WARN Act Employee Claims and Their Impact on Chapter 11 Cases

Daniel F. Dooley, Moderator
MorrisAnderson; Chicago

Michael L. Bernstein
Arnold & Porter LLP; Washington, D.C.

Domenic E. Pacitti
Klehr Harrison Harvey Branzburg LLP; Wilmington, Del.

René S. Roupinian
Outten & Golden LLP; New York

Practice & Procedure

By George Klidonas[1]

The WARN Act: Giving Employees Notice of Layoffs in Bankruptcy

George Klidonas
BakerHostetler
New York

George Klidonas is an associate in BakerHostetler's Bankruptcy, Corporate Restructuring and Creditors' Rights Group in New York. He also serves as a coordinating editor for the ABI Journal *and co-chair of ABI's Bankruptcy Taxation Committee.*

Companies' Worker Adjustment and Retraining Notification (WARN) Act[2] notice requirements have long been in conflict with bankruptcy practice. Under the WARN Act, employers with 100 or more employees are required, with some exceptions, to provide 60 days' notice in advance of plant closings or mass layoffs.[3] Companies facing a bankruptcy filing must assess potential WARN Act exposure.

In *In re Flexible Flyer Liquidating Trust*,[4] the debtor terminated its business and laid off its employees the day it filed for chapter 11 relief but did not provide the required 60-day notice under the WARN Act.[5] The Fifth Circuit sided with the company and held that Flexible Flyer was excused from providing notice to its employees because it fell within one of the exceptions to the Warn Act, namely that the shutdown was the result of unforeseeable business circumstances.[6] The decision explains the mechanics of the WARN Act and discusses the factors that courts look to when deciding whether a company falls within one of the exceptions. This article also provides various lessons to companies that are facing imminent shutdowns or layoffs.

Background: Flexible Flyer's Demise

Flexible Flyer was a manufacturer of swing sets, hobby horses, go-carts, utility vehicles and fitness equipment. It sold to a number of retailers, including Walmart, Toys"R"Us, Kmart and Sam's Club,[7] and was owned by Cerberus Capital Management Corp. CIT Group Commercial Systems LLC provided "factoring" by advancing Flexible Flyer approximately 80 percent of its receivables. Flexible Flyer's primary sources of operating funds were the factoring arrangement with CIT and the capital infusions from Cerberus.[8] The company struggled and Cerberus made numerous threats to shut down its operations, but Flexible Flyer continued to receive assistance from CIT and Cerberus.[9]

In 2005, Flexible Flyer's financial problems worsened. The company notified its employees that April of possible layoffs in its go-cart division.[10] A few months later, the company recalled 10,000 go-carts because of defective parts. Shortly after that, a number of customers decided that they would be deferring the purchase of approximately $5 million in swing sets until the next year.[11] Finally, another customer withheld $300,000 in payments for merchandise that had already shipped.[12] Flexible Flyer's chief financial officer tried to obtain written commitments from customers regarding projected delivery dates or future orders, to no avail.[13] On the bright side, Flexible Flyer's primary competitor had filed for bankruptcy, leaving a chunk of the market share available to the company.

Nonetheless, CIT reduced the amount that it advanced to Flexible Flyer from 80 to 50 percent. Two weeks later, CIT informed the company that it would no longer be providing funding.[14] The CFO requested further funding from Cerberus, but Cerberus refused.[15] Flexible Flyer filed for bankruptcy on Sept. 9, 2005, and notified its employees that it would terminate the business and lay off employees.[16]

A number of employees filed an adversary proceeding, alleging that Flexible Flyer was required to provide a 60-day layoff notice under the WARN Act.[17] A bench trial ensued and the bankruptcy court determined that Flexible Flyer was excused from providing notice of the layoffs because "the shutdown was the result of an unforeseeable business circumstance."[18] The employees appealed to the district court, which agreed with the bankruptcy court.[19] The employees then appealed to the U.S. Court of Appeals for the Fifth Circuit.

What Is the WARN Act?

The WARN Act requires certain employers that are planning a plant closing or mass layoffs to give affected employees 60 days' notice of such action.[20] The purpose of this law is to offer "workers and

1 The views expressed herein are solely those of the author.
2 This article discusses the WARN Act under federal law. However, there are a number of states that have adopted their own versions of the WARN Act. *See, e.g., N.Y. Labor Law* § 860 (McKinney, 2013).
3 20 C.F.R. § 639.1(a).
4 *In re Flexible Flyer Liquidating Trust*, 2013 WL 586823, at *1 (5th Cir. Feb. 11, 2013).
5 *Id.* at *2.
6 *Id.*
7 *Id.* at *1.
8 *Id.*
9 *Id.*
10 *In re Flexible Flyer Liquidating Trust*, 2013 WL 586823, at *1.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.* at *2.
15 *Id.*
16 *In re Flexible Flyer Liquidating Trust*, 2013 WL 586823, at *2.
17 *Id.*
18 *Id.*
19 *Id.*
20 20 C.F.R. § 639.2.

their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs, and, if necessary, to enter skill training or retraining."[21] To prove a WARN Act claim, a plaintiff must demonstrate that "(1) the defendant was 'an employer'; (2) the defendant ordered a 'plant closing' or 'mass layoff'; (3) the defendant failed to give to the plaintiff sixty days notice of the closing or layoff; and (4) the plaintiff is an 'aggrieved' or 'affected' employee."[22] Employers, however, are not always required to give a 60 days' notice, as there are crucial exceptions to the Act. The most notable exception for bankruptcy practitioners is the "faltering company" exemption, meaning that the closing or layoff resulted from "unforeseen business circumstances."[23] If an exception applies, employers are required to give only "as much notice as is practicable."[24]

The Fifth Circuit explained that the unforeseeable circumstances exception "applies when the closing or layoff was 'caused by business circumstances that were not reasonably foreseeable as of the time that the notice would have been required.'"[25] The court further explained that "[c]losings and layoffs are not foreseeable when 'caused by some sudden, dramatic and unexpected action or condition outside the employer's control.'"[26] Courts look to the employer's business judgment, comparing it to what is "commercially reasonable" as would a "similarly situated employer in predicting demands of its particular market."[27]

The Fifth Circuit has previously stated that "it is the probability of occurrence that makes a business circumstance 'reasonably foreseeable' and thereby forecloses use of the [unforeseeable business circumstances] exception."[28] An employer need not give notice of a closing or layoff if that outcome is merely possible; the closing or layoff must be probable. For example, in *Halkias v. Gen. Dynamics Corp.*, General Dynamics' board of directors knew of the possibility that mass layoffs would take place as early as June 1990; however, notice was not given until December 1990.[29] Nonetheless, the Fifth Circuit concluded that the company did not violate the WARN Act because the board's knowledge of the potential that layoffs may occur did not make it a probability, therefore the layoffs were also ultimately out of the board's control.[30]

The Closing of Flexible Flyer's Business Was Not Reasonably Foreseeable

After reviewing the case records from the bankruptcy court proceeding, the Fifth Circuit concluded that the closing of Flexible Flyer's business was not reasonably foreseeable to the company. Sixty days before the company officially shut down, there was no indication that the closing was imminent.[31] The bankruptcy court had found testimony that the CFO had been working tirelessly until the bitter end to keep costs down.[32] Moreover, a major competitor in the market had filed for bankruptcy, opening up an opportunity to increase sales.[33] The CFO explained that he was expecting "an orderly downsizing of the business over time, not an immediate shutdown."[34] Finally, the major catalyst for the company's shutdown was CIT's failure to extend Flexible Flyer any more funding, as well as Cerberus's refusal to provide the company with additional capital.[35] The fact that both CIT and Cerberus abruptly cut off funding was "completely unanticipated."[36]

The Fifth Circuit also rejected the employees' arguments that the 60 days' notice should have been given at some point after the go-cart recall. Although the company was experiencing financial difficulties, it is also true that "encouraging events continued to renew probabilities that better days may be ahead."[37] Because the company acted in "good faith" and operated on the "well-grounded hope" that closings and layoffs would not take place, the WARN Act did not apply. The regulations were meant to protect a company's exercise of business judgment in situations where the company acts reasonably; the court found that Flexible Flyer was well within this ambit. Thus, the Fifth Circuit held that the bankruptcy court did not err in finding the CFO's testimony credible.

Lessons for Employers Facing Financial Difficulties

Companies facing mass layoffs or plant shutdowns should be aware of the requirements under the WARN Act and the exceptions that apply. The Fifth Circuit in *In re Flexible Flyer* focused its analysis on the "unforeseen business circumstance" exception. Interestingly, the factors that the court considered had less to do with unforeseen business circumstances and more to do with the company's "good faith, well-grounded hope and reasonable expectations."[38] For example, there were a number of encouraging events that led the CFO to believe that the company would not plunge into bankruptcy, such as the chapter 11 filing of a major competitor. In addition, the CFO testified that he did not expect an immediate shutdown, but rather an orderly downsizing of the business over a certain period of time. Taking these factors into account, it is clear that the WARN Act is also meant to encourage companies to take reasonable actions to preserve the company and jobs.[39] The Fifth Circuit used Flexible Flyer as an example in explaining that if the rule was different, it would encourage companies like the debtor to abandon all hope in cases where there is some probability of success.[40]

An argument can be made that once a company begins to notice a decrease in revenue and sales, the probability of clos-

21 20 C.F.R. § 639.1.
22 *In re TWL Corp.*, 2013 WL 1285294, at *8 (5th Cir. March 29, 2013).
23 20 C.F.R. § 639.9.
24 20 C.F.R. § 639.9.
25 *In re Flexible Flyer Liquidating Trust*, 2013 WL 586823, at *3 (quoting 29 U.S.C. § 2102(b)(2)(A); 20 C.F.R. § 639.9(b)).
26 *In re Flexible Flyer Liquidating Trust*, 2013 WL 586823, at *3 (quoting 20 C.F.R. § 639.9(b)(1)).
27 20 C.F.R. § 639.9(b)(2).
28 *Halkias v. Gen. Dynamics Corp.*, 137 F.3d 333, 336 (5th Cir. 1998).
29 *Id.*
30 *Id.*
31 *In re Flexible Flyer Liquidating Trust*, 2013 WL 586823, at *3.
32 *Id.*
33 *Id.*
34 *Id.*
35 *Id.* at *4.
36 *Id.*
37 *In re Flexible Flyer Liquidating Trust*, 2013 WL 586823, at *4.
38 *Id.*
39 *Id.*
40 *Id.*

continued on page 86

Practice & Procedure: Giving Employees Notice of Layoffs in Bankruptcy

from page 27

ings and layoffs should not be unforeseeable. It appears that the sudden termination of funding or access to capital was the unforeseeable event on which the Fifth Circuit focused in its *In re Flexible Flyer* opinion, even though its revenues and sales were dropping. Termination of funding was always a possibility, but the court did not find that Flexible Flyer was aware during or before July 2005 (60 days before the closings and layoffs) that it would be stripped of funding. Perhaps the reason that the court focused on funding and access to capital was because it implicitly found that those two events were the immediate causes for Flexible Flyer's bankruptcy petition.

Other courts have held that the "faltering company" exemption, however, should be narrowly construed to prevent the exceptions from swallowing the statute.[41] Under that exception, the Third Circuit explained that the debtor did not satisfy the four elements under the "faltering company" exemption.[42] Interpreting the exception narrowly,[43] the court held that the debtor must be "actively seeking" financing at the time that it gives the 60-day notice; by allowing the debtor to argue that it did not know that the shutdown was on the horizon would allow the exception to swallow the statute.[44] It remains to be seen how other courts analyzing the WARN Act in the bankruptcy context will use the Fifth Circuit's decision to apply their own exceptions. abi

41 *In re APA Transport Corp. Consol. Litigation*, 541 F.3d 233, 247 (3d Cir. 2008).

42 The employer must prove that:

> (1) it was actively seeking capital at the time the 60-day notice would have been required, (2) it had a realistic opportunity to obtain the financing sought, (3) the financing would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown and (4) the employer reasonably and in good faith believed that sending the 60-day notice would have precluded it from obtaining the financing.

Id. at 246-47 (citing 20 C.F.R. § 639.9(a)).

43 *In re APA Transport Corp. Consol. Litigation*, 541 F.3d at 247.

44 *Id.* at 249.

Understanding and Estimating the Impact of Potential WARN Act Claims on Unsecured Creditors

Contributing Editor:
Ted Gavin
NachmanHaysBrownstein Inc.
Wilmington, Del.
tgavin@nhbteam.com

Also Written by:
Hernan Serrano Jr.
NachmanHaysBrownstein Inc.; New York
hserrano@nhbteam.com

Editor's Note: *Please see the feature "In re First Magnus Financial Corp. Revisited: The Powermate Decision" on page 18 for a more detailed analysis of these two cases, which are briefly discussed herein.*

About the Author

Ted Gavin, a certified turnaround professional, is a principal of NachmanHaysBrownstein's Wilmington, Del., office and is co-leader of the firm's Creditors' Services Group. He is also the education director of ABI's Ethics Committee. Hernan Serrano is a managing director with NachmanHaysBrownstein office in New York, where he concentrates on creditor rights and acts as a liquidating trustee and receiver.

Professionals representing creditors' committees are generally focused on one outcome: What will be left for the unsecured creditors? Few things cast this process into such disarray as the filing of a complaint for damages under the Worker Adjustment and Retraining Notification Act (WARN Act, or Act). There is little precedent as to what the outcome of any given suit might be, resulting in debtors pushing such litigation to the back burner while attending to more pressing matters of the restructuring or liquidation. This leaves the committee uncertain as to the potential outcome. While much has been written about landmark WARN Act cases and decisions, in this article we attempt to use the outcomes of these cases as a mechanism for potential claim analysis and decision-making.

Muddy Waters: Defenses Available to the Employer

Early in the process, advisors should ascertain the likelihood and strength of the debtor's various defenses. A "faltering company" is one that may provide less than 60 days' notice to affected employees because, before the time at which notice was actually given, the company was actively seeking capital or business that, if received, would have allowed the employer to delay or avoid having to give notice. In this effect, the employer, in good faith, believed that had notice been provided earlier, such notice would have precluded the company from obtaining said capital or business.[1] In addition, a company may provide less than 60 days' notice if the closing is the result of an unforeseeable business circumstance.[2] Although there are other exemptions, such as that for a natural disaster,[3] these are the most-often used, although there are traps in assuming the validity of either of these exemptions.

Last in Line

Ted Gavin

Importantly, the debtor must actually give notice. Courts have found that a failure to give explicit notice can render invalid any claim of an exemption under the "faltering company" or "unforeseen circumstances" tests that provide for "shortened notice," and not an exemption to notice. In addition, the qualitative aspect of the defenses must also be met. For a distressed company, showing that it was actively seeking capital (either debt or equity) that would have prolonged survival should not be a difficult endeavor. Meeting the requirements of the good-faith presumption, however, is a difficult hurdle to clear. As for the exemptions granted by §2102(b)(2), a company with a sustained history of losses and deteriorating performance is unlikely to claim that its collapse was unforeseen, especially given general acceptance that only about 8 percent of business failures stem from external factors beyond management's control.[4]

One often-overlooked exemption stems from the Act's requirement that the number of employees used in calculating liability be at a single site. Companies in the transportation or logistics industries, for example, may operate using widely-dispersed employees or facilities (drivers' terminals, pilots' bases, etc.) getting their directions from a single location. *In Teamsters Local Union 413 v. Drivers Inc.*, 101 F.3d 1107 (6th Cir. 1996), the court held that a trucking company operating from 11 separate terminals had 11 different sites of employment, despite the fact that all routes were discharged from a single terminal.

Another exemption is that of the "liquidating fiduciary." In *United Healthcare*,[5] the court ruled that the debtor was not a "business enterprise" as defined by the Act and was therefore exempt from liability because it functioned as a "liquidating fiduciary" at the time of notice and termination. The facts that ultimately allowed the debtor to meet the definition of liquidating fiduciary were as follow:

- The company had a sustained period (more than three years) of consistent operating losses;
- The company's board accepted an offer of purchase from a competitor that required the debtor to close its hospital and cease operations;
- The company made notice of its intent to cease operations and liquidate, so advised the state regulatory authorities and turned in its operating certificates; and on the same day;
- The company filed a voluntary petition under chapter 11;
- At the time of the petition, the company had *ceased all operations* and transferred all patients to other facilities; and
- After the committee in the debtor's case filed a motion to compel termination of all employees, the debtor terminated 1,200 of its 1,300 employees, with the

1 29 U.S.C. §2102(b)(1).

2 29 U.S.C. §2102(b)(2)(A).

3 29 U.S.C. §2102(b)(2)(B).

4 Bibeault, D.B. 1982. *Corporate Turnaround: How Managers Turn Losers into Winners.* New York: McGraw-Hill. Reprint, Top of the Hill Books, 1996, p. 25-26.

5 *In re United Healthcare System Inc.*, 200 F.3d 170 (3rd Cir. 1999).

remaining employees engaged only in tasks related to the liquidation of the company.

The bankruptcy court rejected the faltering company and unforeseen business-circumstances defenses and ruled that the company was an employer under the Act. On appeal, the Third Circuit determined that the debtor was not operating as a going concern but was instead solely engaged in the liquidation of its enterprise. The appeals court found support in the fact that the hospital had turned in its operating certificates to the state regulatory authorities, thus preventing the debtor from operating under state law.

Ensuring that bankruptcy professionals would forever find little guidance in the court's decision, the appeals court left open the possibility that an employer engaged in a postpetition liquidation of its business may still incur liability under the Act. The key to this liability, said the court, is a review of the debtor's activities both pre- and postpetition to determine if the debtor continued to meet the Act's definition of an employer by continuing to operate its business as a going concern.

In *Jamesway*,[6] the debtor claimed exemption on the basis of the faltering-company, unforeseeable business circumstances and liquidating fiduciary defenses. The court found that because the debtor had provided no notice before terminating employees, the defenses made available under §2102(b)(2) of the Act were unavailable, in that:

- the company's board of directors had voted to liquidate the company and file the chapter 11 case six days before the petition date;
- the company had undertaken explicit plans for the termination of employees, including identification of employees to be terminated and a schedule for the terminations and had started the terminations six days prior to the filing of the case.

This supported the employees' claims that the company had the opportunity to provide shortened notice before the petition date. The court determined that the company had the obligation to notify the terminated employees as required under the Act. The dichotomy presented by *United Healthcare* and *Jamesway* is stark: The debtor that terminated employees postpetition while engaging only in liquidation of the business had no liability, whereas the company that terminated employees before the petition date while liquidating its business had liability. The comparison among liquidating companies that have ceased their going-concern operations would appear to indicate a preference toward notice and termination of employees only postpetition. It is never that simple and an erroneous choice of timing carries a large price.

The Easy Part: Calculating Worst-case Potential Damages

In calculating potential damages, little creativity is required. Estimating 60 days of wages and benefits (damage-period wages) for the terminated employees is a straightforward task, and likely the last trivial task in this process. In determining what the actual damages might be, we first determine when notice was given. If none was given, courts have generally deemed notice to have occurred on the date of termination. If notice was given before termination and the employees were paid for time worked between notice and termination, then the amount of those wages and benefits should be deducted from the damage-period wages. Now, at least, we have

continued on page 82

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

Last in Line: Understanding Impact of Potential WARN Act Claims

from page 33

a number (the "adjusted worst-case damages)." Where that number falls in the scheme of priorities is the subject of great concern and varied opinions.

The Hard Part: Interplay of Recent Cases and the Code's Priority Scheme

Assuming that one reaches comfort as to the adjusted worst-case damages and leaving for future consideration the validity of any defenses, one key issue for consideration is the ultimate priority of any damages. To address this analysis, one must determine when the termination event occurred relative to the petition date.

If termination occurred on or before the petition date, then in the determination of the priority of WARN Act claims, 2008 was a banner year. The first case to address this issue after the enactment of BAPCPA was *First Magnus*,[7] in which the debtor, without providing notice, laid off a number of employees five days before the filing of its chapter 11 petition. A group of employees sued for damages, asserting administrative-expense priority (under the new Bankruptcy Code §503(b)(1)(A)(i) and (ii))[8] for that portion of the 60-day notice period

[7] *In re First Magnus Fin. Corp.*, case No. 4:07-bk-01578-JMM (Bankr. D. Ariz. June 20, 2008).

that extended into the postpetition period. The court determined that, as the claim did not arise from the act of providing necessary and beneficial postpetition services to the estate, and as Bankruptcy Code §503(b)(1)(A) considers the timing as to when services were rendered to determine priority, not when the "wages, salaries or commissions" are due to be paid, any WARN Act claim that employees eventually prevailed upon would not rise to the level of an administrative claim. Thus, by fixing the date of notice and/or termination prepetition, the potential claim would be subject to the $10,950 per employee cap on priority unsecured claims. Any overage would be considered a general unsecured claim.

Recognizing *First Magnus*, the Delaware Bankruptcy Court's decision in *In re Powermate*[9] further developed this guidance. In that case, employees terminated on the petition date sued under the WARN Act and alleged administrative status for the portion of the 60 days wages and benefits due that occurred postpetition (essentially all of the damages due). The debtor sought to have the damages, if awarded, categorized as priority unsecured claims under §507(a)(4) and (5). Hon. **Kevin Gross** cited *First Magnus* extensively and continued the previous court's analysis, ruling that because:

- BAPCPA awards administrative status only to those wages and benefits that are *attributable* to the postpetition period;
- in the case of a WARN Act claim, *attributable* equates to the date on which the rights vest to the employees; and
- in the case of WARN Act damages, those rights vest *as of the termination date*;

then, as the termination date was prepetition, the potential WARN Act claims are prepetition claims, in the first instance as fourth or fifth priority wage claims, then as general unsecured claims. The matter is currently on appeal.

If termination occurred on or before the petition date, calculation of the potential amount of the worst-case claim after Powermate and First Magnus is a matter of calculating the adjusted worst-case damages on a per-employee basis and determining how each employee is impacted by the statutory cap in §507(a)(4) and (5). If, for example, an employee asserts a WARN Act claim of $25,000 and received compensation for post-notice prepetition work in the amount of $1,500, then the remaining priority claim would be calculated as follows:

Statutory Cap: $10,950
Less amount already paid: ($ 1,500)
Priority cap remaining: $ 9,450

The employee would receive priority treatment for the first $9,450 of the claim, with the remaining $15,550 being an unsecured-nonpriority claim. The crucial issue for unsecured creditors in this context is the ultimate amount of potential priority claims, because in a case where unsecured creditors are all but "out of the money," the committee may soon find itself with nothing left for which to fight.

What of those cases where termination (or notice and subsequent termination) occurs postpetition? If the debtor can show clear and convincing evidence that it was not engaged in operation as a going-concern business before or after the termination date, then the "liquidating fiduciary" defense may be available. Be aware, however, of the inherent gamble in that presumption; with the contrast between *United Healthcare* and *Jamesway*, and taking the language in *First Magnus* and *Powermate*, it is conceivable that the mere act of providing notice (either actual or *de facto*) postpetition may give rise to an administrative claim. Giving explicit notices appears to preserve the viability of the faltering company and unforeseen-circumstance defenses, however, and if the company can prove the remaining facts necessary for its any of its defenses, then so be it—but rarely is the committee in a position to have comfort in that outcome.

A case where potential recoveries are so thin that a multi-million dollar administrative claim would "kill the case" is not unrealistic. Advisors to committees should account for this potential risk and determine their stance accordingly. If the adjusted worst-case damages are of such amount that they could be awarded administrative status to the detriment of all other classes of creditors, the committee is left in the same position as where we left the issue of priority claims: With nothing left to fight for, why continue to fight?

Even now, the committee still has leverage: the risk inherent in litigation. While recent cases have discussed treatment of potential claims, many, if not most, settle without a determination by the court as to the validity or amount of the actual claim. This relative uncertainty does provide some assistance to the committee in determining a solution that provides for a recovery to all unsecured creditors. Assuming that a liquidation analysis has been prepared that estimates recoveries by unsecured creditors, the comparison of this estimated recovery to the amount of WARN Act claims may be insightful for both sides. If payment of priority WARN Act claims drains the estate of all available assets and therefore eliminates any hope for subsequent recoveries by both the employees (on the nonpriority portions of their claims) and other unsecured creditors, a committee might seek to ensure a recovery for its constituents by negotiating a recovery for other classes of creditors.

For example, a carve-out for the class of WARN Act creditors wherein some percentage of total recoveries available for the unsecured creditor class are allocated for payment to the WARN Act claimants provides for a viable post-confirmation estate while still recovering value for all classes of unsecured creditors. In calculating the amounts of such an arrangement, of course, attention should be paid to the relative size of the priority claim asserted by the WARN Act claimants as well as the likelihood of success in litigation. While the notion of settling a suit which may have been brought for no other reason than to force a quick settlement because of the fear of a case-killing administrative or priority claim may be distasteful, litigating the case into administrative insolvency doesn't provide any better outcome. With the thoroughly convoluted landscape of cases in this area, there are few opportunities for certainty. But it appears that all parties can at least agree on the math. Maybe. ■

8 "After notice and a hearing, there shall be allowed administrative expenses...including...(6) wages, salaries and commissions for services rendered after the commencement of the case; and (ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based."

9 *In re Powermate Holding Corp.*, case No. 1:08-50559-KG (Bankr. D. Del., Oct. 10, 2008).

Arkansas district judge sides with workers on WARN claims from mass firings.

WARN Act Claims Entitled to Class Status

On a question dividing the courts, a district judge in Arkansas came down on the side of workers by holding that "a class action here is superior [to] the bankruptcy claims process for adjudicating the WARN Act claims" of former employees.

Before conversion of a chapter 11 reorganization to a chapter 7 liquidation, a fired worker initiated a purported class action under the Worker Adjustment and Retraining Notification Act, or WARN Act, which gives claims to employees who were not given 60 days' notice of mass terminations. WARN Act claims can be more significant than general unsecured creditor claims because they are sometimes entitled to priority as chapter 11 administrative expenses.

The class suit had been stayed on agreement until it became clear whether there were assets to pay claims. When the chapter 7 trustee decided there would be a distribution, the WARN plaintiffs filed a motion, granted by the bankruptcy judge, to lift the stay and allow the class suit to proceed. The trustee responded with a successful motion to withdraw the reference, thus lodging the suit in district court.

The plaintiff filed a motion to certify the class under F.R.C.P. 23, which District Judge J. Leon Holmes of Little Rock, Ark., granted in an opinion on April 26.

Judge Holmes concluded that the plaintiffs had satisfied the numerosity, commonality, typicality and adequacy requirements of Rule 23(a). He then turned to the question under Rule 23(b) calling for "a comparative analysis between the advantages and disadvantages of the class action mechanism and the advantages and disadvantages of the bankruptcy claims allowance process."

Judge Holmes said that courts have divergent views on whether class suits are superior to ordinary claims administration. He said that "factors traditionally associated with Rule 23(b)" make "class resolution superior to other methods for fairly and efficiently adjudicating the controversy."

With no class suit, Judge Holmes said that each worker "would be left alone to defend" his or her claim. That process, he said, "would be impracticable because the claims are small." He therefore held that "resolving plaintiffs' WARN Act claims collectively through a class action will be more efficient than handling them in a piece-meal fashion as individual proofs of claim in the bankruptcy proceeding."

Because he was the moving party on withdrawal of the reference, the trustee made opposition to class certification more difficult for himself because, as Judge Holmes said, the trustee "never explained how the bankruptcy claims process would be superior to a class action if withdrawal of the reference was mandatory and the bankruptcy court may be without authority to resolve individual WARN Act claims."

Although it might be a complete defense to the suit itself on the merits, Judge Holmes said that the "liquidating fiduciary" principle was not a factor in class certification.

The opinion is *Morgan v. Affiliated Foods Southwest Inc.*, 15-cv-296 (E.D. Ark. April 26, 2016).