provides certain protections to bargained-for rights under collective bargaining agreements and pension programs. Finally, labor constituencies retain their more practical forms of leverage — such as the right to negotiate in good faith with an employer and the ability to strike — and continue to enjoy certain protections for these actions under federal labor law even when their employer is in bankruptcy.

This panel examines the role labor may play in a healthcare restructuring, reviewing both the relevant labor and bankruptcy laws and the interplay between them, and explores some practical implications of labor's role during the course of the chapter 11 case.

II. RELEVANT LAW

Among the labor law-related challenges awaiting a healthcare business entering bankruptcy are the impact of the issues associated with the rejection of collective bargaining agreements ("CBAs"), modification of pension obligations, the interplay of labor law bargaining requirements with bankruptcy laws, severance obligations and liability under the Worker

---

1 Though this article confines itself to labor issues in bankruptcy, numerous other employee issues — e.g., whether doctors' contracts constitute personal services contracts that cannot be assumed without the counterparty's consent — present themselves in healthcare restructurings.

2 Some jurisdictions permit the filing of class claims by a union, rather than claims by each individual in the class. *Compare In re Birting Fisheries, Inc.*, 92 F.3d 939 (9th Cir. 1996); *Reid v. White Motor Corp.*, 886 F.2d 1462 (6th Cir. 1989); *In re The Charter Co.*, 876 F.2d 866 (9th Cir. 1989), *with Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383 (10th Cir. 1987). Strategic considerations are also important, as labor's leverage and voting power may vary with the manner in which member claims are classified and grouped with the claims of other creditors.

Adjustment and Retraining Notification Act[3] (the "WARN Act"), and issues surrounding appointment of a patient care ombudsman.

A. Section 1113: Termination of Collective Bargaining Agreements

1. Background

The Bankruptcy Code provides debtors with the power to reject executory contracts,[4] but the ability to terminate an unexpired collective bargaining agreement contradicts federal labor law.[5] Conflict between these concepts has spawned significant litigation, legislation, and litigation in furtherance of that legislation as debtors have sought to maximize their rejection powers.

Prior to 1984, there was some judicial acknowledgment that collective bargaining agreements were qualitatively different from typical executory contracts.[6] While these cases upheld rejection, there was a clear sense that the interests of the employees in the bargaining unit must also be considered. This balance was greatly altered in 1984, when the U.S. Supreme Court issued its decision in *NLRB v. Bildisco & Bildisco*.[7] In *Bildisco* the Supreme Court held that: (a) a CBA is an executory contract; (b) rejection of the CBA is appropriate if: (1) the CBA burdens the debtor's estate, (2) after careful scrutiny, the balance of the equities favors rejection, (3) reasonable efforts to negotiate a voluntary solution are not likely to produce a prompt and satisfactory solution, but bargaining to impasse is not required, (4) a judicial finding that rejection will serve the purpose of rehabilitation of the Debtor; and (5) reasoned findings on the record as to why rejection is permissible; and (c) notwithstanding relevant sections of the NLRA, upon filing a bankruptcy petition, an employer is permitted to make unilateral modifications of the CBA until the court acts upon a rejection motion.

Bildisco provoked an absolute firestorm. Employers could reject CBAs, and therefore may brandish bankruptcy and the prospect of rejection as a negotiation tool obtain more favorable collective bargaining agreements. Congress quickly responded by enacting section 1113 of the Bankruptcy Code, which supersedes much of *Bildisco* by providing procedures and tests for rejection or modification of collective bargaining agreements in chapter 11 cases.

---

3 29 U.S.C. §§ 2101 *et seq.*

4 11 U.S.C. § 365(a) (subject to certain limitations, "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor").

5 29 U.S.C. § 158(d).

6 *See*, *e.g.*, *In re Overseas National Airways, Inc. ,* 238 F. Supp. 359 (E.D.N.Y. 1965); *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d. 164 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975); *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*, 523 F.2d 164 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975).

7 465 U.S. 513 (1984)

2. Standard for Rejection/Modification

Section 1113(f) states that: "[no] provision of [the Bankruptcy Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."[8] This ensures the terms and conditions of an unexpired CBA remain in effect until section 1113 procedures are fully satisfied. Courts have taken this requirement quite seriously: in one instance, violation of section 1113(f) doomed a subsequent motion for rejection.[9] While a CBA remains in effect, this provision also means that labor arbitration of prepetition disputes is not subject to the automatic stay, although payment on such arbitration awards will have to be handled through bankruptcy court processes.[10]

Pursuant to section 1113(c), if the debtor and union cannot come to terms over modifications to a CBA, the debtor can move for rejection of the CBA so long as it has complied with the statutory procedures for rejection. Most courts evaluate this process in light of a nine-step test first developed in *In re American Provision Co*:[11]

1. *The debtor must make a proposal to the union after filing of the bankruptcy petition, but before making a section 1113 motion.*

   The court can consider proposals that are in play up until beginning of hearing. To limit consideration to the Debtor's initial proposal would undercut the bargaining process; likewise, the bargaining process may be compromised if new proposals arising at hearing are given consideration.

2. *The proposal must be based on the most complete and reliable information available at the time of the proposal.*

   In addition to demanding such information from a debtor pursuant to the section 1113 process, a union can also consider seeking discovery pursuant to Bankruptcy Rule 2004 or exercising its rights to information under the NLRA in connection with contract enforcement or anticipated "effects" bargaining.

3. *Modification must be necessary to permit reorganization.*

---

8 11 U.S.C. § 1113(f).

9 *See In re Alabama Symphony Assoc.*, 211 B.R. 65 (N.D. Ala. 1996); *but see In re Elec. Contracting Servs. Co.*, 305 B.R. 22, 30 (Bankr. D. Colo. 2003) ("A single wrong move in exigent circumstances should not necessarily be fatal to a reorganization effort.").

10 *See In re Cont'l Airlines, Inc.*, 125 F.3d 120 (3d Cir. 1997); *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990); *In re Chestnut Hill Rehab Hosp.*, 387 B.R. 285 (Bankr. M.D. Fla. 2008); *In re Fulton Bellows & Components, Inc.*, 307 B.R. 896 (Bankr. E.D. Tenn. 2004); *In re Bunting Bearings*, 302 B.R. 210 (Bankr. N.D. Ohio 2003).

11 44 B.R. 907, 909 (Bankr. D. Minn. 1984).

There are two aspects to the necessary inquiry: (1) the standard to be applied (i.e., how necessary must the proposed modifications be?); and (2) the object of the necessity inquiry (i.e., necessary for what goal?).

In *Wheeling-Pittsburgh Steel Corp. v. United Steel Workers*,[12] the Third Circuit answered these questions by stating that rejection must be necessary for the short term goal of avoiding liquidation rather than long-term viability, and that acceptable proposals must be limited to those that are essential for continuation of the business. In contrast, in *Truck Drivers Local 807 v. Carey Transportation Inc.*,[13] the Second Circuit took an approach less favorable to labor positions, stating that the proposals only need be necessary for the long-term goal of increasing the chances for successful rehabilitation, and while such changes must be necessary, they need not be absolutely minimal.

Carey is followed in the Second Circuit by *In re Royal Composing Room, Inc.,*[14] and by the Tenth Circuit in *In re Mile Hi Metal Systems Inc.*[15] *Royal Composing Room* expands on *Carey Transportation* by holding that each "vital element" in the Debtor's proposal does not have to be tested for "necessity" so long as the entire proposal meets that requirement.

4. *Modification must provide that all affected parties are treated fairly and equitably.*

In *In re Century Brass Products, Inc.*, the Second Circuit found the purpose of this provision is to spread the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree.[16] This does not mandate measurement of pain on a dollar-for-dollar basis, but instead requires a determination of fairness under the circumstances,[17] and whether the proposal "exacts more of an economic tribute from [unionized] employees . . . than from the debtor and from other creditors."[18] While the *Wheeling-Pittsburgh* decision has been used by some unions to suggest that a "snap-back" provision restoring wages to pre-concession levels in the event of an improvement in the business's

12 791 F.2d 1074 (3d Cir. 1986).

13 816 F.2d 82 (2d Cir. 1987).

14 848 F.2d 345 (2d. Cir. 1988).

15 899 F.2d 887 (10th Cir. 1990); *see also In re Mesaba Aviation, Inc.*, 341 B.R. 693, 730 (Bankr. D. Minn.) (collecting cases using the *Carey* standard), *aff'd in part, rev'd in part by Ass'n of Flight Attendants-CWA v. Mebaba Aviation, Inc.*, 350 B.R. 435 (D. Minn. 2006).

16 795 F.2d 265, 273 (2d Cir. 1986).

17 *In re Walway Co.*, 69 B.R. 967, 974 (Bankr. E.D. Mich. 1987).

18 *In re William P. Brogna & Co.*, 64 B.R. 390, 392 (Bankr. E.D. Pa. 1986).

circumstances should be a required element of a proposal, there is case law to the contrary.[19]

5. *The debtor must provide the union with relevant information as is necessary to evaluate the proposal.*

Some courts have broadly read this duty to provide all relevant information,[20] while other courts have interpreted this duty more narrowly, such as refusing a union's request for the debtor to include information prepared by the company to evaluate the union's counter-proposals.[21]

6. *The debtor must have met with the union at reasonable times subsequent to making the proposal.*

As with the first element, the idea is to encourage bargaining at the table, rather than in court.

7. *The debtor must have negotiated in good faith concerning the proposal.*

"Good faith" is "'conduct indicating an honest purpose to arrive at an agreement as the result of the bargaining process.'"[22] This requirement is satisfied if the debtor seriously attempts to negotiate reasonable modifications of an existing CBA prior to its rejection motion.[23]

8. *The union must have refused to accept the proposal without good cause.*

The determination of whether the union has refused "without good cause" is fact-specific and determined on a case-by-case basis. There is legislative history on this point, but in practice it may come down to the union providing valid reasons for declining to accept a proposal. Stonewalling will evidence lack of good cause, such as in *In re Maxwell Newspapers, Inc.*, in which a lack of good cause was found where union adhered to demands the debtor could not meet, and failed to offer alternatives that focused on the needs of the debtor's

---

19 *See*, *e.g.*, *In re Garofolo's Finer Foods, Inc.*, 117 B.R. 363 (Bankr. N.D. Ill. 1990); *In re Sierra Steel Corp.*, 88 B.R. 337, 342 (Bankr. D. Colo. 1988) ("A 'snap-back' proposal is not a pre-requisite to a finding that the balance of equities favors rejection of a Collective Bargaining Agreement.").

20 *See, e.g., In re K&B Mounting, Inc.*, 50 B.R. 460, 467 (Bankr. N.D. Ind. 1985).

21 *In re Salt Creek Freightways*, 47 B.R. 835, 839 (Bankr. D. Wyo. 1985).

22 *In re Blue Diamond Coal Co.*, 131 B.R. 633, 646 (Bankr. E.D. Tenn. 1991) (citation omitted).

23 *In re Bowen Enters.*, 196 B.R. 734, 744 (Bankr. W.D. Pa. 1996).

reorganization.[24] Surprisingly, even proposals that may be illegal must nonetheless be considered.[25]

9. *The balance of the equities must clearly favor rejection of the agreement.*

Based on surviving aspects of the *Bildisco* decision and *Carey Transportation,* it is useful to think of the following equitable considerations as governing application of this element:

(a) Likelihood and consequences of liquidation if rejection is not permitted;

(b) The likely reduction in the creditors' claims if the bargaining agreement remains in force;

(c) The likelihood and consequences of a strike if the bargaining agreement is voided;

(d) The possibility and likely effect of any employee claims for breach of contract if rejection is approved;

(e) The cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees' wages and benefits compare to those of others in the industry; and

(f) The good or bad faith of the parties in dealing with the debtor's financial dilemma.

In reviewing this requirement, courts have also focused on the ultimate goal of chapter 11 as the successful reorganization of the debtor.[26]

3. Emergency Modifications

Pursuant to section 1113(e), interim modifications are permissible, upon notice and hearing, "if essential to the continuation of the Debtor's business, or in order to avoid irreparable damage to the estate." The Bankruptcy Code does not impose procedural

---

24 *See* 981 F.2d 85 (2d Cir. 1992).

25 *In re Mile Hi Metal Sys., Inc.*, 899 F.2d at 892 ("[The union] must work with the debtor on the allegedly illegal provisions, explaining why the union deems them unlawful and negotiating changes or alternatives which would avoid the illegality.").

26 *See, e.g.*, *In re Nw. Airlines Corp.*, 346 B.R. 307, 329 (Bankr. S.D.N.Y. 2006); *Carey Transp.*, 816 F.2d at 92-93; *Ass'n of Flight Attendants-CWA*, 350 B.R. 435, 449 (D. Minn. 2006).

requirements concerning bargaining between the parties prior to a motion for modification, but the debtor bears a heavy burden concerning such modifications.[27]

4. Consequences of Rejection

A debtor may unilaterally impose its proposed changes after rejection, but the debtor commits an unfair labor practice if it implements terms inconsistent with its section 1113 proposal.[28] Meanwhile, the debtor remains obliged to bargain with the union, and the union is free to call a strike during the post-rejection period in accordance with labor law because, once the CBA is rejected, the union is released from any no-strike promise.[29] The bankruptcy court is deprived of jurisdiction over any such strike by the Norris-LaGuardia Act.[30]

Also note that bankruptcy does not affect a debtor's obligations to engage in effects bargaining. Even when an employer's decision to change the scope of its business does not constitute a "mandatory" subject of bargaining under federal labor law, the employer must nonetheless bargain with the union concerning the "effects" of such a decision upon affected employees within the bargaining unit.[31] This obligation to bargain over effects has expressly been found to apply to a trustee in bankruptcy.[32] And as a debtor's duty to bargain remains even after rejection of a collective bargaining agreement, presumably the duty to bargain over effects likewise continues after rejection.

When rejection has occurred, there is a split in judicial authority as to whether a union is entitled to contract rejection damages as would apply to a rejected non-labor contract. In *In re U.S. Truck Co.*,[33] the court upheld rejection damages for lost future wages, but such a claim was denied in *In re Blue Diamond Coal Co.*[34] The *Blue Diamond* court reasoned that section 1113 made section 365 entirely inapplicable to collective bargaining agreements. In addition, section 502(b)(7) places a one-year limit on lost future wages for rejected employment agreements, but

---

27 *See*, *e.g.*, *In re Salt Creek Freightways*, 46 B.R. 347 (Bankr. D. Wyo. 1985) (interim changes in CBA may be authorized if evidence establishes that without such changes, company will collapse and employees will no longer have their jobs).

28 *Mile Hi Metal Sys., Inc.*, 295 N.L.R.B. 877, 878 (1989).

29 *See In re Delta Air Lines, Inc.*, 359 B.R. 491, 499-500 (Bankr. S.D.N.Y. 2007).

30 29 U.S.C. §§ 101-10, 113-15.

31 *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981).

32 *See Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983).

33 89 B.R. 618 (Bankr. E.D. Mich. 1988).

34 147 B.R. 720 (Bankr. E.D. Tenn. 1992).

at least one court has found this limitation inapplicable to collective bargaining agreements because they are not employment agreements in and of themselves.[35]

Also note that rejection might not be given retroactive treatment. Thus, in *Hoffman Bros. Packing Co.*,[36] the court held the union had administrative priority for claims arising prior to rejection.

5. Consequences of an Unrejected CBA

What happens if a plan of reorganization is confirmed, but a collective bargaining agreement is not expressly assumed? The Fourth Circuit has held that it is "assumed in bankruptcy as the result of the [debtor's] failure to reject it in accordance with § 1113."[37] Furthermore, the Sixth Circuit has held that a breach of an unrejected CBA gives rise to a superpriority claim immediately payable in full; however, other circuits have rejected this analysis.[38]

6. Section 1113 and Expired Collective Bargaining Agreements

Under the National Labor Relations Act, an employer must honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement.[39] Thus, after the agreement expires, the employer's preexisting terms and conditions of employment — i.e. the most recent "status quo" — must be held constant until the employer and union reach an agreement or impasse.[40] This requirement effectively implies contract terms where they no longer exist.

This rule can create confusion in a chapter 11 setting. The law is unclear on whether a debtor may use section 1113 to reject the terms of a collective bargaining agreement after it has expired and its terms continue in force pursuant to the NLRA, or whether the company must

---

35 *United Steel Workers of America v. Cortland Container*, 105 B.R. 375 (N.D. Ohio 1989); *but see In re N&T Assocs.*, 78 B.R. 285, 288 (D. Nev. 1987) (holding that claim under collective bargaining agreement was limited by section 502(b)(7)).

36 173 B.R. 177, 189 (B.A.P. 9th Cir. 1994).

37 *Adventure Res., Inc. v. Holland*, 137 F.3d 786, 798 (4th Cir. 1998); *accord In re Moline Corp.*, 144 B.R. 75 (Bankr. N.D. Ill. 1992); *In re St. Louis Globe-Democrat, Inc.*, 86 B.R. 606 (Bankr. E.D. Mo. 1988); *but see In re Family Snacks*, 257 B.R. 884, 904 (B.A.P. 8th Cir. 2001) (noting that section 365 procedures must be followed to assume a collective bargaining agreement).

38 *See In re Unimet Corp.*, 842 F.2d 879 (6th Cir. 1988); *but see In re Ionosphere Clubs, Inc.*, 22 F.3d 403 (2d Cir. 1994) (rejecting a superpriority for CBA breach claims).

39 *See, e.g.*, *Laborers Health & Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988).

40 *See NLRB v. Katz*, 369 U.S. 736, 743 (1962).

continue to bargain in good faith to reach an agreement on a new CBA as if it were outside bankruptcy. The United States Bankruptcy Court for the District of Delaware recently held that section 1113 permitted a debtor to terminate an expired CBA, and that decision is currently under appeal at the U.S. Court of Appeals for the Third Circuit.[41]

B. Section 1114: Union Pension and Health Benefits

In addition to the statutory priority for employee benefit plans under section 507(a)(4), additional protection in bankruptcy for retiree benefits applies through section 1114. Section 1114 was enacted in 1988, largely in reaction to the chapter 11 case of the LTV Steel Company, which attempted to end retiree health benefits on the first day of its bankruptcy.[42] Section 1114 features procedural safeguards similar to section 1113, requiring employers to engage in a bargaining process before seeking court approval for modification of payments to "any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents."[43]

As with section 1113(f), section 1114(e) states the trustee "shall timely pay and shall not modify any retiree benefits" unless it has complied with section 1114 procedures, and that any such payments required prior to confirmation of a plan shall enjoy administrative expense priority. Also note that a plan cannot be confirmed if it does not provide for continued payment of retiree benefits as established through section 1114.[44]

Unlike section 1113, section 1114 does not provide for complete rejection of retiree benefits, but it does provide procedures toward modification. Interim modifications may be sought if "essential to the continuation of the Debtor's business" or to "avoid irreparable harm to the estate," although such procedures probably cannot be invoked without first moving for relief under section 1114(g).

If a debtor seeks section 1114 modifications, an entity must be identified with whom the debtor should bargain, which can be an interesting issue as section 1114 applies both to union and non-union retirees. A union shall be the "authorized representative" of retirees who receive benefits pursuant to that union's CBA unless the union opts out of such role, or the court determines that different representation of such persons is appropriate.[45] The court is

---

41 *See In re Trump Entm't Resorts Inc.*, No. 14-12103 (KG), 2014 Bankr. LEXIS 4439 (Bankr. D. Del. October 20, 2014) *appeal docketed*, No. 14-8137 (3d Cir. filed Dec. 15, 2014); *see also In re 710 Long Ridge Road Operating Co.*, No. 13-13653, 2014 WL 407528 (Bankr. D.N.J. Feb. 3, 2014) (holding that section 1113 can be used to modify an expired CBA).

42 *In re Chateaugay Corp.*, 64 B.R. 990, 993 (S.D.N.Y. 1986).

43 11 U.S.C. § 1114(a).

44 *See* 11 U.S.C. § 1129(a)(13).

45 *See* 11 U.S.C. § 1114(c).

otherwise empowered to appoint a committee representing retiree interests, which may be the optimal vehicle when the retiree group includes former members of multiple unions and/or a sizable contingent of non-union retirees.[46] As with the committee of unsecured creditors, such a committee may, subject to court approval, employ its own attorneys and other professionals, with their fees and costs paid by the estate.[47]

In proposing modifications, the debtor must observe procedures and standards similar to section 1113:[48]

1. The debtor must make a proposal to the authorized retiree representative.

2. The proposal must be based on the most complete and reliable information available at the time of the proposal.

3. Modification must be necessary to permit reorganization.

   The legislative history for section 1114 includes congressional statements that "necessity" should be interpreted consistent with the Third Circuit's decision in Wheeling-Pittsburgh: modification as necessary to prevent liquidation of the Debtor.

4. Modification must provide that all affected parties are treated fairly and equitably.

5. The Debtor must provide the authorized retiree representative with relevant information as is necessary to evaluate proposal.

6. The Debtor must have met with the authorized retiree representative at reasonable times subsequent to making the proposal.

7. The Debtor must have negotiated in good faith concerning the proposal.

8. The authorized retiree representative must have refused to accept the proposal without good cause.

9. The balance of the equities must clearly favor of the proposal for modification.

Ultimately, the court cannot approve modifications at a level lower than proposed by the debtor.[49] However, it is important to note that section 1114 protects only those benefits that are

---

46 *See* 11 U.S.C. § 1114(c)(2).

47 *See* 11 U.S.C. §§ 330, 1103, 1114(b)(2).

48 *In re Horizon Natural Res. Co.*, 316 B.R. 268, 281 (Bankr. E.D. Ky. 2004) (noting that the requirements for modification of retiree benefits are substantially the same as those for rejection of collective bargaining agreements).

provided for in the retiree health plan. If the retiree health insurance plan states it is subject to modification, or to termination upon certain circumstances, then section 1114 will not lock benefits at a level contrary to that plan language in most circuits.[50]

C. Severance Obligations and Liability Under the WARN Act

Front-line healthcare employees — the nurses, technicians, and other staff that provide critical services to patients — are the lifeblood of any hospital or other healthcare debtor. For this reason, debtors generally undertake strenuous efforts to ensure that employee claims are among the first claims paid after a chapter 11 case is commenced. However, it can sometimes be necessary as part of a debtor's restructuring to eliminate non-core or unprofitable businesses to preserve the healthier core of the debtor's operations. In such instances, the debtor will often be forced to terminate employees, generating potentially significant termination-related claims against the debtor's estate.

A key consideration in formulating a restructuring strategy for a downsizing debtor is therefore ensuring, to the extent possible, that termination-related claims are treated as pre-petition, general unsecured claims against the debtor and not as administrative or wage priority claims.[51]

1. Severance Claims

Various rules have evolved as courts have categorized severance payments in several ways. For severance payments in compensation of job loss, which are typically payable at termination based on length of service, courts generally pro-rate for the portions allocable to services rendered postpetition or in the 90-day priority window, with the remainder classed as a general unsecured claim. Severance benefits in lieu of notice of termination are generally considered as "earned" at the time of termination and priority flows accordingly. Contractual severance payments independent of length of service or of notice are usually treated as earned

---

(cont'd from previous page)

49 *See* 11 U.S.C. § 1114(g)(3).

50 *See*, *e.g.*, Hr'g Tr. at 109:25-110:2 *In re General Motors Corp.*, No. 09-50026, (Bankr. S.D.N.Y. June 25, 2009), ECF No. 2595 ("Section 1114 doesn't apply to employee benefit plans that are terminable or amendable unilaterally by the plan sponsor."); *In re Delphi Corp.*, No. 05-444481, 2009 WL 637315, at *1-2 (Bankr. S.D.N.Y. Mar. 10, 2009) *modified on other grounds*, No. 05-44481 (RDD), 2009 637259 (S.D.N.Y. Mar. 11, 2009); *In re Doskocil Cos.*, 130 B.R. 870, 876 (Bankr. D. Kan. 1991); *see also In re Chateaugay Corp.*, 945 F.2d 1205, 1207-10 (2d Cir. 1991) (holding that unvested benefits could be modified under predecessor statute to section 1114); *but see In re Visteon Corp.*, 612 F.3d 210, 236-37 (3d Cir. 2010) (holding that section 1114 protections extend to unvested benefits subject to termination outside of bankruptcy).

51 To obtain confirmation of its plan of reorganization, the debtor's plan must provide for the satisfaction of administrative and wage priority claims against it. 11 U.S.C. § 1129(a)(9). Non-priority unsecured claims, by contrast, may receive less-than-full recovery if the plan otherwise complies with the Bankruptcy Code. *See id.* at § 1129(b)(2)(B)(2).

upon execution of the contract, which usually means classification as general unsecured claims.[52]

The only certain way to avoid priority termination-related claims entirely is to effect any necessary operational restructuring plans at least 180 days prior to filing.[53] That is a luxury that very few debtors have. However, formulating a restructuring strategy and terminating any personnel who are not necessary to the go-forward business as soon as possible — and ideally before the commencement of a chapter 11 case — will minimize administrative and wage priority claims and ease confirmation of a plan of reorganization.

2. WARN Act Claims

Severance analysis has guided characterization of claims under the WARN Act. Debtors may violate WARN Act requirements concerning timely notice of termination to affected employees, giving rise to claims for up to 60 days of backpay. Bankruptcy courts have generally analogized such backpay to severance payments in lieu of termination, and apply priority status depending on whether termination occurred prior to or after filing of the bankruptcy petition, and when termination occurred prepetition, the extent to which such claims might enjoy fourth or fifth-priority status.[54] Courts in recent years, however, have disputed the point at which claims under the WARN Act arise and thus have disagreed on whether they are owed administrative expense status.[55]

Where a debtor's employees are subject to a CBA, the debtor must also consider the impact of the terms of the CBA itself on potential WARN Act liability. For example, many CBAs contain "layoff minimization" provisions that require the employer to consult with the union and reach agreement on the terms of any layoff before effecting a reduction in force. If an agreement cannot be reached, such CBAs may require mandatory (and often expedited) arbitration. Although less common, other CBAs require an employer to furlough employees

---

52 *See generally*, 4 *Collier on Bankruptcy* ¶ 507.05(b) (Alan N. Resnick & Henry J. Summer eds., 15th ed. rev. 2009).

53 Section 507(a)(4) of the Bankruptcy Code affords priority treatment to claims for unpaid wages up to $12,475 per employee earned in the 180 days prior to the date on which the bankruptcy case is commenced. 11 U.S.C. § 507(a)(4).

54 *See*, *e.g.*, *In re Kitty Hawk, Inc.*, 255 B.R. 428 (Bankr. N.D. Tex. 2000) (where termination occurs 43 days prior to petition, WARN claims pursued by union are not administrative claims, but are eligible for sections 507(a)(3) or (a)(4) priority or general unsecured status, as applicable); *see also In re Riker Indus. Inc.*, 151 B.R. 823 (Bankr. N.D. Ohio 1993); *In re Cargo, Inc.*, 138 B.R. 923 (Bankr. N.D. Iowa 1992).

55 *Compare In re Powermate Holding Corp.*, 394 B.R. 765, 776 (Bankr. D. Del. 2008) ("[T]he rights of workers discharged in violation of the WARN Act accrue in their entirety upon their termination") *with In re Philadelphia Newspapers, LLC*, 433 B.R. 164, 174-75 (Bankr. E.D. Pa. 2010) (concluding that section 503 provides for administrative expense treatment of WARN Act claims whether or not services were rendered postpetition).

during a shutdown rather than terminating their employment. Such employees are often entitled to benefits under the CBA during the furlough period, including supplemental unemployment benefits. Where these or similar provisions are in play, a debtor may be unable to effect a rapid operational restructuring that requires a workforce reduction. At a minimum, the debtor must begin the process of terminating employees well in advance of the statutory 60-day period to avoid WARN Act liability. In some circumstances, it may be very difficult or impossible to terminate employees prior to a chapter 11 filing to avoid administrative treatment of WARN Act claims.

As with severance obligations, debtors should consult with labor and bankruptcy counsel as long before commencing a chapter 11 case as possible to formulate a restructuring strategy that minimizes administrative and wage priority claims arising under the WARN Act.[56]

D. Appointment of a Patient Care Ombudsman

The Bankruptcy Abuse and Consumer Protection Act of 2005 amended the Bankruptcy Code in a variety of ways that impact debtors operating in the healthcare space. One key amendment was the addition of section 333 of the Bankruptcy Code, which requires that a bankruptcy court presiding over a the chapter 11 case of a "health care business"[57] order, "not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case."[58] The patient care ombudsman is charged with "monitor[ing] the quality of patient care provided to patients of the debtor" and reporting to the bankruptcy court regarding the same.[59]

Many debtors during their chapter 11 cases need to address work force issues regardless of whether their employees are union or non-union employees. These issues are particularly sensitive in health care bankruptcies. Many healthcare providers' employees are front-line caregivers and facility staff who together are responsible for many elements of patient care and safety. Healthcare debtors are generally acutely aware of this dynamic, and the patient care ombudsman requirement (not to mention other the oversight of regulators who closely monitor patient care and outcomes and governmental and non-governmental payors who reimburse

---

56 For additional discussion of the WARN Act in the context of a liquidation, see *infra* notes 75-91 and accompanying text.

57 Pursuant to section 101(27A) of the Bankruptcy Code, "[t]he term "health care business" (A) means any public or private entity (without regard to whether that entity is organized for profit or not for profit) that is primarily engaged in offering to the general public facilities and services for (i) the diagnosis or treatment of injury, deformity, or disease; and (ii) surgical, drug treatment, psychiatric, or obstetric care." 11 U.S.C. § 101(27A).

58 11 U.S.C. § 333(a)(1).

59 *Id.* at § 333(b).

accordingly) reinforces the need to continue to operate at the highest possible level in chapter 11.

III. PRACTICAL APPLICATIONS IN HEALTHCARE BANKRUPTCY CASES

As discussed above, labor plays a key part in many debtors' chapter 11 cases, both because of the essential contributions to the success of the business made by a debtor's workforce and because of the often high fixed costs associated with those contributions. In many cases, a debtor's unions hold among the largest claims against its estate. Understanding those claims and how they will be addressed must be an early step in formulating a reorganization strategy. If modification is necessary, a debtor must take steps to align the terms of its CBA with the its go-forward before a plan is confirmed.[60]

In recent years, many debtors have sought to maximize value through sale of the business as a going concern. Proceeds of such sales are subsequently distributed under a plan of liquidation. In sale cases, potential buyers are often keenly focused on the debtor's CBAs. Although a potential purchaser may determine that the future business will be best served if the debtor's workforce continues under the terms of the existing CBA. However, in some cases, a purchaser may instead conclude that the CBA is too burdensome and refuse to assume the debtor's obligations under it. If no other potential purchasers come to the table, the debtor may have little choice but to seek rejection of the CBA under section 1113 of the Bankruptcy Code in order to effect what it believes is a value-maximizing transaction.

Even if the debtor is successful in obtaining section 1113 relief, a union can strike or employ other practical tools to protect its interests. In a transaction involving a healthcare operator, where state regulatory and other approvals of change-in-control transactions are often necessary, one practical tool may be to apply political pressure to attempt to block transactions the union views as detrimental to labor. This approach has been utilized in several recent proposed transactions with some success.

A. Labor Issues in Asset Sales

1. Is the Purchaser Bound by the Existing CBA?

CBAs are contracts. As a general rule, contractual obligations survive a stock transaction. Accordingly, the acquired company or the surviving company in a merger is generally required to recognize and bargain with existing unions and honor the terms of any existing CBA.[61] In an asset transaction, by contrast, the purchaser is generally not required to

---

60 A debtor that fails to reject a CBA has assumed it. *See supra* note [•] and accompanying text.

61 *See, e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548-50 (1964); *Local 348-S v. Meridian Mgmt. Corp.*, 583 F.3d 65, 74-76 (2d. Cir. 2009); *Children's Hosp.*, 312 N.L.R.B. 920, 927 (1993), *enforced sub nom. Cal. Pac. Med. Ctr. V. NLRB*, 87 F.3d 304 (9th Cir. 1996); *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1366-67 (4th Cir. 1995), *aff'd*, 517 U.S. 392 (1996). However, where there is a lack of "substantial continuity of identity in the business enterprise before and after a change," the duty to arbitrate would be "something imposed from without." *John Wiley & Sons*, *(cont'd)*

adopt the seller's contracts (including its CBAs).[62] Thus, absent a "successorship clause" in its CBA, a debtor can generally sell its assets under section 363 of the Bankruptcy Code "free and clear" of any interests in those assets and not subject to its CBA.[63]

For this reason, many CBAs contain a successorship clause, which obligates the employer to obtain assumption of the CBA by the purchaser in any sale. Even if there is a successorship clause, the Debtor may seek to eliminate it through rejection under section 1113. Alternatively, the debtor may engage in section 1113 negotiations with the intention of modifying the CBA to suit the needs of a purchaser.[64] In either case, the debtor generally needs to engage in such processes before sale of the assets.[65]

2. Duty to Bargain as Successor Employer

Although a purchaser may not be bound by the debtor's CBA, it will be required to recognize and bargain with the union representing the seller's employees if it is a "successor"

(cont'd from previous page)

376 U.S. at 551. Thus, for example, a "stock sale could in many cases serve as a vehicle for acquisition of resources that will be used to operate a substantially different enterprise from that conducted by the original owners . . . . Where the corporate form survives only in name, but an entirely new operation replaces the old, the corporation might not be fairly termed a 'continuing' employer in any practical sense." *EPE, Inc. v. NLRB*, 845 F.2d 483, 490 (4th Cir. 1988).

62 The NLRB requires "clear and convincing evidence of consent, either actual or constructive, before [it] will find that an assumption of the contract occurred." *Field Bridge Assocs.*, 306 N.L.R.B. 322, 323 (1992), *enforced sub nom. Local 32B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993).

63 *See* 11 U.S.C. § 363(b), (f). But a "free and clear" sale may be blocked if it would violate the terms of an existing CBA. *See*, *e.g.*, *In re Lady H Coal Co.*, 199 B.R. 595, 603-04 (S.D. W. Va.) (section 363 sale in violation of collective bargaining agreement may result in administrative claim against estate for damages), *aff'd sub nom. In re Leckie Smokeless Coal Co.*; 99 F.3d 573 (4th Cir. 1996) *In re Stein Henry Co.*, No. 91-15491S, 1992 WL 122902, at *2 (Bankr. E.D. Pa. 1992) (section 1113 requires that plan of reorganization must provide for compliance with contractual successorship provision).

64 Some courts have approved applications to reject CBAs under section 1113 of the Bankruptcy Code where no potential buyer was willing to assume the debtor's CBA in connection with the purchase of its assets. *See, e.g., In re Horizon Natural Res. Co.*, 316 B.R. 268, 268 (Bankr. E.D. Ky. 2004); *In re Nat'l Forge Co.*, 289 B.R. 803, 809-11 (Bankr. W.D. Pa. 2003).

65 *Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 81 (3d Cir. 1999) (a debtor's negotiation of a provision in an asset purchase agreement that "binds itself contractually to obtain a change in the legal relations created by a CBA as a condition precedent to closing a sale of substantially all of the debtor's assets" is an "attempt to effect an alteration of the CBA" and implicates the requirements of section 1113); *see also Maxwell Newspapers*, 981 F.2d 85, 90 (2d Cir. 1992); *In re Lady H Coal Co., Inc.*, 193 B.R. 233, 240 (Bankr. S.D. W. Va. 1996); *cf In re Family Snacks*, 257 B.R. 884 (8th Cir. BAP 2001) (bargaining need not precede a sale).

employer.[66] A purchaser is a successor employer if, after consummation of the transaction, there is (a) substantial continuity of operations and (b) substantial continuity of workforce.[67] The substantial continuity of operations factor examines "'whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.'"[68] The other principal criteria, continuity of the workforce, requires that a majority of the new employer's workforce be comprised of the predecessor's employees.[69]

While a purchaser of assets who is found to be a successor will be required to recognize and bargain with the seller's (or predecessor's) union, a successor is generally free to determine the initial terms and conditions of employment upon which it will hire the predecessor's employees, and to negotiate its own CBAs. The courts and the NLRB have developed an important exception to this principle, however, in circumstances where it is "perfectly clear" that the successor intends to retain all of the employees in the bargaining unit. In those circumstances, "it will be appropriate to have [the successor] initially consult with the employees' bargaining representative before he fixes terms."[70] For example, when a purchaser informed the seller's employees that it would hire them, recognize their seniority and provide them with equivalent salaries, the purchaser was found to be a "perfectly clear" successor obligated to bargain with the union even prior to actually hiring a majority of the predecessor's employees.[71]

3. Transactions Not Supported by Labor

---

66 *N.L.R.B. v. Burns Int'l Sec. Serv. Inc.*, 406 U.S. 272, 293 (1972).

67 *See Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 41 (1987) ("If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation [of the NLRA] is activated.").

68 *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 366 (2d Cir. 2001) (citing *Fall River Dyeing*, 482 U.S. at 43); *see also 3750 Orange Place Ltd. P'ship v. NLRB*, 333 F.3d 646, 655 (6th Cir. 2003) (citing *Fall River Dyeing*, 482 U.S. at 43).

69 *3750 Orange Place Ltd P'ship.*, 333 F.3d 655 (citing *Fall River Dyeing*, 482 U.S. 27, 43); *Hoffman*, 247 F.3d at 366 (citing *Fall River Dyeing*, 482 U.S. 27, 43). This is the key factor in determining successorship; without a majority, the NLRB generally will find no successorship, regardless of the other indicia. *See, e.g.*, *3750 Orange Place Ltd P'ship.*, 333 F.3d 655. Furthermore, the new employer cannot unlawfully refuse to hire certain of the seller's employees in order to avoid employing a majority of the predecessor's employees. *See, e.g.*, *In re Adair Express L.L.C.*,335 N.L.R.B. 1224, 1230 (2001).

70 *Burns*, 406 U.S. at 294-95.

71 *In re Elf Atochem N. Am., Inc.*, 339 N.L.R.B. 796, 796 (2003).

The opportunity to reject burdensome collective bargaining agreements in accordance with section 1113 of the Bankruptcy Code may enable the debtor to undertake value-maximizing transactions that would otherwise be unavailable. But it does not give a debtor free rein to do as it pleases. To reject a CBA, the debtor must meet the stringent requirements of section 1113 by showing, among other things, that the proposed modifications are necessary to permit reorganization and that the modification treat all parties fairly and equitably (i.e., it must not disproportionately place the burden of saving the debtor's business on labor).[72] If section 1113 is granted, a debtor may unilaterally impose its proposed changes after rejection. But the debtor remains subject to non-bankruptcy labor laws and commits an unfair labor practice if it implements terms inconsistent with its section 1113 proposal.[73]

Even if the debtor meets the high standard for obtaining section 1113 relief and imposes the modifications it needs to effectively reorganize, it is not out of the woods. Nothing prohibits a union from exercising its right to strike. Through deprivation of jurisdiction over union strikes under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-10, 113-15, a union can even strike to seek reinstatement of an agreement that has just been rejected.[74]

In the context of a healthcare operator, a union may have additional tools to block a sale that it does not support. Unlike many industries, the transfer of a healthcare business often requires approvals from relevant state authorities. For example, the sale of a healthcare business in California requires the approval of the state's attorney general. In 2014, Prime Healthcare Services Inc. agreed to acquire six troubled nonprofit hospitals from the Daughters of Charity Health System. The Service Employees International Union (SEIU), expressing concern based upon Prime Healthcare's previous hospital acquisitions that services would be cut, prices would be raised, and caregivers would be laid off, opposed the takeover. It reportedly recruited state lawmakers and community groups to oppose the transaction and took out television ads urging the attorney general to reject it. The California attorney general ultimately approved the sale to Prime Healthcare on February 20, 2015, but the impact of the SEIU objections was significant. Just after the sale was approved, the Daughters of Charity Health System sued the SEIU, alleging that the union's interference caused other potential bidders to drop out and significant delays in obtaining the requisite approvals, costing the system tens of millions of dollars.

B. Concerns for Liquidating Debtors

1. Application of Section 1113

Section 1113 may not apply to bankruptcies in any chapter of the Bankruptcy Code other than chapter 11. Pursuant to section 365(d)(1), in chapter 7 cases all executory contracts are deemed rejected as of 60 days after entry of an order for relief unless the court rules otherwise upon timely motion. However, there is authority for the proposition that collective

72 *See supra* notes 16-19 and accompanying text.

73 *Mile Hi Metal Sys. Inc.*, 295 N.L.R.B. 877. 878 (1989).

74 *See Briggs Transp. Co. v. Int'l Bhd. of Teamsters*, 739 F.2d 341 (8th Cir. 1984).

bargaining agreements are not executory in chapter 7 because with the cessation of the debtor's business, mutual material obligations no longer apply.[75]

At least one court has held section 1113 inapplicable in chapter 11 cases that feature liquidation of the debtor's assets pursuant to a plan of reorganization, contrasting this scenario with the focus on postpetition operations that is implicit in section 1113.[76] Other courts have expressly applied section 1113 to liquidating plans.[77]

2. Liquidating Hospitals and the WARN Act

The WARN Act generally requires any "employer" of 100 or more employees to provide sixty days advance written notification before any "mass layoff"[78] The WARN Act defines an employer as, "any business enterprise that employs 100 or more employees." Although the statute fails to define "business enterprise," the pertinent Department of Labor comment explains that "a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a 'business enterprise' in the normal commercial sense."[79] Damages for violations of the WARN Act are calculated as up to sixty days of the covered employee's pay, plus civil penalties of $500.00 per day.[80] Thus, for a large hospital, with a relatively highly compensated staff, this liability could represent a significant sum. Moreover, under some circumstances that sum may become an administrative claim,[81] significantly changing the calculus of the bankruptcy process.

Two cases from over a decade ago have established the framework for evaluating a debtor's liability under the WARN Act in the context of a chapter 11 case where the debtor is liquidating: *In re United Healthcare System, Inc.*[82] and *In re Jamesway Corporation.*[83]

---

75 *See In re Illinois-California Express, Inc.*, 72 B.R. 987, 992 (D. Colo. 1987); *In re Total Transp. Servs.*, 37 B.R. 904, 906-07 (Bankr. S.D. Ohio 1984).

76 *In re Jones Truck Lines, Inc.*, 166 B.R. 885 (Bankr. W.D. Ark. 1994).

77 *See In re Family Snacks*, 257 B.R. 884 (8th Cir. B.A.P. 2001) (collecting cases applying section 1113 to various types of reorganization).

78 29 U.S.C. §§ 2101-02.

79 Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,042, 16,045 (April 20, 1989).

80 29 U.S.C. § 2104(a).

81 *See In re Hanlin Group, Inc.*, 176 B.R. 329 (Bankr. D.N.J. 1995) (finding WARN Act claims asserted by employees who were terminated postpetition entitled to priority status); *but see In re Jamesway Corp.*, 235 B.R. 329 (Bankr. S.D.N.Y. 1999) (finding employees terminated postpetition were not entitled to administrative expense priority status because employer's WARN Act notice obligation arose prepetition).

82 200 F.3d 170 (3rd Cir. 1999).

In *United Healthcare*, the Third Circuit held that a debtor-hospital was not liable for back pay to employees under the WARN Act, where the debtor-hospital filed a chapter 11 petition sixteen days before it laid off 1,200 of its 1,300 employees.[84] The court of appeals reasoned that whether a chapter 11 debtor in possession is an "employer" for purposes of the WARN Act depends on the "nature and extent of the entity's business and commercial activities while in bankruptcy, and not merely on whether employees continue to work 'on a daily basis'"[85] The court of appeals found that a "liquidating fiduciary" was not an "employer," which the WARN Act defines as a "business enterprise."[86]

By contrast, the *Jamesway* court granted summary judgment finding the "liquidating fiduciary" debtor liable as an employer under the WARN Act.[87] The court noted that although the status of "liquidating fiduciary" could relieve a debtor in possession from WARN Act liability, in this case the debtor (1) decided to liquidate, (2) identified which employees would be terminated, (3) planned the schedule for the layoffs, and (4) proceeded to terminate the laid off employees a full six days before filing its chapter 11 petition. The court found that the employer was liable under the WARN Act prior to the chapter 11 filing, because the employees became entitled to notification at the time of these events.[88]

Although these cases deal with a liquidation under chapter 11, this issue was also addressed in the context of a chapter 7 liquidation in *In re Century City Doctors Hospital, LLC*.[89] In *Century City Doctors Hospital,* the bankruptcy court found that, under the facts of the case, the chapter 7 trustee was not acting as an "employer" within the meaning of the WARN Act, and was not subject to its requirements in causing layoffs of the debtor's employees without the required notification,[90] even though the trustee operated the business of the debtor-hospital for approximately one week following the filing of the petition.[91] The court reasoned that the trustee operated the business for the limited purpose of shutting down the debtor's operations and complying with government regulations relating to disposal of medical waste and hazardous materials, with the intention of closing the facility at the earliest reasonable time and liquidating

---

(cont'd from previous page)

83 235 B.R. 329 (Bankr. S.D.N.Y. 1999).

84 *United Healthcare,* 200 F.3d at 172-74.

85 *Id.* at 178.

86 29 U.S.C. § 2101(a)(1).

87 *Jamesway*, 235 B.R. 329 at 335.

88 *Id.* at 343-44.

89 417 B.R. 801 (Bankr. C.D. Cal. 2009).

90 *Id.* at 802.

91 *Id.* at 805.

its assets for the benefit of creditors.[92] The court found that the chapter 7 trustee acted solely as a liquidating fiduciary, rather than as an employer operating a business enterprise in the normal commercial sense.

The court's decision was not predicated on either the status of the trustee under chapter 7 or on how long the business remained in operation, but rather on the nature of the operations. The court noted that the trustee did not operate the business "in the normal commercial sense."[93] Had the trustee operated the hospital "for business purposes" for even a short period of time, the decision might well have been different. In fact, the court stated, "it appears possible that a WARN Act claim could be properly asserted if a chapter 7 trustee were to continue to operate a business for a period of time."[94]

Thus, it is critical for the debtor and counsel to closely analyze any prospective layoffs or hospital closures in light of the WARN Act. When hospital closure and "mass layoffs" are necessary it is critical to consider the timing of not merely the layoffs themselves, but the planning as well. Substantial risk exists for an estate that plans significant employment terminations while still operating as a business enterprise, not purely as a liquidating fiduciary.

92 *Id.*

93 *Id.*

94 *Id.* at 804.