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The Scope of Assistance for Dislocated Workers in the United States and the European Community: WARN and Directive 75/129 Compared

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Abstract

This Note analyzes the major substantive distinctions between WARN and the Directive and recommends that the United States supplement its legislation to raise it to the level of its European counterpart. Part I discusses the history leading to the adoption of the Directive, as well as the structure and scope of its various articles, and reviews the case law interpreting the Directive. Part II describes the economic background that prompted the passage of WARN. It then details the relevant sections of WARN and illustrates how U.S. courts have interpreted these sections. Part III compares the effectiveness of the two pieces of legislation within their respective societies. This Note concludes that WARN, unlike the Directive, inadequately protects employees from unannounced mass dismissals.

NOTE

THE SCOPE OF ASSISTANCE FOR DISLOCATED WORKERS IN THE UNITED STATES AND THE EUROPEAN COMMUNITY: WARN AND DIRECTIVE 75/129 COMPARED

INTRODUCTION

Unemployment and lack of job security are problems with which both the United States and the European Community (the "EC" or the "Community")¹ have struggled.² In 1975,

1. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter EEC Treaty].

2. See COMMISSION THIRD GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES ¶¶ 314, 317 (1969) [hereinafter THIRD GENERAL REPORT]. In 1973, the European Community [hereinafter EC or the Community] experienced 2.7 percent unemployment. JEAN ROSE SKINNER, EUROPE'S JOBLESS: NO END IN SIGHT?, reprinted in 123 CONG. REC. 26,099 (1977). In the trough of the recession of 1975, unemployment soared to 5.2 percent. *Id.* The economic recovery of the following year provided no relief in unemployment, which rose slightly to 5.3 percent. *Id.* By the end of 1977, it was estimated that 6,000,000 people would be out of work. *Id.* The heads of the various Member States convened in Paris to discuss ways to resolve the problem. See COMMISSION SEVENTH GENERAL REPORT ON THE GENERAL ACTIVITIES OF THE EUROPEAN COMMUNITIES ¶ 234 (1973) [hereinafter SEVENTH GENERAL REPORT]. They concluded that improving the quality of life and the standard of living was the desired goal, and that economic expansion of the Community as a whole, rather than expansion of the economies of the individual Member States, was the desired remedy, as unemployment had become a Community-level problem. *Id.* ¶ 236. Thus, the heads of state asked the Community institutions to devise a social program that would further these goals. *Id.* ¶ 234. The Directive on Collective Redundancies [hereinafter the Directive] formed part of this program. *Id.*; see Council Directive No. 75/129, O.J. L 48/29 (1975)

The United States began its continual struggle with unemployment in the period between the Korean War and the mid-1960s. GORDON F. BLOOM & HERBERT R. NOR-THRUP, ECONOMICS OF LABOR RELATIONS 813 (9th ed. 1982). During this period, the United States was plagued with an unemployment rate in excess of 5 percent, rising as high as 7 percent during recessionary periods. *Id.* Unemployment dropped to a low 4 percent in 1965, and remained around that level for several years. *Id.* The recession of 1975 had a more severe effect on the United States than it did on Europe. The unemployment rate in the United States had risen to 8.2 percent. HEARING BEFORE THE JOINT ECONOMIC COMMITTEE, 94th Cong., 1st Sess. 3 (1975) (statement of Glenn E. Watts informing Committee that official unemployment rate of 8.2 percent failed to accurately reflect "catastrophic unemployment problem"). The recession subsided after 1975, and the United States enjoyed a temporary period of business expansion. HEARING BEFORE THE JOINT ECONOMIC COMMITTEE, 97th Cong.,

the EC attempted to alleviate this problem by issuing the Council Directive of 17 February 1975 on the Approximation of the Laws of the Member States Relating to Collective Redundancies (the "Directive").³ The Directive requires that management announce a mass dismissal at least thirty days before carrying it out. This thirty day period provides time for labor and management to discuss the feasibility of avoiding the dismissal. If the dismissal cannot be avoided, they must discuss ways of mitigating its effects.⁴ Through this notification procedure, the EC sought to enhance the participation of labor in decision making, thereby increasing job security.⁵

Thirteen years later, the U.S. Congress passed similar legislation, known as the Worker Adjustment and Retraining Notification Act ("WARN").⁶ Like the Directive, WARN provides a mandatory notice period prior to the effectuation of a mass dismissal or plant closing.⁷ Congress hoped that this notice period would alleviate the effect of an unannounced dismissal, thereby giving workers time to adjust and seek alternate employment.⁸

This Note analyzes the major substantive distinctions between WARN and the Directive and recommends that the United States supplement its legislation to raise it to the level of its European counterpart. Part I discusses the history leading to the adoption of the Directive, as well as the structure and scope of its various articles, and reviews the case law interpreting the Directive. Part II describes the economic back-

2d Sess. 4 (1982) (statement of Hon. Martin Feldstein). This period of expansion lasted until 1980. *Id.* By 1980, the unemployment rate had dropped to 6.3 percent. *Id.* This low unemployment rate was short lived, however, and by 1982 it soared to 10.8 percent. *Id.* at 2 (statement of Rep. Reuss, Chairman). Whereas the EC passed the Directive in the midst of the first major post-war recession, it was not until 1988 that Congress passed similar legislation known as the Worker Adjustment and Retraining Notification Act. 29 U.S.C. §§ 2101-2109 (1988) [hereinafter WARN]. WARN requires employers to notify their employees at least sixty days prior to either closing the business or effectuating a mass dismissal. *Id.* § 2102(a). Congress intended that the notice period of WARN absorb the shock of an abrupt dismissal. 134 CONG. REC. 8903 (1988) (statement of Sen. Metzenbaum).

3. Council Directive No. 75/129, O.J. L 48/29 (1975).

4. *Id.*, pmb., at 29.

5. *Social Action Program*, Common Mkt. Rep. (CCH) ¶ 3164.07, at 3164 (1978).

6. 29 U.S.C. §§ 2101-2109 (1988).

7. *Id.* § 2102(a).

8. 134 CONG. REC. 8903 (1988) (statement of Sen. Metzenbaum).

ground that prompted the passage of WARN. It then details the relevant sections of WARN and illustrates how U.S. courts have interpreted these sections. Part III compares the effectiveness of the two pieces of legislation within their respective societies. This Note concludes that WARN, unlike the Directive, inadequately protects employees from unannounced mass dismissals.

I. *THE EUROPEAN SOLUTION TO DISRUPTION OF THE WORK FORCE DUE TO MASS DISMISSALS*

A. *Economic History Leading to the Proposal of the Directive*

The post World War II era was a period of vast recovery for the war-torn European economies.⁹ With economic aid from the United States,¹⁰ the European countries devoted their reconstruction efforts toward a relatively unexplored economic sector: industrialization. The result of this industrial revolution was an overwhelming increase in European gross domestic product.¹¹

9. See generally HADLEY ARKES, *BUREAUCRACY, THE MARSHALL PLAN AND THE NATIONAL INTEREST* 24 (1972).

10. *Id.* at 48. The year 1947 marked the commencement of U.S. aid to European reconstruction by means of the Marshall Plan. *Id.* The Marshall Plan, proposed by then Secretary of State George Marshall, was the method by which President Harry S. Truman and Secretary of War Henry Stimson hoped to restore and maintain world stability through the economic recovery of Europe. *Id.* at 24-26. Essential to the recovery of Europe was the economic recovery of Germany, as Germany was the major pre-war supplier of industrial goods. *Id.* at 26, 47. Thus, Secretary of State Marshall developed a plan involving the liberal removal of reparations and the provision of money and resources Europe needed to recover from World War II. *Id.* at 34, 49; see PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 435 (Vintage Books 1989). The former Union of Soviet Socialist Republics, however, continued its policy of imposing heavy war reparations on the Eastern European countries, especially East Germany. ARKES, *supra* note 9, at 57-58. This activity generated a fear of Soviet military capabilities throughout Western Europe. *Id.* Thus, to ensure that the European nations used the U.S. funding to rebuild economically rather than militarily, the United States also supported the rebuilding European nations by providing them with military defense. KENNEDY, *supra*, at 422.

11. KENNEDY, *supra* note 10, at 422. Between 1950 and 1970, the Gross Domestic Product of Europe grew approximately 5.5 percent per annum and 4.4 percent per capita, compared with the world averages of 5 percent and 3 percent, respectively. *Id.* at 421.

Every European nation experienced growth to some degree. *Id.* at 421-28. The German *Wirtschaftswunder* (economic miracle) was the primary example. *Id.* at 425. After the war Germany was divided, and its military machine dismantled. *Id.* Thus, the German population was able to shift the use of its vast internal resources from

Notwithstanding the overall increase in output, this era of prosperity adversely affected the working class. The modernization of industry in Europe caused a general shift in European social structure, as the modernized plants drew agrarian workers into the cities in search of better paying work. At the same time, however, outdated plants were shut down and replaced with more efficient factories. Thus, a substantial portion of the working class already employed in industry found their services no longer needed.¹² As a result of these two phenomena, unemployment increased sharply.

By 1967, the readaption of the agrarian workers to the urban environment and the retraining of those who were displaced due to modernization had necessarily become a priority of EC social policy.¹³ With the dual aim of enhancing employment opportunities and aiding those making a transition from rural to urban life, the EC fortified the fund previously developed for helping the Member States finance the retraining and

military to commercial use. *Id.* Italy also enjoyed vast industrial growth, notwithstanding the fact that it began its recovery from an economic position far worse than that of the other European nations. *Id.* at 422-23.

France and the United Kingdom did not fare as well. The U.K.'s growth rate was probably the lowest in Europe, but overall it was better than the figures of the previous decades. *Id.* at 424-25. The United Kingdom hoped its 1971 accession to the Community would provide a much needed economic impetus. *Id.* Rather, the United Kingdom found itself exposed to both the expensive agricultural price policies of the Community and the fierce manufacturing competition of the other Member States. *Id.* France, while struggling with small, undercapitalized manufacturing processes and small-hold farms, still managed to capture 4 percent of the world gross national product. *Id.* at 427-28. However, modern industrialization of manufacturing processes led to violent outbursts of discontent from the working class who found themselves out of work. *Id.* at 427. While this political unrest was brewing, however, France regained international political power. *Id.* at 428. This power allowed the French government to persuade the EC to adopt positions favorable to Paris. *Id.*

12. See THIRD GENERAL REPORT, *supra* note 2, ¶ 326. As the modernization of Europe progressed, workers had to readapt to their new social situation. COMMISSION FOURTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES ¶¶ 131-34 (1970) [hereinafter FOURTH GENERAL REPORT]. The workers of the coal and steel industries suffered the greatest displacement, although the industrial redevelopment had a great effect in all sectors. *Id.*

13. See generally THIRD GENERAL REPORT, *supra* note 2, ¶¶ 314-30. Many other aspects of employment policy had become an integral part of the social policy of the EC. The need for improving relations between management and labor was recognized as a priority. See SEVENTH GENERAL REPORT, *supra* note 2, ¶ 247. Equal pay for men and women, employing the youth of the EC, and the need for vocational training also enjoyed a position of priority. See COMMISSION EIGHTH GENERAL REPORT OF THE EUROPEAN COMMUNITIES ¶¶ 226, 242-243 (1974) [hereinafter EIGHTH GENERAL REPORT].

readaption of workers.¹⁴ Originally, this "Social Fund" provided the Member States with one half of the funds necessary to provide their unemployed workers with vocational training, resettlement allowances, and unemployment benefits.¹⁵ The Member States were obliged to provide the other half.¹⁶ As early as 1969, however, the EC found it necessary to restructure the Social Fund, and hence it abandoned the system of state contributions.¹⁷ The newly reformed Social Fund, however, still proved to be ineffective in controlling unemployment. Thus, the Commission of the European Communities

14. See EEC Treaty, *supra* note 1, art. 123. Article 123 establishes the Social Fund for the purpose of "improv[ing] opportunities of employment of workers in the Common Market and thus contribut[ing] to raising the standard of living." *Id.* The aim of the Social Fund is to render the employment of workers easier and to increase their geographical and occupational mobility. *Id.*

15. *Id.* art. 125(1). Article 125(2) sets forth the conditions under which the Member States may be reimbursed. *Id.* art. 125(2). Member States may apply for reimbursements from the Social Fund for vocational training if the workers could find employment only in a new occupation, and the workers had been productively employed in the new occupation for six months. *Id.* With respect to assistance toward resettlement allowances, Member States could apply for reimbursement only if the newly located workers had been in productive employment for six months in their new place of residence. *Id.* The Social Fund provided unemployment benefits for workers whose employment was suspended as a result of the conversion (i.e. restructuring) of an undertaking. *Id.* art. 125(1). As was the case with funds for vocational retraining and resettlement aid, the employees had to have been re-employed in the same undertaking for at least six months. *Id.* art. 125(2). Further, the government of the Member State had to submit a plan for the conversion before it was undertaken, and the Commission of the European Community must have approved it. *Id.*

16. *Id.* art. 125(1).

17. THIRD GENERAL REPORT, *supra* note 2, ¶ 324. In 1968, the Social Fund supplied 13,849,037.99 units of account [hereinafter u.a.] to a total of 38,890 workers. COMMISSION SECOND GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES ¶ 387 (1968). In 1968, the amount of the repayments had nearly doubled: 25,904,347 u.a., approximately 23 million u.a. of which went to retraining workers, with the rest devoted to readaption. THIRD GENERAL REPORT, *supra* note 2, ¶ 323. In 1969 monies expended rose to 36.5 million u.a. due to the serious disruption in the coal sector; the need to restructure the fund had become apparent. *Id.* ¶ 324. The repayments stimulated the economic sectors at a national level. *Id.* No impact on the economic and social life at the Community level was felt, however, due to the inherent difficulty in coordinating these two policies. *Id.* Both economic and social policies were independently guided along lines consonant with the divergent economic and social requirements and priorities of the Community. *Id.* As a result, the Community decided to allot the total amount available to all the States in the budget, and abandon the system of Member State contributions to the Social Fund. *Id.* In 1970, the newly structured Social Fund allotted 37 million u.a. for distribution, while the total amount collectively asked for by the Member States totaled 46 million. FOURTH GENERAL REPORT, *supra* note 12, ¶ 128.

(the "Commission") drafted the Social Action Programme,¹⁸ a plan addressing the needs of the Member States in the area of employment policy.¹⁹

The Social Action Programme thus became the vehicle through which the EC promulgated Community-wide standards with respect to all aspects of employment policy. In the name of Community solidarity, the Programme required the Commission to propose, and the Council to adopt, several directives aimed at harmonizing the anomalous employment practices of the Member States.²⁰ The first three directives formed the core of the new policy of protecting the workplace rights of employees. These three directives were the Directive, Council Directive No. 77/187 (the "Business Transfer Directive"),²¹ which protects the continuity of employment when employers sell or transfer their businesses, and Council Directive No. 80/987 (the "Insolvency Directive"),²² which ensures the payment of wages when an employer faces insolvency.

By the unanimous vote of the Council of Ministers, the Directive on Collective Redundancies was the first of the three directives to become effective. Through its provisions, the Directive harmonized the laws of those Member States that already had laws relating to collective redundancies, thereby establishing a Community-wide procedure for providing advance notice of collective redundancies. As is the case with all directives, the Member States are free to fashion their national laws as they see fit as long as the result sought by the directive is

18. See Council Resolution, O.J. C 13/1 (1974) (containing full text of Social Action Programme as adopted by Council of Ministers).

19. *Id.* Drafted at the Summit Conference in Paris in 1972, the Social Action Programme was to be in effect from 1974 until 1976. *Id.* The immediate objectives of the Social Action Programme were to aid migrant and handicapped workers, create the European General Industrial Safety Committee and the European Foundation, and extend the competence of the Miner's Safety and Health Committee. *Id.* The Commission was also required to propose three directives under the Programme, one of which was the Directive on Collective Redundancies. *Id.* The Directive was proposed in 1972. SIXTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES (1972) (discussing directives required under Social Action Programme).

20. See Council Directive No. 75/129, *pmb.*, O.J. L 48/29, at 29 (1975).

21. Council Directive No. 77/187, O.J. L 61/26 (1977) [hereinafter Business Transfer Directive] (concerning safeguarding of employees' rights in event of transfers of undertakings, businesses, or parts of businesses).

22. Council Directive No. 80/987, O.J. L 283/23 (1980) [hereinafter Insolvency Directive] (concerning protection of employees in event of insolvency of their employer).

achieved.²³

B. The Components of the Directive on Collective Redundancies

The Directive consists of three substantive sections. The first section defines the terms and the scope of the Directive,²⁴ while the second section establishes the procedure for consultation between management and labor, and notification of the government labor authority.²⁵ When the management-labor consultations fail to avoid a collective redundancy, the last section of the Directive sets forth the method by which an employer may effectuate the dismissal.²⁶

The Directive's first section defines a collective redundancy in terms of the number of employees dismissed in relation to the number of employees normally employed at a given site. The Directive allows each Member State to choose one of two thresholds.²⁷ The first threshold operates over a thirty-day period. Under this option, businesses that employ between twenty and 100 employees must dismiss at least ten employees to trigger the Directive.²⁸ Those that maintain a work force of 100 to 300 employees must dismiss at least 10 percent of the employees to trigger the Directive.²⁹ Businesses that employ at least 300 workers trigger the Directive by dismissing at least thirty workers.³⁰ The second, less stringent, option operates over a ninety-day period. Under this option, businesses that dismiss twenty employees, regardless of the size of their

23. See EEC Treaty, *supra* note 1, art. 189. A directive is defined in the Treaty as "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.* Where the language of a directive is precise and unambiguous, and the Member State is not required to take any affirmative action in order to implement it, the directive is said to have "direct effect." See, e.g., *Rutili v. Minister for the Interior*, Case 36/75, [1975] E.C.R. 1219, 1236, [1976] 1 C.M.L.R. 140, 158. In such cases, the Member States are restricted to the language of the directive. *Id.*

24. Council Directive No. 75/129, art. 1, O.J. L 48/29, at 29 (1975).

25. *Id.* arts. 2, 3, at 30.

26. *Id.* arts. 3, 4, at 30. The last section comprises the Final Provisions, which are largely administrative. *Id.* arts. 5-8, at 30. It should be noted that article 5 of the Directive allows the Member States to adopt measures that are more favorable to workers than are those required by the Directive. *Id.* art. 5, at 30.

27. *Id.* art. 1, at 29.

28. *Id.* art. 1(a)(1).

29. *Id.* art. 1(a)(2).

30. *Id.* art. 1(a)(3).

labor force, trigger the Directive.³¹

In addition to setting up the two thresholds, the first section of the Directive excludes four classes of employees from its scope.³² First, the Directive excludes those employees hired to complete a specific contract and those hired specifically for a limited period.³³ These employees, however, remain within the scope of the Directive if the dismissal occurs before the task is completed or before the limited period elapses.³⁴ Second, the Directive excludes employees of public administrative bodies or establishments governed by public law.³⁵ The third exclusion encompasses the crews of sea-going vessels.³⁶ Fourth, the Directive excludes those employees who lose their jobs due to the closing of the business as the result of a judicial decision.³⁷

Once the employer decides to dismiss a sufficient number of employees to trigger the Directive, the second section of the Directive requires management and labor to embark on a detailed consultative process.³⁸ Article 2 requires the employer to provide the representatives of the employees with all relevant information, such as the number of employees that will be dismissed, the number of workers normally employed, and the period over which the redundancies will be effected.³⁹ The employer must also supply the representative of the employees with the reasons, in writing, for the redundancies.⁴⁰ The reason for this transfer of information is to aid the representatives of the employees in making constructive proposals.⁴¹

In addition to providing this information, employers must simultaneously notify the government labor authority and

31. *Id.*

32. *Id.* art. 1(2).

33. *Id.* art. 1(2)(a).

34. *Id.*

35. *Id.* art 1(2)(b).

36. *Id.* art 1(2)(c).

37. *Id.* art. 1(2)(d). Bankruptcy is an example of a business closing as the result of a judicial decision. *Dansk Metalarbejderforbund v. H. Nielsen and Son*, Case 284/83, [1985] E.C.R. 553, [1986] 1 C.M.L.R. 91, 93.

38. Council Directive No. 75/129, art. 3, O.J. L 48/29, at 30 (1975). "Labor" usually refers to the representatives of the employees. *Id.* arts. 2, 3, at 29-30.

39. *Id.* art. 2(3), at 30.

40. *Id.*

41. *Id.*

meet with the representative of their employees.⁴² During the meeting, labor and management discuss the possibility of avoiding the dismissal.⁴³ If they determine that a dismissal is the only viable solution, they propose and discuss methods to minimize the effect of the dismissal on workers.⁴⁴ The discussion at the meeting may also involve alternatives to dismissal such as salary freezes or pay cuts, uncompensated overtime, a reduction in work hours, work-force attrition, or temporary lay-offs with priority re-hiring.

Where management and labor determine that a collective redundancy is the only viable alternative, the third section of the Directive dictates the method by which employers must effectuate the dismissal. The employers must first submit a detailed written report to the public employment authority.⁴⁵ Upon receiving the report, the public employment authority has thirty days to evaluate the severity of the dismissal and to prepare the Community for the sudden flood of unemployed.⁴⁶ While waiting for this thirty-day period to expire, employers may not dismiss any employees.⁴⁷

The thirty-day notice period is somewhat flexible. In some circumstances, the Member States may permit the public employment authority to lengthen the period.⁴⁸ In these cases, the public employment authority may extend the period to a maximum of sixty days.⁴⁹

42. *Id.* arts. 2(1), 3, at 29.

43. *Id.* art. 2(2), at 30.

44. *Id.*

45. *Id.* art. 3(1). The report must include the reasons for the redundancies, the number of workers that will be affected, the period over which the redundancies are to be made, and any other relevant information produced by the meeting between the employer and the representative of the redundant employees. *Id.*

46. *Id.* art. 4(2).

47. *Id.* art. 4(1). It is conceivable that an employer may notify both the employee representative and the public authority simultaneously so as to shorten the total length of time involved in the process.

48. *Id.* art. 4(1),(3).

49. *Id.* art. 4(3). Article 4(3) provides that where the initial period provided for in paragraph 1 is shorter than 60 days, Member States may grant the competent public authority the power to extend the initial period to 60 days following notification where the problems raised by the projected collective redundancies are not likely to be solved within the initial period.

Id. Article 4(3) goes on to state that the Member States may grant the public employment authority wider power to extend the period. *Id.*

The provisions of the Directive represent the minimum standards required by the EC. In implementing the Directive, the Member States are free to impose standards that are more severe than those required by the Directive.⁵⁰ Many of the Member States have done so by lowering the threshold numbers or strengthening the notice requirements.⁵¹ The overall effect has been a level of work-place rights enhanced beyond that envisioned by the EC.

The Directive contains one significant loophole that has emerged over the past few years as a result of increased international corporate restructuring.⁵² The Directive does not provide for the situation where the decision to effectuate a redundancy is made by a controlling parent company or head

50. Council Directive No. 75/129, art. 5, O.J. L 48/29, at 30 (1975). This provision allows the Member States to adopt legislation more favorable to the employees. *Id.*

51. Belgium, for example, defines a collective dismissal as a dismissal of personnel for economic or technical reasons involving, over a period of sixty days, a 10 percent reduction in the work force and a minimum of six dismissals in the case of companies employing between twenty and fifty people. 1 *DOING BUSINESS IN EUROPE* (CCH) ¶ 9-160 (1987). A plant closing is defined as when "a company or division employing 20 or more persons definitively ceases its principal activity and the number of employees is reduced to less than one-quarter of the average number of employees who are employed in the company or division in the preceding calendar year." *Id.*

In Germany, employers are obliged to notify the district labor exchange office if they intend to dismiss, within thirty days, five workers in a plant employing between twenty and fifty-nine employees, 10 percent of a 6,500 person work force, or more than twenty-five members of the work force. *Id.* ¶ 35-220. In plants of more than 500, thirty dismissals will trigger the German legislation. *Id.*

The Netherlands has strong legislation as well. *Id.* ¶ 66-850. Employers in the Netherlands must notify both the district Labor Bureau and the interested trade union one month before filing an application for permission to dismiss. *Id.* This application provides that trade unions are to be consulted and that the government must have had a chance to avoid the unemployment. *Id.* Twenty employees will also trigger the legislation of the Netherlands. *Id.*

In Greece, the redundancy law applies to any employer with twenty to fifty employees who wishes to dismiss more than five during the same month. *Id.* ¶ 42-780. In a plant with a work force of more than fifty employees, 2 percent to 3 percent of the total number or more than thirty during the same month will trigger the law. *Id.*

52. *Proposal to Close Loophole in Collective Redundancies Directive*, Common Mkt. Rep. (CCH) 6 (Oct. 17, 1991) [hereinafter *Proposal to Close Loophole*]. In 1988-89, 55 percent of acquisitions were transnational. [New Developments] Common Mkt. Rep. (CCH) ¶ 96,085 (Oct. 17, 1991). Forty percent of acquisitions involved undertakings from two different Member States, and 15 percent involved undertakings from third countries. *Id.*

office as opposed to the employing subsidiary or branch.⁵³ In such a circumstance, the immediate employer may not have access to all of the information that it is required to pass on to the employees' representatives and the government labor authority.⁵⁴

In order to fill this gap, the Commission has proposed an amendment to the Directive.⁵⁵ This amendment will require that the procedures of the Directive apply regardless of where the decision to dismiss was made.⁵⁶ The remedy, as provided by the amendment, for failure to fulfill the notification and consultation procedure is the nullity of the collective redundancy.⁵⁷

The proposed amendment will modify the existing provisions of the Directive in three ways. First, the exception for collective redundancies that results from a judicial decision will be eliminated.⁵⁸ Second, crews of sea-going vessels will no longer be excluded from the protection of the Directive.⁵⁹ Third, establishments that employ fewer than fifty workers will no longer be required to designate workers' representatives for the purposes of information and consultation requirements.⁶⁰ Consequently, such establishments will no longer be obliged to follow the consultation procedure.⁶¹ Finally, the proposed amendment will allow its provisions to be implemented through collective bargaining agreements.⁶² This provision brings the Directive in line with other recently proposed

53. *Id.*

54. Commission Proposal for a Council Directive Amending Directive 75/129 on the Approximation of the Laws of the Member States Relating to Collective Redundancies, pmbl., O.J. C 310/5, at 5-6 (1991) [hereinafter Commission Proposal]; see *Proposal to Close Loophole, supra* note 52, at 6.

55. Commission Proposal, *supra* note 54, O.J. C 310/5 (1991).

56. *Id.* art. 1(4)(4), at 6.

57. *Id.* Six Member States already allow their courts to declare null and void collective redundancies that are carried out in violation of the Directive. [New Developments] Common Mkt. Rep. (CCH) ¶ 96,085 (Oct. 17, 1991). These Member States are Germany, Greece, Italy, Luxembourg, the Netherlands, and Portugal. *Id.*

58. [New Developments] Common Mkt. Rep. (CCH) ¶ 96,085 (Oct. 17, 1991). The legislation of France, Germany, the Netherlands, Portugal, Spain, and the United Kingdom already contain such a provision. *Id.*

59. Commission Proposal, *supra* note 54, art. 1(2), O.J. C 310/5, at 6 (1991).

60. *Id.* art. 1(4)(5).

61. *Id.*

62. *Id.* art. 2(1), at 7.

directives in the sphere of employment law.⁶³

The purpose of the Directive is to mitigate, and possibly avoid, dismissals through management-labor negotiations. Where negotiations result in a dismissal, the notice period not only gives employees time to adjust but also enables the public employment authority to implement various assistance programs. Thus, this process of notification and consultation ensures that the interests of the employees will be protected to the fullest extent possible.

C. *Judicial Interpretation of the Directive*

The Treaty establishing the European Economic Community ("EEC Treaty")⁶⁴ empowers the Court of Justice to interpret both its provisions and the legislation enacted thereunder.⁶⁵ The Court of Justice has interpreted three substantive issues concerning the Directive. These issues were the scope of the Directive's exemptions, the status of constructive dismissals, and the duty of an employer to foresee the possibility of a collective redundancy.⁶⁶

1. The Exclusivity of the Exemptions Under Article 1(2)

The first issue to come before the Court of Justice related to the breadth of the four exemptions of the Directive.⁶⁷ In *Commission v. Belgium*,⁶⁸ the Court held that Belgian implementing legislation fell short of the requirements of the Directive because it exempted too many workers. In addition to excluding port and construction workers,⁶⁹ the Belgian legislation attempted to exclude employees dismissed as the result of a

63. [New Developments] Common Mkt. Rep. (CCH) ¶ 96,085 (Oct. 17, 1991).

64. EEC Treaty, *supra* note 1.

65. *Id.* art. 164.

66. Although this Note discusses only two of the cases involving the Directive, there are actually four. The two that will not be discussed involved proceedings concerning the delay of Italy in implementing the Directive, and have no substantive value for the purposes of this Note. *Commission v. Italy*, Case 131/84, [1984] E.C.R. 3531, [1985] 3 C.M.L.R. 693; *Commission v. Italy*, Case 91/81, [1982] E.C.R. 2133, [1982] 3 C.M.L.R. 468.

67. *See supra* notes 27-31 and accompanying text (explaining threshold numbers required to trigger Directive).

68. Case 215/83, [1985] E.C.R. 1039, [1985] 3 C.M.L.R. 624.

69. *Id.* at 1052, [1985] 3 C.M.L.R. at 635.

plant closing.⁷⁰

With respect to the port and construction workers, Belgium claimed that port and construction workers are historically engaged on a day-to-day basis to perform a specific task, and thus are necessarily exempt from the scope of the Directive.⁷¹ Because the number of port and construction workers engaged under indefinite contracts was negligible, Belgium claimed that the practical effect of their exclusion from the enabling legislation would not cause Belgium to fall below the Community standard.⁷² The Court of Justice dismissed this contention, however, holding that the practical effect of the legislation is irrelevant.⁷³ The Court stressed that it is possible for port and construction workers to enter into indefinite contracts. Thus, they are intended to be covered by the Directive, regardless of how few they may be.⁷⁴

The Belgian legislation also excluded employees dismissed as a result of a plant closing.⁷⁵ Belgium argued that most plant closures are the result of judicial decisions, and thus most of them would be excluded from the protection of the Directive.⁷⁶ Again the Court of Justice disagreed. The Directive, the Court of Justice stated, is intended to protect all employees who fall within its scope, no matter how few. This scope includes those employees dismissed as the result of a plant closing that was not judicially ordered.⁷⁷

2. Unilateral Acts by Employees

The second issue to come before the Court of Justice was the liability of employers under the Directive when their employees unilaterally terminated their own employment. In *Dansk Metalarbejderforbund v. H. Nielsen and Son*,⁷⁸ the employees

70. *Id.* at 1051, [1985] 3 C.M.L.R. at 633-34.

71. *Id.*; see Council Directive No. 75/129, art. 1(2)(a), O.J. L 48/29, at 30 (1975).

72. *Belgium*, [1985] E.C.R. at 1053, [1985] 3 C.M.L.R. at 635-36.

73. *Id.* at 1054, [1985] 3 C.M.L.R. at 636.

74. *Id.*

75. *Id.* at 1050, [1983] 3 C.M.L.R. at 633.

76. *Id.* at 1051, [1983] 3 C.M.L.R. at 634; see Council Directive No. 75/129, art. 1(2)(d), O.J. L 48/29, at 29 (1975). Article 1(2)(d) of the Directive exempts "workers affected by the termination of an establishment's activities where that is the result of a judicial decision." *Id.*

77. Council Directive No. 75/129, O.J. L 48/29 (1975).

78. Case 284/83, [1985] E.C.R. 553, [1986] 1 C.M.L.R. 91.

ceased work after their nearly insolvent employer refused to guarantee the payment of their wages.⁷⁹ The employees' union subsequently sued the employer, claiming that the failure to guarantee payment forced the employees to cease work, and thus the employer had, in effect, dismissed the employees.⁸⁰ The union charged the employer with liability under the Directive because the employer failed to satisfy the Directive's procedural requirements prior to effectuating the "constructive dismissal."⁸¹ The Court of Justice rejected the union's claim, stressing that the purpose of the Directive is to minimize or avoid mass dismissals through utilization of the consultative procedure.⁸² To allow employees to terminate their employment unilaterally, even when they fear nonpayment of their wages, would deprive employers of their discretion as to when to apply the collective redundancy procedures, and thereby undermine the purpose of the Directive.⁸³

3. Unilateral Acts by the Employers

The last issue, also addressed in *Dansk*, was the duty of employers to foresee the possibility of dismissals.⁸⁴ In considering whether employers have such a duty, the Advocate General pointed out that to require employers to foresee a collective redundancy would endanger employment rather than protect it, as such a requirement would compel employers to contemplate collective redundancies while at the same time

79. *Id.* at 561, [1986] 1 C.M.L.R. at 97.

80. *Id.*, [1986] 1 C.M.L.R. at 98.

81. *Id.* at 562, [1986] 1 C.M.L.R. at 98.

82. *Id.*, [1986] 1 C.M.L.R. at 99. The Advocate General expressed the objective of the Directive as protecting employees against a unilateral attack made by their employer. The Advocate General stated that "[t]he directive does not have the objective of guaranteeing a form of social security for workers whose employer encounters financial difficulties, but seeks . . . to strengthen the protection of the worker against unilateral acts by the employer in the form of collective redundancies." *Id.* at 556, [1986] 1 C.M.L.R. at 94.

83. *Id.* at 563, [1986] 1 C.M.L.R. at 99. The Court of Justice based its holding in light of the Directive's objective, which is to protect the employee from redundancies actually contemplated by employers. *Id.* The Court held that to allow constructive termination to trigger the Directive, then, would undermine this objective as such an action would allow the employees to effect collective redundancies against the intention of their employers. *Id.* This would actually allow the employees to create the conditions that give rise to compensation, the Court continued, as a constructive dismissal would undercut the ability of employers to utilize the consultative process. *Id.*

84. *Id.*

trying to overcome financial difficulties.⁸⁵

The Court of Justice took a more pragmatic view. Once again strictly construing the language of the Directive, the Court refused to recognize a duty on the employer to foresee a collective redundancy.⁸⁶ Instead, the Court held that employers must actually contemplate collective redundancies before they will be held to the provisions of the Directive.⁸⁷ In so holding, the Court stressed that the interpretation requested by the employees in *Dansk* would run afoul of article 1(2) of the Directive, as that article excludes collective redundancies that result from termination due to judicial decisions.⁸⁸ In more general terms, the Court explained that because the Directive does not expressly list situations in which employers must "contemplate" a collective redundancy, there can be no implied obligation to foresee one.⁸⁹

These cases demonstrate that the objective and plain meaning of the Directive's language govern the Court's interpretation.⁹⁰ The Court of Justice has consistently construed the language of the Directive narrowly so as to conform its language to its objective of protecting employees from the inequitable actions of their employers. In this context, only those employers who affirmatively dismiss employees will be held to the requirements of the Directive. Circumstances beyond the employer's control that result in dismissal, such as bankruptcy or a strike, cannot bind the employer to the terms of the Directive.

II. *THE WARN ACT*

In 1988, the U.S. Congress enacted legislation with characteristics similar to those of the Directive: WARN. Like the Directive, WARN requires employers to notify their employees and the local government prior to effectuating a dismissal. Unlike the Directive, however, WARN does not require negotia-

85. *Id.* at 557, [1986] 1 C.M.L.R. at 96.

86. *Id.* at 563, [1986] 1 C.M.L.R. at 99.

87. *Id.*, [1986] 1 C.M.L.R. at 100.

88. *Id.* at 564, [1986] C.M.L.R. at 100.

89. *Id.*, [1986] 1 C.M.L.R. at 99-100.

90. *Id.* In *Dansk*, the Court of Justice looked specifically at the language of the Directive, and interpreted it literally, in light of the objective of the Directive. *Id.* at 563, [1986] 1 C.M.L.R. at 99.

tions between labor and management in addition to notice. Due largely to this difference and the judicial interpretation of the U.S. statute, WARN has a quite different impact on the U.S. work force than the Directive does on the European work force.

A. *Conditions Preceding the Passage of WARN*

1. Economic Factors Leading to the Passage of WARN

At the conclusion of World War II, the United States led the world in economic production.⁹¹ This economic prosperity, however, soon dissipated as a result of two antagonistic forces: the increase in industrial productivity of modern Europe and the general shift of the U.S. work force away from industrial jobs to the personal services sector.⁹² By 1960, the U.S. economy felt the short term repercussion of its shifting work force—the decline of research and development as compared to other countries.⁹³ As a result, competition with non-U.S. goods became increasingly difficult, causing higher than average inflation.⁹⁴ This inability of the United States to compete laid the foundation for the development of longer term effects, such as decreasing productivity and an increasing federal deficit.⁹⁵

By the late 1970s, the U.S. economy felt the long term repercussions of the shifting work force. In the period between 1978 and 1982, productivity growth fell dramatically.⁹⁶ As a result, the United States found it increasingly difficult to compete in the international market,⁹⁷ leading to a further de-

91. KENNEDY, *supra* note 10, at 432.

92. *Id.* at 433. In addition to the shift away from mass production to less productive personal services, other downward U.S. economic trends were present, such as fiscal and taxation policies that encouraged high consumption but also a low personal savings rate, a decrease in research and development, and the devotion of a large proportion of the national product to defense expenditures. *Id.* These contributed to the decline of U.S. prosperity. *Id.*

93. *See id.* (discussing decline of U.S. research and development).

94. *Id.* at 434. Other factors were present that fostered high inflation. *Id.* at 433-34. These factors included a surge of investment in Europe, a further increase in overseas military spending, and the increasing inability of the United States to compete industrially with other nations. *Id.*

95. *Id.*

96. *Id.* at 434. Productivity growth fell from 2.4 percent to 0.2 percent. *Id.*

97. *Id.* at 435.

cline in the U.S. per capita gross national product.⁹⁸ Finally, by the late 1980s, the large plants of the Midwest had laid-off thousands of workers without warning.⁹⁹

2. The Legislative Debates

In 1973, the Senate first considered legislation requiring employers to give notice prior to mass dismissals.¹⁰⁰ Throughout the next fifteen years, Congress heatedly debated the terms of legislation aimed at requiring notification prior to a plant closure or a mass dismissal.¹⁰¹ The opponents of advance notice argued that it was a radical idea that would strike at the very heart of the free enterprise system.¹⁰² They also harbored concerns that advance notice would be detrimental to foreign trade.¹⁰³ Proponents, on the other hand, stressed that the issue was one of human decency,¹⁰⁴ and noted that most U.S. competitors already required advance notice.

98. *Id.*

99. *See* 134 CONG. REC. 8903 (1988) (statement of Sen. Metzenbaum informing Senate of recent plant closings in Michigan and Ohio).

100. 119 CONG. REC. 41,364 (1973). Senator Walter Mondale proposed bill S2809, which purported to amend the Manpower Development and Training Act. *Id.* The amendment would have not only required notice of a plant closing, but also other assistance including retraining. *Id.* Further, the amendment would have prevented federal support for unjustified dislocations. *Id.* The same legislation was proposed to the House of Representatives in 1974. 120 CONG. REC. 17,586 (1974) (statement of Rep. Patten introducing the same amendment).

101. Advance notice legislation has consistently arisen in Congress since that time. 125 CONG. REC. 21,679 (1979) (statement of Rep. William Ford introducing H.R. 5040 that required notice to Secretary of Labor, labor organizations that are affected, and employees and local government); 129 CONG. REC. 10,576 (1983) (statement of Rep. William Ford introducing H.R. 2847 as National Employment Priorities Act); 131 CONG. REC. 5920 (1985) (introducing plant closing bill as Labor-Management Notification and Consultation Act); 133 CONG. REC. 2231 (1987) (statement of Sen. Metzenbaum introducing S. 538—Economic Dislocation and Worker Adjustment Assistance Act). WARN was then introduced as part of the Omnibus Trade and Competitiveness Act of 1987. *See* 133 CONG. REC. 17,849 (1987) (statement of Sen. Bonior).

102. 134 CONG. REC. 8618 (1988) (statement of Sen. Metzenbaum).

103. *Id.* at 15,782. Senator Symms expressed concern that advance notice “will increase labor market rigidity” and “reduce management flexibility.” This would, in turn, “increase labor costs and thus productivity costs, and therefore encourage off-shore sourcing of the products [plants] produce.” *Id.* Senator Symms queried “how in the world does [advance notice] help this economy of ours if we do things which make it harder to do business in the United States.” *Id.*

104. *Id.* at 8903. Sen. Metzenbaum urged the adoption of WARN by asking, “What happens to these hard working, dedicated Americans and their communities when an employer suddenly pulls the plug? How do they begin to pick up the

Finally, after failing to override President Reagan's veto, Congress enacted WARN in 1988 without his signature.¹⁰⁵ Through WARN, Congress intended to establish a mandatory notice provision that would provide a transition period during which soon to be dismissed employees could seek alternate employment or retraining.¹⁰⁶ The period was also intended to provide time for the state dislocated worker unit to prepare itself for the influx of unemployed.¹⁰⁷

B. Notice—*The Essence of WARN*

WARN sets out the procedure that employers must follow prior to executing a mass dismissal or plant closing.¹⁰⁸ The three substantive sections of WARN¹⁰⁹ include its definitions and their scope,¹¹⁰ the required notice procedure,¹¹¹ and the

pieces? . . . The advance notice requirement will not end the tragedy of plant closing. But it will act as a shock absorber." *Id.*

105. President's Message to Congress on Veto of H.R. 3 or the Omnibus Trade and Competitiveness Act, *id.* at 12,130 (1988). President Reagan vetoed the entire trade bill because of his opposition to the advanced notice provision. *Id.* The House overrode the veto, but the Senate sustained it. *Id.* at 12,152-53; *id.* at 13,716. The advance notice provision was then severed from the Omnibus Trade Act and reintroduced. See 133 CONG. REC. 17,849 (1987) (statement of Rep. Bonior speaking on behalf of S. 2527 Plant Closing Notification Act). President Reagan did not veto the bill, but refused to sign it. Thus, WARN became law without his signature. 24 WEEKLY COMP. PRES. DOC. 990 (Aug. 8, 1988). For a comprehensive discussion of the history of WARN, see Christopher Yost, *WARN: Advance Notice Required?*, 38 CATH. U. L. REV. 675 (1989).

106. 20 C.F.R. § 639.1(a) (1991); see H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.A.N. 2078. The House Conference noted that advance notice is an essential component of a successful worker adjustment program. *Id.* It also indicated that WARN and the Economic Dislocated Worker Assistance Act [hereinafter EDWAA] are intended to be closely intertwined so as to create a program of dislocated worker assistance. *Id.*; see *infra* notes 239-44 (discussing EDWAA).

107. 20 C.F.R. § 639.1 (1991).

108. 29 U.S.C. § 2102 (1988).

109. *Id.* The remaining sections deal with administrative matters. Section 2105 states that WARN does not preempt other statutory or contractual rights and remedies of employees. *Id.* § 2105. Section 2106 encourages employers to take action even where they are not statutorily required to do so. *Id.* § 2106. Section 2107 grants the Department of Labor authority to prescribe regulations regarding WARN. *Id.* § 2107. Section 2108 explains the effect of WARN on other laws. *Id.* § 2108. Lastly, § 2109 requires the Comptroller General to submit to the Committee on Small Business of both the House and the Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report on employment and international competitiveness, analyzing the costs and benefits of WARN. *Id.* § 2109. To date, this report has not been completed.

110. *Id.* §§ 2101, 2103.

remedy to which affected employees are entitled.¹¹²

WARN applies only to those businesses that employ 100 or more employees. Excluded from this threshold are temporary employees,¹¹³ defined as those who are either hired with the understanding that their employment is only for the duration of a particular project, or those who are hired to operate a temporary facility.¹¹⁴ Thus, the definition necessarily excludes seasonal workers as well.¹¹⁵ Also outside the reach of WARN are employees out of work due to a strike or lock-out.¹¹⁶ Further, employees who are permanently replaced because of participation in an economic strike are not included in compiling the threshold.¹¹⁷

Employers must dismiss a statutory number of the employees included in this threshold to have effectuated a "mass dismissal" under WARN.¹¹⁸ Like the Directive, WARN defines this statutory number in terms of the number of employees dismissed over a thirty-day period in relation to the number of employees usually employed at a given site.¹¹⁹ To execute a mass dismissal, an employer¹²⁰ must permanently dismiss at least fifty employees at one site.¹²¹ In the alternative, the employer must temporarily dismiss either 500 total or 33 percent of all employees.¹²²

Employers are thus not required to give notice at all unless the statutory minimum number of employees will experience an "employment loss."¹²³ The term "employment loss" excludes many types of employees. Employees whose employ-

111. *Id.* § 2102.

112. *Id.* § 2104.

113. *Id.* § 2103(1).

114. *Id.*

115. 20 C.F.R. § 639.3(h) (1991).

116. 29 U.S.C. § 2103(2) (1988).

117. *Id.*

118. *Id.* § 2101(a)(3).

119. *Id.* § 2101.

120. An "employer" is defined by WARN as one who employs 100 or more employees excluding part time workers, or 100 or more who work more than forty hours per week in the aggregate. *Id.* § 2101(1)(a).

121. *Id.* § 2101(a)(2). This threshold cannot include part-time employees. *Id.* § 2101(a)(3)(B)(i).

122. *Id.* § 2101(a)(3)(i)-(ii). Where the 33 percent provision applies, 33 percent of the work force must total at least fifty employees in order for WARN to apply. *Id.*

123. *Id.* Section 2101(a)(6) defines "employment loss" as "(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement,

ers have offered them work at different sites, provided the new sites are within reasonable commuting distance, do not experience an employment loss under WARN.¹²⁴ Also excluded are employees who accept such offers notwithstanding the fact that the new sites are not within a reasonable distance.¹²⁵ Both of these exclusions are conditioned upon the fact that the transfer will not disrupt employment for more than six months.¹²⁶

Once employers have decided to dismiss a sufficient number of employees, the second substantive section of WARN comes into play. This section requires employers to notify their employees. Employers are also required to notify both the state dislocated worker unit¹²⁷ and local government of the pending dismissal at least sixty days prior to the execution of the plant closure or dismissal.¹²⁸

This notice period is somewhat flexible.¹²⁹ Employers may reduce the notice period to "as much notice as is practicable" in three circumstances.¹³⁰ Under the faltering company exception,¹³¹ employers who actively seek capital to avoid a closing or lay-off may shorten the period if they have a good

(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.*

124. Section 2101(b)(2) states that

[n]otwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment.

Id.

125. *Id.* § 2101(b)(2)(B). Section 2101(b)(2)(B) states that "the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later." *Id.*

126. *Id.*

127. The state dislocated worker unit is the unit designated or created through the auspices of the EDWAA. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 2081; see *infra* notes 239-44 (discussing EDWAA).

128. 29 U.S.C. § 2102(a)(1988).

129. *Id.* § 2102(b).

130. *Id.* Employers may reduce the notice period to "as much notice as is practicable" when they are actively seeking capital, when they are faced with unforeseen business circumstances, or when they must close the business as the result of a natural disaster. *Id.*

131. *Id.* § 2102(b)(1).

faith belief that giving notice would frustrate their efforts.¹³² Employers may also reduce the notice period when confronted with unforeseen business circumstances at the time notice would normally have been required.¹³³ Finally, employers need not give any notice if the mass dismissal or plant closing is due to a natural disaster and the giving of notice is impracticable.¹³⁴

Where the employer fails to give adequate notice, the third section of WARN provides a remedy for those employees who have been wrongfully discharged.¹³⁵ In essence, employers are liable for back pay for each day of the violation.¹³⁶ In addition, employers are liable for the value of any benefits to which the employees were entitled while on the job.¹³⁷ Employers must also pay a civil fine for failure to notify local officials.¹³⁸

Employers may mitigate their liability in four ways. First, they may pay the employees their wages during the period of the violation.¹³⁹ Second, they may deduct from the initial calculation of sixty days wages, any voluntary and unconditional payments made to the employees.¹⁴⁰ Third, they may deduct

132. *Id.*

133. *Id.* § 2102(b)(2)(A). When confronted with an unforeseen business circumstance, employers may also extend the duration of a mass layoff beyond the six month limit provided in section 2101(a)(3). *Id.* § 2102(c). Employers who invoke this extension, however, must notify the laid-off employees as soon as it becomes foreseeable that such an extension will be necessary. *Id.* § 2101(c)(2).

134. *Id.* § 2102(b)(2)(B).

135. *Id.* § 2104.

136. *Id.* § 2104(a)(1)(A). The amount recoverable is either the average amount received by the employee over the past three years of employment, or the final regular rate of pay received by the employee, whichever is greater. *Id.*

137. *Id.* § 2104(a)(1)(B). Section 2104(a)(1)(B) provides benefits to which dismissed employees are entitled, and includes the value of any benefits under an employee benefit plan, including any medical benefits incurred during the period of the violation that would have been covered under the employee benefit plan had the employee not been dismissed. *Id.* This liability may be calculated up to a maximum of sixty days, and may not exceed one-half the number of days of the employment. *Id.*; see *Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460 (S.D.N.Y. 1989). In *Finnan*, the court interpreted this provision to require that the benefits to which the employees were entitled during their employment are to be appraised and the value awarded to the employees. *Id.* at 464.

138. 29 U.S.C. § 2104(a)(3) (1988). The fine is US\$500 per day of the violation. *Id.*

139. *Id.* § 2104(a)(2)(A).

140. *Id.* § 2104(a)(2)(B).

any payment made to a third party on behalf of the employee during the period of the violation.¹⁴¹ Fourth, they may mitigate their liability by demonstrating good faith beliefs that their actions would not violate WARN.¹⁴²

C. *Judicial Interpretation of WARN*

Because WARN has been in effect for only a short period of time, case law interpreting its provisions is sparse. Courts have, however, interpreted various aspects of the definition of an "employer" and an "employee" under WARN. They have reviewed several of the exceptions allowing employers to shorten the notice period and have reviewed WARN's remedial provisions. Much of the case law tends to increase workers' difficulty in successfully seeking relief under WARN.

1. The "Employer"

a. Identifying an "Employer"

Stated simply, WARN requires employers to notify their employees of anticipated dismissals.¹⁴³ In interpreting WARN, courts have expounded various elements of the definition of an "employer." In *Hotel Employees Restaurant Employees International Union Local 54 v. Elsinore Shore Associates*,¹⁴⁴ the court determined the level of control that a person must exert over a business to be deemed the employer.¹⁴⁵ The court described the employer as the person responsible for overseeing the daily operation of the business.¹⁴⁶ The court held that mere supervision of the business activities does not elevate the supervisor to the level of an employer.¹⁴⁷

Another aspect of the statutory definition of an "em-

141. *Id.* § 2104(a)(2)(C).

142. *Id.* § 2104(a)(4). The amount of the deduction allowed for a good faith belief is left to the discretion of the court. *Id.*

143. *Id.* § 2102.

144. 724 F. Supp. 333 (D.N.J. 1989).

145. *Id.* The defendants operated a casino in Atlantic City. *Id.* at 334. The casino experienced financial difficulties, and the New Jersey Casino Control Commission appointed a conservator so that the casino could remain operative. *Id.* When the financial problems persisted, the casino was shut down. *Id.* The issue before the court was whether the conservator or the casino management was the employer for the purposes of WARN. *Id.*

146. *Id.* at 335.

147. *Id.* at 336.

ployer" is the time at which to count the number of employees a business must employ before it is considered an "employer." WARN requires that a business employ at least 100 employees before it is deemed an "employer,"¹⁴⁸ but it does not specify whether the employees are to be counted at the time of the dismissal or at the time notice should have been given. In *United Electrical Workers of America v. Maxim, Inc.*,¹⁴⁹ the employer ceased operations without giving adequate notice to its employees.¹⁵⁰ It argued that on the date of closing, the company employed only seventy-six employees, and thus WARN did not apply.¹⁵¹ In a small victory for labor, the U.S. District Court for the District of Massachusetts decided that the number of employees at the site is to be determined on the day that notice is first required to be given, not on the day of the actual closing.¹⁵²

b. Effecting a "Mass Dismissal" Under WARN

In addition to detailing the characteristics of an employer, WARN's definition of "employer" also prescribes the actions a business must take before it has effected a "mass dismissal." To effectuate a mass dismissal under WARN, the employer need only lay-off fifty employees. The courts, however, have limited the scope of employees eligible to be included in this group of fifty employees.¹⁵³ In *Maxim*, for example, the court limited the ability of employees to aggregate various groups of employees dismissed at different times.¹⁵⁴ The employer had initially laid-off a number of employees below the WARN threshold. In a subsequent dismissal, however, the employer

148. 29 U.S.C. § 2101(a)(1) (1988).

149. No. 89-2981, 1990 U.S. Dist. LEXIS 5988 (D. Mass. May 15, 1990) (granting writ of attachment).

150. *Id.* at *5.

151. *Id.* at *3.

152. *Id.*

153. *Id.* at *9; see *Office & Professional Employees Int'l Union v. Sea-Land Serv., Inc.*, No. 90 Civ. 2559, 1991 WL 136036 (S.D.N.Y. July 18, 1991). In *Sea Land*, Judge Leval held that the employees must be laid off for six months before they can be considered to have experienced an employment loss. *Id.* at *4. In granting summary judgment to defendant Sea Land, he stated further that where employees are laid off, recalled, and then laid-off again within thirty days, the first lay-off cannot be considered an employment loss under WARN. *Id.* at *5.

154. *United Elec. Workers v. Maxim*, No. 89-2981, 1990 U.S. Dist. LEXIS 5988, at *8,*9 (D. Mass. May 15, 1990).

laid-off a number of employees that would in itself have triggered WARN.¹⁵⁵ The court ruled that because the second lay-off in itself would have triggered WARN, the two groups of laid-off employees could not be combined so as to afford statutory protection to the smaller group.¹⁵⁶

2. The "Employees"

Just as WARN sets forth the characteristics and actions required of "employers," so too it limits the categories of workers that qualify as statutory "employees." WARN applies only to employers with at least 100 employees, but it specifically exempts certain employees from this threshold. The judiciary has further narrowed the scope of employees entitled to be counted in computing the threshold.

Part-time employees are specifically excluded from the scope of WARN.¹⁵⁷ In *Solberg v. Inline Corp.*,¹⁵⁸ the court defined a "part-time employee" as one who works less than twenty hours per week or less than six months per year.¹⁵⁹ In *Solberg*, the defendant employer hired 300 employees solely for the purpose of fulfilling a large contract.¹⁶⁰ The contract was canceled and the employer fired those employees.¹⁶¹ When the discharged employees brought suit, the court held that for the purpose of WARN these 300 employees were part-time and could not be included in computing the WARN threshold.¹⁶² In reaching this conclusion, the court interpreted the language of the statute literally.¹⁶³ The court found that the language of the statute unambiguously reflected the intent of Congress to exclude both those employees working fewer than twenty hours per week and those employed less than six months prior

155. *Id.* at *7, *8.

156. *Id.* at *9.

157. 29 U.S.C. § 2101(a)(3) (1988).

158. 740 F. Supp. 680 (D. Minn. 1990).

159. *Id.* at 685.

160. *Id.* at 682. Defendant Inline was a packaging company that normally employed approximately thirty employees. *Id.*

161. *Id.*

162. *Id.* at 685.

163. *Id.* at 684. The plaintiffs argued for a broader interpretation on the ground that a literal interpretation would create an unjust result. *Id.* In the alternative, the plaintiffs argued for an interpretation that would limit "part-time employees" to seasonal and "true" part-time employees, i.e. those working less than twenty hours per week. *Id.*

to the layoff.¹⁶⁴ The court did note, however, that part-time employees are “affected” by mass dismissals and are entitled to both notice and a remedy.¹⁶⁵ Thus, the decision makes it more difficult for employees to reach the threshold because the broadly construed “part-time employees” are excluded in compiling the 100 employees needed to trigger WARN. Although they cannot be included in activating WARN, these excluded employees may seek relief.

Unlike part-time employees, employees who have been laid off prior to a plant closure may still be included in computing the WARN threshold if they can show that they have a “reasonable expectation of recall.”¹⁶⁶ In *Damron v. Rob Fork Mining Corp.*,¹⁶⁷ the court adopted the definition of “reasonable expect-

164. *Id.* At the urging of the plaintiffs, the court briefly looked into the legislative history of the definition of “part-time employee.” *Id.* The court examined the House Conference Committee Report and found that the definition was intended to encompass two concepts, that of a part-time employee and that of a seasonal employee. *Id.* In the Report, part-time employees were defined as those “hired to work an average of fewer than 15 hours per week.” *Id.* (citing H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 1045, 1047, reprinted in 1988 U.S.C.C.A.N. 2078, 2080). Seasonal employees, on the other hand, were defined as those “hired for a period not to exceed 3 months per year.” *Id.* Because the legislators wished to combine both concepts into a single term, the two definitions were combined to form the definition of “part-time employee,” which includes “employees who work fewer than 20 hours per week or who have worked fewer than 6 months in the 12 month period prior to the point at which the employer is required to serve notice.” *Id.* From this, the court concluded that newly hired full-time employees were not intended to be included in the compilation of the 100 employees needed to trigger WARN. *Id.* at 685.

165. *Id.* Under WARN, “affected employees” are those “who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer.” 29 U.S.C. § 2101(a)(5) (1988). Section 2102(a)(1) requires that notice be provided to “each affected employee.” *Id.* § 2102(a)(1). The court thus deducted that the intent of Congress was “to exclude ‘part-time’ employees from the calculation of a mass lay-off, but not to exclude them from protection once the lay-off occurs.” *Solberg v. Inline Corp.*, 740 F. Supp. 680, 685 (D. Minn. 1990).

166. 20 C.F.R. § 639.3(a)(1) (1991). WARN itself is silent with respect to what constitutes a “reasonable expectation of recall.” See 29 U.S.C. §§ 2101-2109 (1988). In *Damron v. Rob Fork Mining Corp.*, 739 F. Supp. 341 (E.D. Ky. 1990), *aff’d*, 945 F.2d 121 (6th Cir. 1991), the district court reasoned that employees with a reasonable expectation of recall nevertheless would be “affected” by a dismissal or plant closure, and are thus entitled to the protection of WARN. *Id.* at 343. The Department of Labor regulations define “reasonable expectation of recall” as when an employee understands through notification or industry practice, that his or her employment has been temporarily interrupted and that he or she will be recalled to the same or a similar job. 20 C.F.R. § 639.3(a)(1) (1991).

167. 739 F. Supp. 341.

tation of recall” used by the National Labor Relations Board.¹⁶⁸ This definition weighs three criteria: the past experience of the employer, the employer’s future plans, and the circumstances of the layoff, including the information provided to the employees.¹⁶⁹ In *Damron*, the claimants were employees in a hiring pool who had been “laid-off” for eight to ten years.¹⁷⁰ To attain the requisite number of employees needed to invoke WARN, these employees claimed that they should be included in attaining the threshold because they had a reasonable expectation of being recalled to work.¹⁷¹ This reasonable expectation was based on the allegation that the employer planned to expand its operations and thus was going to recall approximately sixty employees from the hiring pool.¹⁷² The court found, however, that because the plaintiffs did not produce evidence that their employer had definite plans to expand, their expectation of recall was too speculative to warrant aid under WARN.¹⁷³ The court held that allowing the laid-off employees to reap the benefits of WARN would be inconsistent with the purpose of the statute.¹⁷⁴ The court stressed that these employees did not need the notice period to adjust to being out of work, as they had been laid-off for a minimum of eight years.¹⁷⁵ In effect, then, the court limited how far into the future plaintiffs may look to find a reasonable expectation of recall.

3. Reduction of the Notice Period

The courts have reviewed two of the exceptions that allow employers to reduce the notice period to “as much notice as is practicable.” These are the exception for unforeseen business circumstances and the faltering company exception. With respect to the former, the court determined the scope of “un-

168. *Id.* at 344.

169. *Id.*

170. *Id.* at 345.

171. *Id.* at 344.

172. *Id.* at 343.

173. *Id.* at 344. Only those plans in the “near and foreseeable future” are to be examined. *Id.* (citing *Data Technology Corp.*, 281 N.L.R.B. 1005, 1006 (1986)). The actual duration of the layoff is considered when evaluating the three criteria, but is not dispositive. *Id.* at 345.

174. *Id.* at 344.

175. *Id.* at 345.

foreseeable," while for the latter, the court clarified the meaning of the phrase "actively seeking capital."

a. Unforeseen Business Circumstances

Under WARN, employers facing unforeseeable circumstances that adversely affect their businesses are excused from providing their employees with sixty days notice, but only if such notice would be impracticable or create an undue hardship.¹⁷⁶ Examples of such unforeseeable circumstances include natural disasters and sudden, dramatic changes in business conditions such as cost, price, or declines in customer orders.¹⁷⁷

In *Jones v. Kayser-Roth Hosiery, Inc.*,¹⁷⁸ the court held that the business judgment of the employer governs the determination of whether a business circumstance was reasonably unforeseeable.¹⁷⁹ In determining whether the conduct of the employer was reasonable, the court compared the action taken by the employer with the action that a reasonably prudent employer in the same market would have taken.¹⁸⁰ If the reasonably prudent employer would consider a given circumstance unforeseeable in light of the objective facts, then no notice is required.¹⁸¹ The same standard applies to determine how much notice is practical under the circumstances.¹⁸²

176. 29 U.S.C. § 2102(b) (1988).

177. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 2082.

178. 748 F. Supp. 1276 (E.D. Tenn. 1990). The facts of *Kayser-Roth* are exemplary. In *Kayser-Roth*, Kayser-Roth had a substantial contract with J.C. Penney to supply women's hosiery. *Id.* at 1279. This contract, in fact, was saving Kayser-Roth from insolvency. *Id.* J.C. Penney discovered quality problems with the hosiery, and warned Kayser-Roth that the contract would be canceled if the problems were not rectified. *Id.* at 1280-81. The court found that at this point in the negotiations between Kayser-Roth and J.C. Penney it was reasonable for Kayser-Roth to foresee the possibility of a plant closure. *Id.* at 1288.

179. *Id.*

180. *Id.* at 1285. The court stated that "[t]he test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market." *Id.*

181. *Id.* at 1288. The court found that the defendant's reliance on his own personal beliefs in light of the totality of the objective factual circumstances was not commercially reasonable. *Id.*

182. *Id.* The court found that because Kayser-Roth knew that it could not keep

b. The Faltering Company Exception

Employers are also excused from providing the sixty days notice required by WARN if, at the time the notice would have been required, they had been actively seeking capital or business that would have thwarted the need for a dismissal. In *Local 397 v. Midwest Fasteners, Inc.*,¹⁸³ the court established a three prong test for determining the validity of the invocation of the faltering company exception.¹⁸⁴ Under this test, employers must first show the specific steps they have taken to obtain capital or new business.¹⁸⁵ Employers must then show the basis for their good-faith belief that the notice would have prevented them from obtaining the needed capital.¹⁸⁶ To satisfy the third prong of the court's test, employers must show that they notified the employees as soon as practicable, and explain why earlier notice was not given.¹⁸⁷ The court concluded that negotiations for the sale of a business are not equivalent to "actively seeking capital."¹⁸⁸ Thus, where the sale will result in a layoff or closure, notice must be given.¹⁸⁹

4. Remedies

Courts have also considered the remedial provisions of WARN. WARN clearly states that its remedies are exclusive,¹⁹⁰ and attempts to expand them to include punitive damages have proven futile.¹⁹¹ In *Finnan v. L.F. Rothschild & Co.*,¹⁹² the

the Harriman plant open, it was reasonable for Kayser-Roth to notify the employees of the possibility of the plant closing. *Id.*

183. 763 F. Supp. 78 (D.N.J. 1990) (denying plaintiffs' motion for preliminary injunction).

184. See H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 2081-82. The conference report sets forth the same three prong test as does *Midwest Fasteners*. *Id.*; see *Midwest Fasteners*, 763 F. Supp. at 83-84.

185. *Midwest Fasteners*, 763 F. Supp. at 83-84.

186. *Id.*

187. *Id.* at 84.

188. *Id.*

189. *Id.*; see 29 U.S.C. § 2101(b)(1988) (stating that seller is responsible for giving notice up to date of sale). After the date of the sale, the buyer is responsible for providing notice of a dismissal or layoff. *Id.* In addition, any person who is an employee of the seller on the date of the sale will be considered an employee of the buyer. *Id.*

190. 29 U.S.C. § 2104(b) (1988).

191. See *Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460 (S.D.N.Y. 1989) (ruling out possibility of punitive damages).

192. *Id.*

court pointed out that Congress could have chosen to codify common law rules that permit punitive damages, but that it had chosen not to do so.¹⁹³ The court concluded that Congress did not intend claimants to receive punitive damages.¹⁹⁴

In *Midwest Fasteners*, however, the court did not explicitly exclude the possibility of injunctive relief.¹⁹⁵ The employees in *Midwest Fasteners* sought a preliminary injunction to prevent their employer from hiding funds from the court that could be used to pay WARN damages.¹⁹⁶ The court stated that because Congress did not expressly limit the injunctive power of the courts, Congress did not intend to deprive courts of their power in equity.¹⁹⁷ The court refused to interpret the silence of Congress as an implication of such an intent.¹⁹⁸ In this case, however, the court applied the traditional test for granting injunctive relief and denied the injunction.¹⁹⁹

The courts have limited the protection of employees under WARN, thereby making it increasingly difficult for employees to invoke the protection to which they are statutorily entitled. Because the scope of WARN is so narrow, it lacks the force to aid employees adequately in the event of a mass lay-off or dismissal. When compared to the Directive, the weaknesses of WARN become more apparent.

III. *DIRECTIVE 75/129 AND WARN COMPARED*

Despite the striking similarities between WARN and the Directive, the Directive functions more effectively. The Directive requires cooperation between labor and management in exchanging information, and consultation, which may influence the ultimate decisions of management. Further, the Directive covers a wide spectrum of employees and businesses. WARN, which in comparison stands virtually alone in the em-

193. *Id.* at 465.

194. *Id.*

195. *Local 397 v. Midwest Fasteners, Inc.*, 763 F. Supp. 78, 81 (D.N.J. 1990).

196. *Id.* at 79.

197. *Id.* at 81.

198. *Id.* at 81-82.

199. *Id.* at 84. The test to determine whether injunctive relief is appropriate under the circumstances involves evaluating the party's likelihood of success on the merits and balancing the equities. *Id.* In the balance, the court considers whether protecting the rights of the plaintiff by granting the injunction outweighs the prejudicial effects of such a grant to the defendant. *Id.*

ployment sphere of U.S. social policy, mandates no employee participation in the decisions of management. Moreover, because the scope of WARN is so narrow, it covers only a small percentage of U.S. businesses. In addition, employers can easily utilize the various exceptions and mitigation provisions to protect themselves from liability under its provisions.

A. *Participation Versus Deterrence*

The most notable difference between the Directive and WARN is the notification procedure each mandates. By requiring a detailed information and consultation procedure,²⁰⁰ the Directive contributes to management-labor dialogue. During these consultations, they must discuss either alternatives to the proposed dismissal or ways to minimize the number of employees affected. Even where a dismissal is the only reasonable alternative, employees within the EC can be sure that their interests are considered by management during the decision-making process. This procedure may contribute to job security and at least reduces labor's suspicion of management, thus eliminating a major source of industrial unrest.²⁰¹

In the United States, however, employees are entitled only to the sixty-day notice period. WARN requires no employee-management consultation. When employers violate the sixty-day notice period, employees may seek the monetary remedy as statutorily provided. The objective of WARN, then, is merely to deter employers from abruptly dismissing their employees rather than directly protecting employees by requiring their participation in management's decision to dismiss.

The remedial provisions of WARN, however, are not strong enough to serve as a forceful deterrent. The monetary damages for which employers are liable are minimal.²⁰² In many cases, therefore, it may be more cost-effective for employers to violate WARN and submit to liability than to comply with the statute. Employers may prefer to pay the lump-sum remedy of WARN in order to avoid involving the government in their management decisions. In so doing, employers avoid

200. See *supra* notes 38-44 and accompanying text (discussing consultation procedure of Directive).

201. *Social Action Program*, Common Mkt. Rep. (CCH) ¶ 3164.07, at 3164 (1978).

202. See *supra* notes 135-38 and accompanying text (setting forth pay rates).

governmental pressure and adverse public opinion while important decisions are being made. Furthermore, employers stand a fair chance of escaping liability by alleging that they fall within the faltering company exception, or that they were compelled to close as the result of unforeseeable business circumstances.²⁰³ Even where one of the two exceptions does not apply, employers may substantially mitigate their liability by utilizing one of the mitigation procedures provided in the remedial section of WARN.²⁰⁴

B. *The Scope of WARN and the Directive Compared*

In addition to the exceptions and mitigation provisions of WARN, employers may escape liability by claiming that they do not employ enough employees. The courts have narrowly construed WARN to exempt many employees who might otherwise be included, such as part-time and temporary workers. Judicial interpretation of WARN has thus enhanced the difficulty of U.S. workers to compile a sufficient number of employees to trigger WARN.

The Court of Justice, on the other hand, has consistently interpreted the Directive in conformity with its policy objectives. The result of this construction shows that the Court of Justice will not allow the Member States to derogate from the language of the Directive in fashioning their implementing legislation.²⁰⁵ The Directive thus remains broad in scope, and due to its lower thresholds, also covers a much greater segment of the employee population than does the U.S. statute.

1. Part-Time and Temporary Workers

One important difference between the Directive and WARN is that WARN unconditionally excludes part-time workers from its threshold.²⁰⁶ The Directive, on the other hand, is

203. *See supra* notes 183-89 and accompanying text (discussing faltering company exception and exception for unforeseen business circumstances).

204. *See supra* notes 139-42 and accompanying text (discussing mitigation procedures set forth in WARN).

205. *See, e.g.*, *Commission v. Belgium*, Case 215/83, [1985] E.C.R. 1039, [1985] 3 C.M.L.R. 624 (discussing Court's strict construction of language of Directive); *see also supra* note 73 and accompanying text (discussing adherence of Court of Justice to language of Directive).

206. 29 U.S.C. § 2101 (1988). Part-time employees may, however, seek a rem-

silent with respect to part-time employees. Thus, the rights of part-time workers are determined by national law. The Court of Justice's attitude remains unknown.²⁰⁷

Temporary employees are also treated somewhat differently under the two pieces of legislation. Employees who are hired solely for the duration of a contract or for the performance of a specific task can invoke the protection of neither the Directive nor WARN when they are dismissed upon completion of the project. The Directive, however, will protect these temporary employees if they are dismissed before the project is completed.²⁰⁸ WARN, in contrast, unconditionally deems these employees to be "temporary" workers and grants them no protection whatsoever.²⁰⁹

2. The Practical Effects of the Directive and WARN

Another divergence in scope results from the practical effect that the Directive and WARN have on their respective societies. At the time WARN was enacted, it covered only 2 percent of U.S. businesses, and less than half of the U.S. work

edy under WARN if they can show that they were "affected" by the dismissal. See *supra* note 159 and accompanying text (discussing part-time employees).

207. The Commission has proposed a directive to deal with temporary and or part-time employees. Proposal for a Council Directive on Certain Employment Relationships with Regard to Working Conditions, O.J. C 224/4 (1990). This proposal essentially requires that temporary and part-time employees be treated in the same manner as are full-time employees. *Id.* Specifically, the proposed directive guarantees access to vocational training for temporary and part-time employees. *Id.* art. 2(1), at 5. It also provides that the employees covered by the proposal will be included in calculating the threshold which national provisions require for the setting up of workers' representative bodies. *Id.* art. 2(3). Further, the proposal insures that covered employees enjoy the same treatment as full-time workers as regards employment benefits and social services. *Id.* arts. 3, 4. Arguably, then, part-time and temporary workers will be included in the calculation of the threshold of the Directive under articles 2(2) and 4 of the proposed directive, should the proposal ultimately be adopted by the Council of Ministers.

208. Council Directive No. 75/129, art. 1(2)(a), O.J. L 48/29, at 29 (1975).

209. 20 C.F.R. § 639.5(c) (1991). The ability of temporary workers to bring suit under WARN is further limited by the regulations promulgated by the Department of Labor. *Id.* No notice is required prior to closing a temporary facility as long as the employees clearly understood at the time that they were hired that their employment was only to be temporary. *Id.* § 639.5(c)(2). The regulations further provide that temporary employees may not be included in determining whether plant closing or mass layoff thresholds are reached. *Id.* § 639.6(b). Such workers, however, are entitled to notice. *Id.* Seasonal employees are exempt, unless an employer has permanent employees that work on a variety of tasks throughout the year. *Id.* § 639.5(c)(3).

force.²¹⁰ That the application of WARN is so narrow is not surprising.²¹¹ It suffered nearly fifteen years of heated congressional debate and modification.²¹² Undoubtedly, Congress ultimately chose the threshold of 100 employees because of its capacity to pacify the opponents as well as satisfy the proponents of the bill, rather than its ability to avert or assuage the harmful effects of mass lay-offs on society.²¹³

WARN does, however, encourage employers to comply with the notice provision in situations where the statute itself does not apply.²¹⁴ Some states have attempted to fill the gaps that WARN creates by establishing their own programs for dealing with unannounced plant closures.²¹⁵ These programs are aimed primarily at assisting dislocated workers to find jobs or additional training.²¹⁶ These programs do not, however,

210. U.S. GEN. ACCOUNTING OFFICE, HRD 90-3, DISLOCATED WORKERS: LABOR-MANAGEMENT COMMITTEES ENHANCE REEMPLOYMENT ASSISTANCE 36 (1989) [hereinafter GAO REPORT]. The GAO REPORT disclosed that approximately 44 percent of all U.S. workers were employed in establishments of more than 100 employees. *Id.*

211. 134 CONG. REC. 8903 (1988). Even the proponents of WARN recognized that it would be narrowly applicable. Senator Sanford stated that "[i]t is a shame that this provision is being so hotly challenged by the President. It affects a very small percentage of U.S. firms. . . . The measure contains a very broad escape clause for faltering companies and for unforeseen circumstances." *Id.* (statement of Sen. Sanford).

212. *See supra* notes 101-07 and accompanying text (discussing Congressional debate over terms of WARN and its predecessors).

213. *See supra* notes 102-04 (discussing views or proponents and opponents); *see also* 134 CONG. REC. 19,858 (1988) (statement of Rep. Clay outlining modifications made to bill in appeal to its opponents); *id.* at 17,875 (statement of Rep. Bereuter changing his view toward bill after provisions were weakened).

214. 29 U.S.C. § 2106 (1988).

215. *See* GAO REPORT, *supra* note 210, apps. I-IV (indicating that Idaho, Vermont, Michigan, and New Jersey have such programs.) *Id.* These programs attempt to utilize committees composed of labor, management, and a neutral third party to address the needs of workers dislocated by plant closings and layoffs. *Id.* The committees gather information on worker skills and interests, and use the information to match jobs and training to individuals. *Id.* at 3. The committees also work with service providers to determine when and where services are needed, and to monitor the success of individuals in finding employment. *Id.* When employees encounter difficulties in finding employment, the committees intervene to expand or add services, and speed up worker enrollment in training. *Id.* The report discloses that these programs have been largely successful. *Id.* at 78; *see also* MASS. GEN. L. ch. 6, § 190 (1986) (setting forth duties of Massachusetts Industrial Advisory Board, comprised of two representatives of labor and business, one professional economist, one finance expert, and one representative of local government, with secretary of economic affairs and secretary of labor as co-chairmen).

216. *See generally* GAO REPORT, *supra* note 210, at 78.

purport to intervene in the employer's decision to effectuate a mass dismissal.

The Community, on the other hand, is committed to preserving the Directive's goal of reducing the number of abruptly displaced workers. The thresholds of the Directive are much lower than those of WARN. In addition, the Directive expressly allows Member States to implement its provisions by means of legislation that is more favorable to employees than those that are required by the Directive itself.²¹⁷ Many Member States have done so²¹⁸ with the overall effect of enhanced work-place security.

C. *Supplemental Legislation*

An examination of the supplemental legislation of the EC and the United States further demonstrates the greater effectiveness of the Directive. The Directive and WARN occupy different positions within their respective spheres of EC and U.S. social policies. In the EC, the Directive is one of several directives aimed at harmonizing and enhancing the work-place rights of Member States' employees. This results in a system of legislation in which each piece is designed to intertwine and supplement another. In the United States, however, WARN stands virtually alone in protecting the work-place rights of employees. The United States does not have a comprehensive system of legislation aimed at enhancing job security.

1. Supplemental Legislation in the EC

The treatment of insolvent employers by the EC and the United States demonstrates the contrasts between the two systems. The Directive expressly excludes from protection those employees who lose their jobs as a result of the insolvency of their employer.²¹⁹ As part of the Social Action Programme,²²⁰ however, the Community has adopted two other directives aimed at protecting employees' work-place rights. The Insol-

217. See *supra* note 50 and accompanying text (discussing Member State legislation).

218. See *supra* note 51 and accompanying text (discussing laws of individual Member States).

219. Council Directive No. 75/129, O.J. L 48/29 (1975).

220. See *supra* note 20 and accompanying text (discussing directives enacted under Social Action Programme).

gency Directive protects the employees of insolvent employers,²²¹ by requiring that the Member States establish institutions responsible for ensuring the payment of wages and other benefits owed to the employees prior to the insolvency.²²²

The other directive, the Business Transfer Directive, ensures the continuity of employment in the event that an employer sells the business by requiring successor employers to maintain the work force of their predecessors.²²³ The sale of an insolvent business is not considered a transfer or amalgamation under the Business Transfer Directive.²²⁴ Employers who have had to suspend the payment of their debts due to financial difficulties, however, cannot escape compliance with the Business Transfer Directive.²²⁵ Where the business is sold during a semi-insolvency proceeding, the new employer assumes responsibility for paying all of the debts that his predecessor had suspended.²²⁶ This includes any payments owed to the employees by their former employer.²²⁷

Furthermore, the Business Transfer Directive prohibits employers from executing a transfer or merger in order to justify a mass dismissal.²²⁸ Dismissals resulting from a transfer that occurs for economic, technical, or organizational reasons, however, are excluded.²²⁹ This provision seems to give a successor a free hand to dismiss the old work force, provided that the new business is technically or economically different, or organized differently. If, however, the successor attempts such a dismissal, the Directive on Collective Redundancies will be triggered.²³⁰ The European worker, then, is broadly covered by the interplay of these various social policy directives, as

221. Council Directive No. 80/987, O.J. L 283/23 (1980).

222. *Id.*

223. Business Transfer Directive, *supra* note 21, O.J. L 61/26 (1977); see *Foreningen af Arbejdsledere i Danmark v. Danmols Inventar*, Case 105/84, [1985] E.C.R. 2639, [1986] 1 C.M.L.R. 316 (discussing application of Business Transfer Directive).

224. Business Transfer Directive, *supra* note 21, art. 4, O.J. L 61/27, at 27 (1977).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* art. 4(1).

229. *Id.*

230. Council Directive No. 75/129, O.J. L 48/29 (1975). Assuming, of course, that the employer employs enough workers to satisfy the relevant threshold numbers.

some of the gaps left by one are filled by the provisions of another.

2. Supplemental Legislation of the United States

WARN, in contrast, does not expressly excuse insolvent employers from giving the mandatory sixty-day notice. Only employers who show that the required notice would frustrate their attempts to secure needed capital are exempt from giving notice.²³¹ The *Kayser-Roth* court narrowed this exemption further by determining that insolvency does not necessarily constitute an unforeseeable circumstance.²³² Thus, where a business is heading toward insolvency slowly enough for the employer to prepare for it, the employer falls within the scope of WARN liability. Further, the *Midwest Fasteners* court found that an insolvent business that had entered into negotiations to sell the business did not come within the faltering company exception, as negotiating a sale is not equivalent to "actively seeking capital."²³³

Taken alone, this protection may seem contrary to the anti-labor trend evident in the judicial interpretation of WARN. Taken in the proper context, however, it is not so beneficial. If WARN does not protect the employees of insolvent employers, then they will not receive any protection because of the continuing dearth of labor legislation with respect to continuity of work-place rights.

a. Supplemental Judicial Doctrines in the United States

In the United States, employees may utilize two methods to protect the continuity of their employment in the event that their employer sells or transfers the business. The most widely used method is the collective bargaining contract. Under basic principles of contract law, unions can negotiate for binding

231. 29 U.S.C. § 2102 (1988); see *Jones v. Kayser-Roth Hosiery*, 748 F. Supp. 1276, 1285-88 (E.D. Tenn. 1990) (holding that employers must show why giving required notice would frustrate their efforts to secure needed capital).

232. *Kayser-Roth*, 748 F. Supp. 1276; see *supra* note 179 and accompanying text (detailing court's rationale for holding *Kayser-Roth* liable.)

233. *Local 397 v. Midwest Fasteners, Inc.*, 763 F. Supp. 78 (D.N.J. 1990); see *supra* note 188 and accompanying text (postulating that negotiating sale of business is not "actively seeking capital").

carry-over provisions in collective bargaining agreements.²³⁴ Due to judicial determination that such provisions are unenforceable, however, successor employers are not required to accept the substantive provisions of the predecessor's collective bargaining agreement.²³⁵ Nor are they required to maintain the predecessor's work force.²³⁶

234. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-48 (1964). The successor, however, must agree to accept the terms of the collective bargaining agreement. *Id.* at 549.

235. *NLRB v. Burns Int'l Sec. Serv., Inc.*, 406 U.S. 272, 284 (1972).

236. *Id.* at 280; see *Howard Johnson v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262 (1974). In *Burns*, Burns won a contract to supply security guards and continued to employ the guards of its predecessor. *Burns*, 406 U.S. at 274. The U.S. Supreme Court held that although Burns may have a duty to bargain with the incumbent union, it had no duty to recognize the terms of the collective bargaining agreement negotiated by the previous employer. *Id.* at 282-83. There are four seminal Supreme Court cases that trace the debate as to whether collective bargaining agreements should bind successors in the courts. In *Wiley*, the Court held that the terms of the predecessor's collective bargaining agreement are binding on the successor where the successor obtains the business through a merger. *Wiley*, 376 U.S. at 550-51. This was followed in 1972 by *Burns*, 406 U.S. 272. The Court distinguished *Burns* from *Wiley* on the ground that *Burns* involved no dealings between the predecessor and successor, whereas *Wiley* involved an asset merger. *Id.* at 286. Because the totality of the circumstances did not show that Burns substantially continued the same business as its predecessor, *Wiley* did not require Burns to give up its freedom to negotiate its own agreement. *Id.* The Court attempted to clarify the extent to which the terms of a collective bargaining agreement would be binding on a successor in *Howard Johnson*, 417 U.S. 249. In *Howard Johnson*, the Court distinguished *Wiley* and *Burns* by explaining that a merger results in the complete disappearance of the former business. *Id.* at 257. Further, the state law governing the merger specifically held a successor liable for the obligations of its predecessor. *Id.* Thus, the successor probably expected to be bound by the outstanding collective bargaining agreement. *Id.* In *Burns*, however, the predecessor business did not cease to be a corporate entity; it simply lost the contract. *Id.* The relevance of the continued existence of the predecessor is the availability of the union to seek a remedy for a broken contract. *Id.* In *Howard Johnson*, as in *Burns*, the predecessors remained viable entities with substantial assets so they were capable of affording the union a remedy. *Id.* Thus, the Court found no obligation on the part of the successor to recognize the terms of the collective bargaining agreement. *Id.* at 262.

This led to the Supreme Court's most recent decision, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). *Fall River Dyeing* was the successor to Sterlingwale, a company that engaged in two processes of dyeing fabrics. *Id.* at 30. Due to adverse economic conditions, the president of Sterlingwale was forced to liquidate the company's inventory. *Id.* at 31. Seven months after Sterlingwale went out of business, Fall River commenced a new dyeing business in Sterlingwale's old facilities. *Id.* at 32. The employees were independently hired although many of them had worked for Sterlingwale. *Id.* at 33. Furthermore, Fall River engaged in only one of the two dyeing processes of Sterlingwale. *Id.* at 34. Nonetheless, the *Fall River* Court found that Fall River had a duty to bargain with the union that had previously represented the Sterlingwale employees. *Id.* at 41. In so holding, the Court affirmed the

In addition, where the purchase of assets leads to the acquisition of the company, the employees may invoke the successor liability doctrine. Like the Business Transfer Directive, this judicially created doctrine purports to transfer the obligations of the predecessor to the successor.²³⁷ The case law in the area of successor liability is, however, largely fact-specific, and thus rather recondite in application.²³⁸ As a result, em-

proposition set forth in *Burns* that although a successor employer has no duty to assume the provisions of an existing collective bargaining agreement, it does have the duty to bargain with an incumbent union. *Id.* The Court, however, refused to limit *Burns* to the narrow situation where a union is newly certified at the time the employer changes. *Id.* Rather, *Burns* stands for a broader duty to bargain, which includes the situation where unions are not newly elected but still enjoy a one year rebuttable presumption of majority status. *Id.* The *Fall River* Court was careful to point out, however, that the decision is not intended to interfere with "the rightful prerogative of owners independently to rearrange their businesses" as was established in *Wiley*. *Id.* at 40 (citing *Wiley*, 376 U.S. at 549). Thus, the Court continued, "to a substantial extent the applicability of *Burns* rests in the hands of the successor. 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 § 8(a)(5) is activated." *Id.* Because *Burns*, *Wiley*, *Howard Johnson*, and *Fall River* remain good law, the successor liability doctrine is often difficult to apply.

237. Business Transfer Directive, *supra* note 21, O.J. L 61/26 (1977). The Business Transfer Directive of the EC contains an interesting provision in comparison with the successor liability doctrine's application to U.S. labor law. The Directive requires that collective bargaining agreements between the predecessor and the union be recognized by the successor. *Id.* art. 3(2), at 27. Article 3(2) states that the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Id.

The Business Transfer Directive further provides that a transfer cannot constitute the grounds for dismissal. *Id.* art. 4(1). While successor liability may, in some instances, preserve the continuity of employment from the predecessor to the successor, the doctrine in no way obliges the successor to recognize the terms of an outstanding collective bargaining agreement. *See supra* note 236 and *infra* note 238 and accompanying text (providing brief overview of development of successor liability doctrine).

238. The successor liability doctrine evolved from *Wiley*, 376 U.S. 543, *Burns*, 406 U.S. 272, *Howard Johnson*, 417 U.S. 249, and *Fall River*, 482 U.S. 27. *See supra* note 236 (outlining evolution of successor liability doctrine). This doctrine may not only create a duty on a successor employer to bargain with the incumbent union, but may also create an exception to the general proposition that collective bargaining agreements are not binding on a successor employer. As the Court indicated in *Howard Johnson*, a successor employer will be bound by the terms of the former employer's contract if two conditions exist. 417 U.S. 249. First, the successor must continue, essentially unchanged, the business of the predecessor. *Id.* at 259. This "alter ego" will be found only in cases "involving a mere technical change in the

ployees cannot be sure that the successor liability doctrine will protect their rights.

b. Supplemental Legislation in the United States

The supplemental legislation of the United States pales in comparison to the multi-faceted social program of the Community. Legislatively, WARN has only one federal counterpart. In 1988, Congress enacted the Economic Dislocation and Worker Adjustment Assistance Act ("EDWAA").²³⁹ The EDWAA established an assistance program for dislocated workers that provides them with training and employment services.²⁴⁰ The EDWAA further encourages the establishment of local labor-management committees.²⁴¹ These committees support and encourage workers as they cope with job loss by identifying local organizations able to provide assistance and facilitate the development of assistance strategies tailored to the needs of individual employees.²⁴²

The EDWAA and WARN suffer from the same inherent weakness—the after-the-fact approach to worker assistance. Before employees can benefit from the EDWAA, they must have already lost their jobs. The committees envisioned in the EDWAA do not purport to ensure that employers comply with WARN. They serve merely as employment agencies, and em-

structure or identity of the employing entity, frequently to avoid the effect of the labor laws." *Id.* at 260 n.5. Second, the successor must expressly or impliedly assume the collective bargaining agreement. *Id.* at 262. This is consonant with basic contract and labor law principles of freedom to bargain. *See, e.g., Burns*, 406 U.S. at 287-88 (stating that private bargaining under governmental supervision of procedure alone, without any official compulsion over actual terms of contract, is fundamental premise of federal labor laws). The successful invocation of the doctrine is clearly dependent on the circumstances of each case. *Howard Johnson*, 417 U.S. at 256.

239. Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified at 29 U.S.C. § 565(IV)(D) (1988)).

240. GAO REPORT, *supra* note 210, at 11. The law provides funding for dislocated workers. *Id.* In 1989, US\$980 million was allotted, but only US\$284 million was appropriated to the fund. *Id.* The 1990 budget proposed US\$400 million for the programs. *Id.* EDWAA essentially shifts the responsibility for dislocated worker programs to local areas. *Id.* Most of the funds are distributed directly to local areas according to a formula rather than by the governor. *Id.* Significant provisions of the law provide for "the establishment of (1) state rapid response teams to offer workers assistance before layoff, and (2) labor and management committees to facilitate this assistance." *Id.*

241. U.S. GENERAL ACCOUNTING OFFICE, T-HRD-91-19, ADVANCE NOTICE: PUBLIC AND PRIVATE SECTOR POLICY AND PRACTICE 4 (1991).

242. *Id.*

ployees remain faced with the threat of abruptly losing their jobs. The United States simply does not have legislation designed to aid employees before they lose their jobs. As demonstrated by the European experience, labor-management cooperation is an effective method to protect employees before they lose their jobs.

CONCLUSION

The EC's method of providing employees with information and guaranteeing them the right to be consulted before management makes decisions affecting their employment status far surpasses the compensatory method chosen by the United States. The European system ensures that at the very least employees are aware of situations that may affect their employment status long before they are dismissed. The U.S. system, on the other hand, basically offers monetary compensation to an already dismissed employee. This monetary solution can neither compensate dismissed employees adequately nor enhance job security. To elevate the U.S. social policy to the level of that of the EC, Congress should strive to discourage employers from violating notice provisions while at the same time enhance job security by creating a mandatory system of worker participation in management decisions.

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