

# INCREASING THE LABOR-RELATED COSTS OF BUSINESS TRANSFERS AND ACQUISITIONS—THE SPECTRE OF PER SE LIABILITY FOR NEW OWNERS

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## I. INTRODUCTION

The obligations transferred to new owners under the federal labor law successorship doctrine increasingly constrain the common law freedom of entrepreneurs to acquire and dispose of business entities. The unassumed liabilities imposed upon new owners of labor intensive enterprises now extend far beyond even the original Taft-Hartley arbitration, union bargaining, and remedial obligations.<sup>1</sup> As additional financial burdens and contractual restraints incurred by predecessors are transferred wholesale to bona fide "successors,"<sup>2</sup> their cumulative impact severely restricts preexisting managerial "start-up" flexibility, significantly escalates financial transaction costs for both sellers and buyers, and saddles buyers with other long-range labor costs that are incalculable at the time of ownership transfer.

Despite the proliferation of labor-related liabilities, prospective purchasers often neglect to consider these consequences prior to acquisition of the predecessor's enterprise. Those purchasers who do so out of the mistaken belief that these liabilities are inconsequential are in for an unpleasant surprise. Even when a buyer undertakes an effort to measure the seller's labor circumstances against the economics of the purchase, the current unpredictable and confusing criteria adopted to determine successorship<sup>3</sup> renders illusory any accurate prediction of which liabili-

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1. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973); *NLRB v. Burns Int'l Sec. Serv. Inc.*, 406 U.S. 272 (1972); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

2. Unless otherwise stated, the terms "successor" and "bona fide successor" are interchangeable terms of art defining a new owner who acquires unassumed obligations of the predecessor solely by virtue of its status as a successor employer, who is unrelated to predecessor in terms of common ownership, and who has neither participated in the predecessor's violations nor entered into the sale to avoid any obligations incurred by the predecessor.

3. See *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 262 n.9 (1974) ("There is, and can be, no single definition of 'successorship' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.")

See also *International Ass'n of Machinists, Dist. Lodge 94 v. NLRB*, 414 F.2d 1135, 1139 (D.C. Cir.), cert. denied, 396 U.S. 889 (1969) (Leventhal, J., concurring) (test of successorship is largely "impressionistic").

ties and obligations will be imposed.

Although commentators debate the proper balance between business transfer prerogatives and investor flexibility on one hand, and collective agreement enforceability and employee job security on the other,<sup>4</sup> none has yet compiled a comprehensive survey of existing and potential labor law liabilities. This article addresses that void.

Such a survey is particularly relevant because in this decade market entrance and expansion have been accomplished by an accelerating rate of corporate stock and assets purchases, takeovers, leveraged buyouts, and mergers.<sup>5</sup> This marketplace dynamic is now imperiled by the costly obligations the successor doctrine transfers to new owners. The economic reality is that the buyer is unable to anticipate, and therefore unable to reflect in the purchase price, all these encumbrances. As these fiscal and labor costs continue to increase, investors will be unable to afford to use assets or stock purchases to salvage declining businesses or to open new markets. The detrimental consequences of these restrictions on free transferability will be fewer jobs preserved or created for our workforce.

This survey begins in Part II with an examination of the 1973 Supreme Court decision in *Golden State Bottling Co. v. NLRB*. That decision has served as the touchstone for the rapid expansion of successor liability from the National Labor Relations Act (NLRA) to other federal labor statutes and state law. Part III marks the evolution of successor liability under the NLRA. Part IV chronicles the transfer of liabilities to other federal statutes and state laws, and Part V forecasts liabilities likely to be imposed under other statutes. Part VI describes the evolution of the successorship doctrine into an anticompetitive restraint on business transferability which replaces consideration of managerial prerogative with nearly per se liability. Finally, the last section offers new owners some practical options for avoiding or indemnifying these liabilities, but reluc-

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4. See, e.g., J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 160-70 (1983) (imbalance against employee interests); Bakaly & Bryan, *Survival of the Bargaining Agreement: The Effect of Burns*, 27 VAND. L. REV. 117, 128-29 (1974) (survival of labor contract obligations after transfer of ownership restricts capital mobility); Van Wezel Stone, *Labor and the Corporate Structure*, 55 U. CHI. L. REV. 73, 102-05 (1988) (existing successorship law provides no role for labor in corporate decision making).

5. Dobrzynski, *For Better or for Worse?*, BUS. WK., Jan. 12, 1987, at 38, 38-39 (In a four year pre-1987 period, 12,200 companies and corporate divisions transferred ownership at cost of \$490 billion.).

tantly concludes that in most transfers the new owner is now the de jure surety for any of the predecessor's labor-related obligations.

## II. *GOLDEN STATE BOTTLING* UNCAPS SUCCESSOR LIABILITY

In his brief in *Golden State Bottling Co. v. NLRB*<sup>6</sup> Solicitor General Bork stated:

The principal question in this case is whether the [Labor] Board may properly require a *bona fide* successor employer (All American), who acquires its predecessor's business (Golden State) with knowledge that the predecessor has failed to remedy its unfair labor practice in discharging an employee, may be required to reinstate the employee with back pay.<sup>7</sup>

The Supreme Court, deeply divided on most labor cases, unanimously answered "yes" to the posed question. To reach this result, the Court, as discussed below, either greatly expanded or created an exception to the limitations embodied in Rule 65(d) of the Federal Rules of Civil Procedure which protects unnamed entities from the reach of court injunctions. The Court also expanded an early NLRA decision beyond any logical limitation, and engrafted upon the NLRA a broad "public policy" justification for extending National Labor Relations Board (NLRB or Labor Board) orders beyond the statutory standard of "any person named in the complaint"<sup>8</sup> to reach an innocent purchaser. The Court's unanimous decision on these questionable grounds can perhaps be rationalized only by its sympathy for an employee's ten year odyssey in search of compensatory redress for his discharge by Golden State.

In August 1963, Golden State General Manager Gene Schilling discharged Baker from his position as a driver-salesman in its Pepsi-Cola Bottling Division. Baker filed an unfair labor practice charge with the Labor Board. The NLRB concluded that Golden State unlawfully discharged Baker because of his support for the Teamsters Union, and ordered Golden State and "its successors" to offer Baker immediate reinstatement with full back pay to the date of reemployment.<sup>9</sup> Golden State refused to comply. The Ninth Circuit adopted and enforced the order in December 1965.<sup>10</sup>

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6. 414 U.S. 168 (1973).

7. Brief for the National Labor Relations Board at 15, *Golden State*, 414 U.S. 168 (1973) (No. 72-702). The Supreme Court agreed with this formulation. *Golden State*, 414 U.S. at 170.

8. See *infra* Part II(B).

9. *Golden State*, 147 N.L.R.B. 410, 415 (1964).

10. *NLRB v. Golden State Bottling Co.*, 353 F.2d 667 (9th Cir. 1965).

Over two years later, in January 1968, Golden State sold its assets in the Bottling Division to All American Beverage, Inc. All American acquired the machinery, buildings, accounts receivable, trade name, and real estate of the Golden State bottling operation. The sales agreement, executed by Schilling as secretary of Golden State, did not refer to the Baker discharge proceeding. The agreement enumerated, however, other liabilities to be assumed by All American, and warranted that no pending litigation existed against the Bottling Division. The sale removed Golden State from the soft drink bottling and distribution business entirely.

All American continued the bottling business in the same plant without operational hiatus or modification. All American hired all but a few of Golden State's employees. It also hired Golden State's twelve distributors who continued to distribute the same products to the same customers. Golden State's supervisory and managerial staff transferred to All American, including Schilling, who was hired as general manager and president of the bottling operation.

Two weeks after the Ninth Circuit entered a final decree on other aspects of the Labor Board's original decision against Golden State,<sup>11</sup> Schilling, as president of All American's Bottling Division, on behalf of Golden State, offered Baker reinstatement as a driver-salesman. At this time (November 1968), because of the January 1968 sale to All American, Schilling had no authority to represent Golden State, and Golden State, no longer in the soft drink distribution business, was in no position to rehire Baker. Nevertheless, in November 1969, Golden State responded to the Labor Board's back pay proceeding by claiming it had offered reinstatement to Baker, which would toll back pay as of that date. This response did not mention that All American had been operating the bottling business for nearly two years.<sup>12</sup> Golden State did not admit to the January 1968 sale of the business until a second back pay proceeding was initiated against both Golden State and All American.<sup>13</sup> On this record of equivocation—if not duplicity—the Labor Board inferred that Golden State had attempted to conceal the sale to frustrate the Labor

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11. *NLRB v. Golden State Bottling Co.*, 401 F.2d 454 (9th Cir. 1968) (on petition for rehearing).

12. The response was verified "under penalty of perjury" by E.J. Crofoot as president of Golden State. Brief for the National Labor Relations Board at 445 (Appendix B), *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973) (No. 72-702).

13. Joint Appendix at 39, *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973) (No. 72-702).

Board's effort to obtain backpay and reinstatement for Baker.<sup>14</sup>

The Supreme Court cited this factual conclusion and found "no justification" for disturbing the Labor Board's finding that All American's claim of ignorance about the Baker litigation before the date of transfer was "incredible."<sup>15</sup> Accordingly, the Court agreed that All American acquired Golden State's operation with knowledge of the Labor Board's order requiring Baker's reinstatement with back pay.<sup>16</sup> While the record before the Court renders these factual affirmances unremarkable, the significance of *Golden State* to the subsequent escalation of labor law liability for new owners rests on its questionable elimination of the legal restraints found in both Rule 65(d) of the Federal Rules of Civil Procedure and statutes limiting the authority of courts and administrative agencies to include unnamed new owners within existing orders.

#### A. Rule 65(d)

Rule 65(d)<sup>17</sup> explicitly permits administrative and judicial orders to reach "the parties to the action," those in a beneficial relationship with the named party such as officers, agents, servants, employees and attorneys, and "those persons in active concert or participation with them."<sup>18</sup> Unless a new owner falls within one of these three categories, the Rule precludes the imposition of obligations, presumably codifying due process requirements. Dilution of the procedural and substantive safeguards

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14. *Pepsi-Cola Bottling of Sacramento*, 187 N.L.R.B. 1017, 1021 (1971).

15. 414 U.S. at 173-74.

16. *Id.* at 174. The opinion, however, is ambiguous about whether the successor must have actual or constructive notice before the purchase date, and whether the successor must have knowledge of NLRB or circuit court adjudicated unfair labor practices or merely knowledge of specific NLRB charges served upon the seller. The Supreme Court used the phrase "unfair labor practice litigation" to describe the subject of the purchaser's knowledge. *Id.* at 173. The Labor Board's remedial order against Golden State had been enforced by the Ninth Circuit over two years prior to the date of sale. There was no dispute that All American was a "successor" to Golden State, even under the narrow definition set forth by the dissenters in *NLRB v. Burns Int'l Sec. Serv. Inc.*, 406 U.S. 272 (1972), discussed *infra* notes 47-52 and accompanying text. *Id.* at 182-83 n.5.

In addition, the Court's opinion is silent about which party (the NLRB or the new owner) has the burden of proof on the presence or absence of knowledge.

17. Federal rules provide, in pertinent part, that "[e]very order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." FED. R. CIV. P. 65(d).

18. *Id.* Cf. *Rendleman, Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873, 908 (1975) (under traditional doctrine, procedural rules, or the Constitution, only named parties, agents of parties, and associates-confederates of parties are bound by injunctions).

embodied in the statute and the Constitution extends federal government interdiction of private business relationships well beyond the justification provided by federal labor policy. The Supreme Court, however, held in *Regal Knitwear Co. v. NLRB*<sup>19</sup> that a disguised continuance of the violator (albeit labeled as a "successor" by the Labor Board in its order) could be required to remedy what in reality were its own violations without running afoul of due process requirements. This could occur where a complete identity of interests exists between the violator and its alter ego.<sup>20</sup>

In *Golden State*, the Court mischaracterized its *Regal Knitwear* holding,<sup>21</sup> and failed to distinguish between the second and third Rule 65(d) categories (beneficial relationship and active concert), resulting in a *pro tanto* amendment to Rule 65(d). This judicial amendment swept within it transferees without the associational ties enumerated in the Rule, who had neither participated in the violation, nor collusively attempted to evade or frustrate the original order.

In its analysis, the *Golden State* Court first posited that *Regal Knitwear* "left open" the question of whether Labor Board orders could reach innocent purchasers. From this erroneous premise the Court then announced that the *Regal Knitwear* decision affirmatively held that Rule 65(d) was *not* a bar to such orders.<sup>22</sup> Perhaps one could argue that a succession in a very limited sense occurred in *Regal Knitwear* between the violator and the alter ego entity, and thus the "successor" label linked the alter ego transferor to the original order. However, *Regal Knitwear* recognized that independent transferees were beyond the scope of Rule 65(d): "[t]he courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law."<sup>23</sup>

Unlike *Regal Knitwear's* disguised continuance, *Golden State's* and *All American's* ownerships were entirely independent. The sale discontinued *Golden State's* bottling and distribution business entirely, and *Golden State* did not undertake the assets sale in an attempt to evade the Labor Board's original reinstatement and back pay order. Thus, before

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19. 324 U.S. 9 (1945).

20. *Id.* at 14.

21. *Id.* at 9.

22. 414 U.S. at 179.

23. 324 U.S. at 13 (dictum).

construing Rule 65(d) to encompass the degree of corporate autonomy found in the sale to All American, the Court should have confronted directly the dictum of *Regal Knitwear*.

Instead, the Court seized on the successor concept to establish an undefined "privity" between the predecessor and the successor. This privity in turn created an identity of interests<sup>24</sup> between All American and Golden State in the "employing enterprise."<sup>25</sup> All American, however, had no beneficial association with Golden State similar to those enumerated in Rule 65(d).<sup>26</sup> Further, the catalogue of persons specified in the Rule as being bound by a court order just as the named party is bound makes no mention of the term "successor." Moreover, the term "privity," whatever it may mean,<sup>27</sup> is also absent from the Rule. The Court thus amended the Rule by adding the term "successor" as an equivalent of an agent, employee, or officer. A "successor," however, is not subject to the same control or direction as people in these other categories. Although the Court addressed this issue in legal, yet imprecise, terms, its discussion masks its value judgment that a buyer-seller relationship alone is adequate to render an independent transferee an obligor under Rule 65(d).<sup>28</sup>

The Court also referred to All American's participation in the separate back pay proceeding as a basis for binding All American to the Labor Board's order. That proceeding allowed All American the opportunity to contest knowledge and successor status but not liability *vel non*.<sup>29</sup> The Court apparently did not regard this participation as transforming All American into a "party to the action," perhaps because All American was not a party to the unfair labor practice proceeding against Golden

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24. The Court's creation of this "privity" tied to the "locus" of the unfair labor practice, continued unchanged by All American, allowed it to ultimately conclude that the Labor Board's order against All American was within the boundaries of Rule 65(d). 414 U.S. at 180.

25. *Id.*

26. The Court additionally relied upon the unexplained notion that a successor "may" benefit from unremedied unfair labor practices. 414 U.S. at 184. This dubious third party beneficiary theory was downplayed by the Labor Board in *Perma Vinyl*, where the NLRB acknowledged that a bona fide successor is "not a party to the unfair labor practices and continues to operate the business without any connection with [the] predecessor." *Perma Vinyl*, 164 N.L.R.B. 968, 969 (1967), discussed *infra* note 111.

27. The Court did not elaborate on the definition of "privity." See Rendleman, *supra* note 18 at 879-80 (criticizing "privity" concept as "circular" and "barren").

28. See Barksdale, *Successor Liability Under the National Labor Relations Act and Title VII*, 54 TEX. L. REV. 707, 715 (1976) ("[A]nyone who purchases products or services . . . would conceivably satisfy the privity requirement. . .").

29. *Golden State*, 414 U.S. at 180-81.

State and was not named in the Labor Board's order issued against Golden State, except as an unspecified "successor." Moreover, it would have been flatly inequitable to bootstrap All American's role as a voluntary participant in the back pay proceeding into one as a "party to the action" within Rule 65(d). At most, then, All American could be said to have received an opportunity to contest its status as a surety for an already determined liability.<sup>30</sup>

### B. Statutory Authority of the NLRB

Equally deficient is the *Golden State* Court's treatment of the statutory limitations on the NLRB's remedial authority. Section 10(c) of the NLRA delegates broad remedial discretion to the NLRB but limits its application to the "person named in the complaint."<sup>31</sup> It also provides for an award of back pay from "the employer . . . responsible for the discrimination suffered."<sup>32</sup> Under these standards, the NLRB could not reach All American: All American was named in the supplemental back

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30. Professor Rendleman does not explain why notice alone renders an independent purchaser an "obligor" as a "named party" under Rule 65(d). Rendleman, *supra* note 18, at 891. "Common sense" may require a purchaser to assume *all* the liabilities of the seller. *Id.* This requirement must still survive due process principles embodied in the Constitution and Rule 65(d).

Rule 65(d) also reflects common law limitations upon third party liability. These limitations provide that assets purchasers do not assume a seller's liabilities absent collusion, evasion, or assent. *See Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 440 (7th Cir. 1977) (Wisconsin law precludes strict liability for injury from seller's manufacturing defects); 15 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 7122 (rev. perm. ed. 1983). These principles have not been abolished by the NLRA or by amendment to Rule 65(d).

Professor Rendleman also assumes erroneously that All American had "an opportunity to be heard at the unfair labor practice hearing." Rendleman, *supra* note 18, at 891. In fact, this hearing antedated the date of sale by five years.

An alternative interpretation for the *Golden State* holding is an *in rem* concept that assumes the property sold to All American is "infected" with the unremedied unfair labor practice and any independent purchaser of this "locus" with knowledge of the "infection" takes this property interest bound by this "lien." This on-going property interest theory, however, does not fit within the Rule 65(d) categories. This interpretation has been applied in patent infringement injunctions. *E.g.*, *Herlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975).

31. 29 U.S.C.A. § 160(c) (West Supp. 1988).

32. Section 10(c) provides:

If . . . the Board shall be of the opinion that *any person named in the complaint* has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue and cause to be served on *such person* an order requiring *such person* to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay. . . . Where an order directs reinstatement of an employee, back pay may be required of the employer . . . *responsible for* the discrimination suffered. . . .

*Id.* (emphasis added).

pay specification, but was not named in the complaint and was not the employer responsible for the unlawful discrimination against Baker. Yet instead of directly addressing this statutory language, the Court looked again to *Regal Knitwear*, a decision wholly unconcerned with section 10(c). There, the Court remarked in passing that an ownership transfer can be performed either as a means of evading the judgment or "for other reasons."<sup>33</sup> The Court in *Golden State* interpreted this phrase as approving extension of the Labor Board's remedial authority under the NLRA to reach innocent transferees.<sup>34</sup> In the aftermath of this sweeping decision, it is hardly surprising that new owners face remedial obligations under an increasing variety of regulatory statutes without legislative sanction.<sup>35</sup>

### III. DEVELOPMENT OF SUCCESSOR LIABILITY UNDER NLRA

#### A. *Collective Bargaining Obligations*

Whenever an ownership transfer involves a union-organized seller, the successor doctrine creates increased labor costs for the buyer arising from the seller's collective bargaining agreement. The transfer of these seller's unassumed contractual obligations to the new owner burdens and even eliminates the buyer's managerial discretion to alter operations and modify terms and conditions of employment, and may delay or frustrate the sale itself. The Supreme Court's exalted endorsement of arbitration as the highroad to peaceful resolution of industrial strife<sup>36</sup> underlies the Court's willingness to impose on the new owner the seller's promise to arbitrate employee grievances when the change of ownership occurs before the expiration of the seller's collective bargaining agreement. This, in turn, has led federal judges and arbitrators to require that successors adhere to the entire contract based upon contractual clauses binding the seller's successors and assigns. It has even led to suits to

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33. *Regal Knitwear*, 324 U.S. at 14-15 (emphasis added).

34. *Golden State*, 414 U.S. at 175-77 (citing *Regal Knitwear*). See also Barksdale, *supra* note 28, at 713 ("the Court's disingenuous reliance on *Regal Knitwear* represents at least a major extension of the case.").

35. See, e.g., *Oner II, Inc., v. EPA*, 597 F.2d 184, 186-87 (9th Cir. 1979) (purchaser liable for \$20,600 fine against seller for violating the Insecticides and Environmental Pesticide Control Act, 7 U.S.C. §§ 136-136w (1980), citing *Golden State*, 414 U.S. 168 (1973)); *Ray v. Alad*, 19 Cal.3d 22, 30, 560 P.2d 3, 8, 136 Cal. Rptr. 574, 579 (1977) (successor liable for seller's product liabilities, citing *Golden State*). See also *Doe, Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1, 31 n.86 (1986).

36. *The Steelworker Trilogy*, 363 U.S. 564 (1960); 363 U.S. 574 (1960); 363 U.S. 593 (1960).

compel compliance with arbitration awards imposed against the seller. As shown below, the increasing emphasis upon survivability of contractual rights has steadily diluted the necessity of a successor's assent to assume the seller's contract liabilities.

The creation of the Supreme Court's successorship doctrine began in *John Wiley & Sons v. Livingston*<sup>37</sup> where "substantial continuity of identity"<sup>38</sup> after the merger bound a nonconsenting new owner to the seller's contractual promise to arbitrate its employee grievances, notwithstanding the absence of a successors and assigns clause. In *Wiley*, the unionized employer (Interscience) was absorbed by merger into the larger nonunion firm (Wiley) before the collective bargaining agreement expired. The union grieved Wiley's refusal to continue contractual benefits and pension payments for the former Interscience employees retained by Wiley.

The Court transformed Wiley's decision to continue the same business with a majority of the former Interscience employees into its "consent" to be bound by the arbitration clause notwithstanding Wiley's express refusal to continue to give effect to Interscience's union contract or to recognize or bargain with the union. This fictional assent to a clause Wiley had not bargained for enabled the Court to assert that Wiley's arbitration obligation was not actually imposed by judicial decree.<sup>39</sup> The Court also referred to New York law which holds merged corporations liable for the debts of a disappearing corporation.<sup>40</sup>

Although the Court remitted to an arbitrator the actual extent of Wiley's unassumed obligations under the Interscience contract, the opinion acknowledged that a successor could be saddled with the disruptive effects of different and presumably higher wages and benefits applied to the former Interscience employees now performing the same tasks alongside Wiley's employees.<sup>41</sup> In addition, the opinion did not suggest that the arbitrator lacked authority to construe "business continuity" as "assent"

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37. 376 U.S. 543 (1964).

38. *Id.* at 551. The *Wiley* Court stated that when "lack of any substantial continuity of identity in the business enterprise before and after a change" exists the purchaser should not be required to assume the predecessor's liabilities. *Id.*

39. *Id.*

40. *Id.* at 550 n.3. It is unclear whether the Court intended this reference as support for its conclusion.

41. *Id.* at 551 n.5. The arbitrator required Wiley to pay six employees a total of \$338.00 for vacation pay accrued between the date of sale and the expiration of Interscience's contract with the union. Interscience Encyclopedia, Inc., 55 Lab. Arb. (BNA) 210, 225 (1970) (Roberts, Arb.).

not just to the predecessor's arbitration clause but also to the entire contract.<sup>42</sup>

In *William J. Burns International Security Services, Inc.*<sup>43</sup> the NLRB applied its interpretation of *Wiley* to a refusal-to-bargain complaint arising under the NLRA.<sup>44</sup> In this case Burns replaced Wackenhut as the contractor providing security services to Lockheed. A collective bargaining agreement between Wackenhut and its guards was in effect at the time Lockheed awarded the contract to Burns. The record does not disclose whether the contract included a successors and assigns clause. Burns retained twenty-seven of the forty-two guards employed by Wackenhut in its new unit of forty-two employees. The union demanded that Burns honor the unexpired Wackenhut contract. Burns refused and recognized another union as the exclusive bargaining agent for its guards.

The Labor Board viewed the *Wiley* decision, which bound a successor to an unexpired arbitration clause, as necessarily implying "that the collective bargaining agreement itself was binding on the successor."<sup>45</sup> The Supreme Court unanimously disagreed,<sup>46</sup> electing instead to construe *Wiley* narrowly as a case arising "against a background of state law that embodies the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."<sup>47</sup> The *Burns* opinion further qualified *Wiley* on three unpersuasive grounds: the cases arose under different provisions of the NLRA;<sup>48</sup> no

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42. The AFL-CIO urged the Court to adopt the view that the entire contract is binding upon a new owner who is a stock purchaser. Brief for AFL-CIO at 15, *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). See Benetar, *Successorship Liability Under Labor Agreements*, 1973 Wis. L. REV. 1026, 1020-32 (analysis of contractual assumption by successors).

The Supreme Court's refusal to reject this assertion expressly apparently allowed the Labor Board subsequently to adopt it. See *infra* note 149.

43. 182 N.L.R.B. 348 (1970), enforced in part *William J. Burns Int'l Detective Agency v. NLRB*, 441 F.2d 911 (2d Cir. 1971), *aff'd sub nom. NLRB v. Burns Int'l Sec. Ser.*, 406 U.S. 272 (1972).

44. 29 U.S.C. § 158(a)(5) (1982).

45. Brief for the National Labor Relations Board at 10, *NLRB v. Burns*, 406 U.S. 272 (1972) (Nos. 71-123; 71-198).

46. Although the Court unanimously agreed on the scope to be given *Wiley*, four justices disagreed with the majority's finding that Burns was a successor. 406 U.S. 272, 296 (Rehnquist, J., dissenting in part).

47. *NLRB v. Burns Int'l Sec. Ser.*, 406 U.S. 272, 286 (1972). The Court, in a five to four decision, agreed with the Labor Board that Burns had a duty to bargain with Wackenhut's union. See *infra* notes 90-94 and accompanying text.

48. 406 U.S. at 285-86. The opinion also did not justify why some limitation on investor purchase prerogatives is required by federal labor policy under § 301, but not under § 8(a)(5).

merger or sale of assets occurred in *Burns*;<sup>49</sup> and *Wiley* involved the federal policy favoring arbitration,<sup>50</sup> unlike *Burns* where the contractual agreement under the NLRA depended upon the free play of "economic realities."<sup>51</sup>

The Court's disinclination to overrule *Wiley* coupled with its detailed focus on the particular transactional facts<sup>52</sup> enabled arbitrators to continue to bind nonconsenting new owners to contractual obligations that were now placed beyond the Labor Board's powers.<sup>53</sup>

*Howard Johnson Co. v. Detroit Local Joint Executive Board*<sup>54</sup> presented the Court with an opportunity to harmonize *Burns* with *Wiley* or to overrule one opinion or the other. As in *Wiley*, the union brought its cause of action under section 301 and sought to compel Howard Johnson to arbitrate the extent of its obligations to the seller's union under an unexpired collective bargaining agreement. Moreover, the contract included a successors and assigns clause requiring contract adoption by the buyer.

The Court, however, declined to decide whether *Burns* and *Wiley* were "irreconcilable,"<sup>55</sup> and elected to further limit *Wiley* by attaching unexplained significance to transactional distinctions in its "substantial continuity of identity"<sup>56</sup> analysis. *Howard Johnson* involved a sale of assets

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49. 406 U.S. at 286. The Court did not explain satisfactorily why the form of ownership transaction is relevant to its analysis under the majority's employee continuity formulation where both *Wiley* and *Burns* hired a sufficient number of their predecessors' employees to be "successors" under federal labor policy.

50. The Court created this policy in *The Steelworker Trilogy*, 363 U.S. 564 (1960); 363 U.S. 574 (1960); 363 U.S. 593 (1960).

51. 406 U.S. at 288. The opinion is silent on why *Burns* was entitled to the opportunity to put the union to this "reality" test but *Wiley* was not.

52. *Id.* at 274-77.

53. *See, e.g., United Steelworkers of America v. United States Gypsum Co.*, 492 F.2d 713, 725-27 (5th Cir. 1974) (*Burns* does not also deny arbitrators latitude to determine "extent to which the predecessor's labor agreement should be deemed binding on the successor"), *enforcing United States Gypsum Co.*, 56 Lab. Arb. (BNA) 363 (1971) (Valtin, Arb.) (requiring contract adoption), *cert. denied*, 419 U.S. 998 (1974). *See also ABA Diesel Parts & Service Co.*, 62 Lab. Arb. (BNA) 660, 666 (1974) (Harter, Arb.) (new owner required to credit service with predecessor in determining vacation periods where all predecessor's employees hired and new owner agreed to adopt "same terms" as predecessor's contract, citing *Perma Vinyl*); *Elesco Smelting Corp.*, 56 Lab. Arb. (BNA) 1256 (1971) (Sembower, Arb.) (new owner bound by predecessor's practice of paying employees Christmas bonuses despite lack of knowledge where new owner made no other modifications in the predecessor's terms and conditions of employment).

54. 417 U.S. 249 (1974).

55. *Id.* at 256.

56. *See supra* note 38.

where after the sale the seller continued as an entity and could still be reached to satisfy labor law obligations.<sup>57</sup> In contrast, *Wiley* involved both a predecessor who disappeared after the merger and a state law requiring that the surviving corporation assume unsatisfied liabilities.<sup>58</sup> The Court elevated the significance of Howard Johnson's decision to hire a small number of the predecessor's employees to an analytical status sufficient to dissipate any employee continuity expectations implicit in the successors and assigns clause.<sup>59</sup> The Court also shifted the liability focus to the seller without explaining how the seller's breach of the successors clause or satisfaction of liabilities might affect the status of the sale or the new owner's remedial obligations.<sup>60</sup> Finally, the Court's policy rationale for reversing Howard Johnson's arbitration obligation was reduced to the "circumstances of this case."<sup>61</sup>

This narrow factual emphasis and the Court's omission of any reference to an arbitrator's authority to impose specific contractual obligations upon new owners have allowed lower courts to breathe continuing life into *Wiley*.<sup>62</sup> In turn, upon court referral, arbitrators have continued to impose substantive contractual obligations upon new owners who continue the seller's business with bargaining units consisting of a majority of the seller's employees.<sup>63</sup> In addition, labor organizations have aggressively followed Justice Marshall's suggestion in *Howard Johnson* that

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57. *Id.* at 257.

58. *See supra* notes 37-40 and accompanying text.

59. 417 U.S. at 258 n.3. Of course, *Wiley* did not know when it retained Interscience's employees that this hiring decision would nullify its express liability disclaimer.

60. *Id.*

61. *Id.* at 262 n.9.

62. *See Boeing Co. v. Machinists*, 504 F.2d 307 (5th Cir.) (*Wiley* survives *Burns*), *cert. denied*, 421 U.S. 913 (1974); *Carter v. CMTA Molders & Allied Workers*, 489 F. Supp. 704, 709 (N.D. Cal. 1980) (same); *Local 1529, Food and Commercial Workers v. Chambers Big Star*, 124 L.R.R.M. (BNA) 2120 (W.D. Tenn. June 17, 1986) (new owner's obligation to arbitrate extent of contract obligations remains after *Howard Johnson*); *Local 1115, Joint Bd. Nursing Home v. B & K Investments*, 436 F. Supp. 1203, 1209 (S.D. Fla. 1977) (same). *Cf. Hospital Workers Local 250 v. Pasatiempo Dev. Corp.*, 627 F.2d 1011 (9th Cir. 1980) (no duty to arbitrate under *expired* contract when grievance arose after sale).

63. *See, e.g., Consolidation Coal Co.*, 90 Lab. Arb. (BNA) 952 (1988) (Stoltenberg, Arb.) (successor bound by predecessor's past practices); *Arch of West Virginia*, 90 Lab. Arb. (BNA) 891 (1988) (Stoltenberg, Arb.) (same); *Schneiers Finer Foods, Inc.*, 72 Lab. Arb. (BNA) 881 (1979) (Belkin, Arb.) (new owner with notice of predecessor's successors and assigns clause bound by seller's contract despite express disclaimer of any such obligations, *B & K Investments, Inc.*, 71 Lab. Arb. (BNA) 366, 368 (1978) (Turkus, Arb.) (successor bound by predecessor's contract). *Cf. Pinkertons, Inc.*, 89 Lab. Arb. (BNA) 917, 920 (1987) (Peterson, Arb.) (successor's liability to hire certain predecessor employees depends upon extent of hiring authority retained). *See generally*

successors and assigns provisions provide a cause of action against sellers who transfer ownership without the collective bargaining agreement.<sup>64</sup> Federal courts have repeatedly issued injunctions against such transfers pending arbitration to determine whether the buyer should assume the labor contract when the seller breached this provision.<sup>65</sup>

None of the decisions imposing contractual obligations on new owners even contemplates how an arbitrator acquires jurisdiction over a non-signatory who had never consented to arbitrate anything with the union and had expressly declined to assume the seller's contract or its labor obligations.<sup>66</sup> In one case an arbitrator issued an advisory opinion on

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Crystal & Brodecki, *Are Successors and Assigns Clauses Really Binding?*, 38 LAB. L.J. 547, 554-57 (1987).

Absent a purchaser's express written disclaimer of contractual survivability, vague oral representations regarding continuation of the seller's "terms" will be strictly construed as assent to be bound. *E.g.*, *United Food & Commercial Workers v. Geriatric Center of St. Louis*, 543 F. Supp. 340 (E.D. Mo. 1982); *American Petrofina, Inc.*, 63 Lab. Arb. (BNA) 1300 (1975) (Marlatt, Arb.). *Cf.* *Culinary Workers v. Howard Johnson*, 535 F.2d 1160 (9th Cir. 1976) (new owner who continued predecessor's operations with former employees *not* bound by predecessor's contract; at time of acquisition the purchaser refused to recognize union or be bound by contract); *Servicecare Inc.*, 82 Lab. Arb. (BNA) 590 (1984) (Talarico, Arb.) (express disclaimer to recognize accrued vacation benefits held also valid as a disclaimer to recognize accrued sick leave benefits); *J.J. O'Donnell Woolens, Inc.*, 61 Lab. Arb. (BNA) 739 (1972) (Hogan, Arb.) (successor's written refusal to accept accrued benefits prior to sale held effective).

Arbitrators have declined to bind new owners to their predecessors' contract if they are not "successors" because of hiring practices limiting the number of predecessors employees hired, or because of operational changes, or because the seller's contract has no successors and assigns clause. *E.g.*, *Kroger Co.*, 78 Lab. Arb. (BNA) 569 (1981) (Howlett, Arb.); *Decatur Herald & Review, Inc.*, 73 Lab. Arb. (BNA) 745 (1979) (Jones, Arb.); *New England Lead Burning Corp.*, 58 Lab. Arb. (BNA) 1254 (1972) (Keefe, Arb.); *Kent Enterprises, Inc.*, 55 Lab. Arb. (BNA) 777 (1970) (Roberts, Arb.). *See also* *Smegal v. Gateway Foods of Minneapolis, Inc.*, 819 F.2d 191 (8th Cir. 1987) (change of operations); *Service Hosp. Employees Union v. Cleveland Tower Hotel, Inc.*, 606 F.2d 684, 687-88 (6th Cir. 1978) (no continuity of employees); *Distillery Workers, Local 19 v. Key Wines & Liquors*, 113 L.R.R.M. (BNA) 3377 (D.N.J. July 8, 1983) (no duty to arbitrate where new owner hired nine employees from the seller in new unit of 23).

64. 417 U.S. 249, 258 n.3 (1974).

65. *Culinary Workers, Local 226 v. Royal Center, Inc.*, 754 F.2d 835 (9th Cir. 1985); *Machinists, Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276, 287 (7th Cir. 1981); *Teamsters Local 961 v. Graves Truck Line, Inc.*, 502 F. Supp. 1292 (D. Colo. 1980); *Local 1115 v. B & K Investments*, 96 L.R.R.M. (BNA) 2353 (S.D. Fla. Sept. 10, 1977); *Amalgamated Food Employee's Union, Local 590 v. National Tea Co.*, 346 F. Supp. 875 (W.D. Pa. 1972). *Contra* *Anderson v. Ideal Basic Indus.*, 804 F.2d 950, 953 (6th Cir. 1986) (clause unenforceable against seller). *See also* Fasman, *Labor Relations, Consequences of Mergers and Acquisitions*, 13 EMPLOYEE REV. L.J. 14, n.26 (1987) (collecting arbitrator's decisions on the binding effect of successors and assigns clauses); Kramer & Schindel, *Bargaining Obligations and Corporate Transformations*, in PROCEEDINGS OF N.Y.U. NATIONAL CONFERENCE ON LABOR 223, 257-59 (R. Adelman, ed. 1980).

66. The Supreme Court has said that an employer's arbitration obligation is not created by

whether the purchaser could be bound by the seller's contract because the purchaser was not a signatory to the seller's arbitration provision.<sup>67</sup> Constrained by a judicial decree ordering arbitration, the arbitrator concluded the new owner was not a "legal" successor.<sup>68</sup> It is unclear how a contrary award would have been enforceable. In any event, few new owners have challenged the arbitrator's authority to determine their contractual obligations absent their consent to arbitration.

The Supreme Court's abiding faith in arbitration ironically so far has frustrated union efforts to require successors to abide by arbitration awards issued against their predecessors. In *Shaffer v. Mitchell Transport, Inc.*,<sup>69</sup> Martin Trucking was party to a collective bargaining agreement that limited the number of employee-drivers used to preserve hauling work for owner-drivers. An arbitration committee ordered Martin to comply with this portion of the contract. Thereafter, Martin sold its hauling company to Mitchell. Mitchell agreed "to assume the terms and obligations of [Martin] under the Collective Bargaining Agreements."<sup>70</sup> After the sale, the union obtained a \$172,833 award against Martin for its breach of the work preservation clause and then sought to enforce the award against Mitchell. The lower court agreed that Mitchell was bound by the award, rejecting Mitchell's claim that the question of whether Mitchell was bound by the award was arbitrable.<sup>71</sup>

The Third Circuit vacated the district court's order<sup>72</sup> on the plausible theory that the committee's liability award was distinct from the merits award.<sup>73</sup> The court cited the *Steelworkers Trilogy* policy favoring arbitration in support of its remand, but distinguished *Golden State* on the irrelevant ground that the arbitration committee award in *Shaffer* did not contain a successorship clause.<sup>74</sup> The court should have deemed this omission from the award meaningless, however, because 1) an arbitrator has no authority to bind any nonconsenting entity (including the buyer) to the award, and 2) such an inquiry is not pertinent to the traditional

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federal law, but by voluntary agreement. *Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

67. *Kroger Co.*, 78 Lab. Arb. (BNA) 569, 578 (1981) (Howlett, Arb.).

68. *Id.* at 591.

69. 635 F.2d 261 (3d Cir. 1980).

70. *Id.* at 263.

71. *Id.* at 262.

72. *Id.* at 267 (vacated and remanded to district court with directions to stay proceedings pending arbitration).

73. *Id.* at 264-65.

74. *Id.* at 264-65, 266-67.

successorship inquiry performed by courts. Instead, the court should have considered whether the *collective bargaining agreement* contained a successorship clause, and why Mitchell's express assumption of all of Martin's collective bargaining obligations did not also include the arbitration award against Martin, particularly because the award "is actually a vehicle by which meaning and content are given to the collective bargaining agreement."<sup>75</sup> Thus, in this context, Mitchell's assent to Martin's collective bargaining obligations eliminated the distinction, initially drawn by the court, between the merits and liability proceedings. Ultimately, the court simply considered the district court's remedial obligation to "go far beyond what has previously been accomplished under the successorship doctrine."<sup>76</sup>

While the court correctly concluded that the lower court's opinion was unprecedented, the operative facts seem to fall well within the existing successorship doctrine because of Mitchell's express agreement to assume Martin's contractual obligations. Because Mitchell agreed to be bound by the contract and because the award against Martin became part of the obligation established by the contract, the court unnecessarily raised the issue of Mitchell's knowledge of the award. As Mitchell accepted the contractual obligations without reservation, the court should have determined that Mitchell accepted the obligation from the award as part and parcel of the same bundle of obligations.

Only one relevant question remained: whether Mitchell was Martin's "successor." On the facts set forth by the court, no other conclusion was supportable. The court's misperception of the effect of an arbitration award upon continuing collective bargaining obligations, and its unduly restrictive view of *Golden State*, makes it unlikely that this opinion will continue to shelter successors from arbitration awards issued against their predecessors, particularly where the buyer expressly agrees to assume the seller's contract obligations without limitation.

### B. *The Duty to Bargain*

Beginning in 1937, the Labor Board adopted a policy of directing its orders against the violator's successors and assigns regardless of any impending or actual change of ownership.<sup>77</sup> The Labor Board's first oppor-

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75. *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960).

76. *Shaffer*, 635 F.2d at 267.

77. *Hill Bus Co.*, 2 N.L.R.B. 781, 800 (1937).

tunity to apply a "successor" order against a new owner occurred in *South Carolina Granite*.<sup>78</sup> Blair Quarries acquired South Carolina Granite's quarry and crushing plant by lease and continued the same operation without hiatus using the same workforce under the same supervisors. The Labor Board labeled Blair Quarries a "successor" to South Carolina Granite to create a sufficient link between the two "employing industries" to establish Blair's statutory obligations to recognize and bargain with the labor organization that had organized South Carolina Granite's employees.<sup>79</sup> According to the Labor Board, Blair's failure as a successor to South Carolina Granite to accord recognition to the union constituted an unlawful refusal to bargain under the NLRA.<sup>80</sup>

Subsequently, the Labor Board extended the concept of successorship to transactions in which the seller continued in existence after the sale,<sup>81</sup> and where only limited assets were purchased by the new owner.<sup>82</sup> Following *South Carolina Granite*, the Labor Board based its bargaining orders on factual findings that a majority of the successor's employees formerly worked for the predecessor. If these employees performed essentially the same work under similar working conditions, the Labor Board then inferred that the successor's employees continued to regard the predecessor's union "as a congenial and effective representative,"<sup>83</sup> despite the change of ownership.

For a brief period beginning in 1963 with *Stepp's Friendly Ford*,<sup>84</sup> the Labor Board modified the prerequisite finding that a "majority" of the successor's workforce consists of the predecessor's employees to a "substantially" the same workforce standard.<sup>85</sup> On review, the Ninth Circuit

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78. 58 N.L.R.B. 1448 (1944), *enforced sub nom.* NLRB v. Blair Quarries, 152 F.2d 25 (4th Cir. 1945). The Labor Board rejected the General Counsel's contentions that the new employer was merely South Carolina Granite's alter ego and that the transaction had been undertaken to evade existing remedial obligations. 58 N.L.R.B. at 1465.

79. 58 N.L.R.B. at 1464-65. The Labor Board borrowed the "employing industry" concept from NLRB v. Colten, 105 F.2d 179 (6th Cir. 1939), a case involving a challenge to the enforceability of a Board order against an executrix.

80. 58 N.L.R.B. at 1468. For the statutory source of "refusal to bargain," see National Labor Relations Act § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982).

81. *Allan W. Fleming, Inc.*, 91 N.L.R.B. 612 (1950).

82. *Cruse Motors, Inc.*, 105 N.L.R.B. 242 (1953). See also *Motor City Dodge, Inc.*, 185 N.L.R.B. 629 (1970).

83. R. GORMAN, BASIC TEXT, UNIONIZATION AND COLLECTIVE BARGAINING LABOR LAW 118 (1976).

84. 141 N.L.R.B. 1065 (1963).

85. *Id.* See also *Maintenance, Inc.*, 148 N.L.R.B. 1299, 1301 (1964) ("[t]he critical question is . . . whether [the new owner] continued essentially the same operation, with substantially the same

reversed the Labor Board's successorship finding,<sup>86</sup> and the NLRB acquiesced<sup>87</sup> and returned its focus to whether a majority of the employee composition in the new employer's bargaining unit contained employees who formerly worked for the predecessor as the necessary prerequisite to inferring a bargaining obligation after a transfer of ownership.<sup>88</sup>

Concurrently, the Labor Board converted the successor's bargaining obligation where transfers involved unionized predecessors into a prohibition against unilateral changes in terms and conditions of employment. The Labor Board further imposed a requirement that the new owner retain the predecessor's employees and refrain from any terminations without prior agreement by the union.<sup>89</sup>

In *NLRB v. Burns*<sup>90</sup> the Supreme Court addressed the Labor Board's evolving successorship principles that extended and enforced union recognition and bargaining obligation to unconsenting new owners after transfers of ownership. First, the Court agreed that a wholesale duty to bargain can be transferred to a new owner by operation of law, despite an express disclaimer, whenever a "continuity of the business enterprise" exists, and a majority of the new owner's workforce consists of employees formerly employed by the predecessor.<sup>91</sup> The Court emphasized that the award of Lockheed's contract to Burns in place of Wackenhut occurred

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employee unit. . . .") (dicta) (90% of the new employer's workforce consisted of employees who formerly worked for the predecessor).

86. *NLRB v. Stepp's Friendly Ford*, 338 F.2d 833, 836 (9th Cir. 1964), *rev'g* 141 N.L.R.B. 1065 (1963). The Ninth Circuit refused to find successorship because the new employer's complement of eight salesmen contained only three previously employed by the seller, even though the court agreed with the Board that the new employer continued the same operation at the same location with substantially the same supervisors. The court also noted that the new employer had hired only three of the twelve salesmen employed by the predecessor immediately prior to the transfer of ownership. *Id.* at 836.

87. *Tallakson Ford, Inc.*, 171 N.L.R.B. 503 (1968) (citing the Ninth Circuit's *Stepp's Friendly Ford* opinion with apparent approval). *See also* *Lloyd A. Fry Roofing Co.*, 176 N.L.R.B. 1025, 1026 n.6 (1969) (rejecting alternative suggestion in *Stepp's Friendly Ford* that the alleged successor must also hire a majority of the employees formerly employed by the predecessor), *remanded on petition for enforcement*, 435 F.2d 848 (5th Cir. 1970).

88. *See, e.g.*, *Plant & Field Serv. Corp.*, 184 N.L.R.B. 849 (1970); *Joe Robertson & Son, Inc.*, 174 N.L.R.B. 1073 (1969); *Ellary Lace Corp.*, 178 N.L.R.B. 73 (1968); *Pargament Fidler, Inc.*, 173 N.L.R.B. 696 (1968); *Federal Elec. Corp.*, 167 N.L.R.B. 469 (1967) (no successor bargaining obligation where minority of new owner's employees formerly worked for predecessor).

89. *Overnite Transp. Co.*, 157 N.L.R.B. 1185 (1966), *enforced*, 372 F.2d 765, 768 (4th Cir.), *cert. denied*, 389 U.S. 838 (1967); *Chemrock Corp.*, 151 N.L.R.B. 1074 (1965).

90. 406 U.S. 272 (1972).

91. *Id.* at 279, 281 ("if a majority of employees after the change of ownership or management were employed by the preceding employer"; "majority of the employees hired by the new employer are represented by a recently certified bargaining agent").

within four months of the certification of representative status to Wackenhut's union. Burns could not have reasonably believed that the union no longer enjoyed majority support after such a short time. In the absence of a change in employer, there is "an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year."<sup>92</sup> Thus, the successor's duty to bargain *extends* for the same duration (the certification year) required of the predecessor, as if no transfer had occurred.

The Court, however, rejected the Labor Board's opinion as to when the successor's duty to bargain *attaches*. In the Court's view, the duty commences only after a majority of the new owner's workforce is composed of employees who formerly worked for the predecessor. Prior to this time, the new owner is free to alter the predecessor's status quo by offering new terms and conditions of employment.<sup>93</sup> The Court also suggested that the duty to bargain might not attach until the new owner had hired a full complement of employees, rather than as of the date the new owner commenced operations.<sup>94</sup>

After *Burns*, the Labor Board attempted to circumvent the "full complement" dictum to minimize the circumstances in which a union recognition demand upon a new owner could be deemed premature and therefore lawfully deniable. First, the Labor Board borrowed the "representative complement" doctrine from representation election law.<sup>95</sup> As applied to transfers of ownership, once the new owner has hired a representative rather than a full complement of employees, the new owner becomes a successor with a duty to bargain with the predecessor's union if a majority of the "representative complement" formerly worked for the predecessor.<sup>96</sup> In addition, the Labor Board created the "continuing demand" theory to activate a bargaining obligation whenever a new owner's increasing work force is composed, no matter how momentarily, of a majority of employees who had worked for the seller.<sup>97</sup> Through

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92. *Id.* at 279 & n.3.

93. *Id.* at 294-95. In so holding the Court implicitly repudiated the restraints imposed upon these prerogatives by *Overnite Transp.*, 157 N.L.R.B. 1185 (1966) and *Chemrock Corp.*, 151 N.L.R.B. 1074 (1965). See *supra* note 89 and accompanying text.

94. *Id.* at 295 (dictum).

95. See *Endicott Johnson De Puerto Rico*, 172 N.L.R.B. 1676 (1968) (election may be held where employer's prospective bargaining unit has a representative rather than a full complement of eligible voters).

96. See, e.g., *id.*

97. E.g., *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1985); *Premium Foods, Inc. v. NLRB*, 709 F.2d 623 (9th Cir. 1983); *NLRB v. Hudson River Aggregates*, 639 F.2d 865 (2d Cir.

these prescriptions the Labor Board placed new restraints on a purchaser's freedom to exercise its prerogatives, established by *Burns*, to hire its own workforce and establish its own initial conditions of employment. The validity of the Labor Board's deflation of *Burns* came before the Supreme Court in *Fall River*.<sup>98</sup>

Seven months after the unionized predecessor ceased operations, Fall River purchased certain existing equipment and inventory at a creditor's auction. Fall River then hired the first twenty-one of its anticipated employee complement as a "start-up" crew to repair and clean machinery at a leased building used by the predecessor. Eighteen of these twenty-one employees had been employed by the predecessor. Four months later Fall River hired its first shift of fifty-five employees, thirty-six of whom formerly worked for the predecessor. Within three months thereafter Fall River fully staffed a two-shift workforce of one hundred and six employees, in which the predecessor's employees were a minority. The following month, through employee-circulated petitions, eighty-nine of the one hundred and six employees disclaimed interest in continuing representation by the union.

Under the "substantial and representative complement" theory, the Labor Board was able to select the date when the first shift (fifty-five of the one hundred and six) was hired as the appropriate point in Fall River's hiring process to ascertain work force continuity. This was the last time in the hiring process that the new unit consisted of a majority of the predecessor's employees. Further, although the union's one bargaining demand upon Fall River was premature and was lawfully denied because it was made when only the start-up crew had been hired, the Labor Board converted this single request into a "continuing" demand that became operative when the first shift began operations four months later. Finally, the Labor Board presumed that the thirty-six of the fifty-five first shift employees, who had been represented by the union while in the predecessor's employ, continued to desire the same union representation solely because they had been employed in a union-represented bargaining unit. Because the petitions that disclaimed union representation post-

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1981); *Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980); *NLRB v. Pre-engineering Bldg. Prod., Inc.*, 603 F.2d 134 (10th Cir. 1979); *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609 (9th Cir. 1977); *Indianapolis Mack Sales*, 272 N.L.R.B. 690 (1984), *enforc. denied*, 802 F.2d 280 (7th Cir. 1986); *Aircraft Magnesium*, 265 N.L.R.B. 1344, 1345 n.9 (1982), *enforced*, 730 F.2d 767 (9th Cir. 1984); *Spruce Up Corp.*, 209 N.L.R.B. 194, 197 (1974), *enforced sub nom. NLRB v. Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975).

98. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

dated the hiring of the first shift—the date on which the Labor Board established Fall River's bargaining obligation—the Labor Board simply ignored them. Neither the union nor the Labor Board's General Counsel alleged that Fall River's hiring decisions were unlawful or discriminatory.

In upholding the illegality of Fall River's refusal to bargain, the Supreme Court modified *Burns* in two significant respects. First, the majority said that its reference in *Burns* to "full employee complement" was not intended to establish the moment when the new owner's duty to bargain attaches.<sup>99</sup> This modification of *Burns* allowed the Court to endorse the "substantial and representative complement" standard rationalized on the assumed and unexamined "interest" of the predecessor's employees hired by Fall River (who had actually expressed their rejection of the union) in quickly reestablishing union representation.<sup>100</sup> This retrenchment of *Burns* was particularly consequential because under the full complement standard Fall River would not have been a "successor" because the predecessor's employees were a minority in Fall River's unit and had been a minority as of the date the full employee complement was hired.

Second, the Court disconnected the inference of continuing union support in the successor's unit from the requirement of a recent union certification.<sup>101</sup> This dashed expectations that the new owner's duty to bargain would be limited to circumstances evidencing a reliable basis for presuming majority status. Consequently, this authorized the Labor Board to continue to draw broad inferences of continuing union support under the guise of fostering "industrial peace."<sup>102</sup> This holding also obviated the need to assess the effect of an operational hiatus upon future or continuing employment expectations or to ascertain whether any of the employees in the new owner's employ viewed the seller's union as an "effective and congenial" representative.

The Court also shifted the focus of the successorship doctrine dramatically away from the *Burns* business transferability considerations solely to the employee's view of job continuity.<sup>103</sup> This myopic focus, however, disregards operational modifications which are as much a measure of

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99. 482 U.S. at 47-48 n.14.

100. *Id.* at 48-49.

101. *Id.* at 41.

102. *Id.* at 39 ("We now hold that a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified").

103. *Id.* at 44. ("[F]rom the perspective of the employees, their jobs did not change.").

“continuity” as comparative job descriptions. The Court also freed a union from any initial requirement of tying its bargaining demand to a new unit that has even a “representative complement” of employees whom the union represented. Now, in transfers of ownership involving unionized sellers, the seller’s union need not reassert its bargaining claim even when it has been lawfully refused by the new owner.<sup>104</sup>

Without so acknowledging, the Court significantly undermined the continuing validity of *Burns* and its cursory analysis failed to seriously scrutinize Labor Board-created doctrines designed to facilitate facile rationalizations for sanctioning union bargaining demands without even a probability that the seller’s employees as a unit had any “expectation” of continuing employment or any consideration of the actual union representation desires of Fall River’s full employee complement.<sup>105</sup> The Court also substituted a vague “continuity” standard for the functional and predictable “full employee” complement measure in its determination of whether the buyer’s unit is composed of a majority of employees who formerly worked for the seller. The “representative complement” measure places unlimited discretion upon after-the-fact-finders to pick any point in the new owner’s hiring process and create a bargaining obligation.

#### IV. *GOLDEN STATE BOTTLING AS A CATALYST TO KNOWN LIABILITIES*

##### A. *The Obligation to Remedy Unfair Labor Practices*

Prior to the Supreme Court’s decision in *Golden State*, the Labor Board and the federal courts employed a cautious approach to imposing liability on successors to avoid inflicting any hardship or burden upon an innocent party.<sup>106</sup> Thus, the Labor Board carefully tailored the successor’s reinstatement obligation to apply only when current vacancies existed<sup>107</sup> and its backpay obligation to commence five days after the

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104. *Id.* at 52--53.

105. George, *Successorship and the Duty to Bargain*, 63 N.D. L. REV. 277, 280 (1988) (“no real evidence that the assumptions made have any connection with the reality of employee’s desires”).

106. See Northern Virginia Sun Publishing Co., 159 N.L.R.B. 1634 (1966), *aff’d sub nom.* Wheeler v. NLRB, 382 F.2d 172 (D.C. Cir. 1967) (no reinstatement obligation). See also Tri State Maintenance Corp., 167 N.L.R.B. 933 (1967), *aff’d as modified*, 408 F.2d 171 (D.C. Cir. 1968) (no obligation to hire predecessor’s employees).

107. Thomas Engine Corp. & Upshur Engine Co., 179 N.R.L.B. 1029 (1970) (NLRB’s order of immediate reinstatement enforceable only if current vacancy exists; if none, then place employee on preferential hiring list), *aff’d sub nom.* UAW v. NLRB, 442 F.2d 1180 (9th Cir. 1971).

discriminatees affirmatively requested employment with the successor.<sup>108</sup> Also, the Labor Board declined to order bargaining where there was no evidence that a majority of the successor's employees had indicated any support for the predecessor's union.<sup>109</sup> The Labor Board's first attempt to require that a successor recognize a union based solely on union authorization cards presented to the predecessor was denied judicial enforcement.<sup>110</sup> In this posture, a new owner who met the successor criteria could be certain its innocence would be recognized and that its obligations arising from the seller's unfair labor practices would be fashioned in recognition of this status.

Since Supreme Court approval of the *Perma Vinyl* doctrine<sup>111</sup> in *Golden State*, the NLRB's consideration for successors with clean hands has been replaced by an aggressive compliance policy which considers the successor and the violator *in pari delicto*. Thus, bona fide successors are now required to offer immediate reinstatement to employees unlawfully discharged by their predecessors without regard to existing vacancies or the hardship to displaced employees in the successor's workforce, and to pay backpay compensation from the date of the discharge by the predecessor to the date of reinstatement.<sup>112</sup> In only one reported case, *Bellingham Frozen Foods, Inc. v. NLRB*<sup>113</sup> has a court denied enforce-

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108. 179 N.L.R.B. at 1029.

109. *Id.* See also *Southland Mfg. Co.*, 186 N.L.R.B. 792 (1970) (new election ordered), *cert. denied*, 414 U.S. 858 (1973); *Emerson Elec. Co.*, 176 N.L.R.B. 744 (1969) (initial bargaining order against successor denied).

110. *Webb Tractor & Equip. Co.*, 181 N.L.R.B. 230 (1970), *enforcement denied sub nom.* *NLRB v. Inland Mach. Co.*, 80 L.R.R.M. (BNA) 2738 (9th Cir. May 11, 1972) (per curiam) (ordering new election).

111. In *Perma Vinyl*, 164 N.L.R.B. 968 (1967), *enforced sub. nom.* *United States Pipe & Foundry Co. v. N.L.R.B.*, 398 F.2d 544 (5th Cir. 1968), the Labor Board stated that a new owner who acquired a business with unremedied unfair labor practices should be required to remedy those practices provided it had notice of its predecessor's practices. This liability results from a balancing of the equities involved; the new employer is in the best position to effectively remedy the practice (and to reflect that practice in the purchase price), and the predecessor's employees must be assured of their statutory rights under the NLRA. *Id.* at 969 (footnotes omitted).

112. See, e.g., *NLRB v. South Harlan Coal, Inc.*, 844 F.2d 380, 387 (6th Cir. 1988); *Evans Services, Inc. v. NLRB*, 810 F.2d 1089, 1094 (11th Cir. 1987); *NLRB v. Hot Bagels and Donuts*, 622 F.2d 1113, 1116 (2d Cir. 1980); *NLRB v. East Side Shopper, Inc.*, 498 F.2d 1334, 1336 (6th Cir. 1974); *Signal Communications, Inc.*, 284 N.L.R.B. No. 54, 126 L.R.R.M. (BNA) 1355 (June 22, 1987); *St. Marys Foundry Co.*, 284 N.L.R.B. No. 30, 125 L.R.R.M. (BNA) 1146 (June 12, 1987), *enforced sub nom.* *NLRB v. St. Marys Foundry Co.*, 860 F.2d 679 (6th Cir. 1988); *Martin J. Barry Co.*, 278 N.L.R.B. 393 (1986); *Petros Coal Corp.*, 257 N.L.R.B. 282 (1981); *The Bell Co. Inc.*, 243 N.L.R.B. 977 (1979); *Am-Del-Co., Inc.*, 234 N.L.R.B. 1040 (1978); *Mansion House Center Management Corp.*, 208 N.L.R.B. 684 (1974).

113. 626 F.2d 674 (9th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

ment of a reinstatement order issued against a bona fide successor. This occurred not because of any inequity or burden to the innocent successor or its existing workforce, but because the successor did not hire any of the discriminatee's fellow employees from the predecessor's bargaining unit.<sup>114</sup>

The Labor Board, with judicial approval, also has ordered successors to post cease and desist notices for their predecessors' unlawful interrogations of, and discharge threats against, pro-union employees.<sup>115</sup> The Labor Board also has required successors to accord recognition to their predecessors' union to remedy the predecessors' previous unlawful withdrawals of recognition.<sup>116</sup> In other cases, successors were required to reinstate unfair labor practice strikers who had been denied reemployment by their predecessors. These reinstated employees were then included in the determination of whether the successors' units consisted of a majority of the predecessor's employees, thereby bootstrapping the further finding that the successor "unlawfully" denied recognition to their predecessor's unions.<sup>117</sup> In addition, Labor Board orders have required successors to engage in bargaining with the predecessor's union over the operational close down effects upon the predecessor's employees,<sup>118</sup> and to recognize the predecessor's union as a remedy for the predecessor's refusal to honor an initial Labor Board certification of union representation of its employees.<sup>119</sup>

Where federal circuit courts have affirmed remedial orders that contain the customary "successors and assigns" language, the Labor Board uses civil contempt petitions against the new owner when the sale or transfer occurs before the predecessor complies with the court decree issued against it. The federal circuit courts have approved this use of contempt sanctions against an innocent purchaser. Yet imposition of the

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114. *Id.* at 680-81.

115. *NLRB v. Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267, 270, 272 (10th Cir. 1980) (applying labor law successor principles to stock sale).

116. *Westwood Import Co., Inc.*, 681 F.2d 664, 668-69 (9th Cir. 1982); *NLRB v. Winco Petroleum Co.*, 668 F.2d 973, 979 (8th Cir. 1982).

117. *NLRB v. Jarm Enterprises, Inc.*, 785 F.2d 195, 204-05, 205-06 (7th Cir. 1986); *NLRB v. Fabsteel Co. of La.*, 587 F.2d 689, 691-93, 693-95 (5th Cir. 1979), *cert. denied*, 442 U.S. 943 (1979); *Proxy Communications of Manhattan, Inc.*, 290 N.L.R.B. No. 68, 129 L.R.R.M. (BNA) 1175 (July 29, 1988).

118. *Big R Distributors, Inc.*, 280 N.L.R.B. No. 148, 123 L.R.R.M. (BNA) 1254 (July 31, 1986).

119. *Aquabrom, Div. of Great Lakes Chem. Corp.*, 280 N.L.R.B. No. 66, 122 L.R.R.M. (BNA) 1331 (June 30, 1986), *aff'd on civil contempt*, 855 F.2d 1174 (6th Cir. 1988); *Mediterranean Diner, Inc.*, 279 N.L.R.B. 538, 538-39 (1986).

sanction has been delayed by a dispute over whether the Labor Board or a special master must first determine the new owner's successor status.<sup>120</sup>

In *NLRB v. Cott Corporation*,<sup>121</sup> the First Circuit denied affirmance of another Labor Board attempt to enforce an initial bargaining order against a bona fide successor. The bargaining order was predicated upon a union authorization card majority tendered two years before the successor, Cott, took over the business.<sup>122</sup> Because the Labor Board elected to proceed against Cott as an innocent party, the court viewed the relevant inquiry to be whether the unremedied effects of previous unfair labor practices continued, rather than whether Cott's employees continued to support the union.<sup>123</sup> Prior to institution of the suit, Cott had voluntarily complied with all the obligations imposed upon the violator, Ponn, except for the union recognition requirement.<sup>124</sup> Thus, the only outstanding violation was Ponn's refusal to recognize the union two years before the sale to Cott. The court considered this violation fully dissipated because, although Cott's initial employee complement consisted of a majority of Ponn's employees, only one of Ponn's employees remained in Cott's employ at the time the Labor Board first demanded it recognize the union.<sup>125</sup> Significantly, the court, unlike the Ninth Circuit in a previous decision,<sup>126</sup> did not unilaterally substitute a rerun election for the Labor Board's bargaining order.<sup>127</sup>

The unique circumstances of Cott's voluntary compliance with the order issued against Ponn limits the future significance of this precedent. Essentially, the case stands for the narrow principle that a successor who acts without compulsion to dissipate the effects of the predecessor's NLRA violations can, with nearly 100% employee turnover, avoid being

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120. *NLRB v. FMG Inds.*, 820 F.2d 289, 294 (9th Cir. 1987); *Aquabrom v. NLRB*, 746 F.2d 334 (6th Cir. 1984); *Computer Sciences Corp. v. NLRB*, 677 F.2d 804 (11th Cir. 1982).

121. 578 F.2d 892 (1st Cir. 1978).

122. *Id.* at 893.

123. *Id.* at 895 n.4.

124. *Id.* at 893.

125. *Id.* at 895. The court, however, did not explain why this date was more significant than any other, or why Cott should profit from its employee turnover after hiring a majority of the predecessor's employees.

The opinion could have been buttressed by analogy to court cases dismissing initial card majority bargaining orders where Labor Board delay has led to a prolonged period of employee turnover. See *NLRB v. Clark's Gamble Corp.*, 422 F.2d 845, 847 (6th Cir.), *cert. denied*, 400 U.S. 868 (1970). This policy has even more force when applied in favor of bona fide successors who have not been asked to recognize the predecessor's union.

126. *NLRB v. Inland Mach. Co.*, 80 L.R.R.M. (BNA) 2738, 2738 (9th Cir. May 11, 1972).

127. *Cott*, 578 F.2d at 896.

required to recognize and bargain with the predecessor's union.<sup>128</sup>

### B. Civil Rights Liability

The Equal Employment Opportunity Commission (EEOC) readily grasped the *Golden State* opinion's potential for extending Title VII<sup>129</sup> liability for unfair employment practices. In *EEOC v. MacMillan Bloedel Containers*,<sup>130</sup> the Sixth Circuit agreed that the NLRA (which by then provided for successor liability) was the appropriate model for imposing such liability.<sup>131</sup> The court enunciated a multifactor test for determining whether the new owner was a "successor"<sup>132</sup> and defined the prerequisite "notice to the successor" as notice of the EEOC charge against the predecessor prior to the transfer of ownership.<sup>133</sup> The court further specified that "[the predecessor's] ability to provide relief will be a necessary inquiry" in determining the successor's remedial obligations.<sup>134</sup>

In the aftermath of *MacMillan*, every federal circuit court that has considered the matter has approved successor liability under Title VII. As a result, a successor is now required to pay money damages and attorney's fees,<sup>135</sup> to offer immediate reinstatement to employees terminated

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128. The Labor Board has not yet required a successor to make trust fund contributions unlawfully discontinued by the predecessor. See *J.P. Sturris Corp.*, 288 N.L.R.B. No. 77, 128 L.R.R.M. (BNA) 1067 (April 26, 1988) (no contribution remedy where successor did not hire *all* of the predecessor's employees). The Labor Board has also recognized that the Court's decision in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), precludes a successor from being required to accept a collective bargaining agreement unexecuted by the predecessor. *Martin J. Barry Co.*, 278 N.L.R.B. 393 (1986).

129. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1981).

130. 503 F.2d 1086 (6th Cir. 1974).

131. *Id.* at 1089-93.

132. The *MacMillan* court found the following nine factors relevant to its determination of whether a new owner was a "successor" for Title VII liability purposes:

- 1) whether the successor company had notice of the charge,
- 2) the ability of the predecessor to provide relief,
- 3) whether there has been a substantial continuity of business operations,
- 4) whether the new employer uses the same plant,
- 5) whether he uses the same or substantially the same work force,
- 6) whether he uses the same or substantially the same supervisory personnel,
- 7) whether the same jobs exist under the same working conditions,
- 8) whether he uses the same machinery, equipment and methods of production and
- 9) whether he produces the same product.

*Id.* at 1094 (citations omitted).

133. *Id.* at 1093.

134. *Id.* at 1092.

135. *Criswell v. Delta Airlines, Inc.*, 860 F.2d 1088 (9th Cir. 1988) (ordered published Feb. 28, 1989); *In re National Airlines, Inc.*, 700 F.2d 695, 699 n.5 (11th Cir. 1983), *cert. denied*, 464 U.S. 933 (1983); *Trujillo v. Longhorn Mfg. Co., Inc.*, 694 F.2d 221, 224-25 (10th Cir. 1982); *Slack v.*

by the seller,<sup>136</sup> to comply with injunctions and consent decrees issued against the seller,<sup>137</sup> and to continue the seller's pension and welfare contributions<sup>138</sup> and medical benefits compensation.<sup>139</sup>

In addition to Title VII, courts have imposed liability on bona fide successors for their predecessors' violations of the Equal Pay Act,<sup>140</sup> the Age Discrimination In Employment Act,<sup>141</sup> the Pregnancy Discrimination Act,<sup>142</sup> and the Civil Rights Act of 1866.<sup>143</sup>

In the main, courts have applied the *MacMillan* notice requirement strictly,<sup>144</sup> and also have excused the successor who had knowledge of violations from liability where the predecessor continued in existence after the sale and therefore remained in a position to provide reinstatement

Havens, 522 F.2d 1091, 1094-95 (9th Cir. 1975); EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981). See also Kolosky v. Anchor Hocking Corp., 33 Fair Empl. Prac. Cas. (BNA) 1185 (W.D. Pa. 1983) (successor liable for injunctive relief and any obligation incurred by predecessor).

136. EEOC v. Oakley-Keese Ford, 13 Fair Empl. Prac. Cas. (BNA) 850 (W.D. Tenn. 1976); Escamilla v. Mosher Steel Co., 386 F. Supp. 101 (S.D. Tex. 1975).

137. Criswell v. Delta Airlines, Inc., 860 F.2d 1088 (9th Cir. 1988) (ordered published Feb. 28, 1989); Bates v. Pacific Maritime Ass'n, 744 F.2d 705, 711 (9th Cir. 1984) (consent decree). Cf. Waker v. Republic Steel Corp., 45 Fair Empl. Prac. Cas. (BNA) 303 (N.D. Ala. 1987) (successor *not* bound by 13 year old consent decree in absence of consent).

138. EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).

139. EEOC v. MTC Gear Corp., 595 F. Supp. 712, 716-17 (N.D. Ill. 1984).

140. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1978). Carlton v. Interfaith Medical Center, 612 F. Supp. 118 (E.D.N.Y. 1985).

141. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982). Criswell v. Delta Airlines, Inc., 860 F.2d 1088 (9th Cir. 1988) (mem.) (successor obligated to hire predecessor's second officer pilots over age 60 despite its policy of not hiring pilots over age 60 as second officers). Bernstein v. Consolidated Foods Corp., 622 F. Supp. 1096 (N.D. Ill. 1984).

142. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982). EEOC v. Vucitech, 842 F.2d 936, 944-45 (7th Cir. 1988) (citing *Golden State*).

143. 42 U.S.C. § 1981 (1982). Musikiwamba v. ESSI, Inc., 760 F.2d 740 (7th Cir. 1985) (remedial not punitive or compensatory); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988).

144. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041-42 (1987) (no successor liability absent filed or pending charge known prior to date of purchase); Dominguez v. Hotel, Motel, Restaurant & Misc. Bartenders Union, Local 64, 674 F.2d 732, 733 (8th Cir. 1982) (no direct or indirect evidence of successor's knowledge of pending discrimination charge against predecessor); Wiggins v. Spector Freight Systems, Inc., 583 F.2d 882 (6th Cir. 1978) (no notice of "contingent" discrimination prior to "time of acquisition"); Burt v. Ramada Inn, 507 F. Supp. 336 (N.D. Miss. 1980), *aff'd without opinion*, 650 F.2d 281 (5th Cir. 1981) (no knowledge of charge or of identity of alleged discriminatee prior to acquisition). Cf. Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) (absence of "technical" notice of EEOC proceedings immaterial where successor had full opportunity to defend). *But see* Escamilla v. Mosher Steel Co., 386 F. Supp. 101 (S.D. Tex. 1975) (successor's opportunity to conciliate EEOC charge after transfer sufficient to create reinstatement and back pay obligation).

and financial relief.<sup>145</sup>

In one significant case the seller did not disclose the possibility of liability for sex discrimination to the buyer and no common identity of ownership existed between the parties. The court noted the buyer's absence of "due diligence" in failing to make an inquiry prior to purchase, but concluded no successor liability could be imposed absent judicial precedent or congressional legislation imposing a "due diligence" inquiry requirement upon prospective buyers.<sup>146</sup>

Finally, in borrowing the NLRA "substantial continuity of identity"<sup>147</sup> successor test, courts have given determinative weight to the number of the seller's employees hired by the putative successor<sup>148</sup> and distinguished assets purchases from stock sales<sup>149</sup> in applying the standard.<sup>150</sup>

### C. Mine Safety and Health Liability

The Federal Coal Mine Safety and Health Act broadly protects coal

145. *Brown v. Evening News Ass'n*, 473 F. Supp. 1242 (E.D. Mich. 1979) (no successor joint or several liability where violator able to provide substantial relief).

146. *Wheeler v. Snyder Buick, Inc.*, 794 F.2d 1228, 1236-37 (7th Cir. 1986). *Barksdale*, *supra* note 28, at 729 (suggesting purchasers have duty to inquire about the predecessor's civil rights compliance prior to purchase).

147. *See supra* note 38 for the Supreme Court's original formulation of this test in *Wiley*. *See also supra* note 132 for the *MacMillan* nine factor successorship test.

148. *Forde v. Kee Lox Mfg. Co. Inc.*, 584 F.2d 4 (2d Cir. 1978) (minority of predecessor's employees hired, held not to be a "successor"). *Cf. EEOC v. Chandelle Club*, 506 F. Supp. 75, 77 (W.D. Okla. 1980) (no attorney fees owed new owner where liability claim as "successor" promptly dismissed by EEOC).

149. After *Burns*, the Labor Board limited the Court's "no contract adoption" holding to assets purchasers. *E.g., Topinka's Country House, Inc.*, 235 N.L.R.B. 72 (1978), *enf'd*, 624 F.2d 770 (6th Cir. 1980); *Western Boot & Shoe, Inc.*, 205 N.L.R.B. 999 (1973) (stock purchaser obligated to assume existing contract). *See Krupman & Kaplan, The Stock Purchaser After Burns: Must He Buy the Union Contract?* 31 LAB. L.J. 328 (1980) (stock purchaser's responsibilities should be no greater than assets purchaser's). Courts have recognized that both types of purchases can have the same type of operational and organizational changes with the same consequences upon employees. Therefore, courts have applied successorship law rather than corporate law in assessing the impact of the new owner's operational change upon affected employees. *See EPE Inc. v. NLRB*, 845 F.2d 483, 490 (4th Cir. 1988) (operational changes could preclude "continuity" in stock purchases); *NLRB v. Pepsi-Cola Bottling Co. of Topeka*, 613 F.2d 267 (10th Cir. 1980); *Emanuel, Corporate Acquisitions . . . The Management Perspective*, 10 INDUS. REL. L.J. 66, 73-74 (1988) (whether labor law successor principles apply to stock sales pending decision before NLRB).

150. *Wells v. Continental Baking Co.*, 43 Fair Empl. Prac. Cas. (BNA) 1185 (W.D.N.Y. 1987) (record unclear whether new owner is assets or stock purchaser); *Burt v. Ramada Inn*, 507 F. Supp. 336 (N.D. Miss. 1980) (purchase without assuming seller's obligations), *aff'd without opinion*, 650 F.2d 281 (5th Cir. 1981).

miners and other employees of mine operators from workplace hazards associated with coal mine accidents and explosions.<sup>151</sup> The Act delegates authority to the Department of Labor to promulgate mandatory mine safety and health standards,<sup>152</sup> and to enforce these standards via inspection and citations with civil penalties and mine closure orders.<sup>153</sup> Enforcement also depends upon the initiative of individual miners to report standards violations. Accordingly, the Act expressly forbids discipline, discharge, or any form of discrimination against miners who exercise this reporting and disclosure function.<sup>154</sup> Administrative adjudication of claims alleging violations of this provision was entrusted in 1977 to the five-member Federal Coal Mine Safety and Health Review Commission.<sup>155</sup>

Within two years of its creation, the Commission discovered the *Mac-Millan* decision and, adopting its multiple factor test of successorship,<sup>156</sup> borrowed its rationale to justify the imposition of affirmative reinstatement, including temporary reinstatement (prior to hearing), back pay, civil fines, and attorneys' fees on successor operators.<sup>157</sup>

A recent case illustrates the application of these principles.<sup>158</sup> In early July 1984, three miners employed by Sugartree Corporation complained to their foreman about severe coal dust conditions in the mine. When their complaints went unheeded, they left their jobs. Thereafter, Sugartree laid them off, assertedly because of declining production at the mine. In September 1984, Sugartree transferred its mining rights permit to Richland Coal Company which, in turn, transferred operating responsibility to Terco, Inc. Also in September 1984, a Review Commission Administrative Law Judge (ALJ) issued reinstatement orders against Sugartree requiring the immediate rehiring of the miners pending decision on the merits. Because Sugartree had dissolved, the miners applied

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151. The Coal Mine Safety and Health Act of 1969, *as amended*, The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801-962 (1982). *See generally* Nat'l Indep. Coal Operators Ass'n v. Kleppe, 423 U.S. 388 (1976).

152. 30 U.S.C. §§ 811, 841-878 (1982).

153. *Id.* §§ 813, 814-821.

154. *Id.* § 815(c).

155. *Id.* § 823(a).

156. *See supra* note 132.

157. *Munsey v. Smitty Baker Coal Co., Inc.*, 2 F.M.S.H.R.C. 3463 (1980), *aff'd without discussion sub nom.*, *Munsey v. Federal Mine Safety & Health Review Comm'n*, 701 F.2d 976 (D.C. Cir.), *cert. denied sub nom.*, *Smitty Baker Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 464 U.S. 851 (1983).

158. *Corbin v. Sugartree Corporation*, 9 F.M.S.H.R.C. 394 (1987).

to Terco for reinstatement, but without success. Thereafter, the Commission concluded Terco was a "successor" to Sugartree and held Terco liable for reinstatement of the miners laid off by Sugartree, full back pay from the date of layoff, and payment of the \$1,000 fine assessed against Sugartree.<sup>159</sup> On Terco's review petition, the Sixth Circuit affirmed the Commission's affirmative remedial order in full.<sup>160</sup>

In applying its own *MacMillan* factors, the Sixth Circuit noted that Sugartree, as a dissolved corporation after September 1984, was unable to provide any of the financial or affirmative relief ordered by the Commission.<sup>161</sup> Although Sugartree ceased operations in September just prior to the ALJ's temporary reinstatement order, the court inferred "knowledge" from the fact that the president of Sugartree became president of Terco from September until December 1984, a date after the miners had filed their complaints.<sup>162</sup> Because at least fifty percent of Terco's workforce consisted of miners formerly employed by Sugartree and Terco continued to produce coal, albeit under a different mining method, the court agreed Terco was a "successor" to Sugartree.<sup>163</sup> The court rejected Terco's contention that because it had not purchased an ongoing business, it could not be held responsible for Sugartree's violations. Instead, the court relied upon the closely linked ownership between Sugartree and Terco to obviate the requirement that a sale is a prerequisite to application of the successor doctrine.<sup>164</sup>

While the Commission decision is limited to the coal industry, the Sixth Circuit's affirmance broadly assigns complete liability after any form or manner of transfer that continues the same business with a substantial number of the violator's employees. This application of *MacMillan* could widely influence other judicial and administrative decision makers and further expands the reach of orders against bona fide successors.

#### D. Wage and Hour Liability

The Fair Labor Standards Act (FLSA) requires employers or "enter-

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159. *Id.* at 396.

160. *Terco, Inc. v. Federal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987), *cert. denied*, 109 S. Ct. 57 (1988).

161. 839 F.2d at 239.

162. *Id.*

163. *Id.*

164. *Id.* at 239-40.

prises" engaged in commerce to pay employees a minimum wage and a premium wage rate above a certain number of hours worked per week.<sup>165</sup> The Department of Labor administers the FLSA and has primary enforcement responsibility.<sup>166</sup> Upon investigation, the administrator may seek injunctive relief to restrain further violations<sup>167</sup> and may file suit to recover unpaid minimum wages and overtime pay, liquidated damages, pre- and post-judgment interest, and attorneys' fees.<sup>168</sup> The Act is silent as to the administrator's authority to proceed against successors of violators.

Early federal government efforts to extend injunctions to successors were unsuccessful.<sup>169</sup> However, after *Golden State* and *MacMillan*, the government secured judicial decrees requiring new owners determined to be "successors" to share joint and several liability with the predecessor violators for wage payments, compensatory fines including the time period prior to acquisition, and attorneys' fees.<sup>170</sup> In these cases the courts generally required proof of the established prerequisites—purchaser knowledge prior to takeover and successorship status—before imposing joint and several liability on the successor. In one recent case, however, a federal district court assessed wage and hour compensation liability on a new owner who did not hire a majority of the violator's employees. In addition, the court inferred that the new owner had knowledge before the takeover date on the basis that one former officer of the violator hired by the new owner "should have known" that a wage

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165. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982 & Supp. IV 1986). See Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715 (1988).

166. *Id.* § 204 (1982).

167. *Id.* § 217 (1982). See *Donovan v. Brown Equip. & Serv. Tools, Inc.*, 666 F.2d 148, 156-57 (5th Cir. 1982) (explaining equitable objectives of injunctive relief). Injunctive relief is also available to compel reinstatement and backpay to employees discharged for asserting rights under the Act. *Mitchell v. DeMario Jewelry Co.*, 361 U.S. 288 (1960).

168. 29 U.S.C. § 216 (1982). See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1944) (liquidated damages); *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 57 (2d Cir. 1984) (pre- and post-judgment interest).

169. *McComb v. Row River Lumber Co.*, 177 F.2d 129, 130 (9th Cir. 1949) (emphasizing absence of due process); *Tobin v. Rockett*, 19 Lab. Cas. (CCH) ¶ 66,207 (M.D. Ala. 1950) (innocent new employer beyond reach of injunction).

170. *Donovan v. Maverick Oil Co.*, 92 Lab. Cas. (CCH) ¶ 34,091 (E.D. Mich. 1981) (citing *MacMillan*); *Marshall v. Keasling*, 82 Lab. Cas. (CCH) ¶ 33,562 (E.D. Mich. 1977) (citing *MacMillan*). Cf. *Usery v. Broadway Inn, Inc.*, 84 Lab. Cas. (CCH) ¶ 33,709 (W.D. Mo. 1978) (lack of privity between first successor and violator raises legal question of which successor is obligated to comply with injunction).

compensation claim would be filed.<sup>171</sup> This rationale approaches per se liability by treating a new owner as a surety for the violator where the new owner is not a successor and lacks any opportunity before the time of takeover to indemnify itself from unascertainable and unanticipatable obligations.

### *E. Veterans Reemployment Rights Liability*

In the Selective Service Act of 1948, Congress extended federal reemployment protections for honorably discharged servicemen and women to "the [former] employer's successor in interest."<sup>172</sup> Several federal circuit courts construed this phrase narrowly to require some identity of ownership and control between the prior and new employers absent any contrary statutory definition or legislative history.<sup>173</sup> This interpretation limited a new owner's reemployment obligation to acquisitions by merger.<sup>174</sup>

Recent adaptations of the labor and civil rights successorship principles discussed above have now expanded the "successor in interest" concept to include bona fide purchasers of assets. Courts assessing liability under the Veterans Reemployment Rights Act have adopted this broader definition of "successor," and the greater reach of liability it provides. For example, in *Chaltry v. Ollie's Idea, Inc.*,<sup>175</sup> the parties stipulated that no common ownership existed between seller and buyer.<sup>176</sup> Notwithstanding, the court applied the Sixth Circuit's *MacMillan* factors<sup>177</sup> and declared that the purchaser was a successor to the seller, and then imposed a \$19,000 liability judgment upon the purchaser for the seller's unlawful refusal to rehire Chaltry.<sup>178</sup>

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171. *Brock v. LaGrange Equip. Co.*, 28 Wage & Hour Cas. (BNA) 780 (D. Neb. 1987) (citing *Golden State*).

172. 38 U.S.C. § 2021(a)(B)(i), (ii) (1982) (current version now entitled Veterans Reemployment Rights Act). See *Rix v. Turnbull-Novak, Inc.*, 260 F.2d 785, 788 (8th Cir. 1958) (veteran shall be restored to pre-service position by employer or employer's "successor").

173. *Wimberly v. Mission Broadcasting Co.*, 523 F.2d 1260, 1262 (10th Cir. 1975) (new owners had no connection with or financial interest in seller); *Cox v. Feeders Supply Co.*, 344 F.2d 924, 925 (6th Cir. 1965) (no connection between former and new owners); *Rix v. Turnbull-Novak, Inc.*, 159 F. Supp. 199, 201 (W.D. Mo. 1958) (absence of common ownership), *aff'd on other grounds*, 260 F.2d 785 (8th Cir. 1958).

174. *Carr v. RCA Rubber Co.*, 609 F. Supp. 526 (N.D. Ohio 1985); *Sullivan v. Milner Hotel Co.*, 66 F. Supp. 607, 610 (E.D. Mich. 1946).

175. 546 F. Supp. 44 (W.D. Mich. 1982).

176. *Id.* at 46.

177. See *supra* notes 130-134 and accompanying text.

178. 546 F. Supp. at 51-52. Although the court ordered joint and several liability, the seller

The extension of backpay or reinstatement obligations to successors under the Veterans Reemployment Rights Act creates difficult issues of knowledge. Unless the drafted or enlisting employee expresses an intention to return to the seller's employ before commencing military service, it is unlikely the new owner will be aware of this potential liability at the time of a subsequent transfer of ownership.<sup>179</sup> Moreover, the former employer's obligation to reinstate does not arise until the veteran receives a certification of honorable discharge and establishes current qualification to perform his former job. Finally, the veteran has up to ninety days after discharge from the military to apply for reinstatement.<sup>180</sup>

#### F. State Law Obligations

Ownership transfers also occur against a background of state labor statutes that supplement or expand the scope of similar federal labor laws. These statutes regulate intrastate employment relationships and provide a plethora of rights and remedies now actively extended to new owners by analogy to the *Golden State* rationale. Thus, for example, in Iowa successors are held responsible for remedying their predecessors' racial discrimination violations.<sup>181</sup> Kansas courts will hold a bona fide successor liable for its predecessor's sex discrimination only upon unequivocal evidence of the successor's knowledge of the claim prior to the sale.<sup>182</sup> In New York, successors face wage and hour and overtime remedial obligations for their predecessors' state labor standards violations.<sup>183</sup>

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ceased to exist after the sale of assets. *Id.* at 51. See also *Bottger v. Doss Aeronautical Services, Inc.*, 609 F. Supp. 583, 588 (M.D. Ala. 1985) ("successor in interest" finding based upon continuity of employees, supervisors, functions and working conditions where common ownership absent; bona fide successor jointly liable with seller for back pay with interest for seller's unlawful refusal to grant leave for active military duty).

179. *Cox v. Feeders Supply Co.*, 344 F.2d 924 (6th Cir. 1965) (no liability where successor had no knowledge of veteran's reemployment claim at time of purchase). Cf. *Chaltry v. Ollie's Idea Inc.*, 546 F. Supp. 44 (W.D. Mich. 1982) (veteran informed seller of intention to return before commencing military service; successor's knowledge of potential liability inferred from conversation between lawyers for seller and buyer).

180. 38 U.S.C. § 2021(a)(B)(i), (ii) (1982).

181. *First Judicial Dist., Dept. of Correctional Services v. Iowa Civil Rights Comm'n*, 315 N.W.2d 83, 90 (Iowa 1982).

182. *Kansas Comm'n on Civil Rights v. Service Envelope Co.*, 233 Kan. 20, 25, 660 P.2d 549, 43 Fair Empl. Prac. Cas. (BNA) 1191 (1963) (*Golden State* holding limited to ownership transfer circumstances involving evasion, fraud, merger or consolidation mere continuance of violator, or assent to be bound).

183. *Hull-Hazard, Inc. v. Roberts*, 129 A.D.2d 348, 517 N.Y.S.2d 824 (N.Y. App. Div. 1987) (no liability where 50% of owner interest unrelated to predecessor) (dissent cited *Golden State*, 517 N.Y.S.2d at 828).

In California, agricultural employers are potentially liable to their predecessors' unfair labor practices and unlawful withdrawals of union recognition.<sup>184</sup> Significantly, some states require the purchaser of a unionized company to adopt the seller's collective bargaining contract.<sup>185</sup>

Other state law developments expose successors to liability under common law tort and breach of contract claims without reference to any statute. Several federal courts have allowed state law actions by predecessors' employees against new owners for the tort of intentional interference with economic relations,<sup>186</sup> and breach of promises to hire after the transfer of ownership.<sup>187</sup> In these circumstances, successorship status is not required. The risk of liability rises directly from the new owner's decisions on hiring the predecessor's workforce. But by both analogy to *Golden State* and by direct application of state common law, new owners, whether "successors" or not, face expanding liability risks under state laws.

## V. POTENTIAL LIABILITIES

As employment-related laws expand beyond the traditional areas of employee organizational rights and enforcement of collective bargaining agreements, the scope of potential obligations for new owners increases as well. Successors face a more imminent chance of liability for their predecessors' actions under some employment-related statutes than under others. ERISA pension plan protections span certain statutorily defined transfers of ownership and have already generated numerous claims against, and liability risks for, both sellers and new owners. Further, although under the Occupational Health and Safety Act (OSHA),

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184. *San Clemente Ranch v. Agric. Labor Bd.*, 166 Cal. Rptr. 375, 413, 414, 418 (Cal. Ct. App. 1980), *aff'd*, 29 Cal. 3d 848, 633 P.2d 949, 178 Cal. Rptr. 755 (1981).

185. *E.g.*, DEL. CODE ANN. tit. 19, § 706 (Supp. 1988); ILL. ANN. STAT. ch. 48, ¶ 2571 (Smith-Hurd Supp. 1988); MASS. ANN. LAWS ch. 149, § 179C (Law. Co-op Supp. 1988); OHIO REV. CODE ANN. § 4113.30 (Anderson 1980). These state requirements, which are contrary to federal labor policy established in *Burns*, may be vulnerable on federal preemption grounds. *Cf.* *Local 20, Teamsters v. Morton*, 377 U.S. 252, 260 (1964) (States may not by policy or legislation upset the balance of power between labor or management expressed in national labor policy); *Hull v. Florida*, 325 U.S. 538 (1944). *See also* Note, *Labor Policy and Private Determination of Successor Liability: Illinois Successor Clause Statute*, 67 WASH. U.L.Q. 575 (1989).

186. *E.g.*, *Shannon v. Potter Distilleries, Inc.*, 678 F. Supp. 239 (D. Ore. 1987).

187. *Parker v. Diamond Crystal Salt Co.*, 683 F. Supp. 168 (W.D. Mich. 1988) (no breach where successor did not guarantee employment to predecessor's employees); *Jeffers v. Convoy Co.*, 1 I.E.R. 919 (D. Minn. 1986) (fraud claim for breach of promise to hire all of seller's employees preempted by contractual exhaustion requirement).

successors are not currently at risk for their predecessors' violations, the continued validity of this precedent is in doubt.

Successor liability may also be forthcoming under other statutes. Anti-racketeering legislation has been extended to employer-employee relationships, providing a civil cause of action against employers who terminate employees for "blowing the whistle" on company activities which arguably are interdicted by RICO. Recent federal statutes affecting the hiring of aliens and regulating plant closings impose significant restrictions on managerial discretion to hire and fire workers and to continue or discontinue the business. Although no court has yet imposed liability under these statutes, the discussion below outlines why successors may not long escape these liabilities. Given the dangers of such potential liabilities, prudence dictates that, at a minimum, a purchaser at least attempt to assess and protect against these liabilities, through an indemnification agreement or otherwise, before consummating a purchase.

#### A. *ERISA*

The Employee Retirement Income Security Act of 1974 (ERISA)<sup>188</sup> increases the costs of buying and selling operations with employees covered by pension and welfare benefit plans<sup>189</sup> and creates incentives for sellers to transfer pension obligations to buyers thereby creating additional fiscal obligations for new owners.

First, Title I requires parties to multiemployer plans to make timely contributions<sup>190</sup> and creates a cause of an action to recover delinquent contributions.<sup>191</sup> Thus, a new owner could acquire the seller's contributory obligations upon the transfer of ownership, even by an assets purchase, if the new owner meets the test of successorship,<sup>192</sup> or expressly agrees to continue making timely contributions to the plan. The decision to continue contributions renders the new owner an "employer . . . obligated to make contributions," and under the successor doctrine

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188. 29 U.S.C.A. §§ 1001-1461 (1985 & West Supp. 1988).

189. By 1984, eight million persons were receiving pension income from private pension plans. *U.S. Bureau of the Census, Economic Characteristics of Households in the United States* (3d Quarter 1984). Millions more are now covered by such plans.

190. 29 U.S.C. § 1145 (1982).

191. *Id.* § 1132.

192. *Trustees for Alaska Laborers v. Ferrell*, 812 F.2d 512, 515-17 (9th Cir. 1987).

assent can be constructively created.<sup>193</sup> This language appears to allow a new owner to avoid liability by taking no action that could be construed as consent to become an “employer obligated to make contributions” under the statute and by avoiding becoming a successor by operation of law.<sup>194</sup>

Second, new owners may face back pay and reinstatement liabilities for the seller’s violation of ERISA section 510<sup>195</sup> based on analogous extensions of these obligations under the antidiscrimination provisions of the NLRA and Title VII.<sup>196</sup> Section 510 protects employees from discharge or discrimination “for the purpose of interfering with the attainment of any right” under an employee benefit plan.<sup>197</sup> Courts have rejected *per se* applications of this protection by interpreting this provision to require specific evidence of unlawful motive<sup>198</sup> to interfere with the attainment of plan benefits.<sup>199</sup> Assuming that such an evidentiary burden is met and that an unremedied section 510 violation exists at the time of a transfer of ownership, a court might justify an order against a successor by reference to the broad remedial purpose of ERISA to make the promise of a pension “real rather than illusory.”<sup>200</sup> Foreseeably, a court could require

193. *Id.* See also *Massachusetts Laborers' Health & Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24 (1st Cir. 1988).

194. *Cf. Int'l Brotherhood of Painters & Allied Trade Unions v. George A. Kracher, Inc.*, 856 F.2d 1546, 1550 (D.C. Cir. 1988) (1980 ERISA amendments establishing a cause of action for collection designed to simplify collection procedures, not to expand liability “beyond parties who in a plan or collective bargaining agreement obligated themselves to make these contributions.”). *Accord Plumbers' Pension Fund, Local 130 v. Niedrich*, 701 F. Supp. 651 (N.D. Ill. 1988).

195. 29 U.S.C. § 1140 (1982). See *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1015 (W.D. Mo. 1984) (upholding reinstatement and back pay remedies in addition to plan reinstatement against violator).

196. 29 U.S.C. § 158(a)(3); 42 U.S.C. §§ 2000(e)-2 (1982).

197. 29 U.S.C. § 1140 (1982). See *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 360 (E.D. Mo. 1979) (not limited to vested benefits).

198. *Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12, 16 (1st Cir.) (group termination of employees alone not violative of § 510), *cert. denied*, 469 U.S. 1017 (1984). See also *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694, 721-23 (N.D. Ala. 1985) (citing ERISA legislative history drawing express parallel to § 8(a)(3) of the NLRA and concluding sale motivated by legitimate business reasons), *aff'd*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Sutton v. Weirton Steel*, 567 F. Supp. 1184 (N.D. W. Va. 1983) (termination of all employees in connection with a sale does not violate ERISA), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

199. See, e.g., *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1110-114 (2d Cir. 1988) (adopting evidentiary burdens and order of proof under Title VII); *Ferguson v. Freedom Forge Corp.*, 604 F. Supp. 1157, 1162 (W.D. Pa. 1985) (true purpose motive standard).

200. H.R. REP. NO. 533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4648.

a successor to assume make-whole relief, other than plan reinstatement, even where the successor had not consented to making contributions to the benefit plan.<sup>201</sup> To date, in two reported cases claims against new owners have been dismissed where the predecessor fully awarded employees their accrued benefits at the time operations ceased<sup>202</sup> and where the new owner continued the employment of those employees who would have been entitled to shutdown benefits if their employment had not been continued.<sup>203</sup>

Finally, Title III of ERISA,<sup>204</sup> as amended in 1980, 1986, and 1987, creates an insurance system designed to indemnify employees in tax-qualified defined benefit plans against the loss or diminution of their vested pensions benefits.<sup>205</sup> Under the 1987 amendments, a defined benefit plan must be fully funded before it can be terminated.

Different events may trigger potential liability for a new owner for unfunded defined benefit commitments depending upon whether the plan is a single employer or multiemployer plan:<sup>206</sup> the termination of the predecessor's single employer plan or the cessation of operations resulting in the loss of employment of more than twenty percent of single employer plan participants;<sup>207</sup> or a "substantial employer's" withdrawal from a

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201. See *Boesl v. Suburban Trust and Sav. Bank*, 642 F. Supp. 1503, 1515 (N.D. Ill. 1986). See generally *Martucci & Utz, Unlawful Interference with Protected Rights Under ERISA*, 2 LAB. LAW. 251 (1986). A successor who acts so as to deprive the predecessor's employees of accrued pension benefits would be directly liable because the scope of § 510 extends to "any person" or "corporation."

202. *West v. Greyhound Corp.*, 813 F.2d 951, 955 (9th Cir. 1987) (citing *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674 (9th Cir. 1980) (successor free to set initial terms of employment and this right not restrained by § 510).

203. *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (no § 510 violation where new owner continued employment of certain employees without shutdown benefits while those not hired received shutdown benefits).

204. 29 U.S.C.A. §§ 1301-1381 (1985 & West Supp. 1988). See generally *Welch, Employee Benefit Issues*, 10 INDUS. REL. L.J. 84 (1988).

205. Defined contribution plans are not insured. 29 U.S.C. § 1002 (34) & (35) (1985).

206. In single employer plans, the employer's withdrawal liability is either 1) the difference between "the current value of the plan's benefits guaranteed under [ERISA] on the date of termination" and "the current value of the plan's assets allocated to such benefits on the date of termination" or 2) thirty percent of the employer's networth, whichever is less. 29 U.S.C. § 1362(b) (1985). In multiemployer plans, withdrawal liability for the seller is calculated by the proportionate share of the unfunded vested benefits determined primarily by the extent of the employer's prior participation in the pension plan. 29 U.S.C. § 1391 (1985); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984). Litigated multiemployer plan cases demonstrate that this liability can be considerable. *E.g.*, *Barbizon Corp. v. ILGWU Nat'l Retirement Fund*, 842 F.2d 627 (2d Cir. 1988) (\$1.5 million), *cert. denied*, 109 S. Ct. 495 (1988).

207. 29 U.S.C.A. § 1362(e) (West Supp. 1988).

multiemployer plan prior to plan termination.<sup>208</sup>

Whether a new employer is obligated to continue the predecessor's plan or assume withdrawal liability, unlike most other labor law obligations, depends upon the form of the transfer of ownership and whether the plan is single employer or multiemployer. For single employer plan obligations, contribution liability is transferred to new owners (whether successors or not) by express legislative direction when the predecessor ceases to exist because of a "reorganization" involving only a change of identity, a "liquidation" of a subsidiary into its parent corporation, or a "merger, consolidation or division."<sup>209</sup> In these transfer of ownership circumstances, no termination of the single employer plan takes place. If, on the other hand, an assets purchase takes place, a termination is created and the seller is obligated to fully fund the plan.<sup>210</sup> Thus, arms-length assets purchasers who are not members of the "controlled group" that includes the seller should be beyond the reach of liability for unfunded single employer pension plan benefits.<sup>211</sup> It would appear then that a *Wiley* successor would be liable by merger to continue its predecessor's single employer plan, but a *Burns* (third-party contract award), a *Golden State* (arms-length assets purchase; no common ownership), and a *Fall River* (purchase at creditor's sale) new owner would not. The question is not free from doubt, because the applicable opinion has not considered circumstances where the new owner is nonunion, the sale results in the forfeiture of accrued pension benefits, or where the successor doctrine is an independent source of liability.<sup>212</sup>

ERISA section 4218(1) transfers multiemployer defined benefit plan

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208. A "substantial employer" contributes 10% or more of all employer contributions to the plan either during two of the immediately preceding plan years or during the second and third preceding plan years. 29 U.S.C.A. § 1301(a)(2) (West Supp. 1988).

Liability also attaches if the "principal purpose of any transaction" is to avoid a multiemployer defined benefit contribution obligation created by a collective bargaining agreement or the National Labor Relations Act. *Id.* § 1392(c). *Cf. Cuyamaca Meats v. Pension Trust Fund*, 827 F.2d 491, 499 (9th Cir. 1987) (collective bargaining proposals designed to minimize withdrawal liability not for purpose of evading or avoiding liability).

209. 29 U.S.C.A. § 1362(d) (West Supp. 1988).

210. *New York State Teamsters Conf. Pension & Retirement Fund v. St. Lawrence Transit Mix Corp.*, 612 F. Supp. 1003 (N.D.N.Y. 1985). The seller's liability is calculated under formulas set forth in § 4225. 29 U.S.C. § 1405 (1982).

211. Kruegar, *Corporate Transactions after ERISA: Acquisitions, Reorganizations and Divestitures*, 1979 DUKE L.J. 489, 502.

212. Opinion Letter of Pension Benefit Guaranty Corp. No. 78-10 (1978) (asset purchaser who hired most of predecessor's employees, recognized predecessor's union, and established new plans with similar benefits not a successor under § 4062(d)).

contributions to new owners who acquire their predecessors' operations through any of the transaction forms which, as noted above, transfer contribution liability to new owners of operations covered by single employer defined benefit plans.<sup>213</sup> Thus, as in the case of single employer plans, the seller incurs responsibility for unfunded withdrawal liability of a multiemployer plan where an assets purchase occurs,<sup>214</sup> unless the "bona fide, arms-length sale of assets" purchaser 1) agrees to continue contributions to the plan, 2) purchases a surety bond covering five plan years in an amount determined by statutory formula, and 3) the seller agrees in the sales agreement to be secondarily liable for the buyer's withdrawal for the first five years of the plan after the date of sale.<sup>215</sup>

In assets purchases, it is in the seller's interest to have the buyer agree to hire the covered employees and continue the benefit plan after the sale. This avoids the potentially crippling burden of paying unfunded withdrawal liability. The buyer's primary interest is to assure that the purchase price is low enough to allow absorption of the increased labor costs directly resulting from the continuation of the seller's defined benefit plan. If, on the other hand, the buyer refuses to do so, the seller must ensure that the purchase price is high enough to cover its resulting withdrawal liability.

The primary ERISA impact, then, for any purchaser is the comparative costs to the parties of either adoption of the existing plan or the withdrawal liability.<sup>216</sup> A secondary but potentially as important impact

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213. 29 U.S.C. § 1398(1). See *Dorn's Transp. Inc. v. Teamsters Pension Trust Fund of Phila.*, 787 F.2d 897 (3d Cir. 1986); *Connors v. B & W Coal Co.*, 646 F. Supp. 164 (D.D.C. 1986); *Opinion Letter of Pension Benefit Guaranty Corp.*, No. 82-84 (1982).

214. Section 4201(a), 29 U.S.C. § 1381(a) (1982). Cf. *Richland Indus. Ltd. v. Robbins*, 617 F. Supp. 639, 641-43 (N.D. Ill. 1985) (assets purchaser not liable for predecessor's *pre-ERISA* multiemployer plan withdrawal liability albeit a successor).

215. Section 4204(a)(1)(A)(B)(C); 29 U.S.C. § 1384(a)(1) (1982). See, e.g., *Park South Hotel Corp. v. New York Hotel Trades Council*, 851 F.2d 578, 582-84 (2d Cir. 1988), *rev'g* 671 F. Supp. 1000 (S.D.N.Y. 1987), *cert. denied*, 109 S. Ct. 493 (1988); *Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 203 (6th Cir. 1988); *Teamsters Pension Trust Fund v. Central Michigan Trucking*, 857 F.2d 1107, 1109-10 (6th Cir. 1988). See also *Young v. Standard Oil*, 849 F.2d 1039, 1048 (7th Cir. 1988) (no liability for severance pay where covered employees offered employment by successor), *cert. denied*, 109 S. Ct. 529 (1988); *Accardi v. Control Data Corp.*, 836 F.2d 126 (2d Cir. 1987) (no liability for severance pay upon sale of a division), *rev'g*, 658 F. Supp. 881 (S.D.N.Y. 1987).

New owners who agree to these statutory requirements thereby assume more than make-whole liability for withdrawal or failure to make a withdrawal payment during the five year plan period. See §§ 4204(a)(2), (b)(1)(2); 29 U.S.C. §§ 1384(a)(2), (b)(1)(2) (1982).

216. See *Welch*, *supra* note 204, at 84-86.

is that if the assets purchaser agrees to continue the plan, the new owner will have by necessity hired all of the covered employees, thereby ipso facto satisfying the prerequisite "employed continuity" test which could place the owner "in the shoes" of the seller for other labor-related obligations under the successorship doctrine.

### *B. Occupational Safety and Health Act*

The Occupational Safety and Health Act of 1970 (OSHA)<sup>217</sup> was enacted "to assure so far as possible" safe and healthful working conditions for all employees<sup>218</sup> employed in a business "which affects commerce."<sup>219</sup> OSHA authorizes the Secretary of Labor to develop "national consensus" occupational safety and health standards,<sup>220</sup> to conduct on-site inspections and investigations,<sup>221</sup> and to require employers to maintain records and make periodic reports on workplace injuries.<sup>222</sup> The Secretary of Labor may also, "upon inspection or investigation,"<sup>223</sup> issue citations for alleged violations of the employer's general duty to secure workplace safety from recognized hazards,<sup>224</sup> or from violations of any other consensus standards or regulations promulgated by the Secretary.

The Secretary's rulemaking, inspection and citation authority is distinct from the adjudicative duties assigned to the Occupational Safety and Health Review Commission.<sup>225</sup> The Commission confronted the reach of the Secretary's citation authority early in its history and ruled that successors could not be held liable for the predecessor's violations because the Secretary's jurisdiction under section 9(a) is predicated on an "inspection or investigation."<sup>226</sup> After *Golden State*, the Secretary again attempted to bridge a sale of ownership by imposing liability on the new employer, but the Commission reaffirmed its prior holding that a citation is a condition precedent to a Secretary's proceeding against any

217. 29 U.S.C. §§ 651-678 (1982).

218. OSHA § 2(b), 29 U.S.C. § 651(b) (1982).

219. *Id.* § 3(6), 29 U.S.C. § 652(6) (1982).

220. *Id.* § 6(a), 29 U.S.C. § 655(a).

221. *Id.* § 8(a), 29 U.S.C. § 657(a).

222. *Id.* § 8(c)(1), (2), 29 U.S.C. § 657(c)(1), (2).

223. *Id.* § 9(a), 29 U.S.C. § 658(a).

224. *Id.* § 5(a)(1), 29 U.S.C. § 654(a)(1). *See also* UAW v. General Dynamics Land Systems Div., 815 F.2d 1570 (D.C. Cir. 1987) (compliance with a specific OSHA standard does not ipso facto absolve employer from further complying with general duties under OSHA).

225. OSHA § 12(a), 29 U.S.C. § 661(a).

226. *The Anaconda Company*, 1 O.S.H. Cas. (BNA) 3175 (1973).

employer.<sup>227</sup>

The statutory language in section 9(a) is similar to the "person named in the complaint" limitation of section 10(c) of the NLRA. The Supreme Court's summary rejection of a literal reading of the language in section 10(c) of the NLRA<sup>228</sup> in *Golden State* suggests that section 9(a) of OSHA could also be construed to permit application of fines, compliance and notice posting obligations under OSHA to bona fide successors who acquire workplaces carrying unremedied OSHA citations. The Commission's statutory remedial authority, however, does not specifically instruct it to "effectuate the policies" of OSHA, in contrast to the language in the NLRA. This language in fact, provided the basis for the Supreme Court's rationale for upholding the Labor Board's authority to reach successors under the NLRA.<sup>229</sup> Even in the absence of such language, the Commission weighs this remedial concept—effectuation of OSHA's policies—in its assessment of appropriate remedies.<sup>230</sup> In addition, the foregoing distinction between the statutory language found in OSHA and that found in the NLRA could be overcome by attributing paramount weight to the broad congressional purpose of securing safe working conditions. Further, the Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.) overcame similar language in applying its orders to new owner operators.<sup>231</sup> It seems reasonable, then, to predict that the weight of Supreme Court authority, the cumulative expansion of successor liability by lower courts, and the F.M.S.H.R.C.'s imposition of remedial obligations upon innocent new owners will eventually lead to the Commission's reversal of this policy.<sup>232</sup>

In addition, an analogy to the Mine Safety and Health Act seems likely to lead to the imposition of reinstatement and back pay remedies upon successors who acquire operations from sellers who have dis-

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227. *Clearwater Veneer Co.*, 3 O.S.H. Cas. (BNA) 1216, 1218 (1975). The Commission has also ruled that a violator who goes out of business is beyond a penalty sanction. *L.R. Ward Steel Prods. Inc.*, 5 O.S.H. Cas. (BNA) 1931 (1977).

228. See *supra* note 32 for text of NLRA § 10(c).

229. *Golden State*, 414 U.S. 168, 175-77 (1973). See also *supra* Part II(B).

230. See, e.g., *Secretary v. Crescent Warf & Warehouse Co.*, 1 O.S.H. Cas. (BNA) 1219, 1221-23 (1973).

231. See *supra* Part IV(C).

232. Difficult questions of employer knowledge and lack of opportunity to seek indemnification for OSHA fines will be presented if this reversal is achieved, however, because the Secretary is allowed considerable time between conducting an inspection and issuing a citation. See, e.g., *Donovan v. Royal Logging Co.*, 645 F.2d 822 (9th Cir. 1981) (five-month delay between inspection and citation is "reasonable promptness" absent showing of prejudice).

charged employees for exercising OSHA notice and complaint rights<sup>233</sup> before the sale.<sup>234</sup>

### C. RICO

The Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO)<sup>235</sup> creates a civil cause of action for "any person injured in his business or property by reason of a violation of section 1962."<sup>236</sup> This section provides in pertinent part that:

[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.<sup>237</sup>

Injured parties may recover treble damages, litigation costs, and reasonable attorneys' fees.<sup>238</sup>

Employees have instituted suits against their former employers under section 1964 as separate counts in actions for wrongful discharge. These claims include allegations that an employee's discharge, resulting in injury to their employability, occurred for "blowing the whistle" on criminal conduct alleged to violate RICO after the employee discovered or refused to participate in that activity.<sup>239</sup> In addition, employees have alleged breaches of employment contracts on the grounds that their employers engaged in criminal conspiracies or fraud, or both to deprive them of employment, to deny them pension and other benefits, and to subject them to sexual harassment.<sup>240</sup>

In *Sedima v. Imrex Co.*<sup>241</sup> the Supreme Court interpreted narrowly the language "by reason of" in section 1964(c) as a standing requirement that the claimed injury must result from the conduct constituting the

233. OSHA § 11(c), 29 U.S.C. § 660(c) (1982).

234. See *supra* Part IV(C).

235. 18 U.S.C.A. §§ 1961-1968 (1984 & West Supp. 1988).

236. RICO § 901(c), 18 U.S.C. § 1964(c) (1982).

237. *Id.* § 901(c), 18 U.S.C. § 1962(c).

238. *Id.* § 901(c), 18 U.S.C. § 1964(c).

239. See, e.g., *Cullom v. Hibernia National Bank*, 859 F.2d 1211 (5th Cir. 1988). In one unreported case, a federal jury awarded \$43 million in treble damages to an employee fired for refusing to participate in "cover up" security fraud violations. Harrison, *Look Who's Using RICO*, 75 A.B.A. J. 56 (Feb. 1989).

240. See generally Shepard, Horn, & Duston, *RICO and Employment Law*, 3 LAB. L. 267, 276-82 (1987).

241. 473 U.S. 479 (1985).

RICO violation.<sup>242</sup> Most courts dismiss RICO claims unless an employee can show a causal nexus in one of two ways: the discharge itself constituted a RICO violation, or the employee was a target or victim of "predicate acts."<sup>243</sup>

To date, no reported decisions have required a new owner to pay treble damages as an innocent successor where a transfer of ownership occurs before compliance with court ordered remedies. However, it seems unlikely that a transfer of ownership will allow employers found liable to their employees for injuries to employability, or their "successors," to escape entirely treble damage judgments. Certainly the parameters of this civil cause of action as applied to labor disputes in general or to successorship liability in particular will not be finally determined for years.<sup>244</sup> Therefore, for the foreseeable future, RICO wrongful discharge and conspiracy actions will continue to pose at least potential liabilities for new owners.

#### *D. Immigration Reform and Control Act*

Beginning November 6, 1986, the Immigration Reform and Control Act of 1986 (IRCA)<sup>245</sup> imposes recordkeeping, employment verification, and antidiscrimination requirements on all employers with four or more employees.<sup>246</sup> The Immigration and Naturalization Service (INS) began issuing citations in May 1987 and enforcing fine collections in May 1988. After a hearing, an ALJ may impose fines of \$100 to \$1000 for record-keeping violations or for failures to verify the legal work status of job applicants even if an illegal worker is never employed.<sup>247</sup> For second or

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242. 473 U.S. at 495, 496-97.

243. See, e.g., *Cullom*, 859 F.2d 1211 (5th Cir. 1988); *Prijol v. Shearson Am. Express, Inc.*, 829 F.2d 1201 (1st Cir. 1987); *Nodine v. Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987); *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987). But see *Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky.) (standing exists where dischargee alleges RICO violations but injury resulted from acts which are not "predicate acts"), *appeal dismissed mem.*, 853 F.2d 927 (6th Cir. 1988); *Acampora v. Boise Cascade Corp.*, 635 F. Supp. 66 (D.N.J. 1986) (standing to sue where fired for discovering illegal activities); *Callan v. State Chem. Mfg. Co.*, 584 F. Supp. 619 (E.D. Pa. 1984) (standing where discharged for refusing to participate in bribery scheme).

244. See Note, *The Exclusive Jurisdiction of the NLRB as a Limitation on the Application of RICO to Labor Disputes*, 76 Ky. L.J. 210 (1987-88) (arguing for RICO jurisdiction in employment disputes unless court must determine whether alleged "predicate act" is an unfair labor practice under NLRA § 8).

245. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (IRCA) (codified in scatter sections beginning at 8 U.S.C. § 1324a (Supp. IV 1986)).

246. *Id.*

247. *Id.*

third violations, penalties up to \$10,000 per alien may be imposed on an employer, and if a "pattern of violations" is found, an employer may face fines of \$3000 per alien, or up to six months imprisonment, or both.<sup>248</sup>

The Act creates a new "citizenship" class of workers protected from employment discrimination.<sup>249</sup> U.S. citizens, temporary and permanent resident aliens,<sup>250</sup> refugees, and persons granted asylum who intend to become a citizen may file discrimination complaints with the Special Counsel for Immigration Related Unfair Employment Practices.<sup>251</sup> Remedies for violations include reinstatement or hiring requirements (for applicants), back pay and reasonable attorneys' fees including those incurred during the administrative proceedings, and fines of \$1000 to \$3000 per violation.<sup>252</sup>

The Act is entirely silent as to the consequences of a transfer of ownership upon outstanding recordkeeping, work verification, and discrimination violations. INS regulations concerning reverification obviate this requirement when an employee "continues his employment with a related, successor or reorganized employer."<sup>253</sup> The regulations define a "successor" as an employer "who continues to employ *some* or all of a previous employer's work force in cases involving a . . . sale of stock or assets. . . ."<sup>254</sup> These regulations, however, assume compliance by the seller and require the new owner to obtain and maintain the seller's employment records and immigration service forms.<sup>255</sup>

In the event of outstanding noncompliance or existing unremedied discrimination violations at the time of sale, a court could apply these regulations to enforce remedial obligations against new owners by analogy to *Golden State* and *MacMillan*. A court would not be restrained by the

248. IRCA § 101(a) (amending the Immigration and Naturalization Act, §§ 274A(e)(4), 274A(f) (hereinafter I.N.A.)) (codified at 8 U.S.C. §§ 1324a(e)(4), 1324(f) (Supp. IV 1986)).

249. *Id.* § 102(a) (amending INA §§ 274B(a)(1), 274B(a)(3)) (codified at 8 U.S.C. § 1324b(a)(1), (3) (Supp. IV 1986)). See generally 52 FED. REG. 37,409 (1987), 53 FED. REG. 10,339 (1988) (to be codified at 44 C.F.R. § 44.106-301).

250. It is estimated that from 3 to 10 million undocumented aliens are in the United States. See Besnoff, *How to Comply with the Immigration Reform Act*, MGMT. SOLUTIONS 12, 16 (August 1987).

251. IRCA § 102(a) (amending I.N.A. § 274B(b)) (codified at 8 U.S.C. § 1324b(1)(a) (Supp. IV 1986)).

252. *Id.* (amending I.N.A. §§ 274B(g)(2), 274(h), 274B(b)) (codified at 8 U.S.C. §§ 1324b(g)(2)(B), 1324b(h) (Supp. IV 1986)).

253. 8 C.F.R. § 274a (1988) (incorporating Part 109). See generally Jacobs, *Unforeseen Obligations of Successor Employers* in 40 PROCEEDINGS OF N.Y.U. NATIONAL CONFERENCE ON LABOR § 6.03 (B. Stein, ed. 1987).

254. *Id.* (emphasis added).

255. See Jacobs, *supra* note 253.

present requirement that the buyer hire a new unit composed of a majority of the seller's employees. The court could use the IRCA regulation's language "some" to reach buyers who hire "some," or, less than a majority of the seller's employees. Thus, is it likely that new owners will be required to remedy their sellers' Immigration Reform and Control Act violations, and these obligations will be transferred to new owners with a minority of predecessor employees on their payroll.

### *E. Worker Adjustment and Retraining Notification Act*

The Worker Adjustment and Retraining Notification Act (W.A.R.N.),<sup>256</sup> effective February 4, 1989,<sup>257</sup> requires "business enterprises" employing a minimum of 100 employees<sup>258</sup> to give any "affected employees,"<sup>259</sup> and State Dislocated Worker Units<sup>260</sup> sixty days prior notice of any plant closing, mass layoff, or employment termination by sale to a purchaser. The Act also requires purchasers to delay "mass layoffs" or a plant closing for at least sixty days after commencing operations.

The Act authorizes the Secretary of Labor to draft "interpretative" regulations as compliance guidelines "to carry out this act"<sup>261</sup> but does not delegate enforcement authority to the Department of Labor or to state governments.<sup>262</sup> Instead, any affected employee, employee representative or state government unit may bring suit individually or by a class action in a federal district court where the alleged violation occurred or where the employer transacts business.<sup>263</sup> Penalties include employer liability for back pay and benefits, including medical expenses for each day of the violation period up to a maximum of sixty days, and a \$500 fine per day for failure to give notice to a local government unit up to a maximum of sixty days (\$30,000).<sup>264</sup> Federal courts do not have authority under W.A.R.N. to enjoin a pending purchase or sale.

Although W.A.R.N.'s notice provisions appear straight forward, they inaugurate onerous, complex, and confusing burdens, particularly for sell-

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256. PUB. L. 100-379, 102 Stat. 890 (1988) (W.A.R.N.) (to be codified at 29 U.S.C. §§ 2101-2109).

257. W.A.R.N. § 11 (to be codified at 29 U.S.C. § 2101 (note)).

258. *Id.* § 2(a)(1) (to be codified at 29 U.S.C. § 2101(a)(1)).

259. *Id.* §§ 2(a)(5), 3(a)(1) (to be codified at 29 U.S.C. §§ 2101(a)(5), 2101(a)(1)).

260. *Id.* § 3(a)(1) (to be codified at 29 U.S.C. § 2102(a)(1)).

261. *Id.* §§ 8, 11 (to be codified at 29 U.S.C. §§ 2107, 2101(note)).

262. 53 FED. REG. 43,736 (1988).

263. W.A.R.N. § 5(a)(1) (to be codified at 29 U.S.C. § 2104(a)(1)).

264. *Id.* § 5(a)(2) (to be codified at 29 U.S.C. § 2104(a)(2)).

ers and buyers. Most significantly, W.A.R.N. may adversely redefine the successorship doctrine employee continuity factor. This is so because section 2(b)(1) effectively awards "tenure" to the predecessor's employees by providing that "any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale."<sup>265</sup> The Department of Labor's Proposed Rules purport to limit section 2(b)(1) tenure by making it applicable only for purposes of W.A.R.N.<sup>266</sup> It is not apparent why continuing employee tenure must be created merely to insure that a sale will not toll the maximum sixty day liability period for the seller's employees who are terminated without any or inadequate notice. There is no pre-enactment legislative history to support the Department of Labor's interpretation. During the post-enactment rulemaking process, the Act's principal authors stated that an earlier Department of Labor version *without* language limiting tenure to W.A.R.N. is a correct interpretation of section 2(b)(1).<sup>267</sup> On the other hand, the same authorities stated that this provision "was not intended to affect . . ." employee status after a sale under any other statutes.<sup>268</sup> Even if construed to be consistent, these post-enactment comments are not reassuring because they are personal views, not legislative history, and as such should be given no weight in statutory construction.<sup>269</sup> Moreover, the expansive statutory language makes no mention of preserving the maximum liability period for affected employees, does not expressly foreclose the requirement that the buyer hire the seller's affected employees at least for this liability period,<sup>270</sup> or in any way define the vague term "tenure."

Despite these ambiguities, W.A.R.N. is the first federal statute to explicitly extend the employer-employee relationship across a transfer of ownership. This legislation overlaps and potentially interdicts the new

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265. *Id.* § 2(b)(1) (to be codified at 29 U.S.C. § 2101(b)(1)).

266. 53 FED. REG. 49,076, 49,083-84 (1988) (to be codified at 20 C.F.R. pt. 639.4(c)) (proposed Dec. 5, 1988).

267. *Comments Submitted to the Labor Department in Response to its Policy Paper on W.A.R.N.*, DAILY LAB. REP. (BNA) No. 209 at E-2 (Oct. 28, 1988) (written comments signed by Sen. Metzenbaum and Reps. Ford, Clay and Jeffords).

268. *Id.*

269. *Nat'l Woodwork Mfg. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967).

270. *Comments on the Labor Department's Interim Rule Interpreting the Worker Adjustment and Retraining Notification Act*, DAILY LAB. REP. (BNA) No. 35, at D-8 (Feb. 23, 1989) (written comments by Business Roundtable).

owner's already circumscribed prerogatives<sup>271</sup> to establish employment conditions different from those of the seller prior to announcing an intention to hire or actually hiring an employee complement composed of a majority of employees who formerly worked for the seller.<sup>272</sup> The reality is that W.A.R.N. does not inhibit the conversion of its continuing tenure status into additional employees of the buyer who formerly worked for the seller who must be counted in determining whether the buyer is a successor subject to all the non-W.A.R.N. obligations catalogued by this Article.

The Act's principal authors have also expressed the view that W.A.R.N.'s monetary penalties, unlike its employee tenure, do not reach across a transfer of ownership.<sup>273</sup> These remarks are also post-enactment and therefore can not be relied upon to settle this question. Moreover, these remarks assume that the seller is financially able to remedy its W.A.R.N. violations. Neither the language of the Act nor the views of its sponsors provide any basis to assume that W.A.R.N. forecloses a federal judge from transferring the seller's workforce compensation obligations to a new owner when, by analogy to *MacMillan*, the court finds that the seller is unable to provide "substantial relief" for its labor violations.<sup>274</sup>

Finally, section 2(b)(1) also sets forth ill-considered and unexplained rules governing W.A.R.N.'s application to "assets sales" involving "a sale of part or all of an employer's business."<sup>275</sup> By reference to the Act's sparse legislative history, the AFL-CIO construes these provisions to exempt the seller from a notification obligation "where the buyer agrees to hire the seller's employees."<sup>276</sup> If this view is correct, then sellers will be under great pressure to avoid the risk of monetary penalties for inadequate notices by insisting that the buyer retain the seller's workforce. This employee retention could also transform the buyer into a "succes-

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271. See *infra* notes 278-290 and accompanying text.

272. Remarks of John S. Irving on Plant Closings Before NAM Conference, San Francisco, Oct. 25, 1988, DAILY LAB. REP. (BNA) No. 207, at D-6, 7 (Oct. 26, 1988).

273. Comments Submitted to the Labor Department, *supra* note 267, at E-2.

274. Compare *MacMillan*, 503 F.2d 1086 (6th Cir. 1974), discussed *supra* note 132, with *Brown v. Evening News Ass'n*, 473 F. Supp. 1242 (E.D. Mich. 1979), discussed *supra* note 145.

275. W.A.R.N. § 2(b)(1) (to be codified at 29 U.S.C. § 2101(b)(1)).

276. Comments Submitted to the Labor Department, *supra* note 267, at E-9 (comments of the AFL-CIO). A seller who persuades a buyer to hire its employees might avoid a W.A.R.N. obligation because no "employment loss" affecting its workforce will occur. See Hunsicker, *Federal Plant Closing Law Insignificant to Philadelphia*, LEG. INTELLIGENCES 9 (Oct. 31, 1988).

sor," subject to myriad labor-related liabilities incurred by the seller prior to the sale.

## VI. TOWARD LIABILITY PER SE

The unvarying expansion of labor-related liabilities imposed upon new owners has been accompanied by steady erosion of the elements of the successor doctrine linked to "the rightful prerogative of owners independently to rearrange their businesses."<sup>277</sup> Not only have remedial obligations multiplied, but defenses have been nullified and procedural safeguards have been disregarded or discarded. This dual dynamic has now tilted the successor field toward per se liability. The number and cumulative costs of transferred liabilities can no longer safely be ignored by prospective purchasers when discovered prior to purchase. A new owner can avoid these accumulating liabilities only if it elects to change substantially the seller's operation *and* it hires preferably none, or at most only a small minority, of the seller's employees. Today, it is increasingly unlikely that a new owner can purchase a going concern and operate it with the seller's experienced employees without simultaneously assuming joint and several remedial liability for the seller's violations of a variety of federal and state laws, being required to recognize the seller's union despite operational modification and hiatus, or even in some cases, accepting the seller's unexpired collective bargaining agreement.

The seminal decision that portends unrestricted labor law liability for new owners is *Fall River Dyeing & Finishing Corp. v. NLRB*.<sup>278</sup> This modification of *Burns* not only "perpetuates an unpredictable network of criteria [that] will work to discourage investment in the assets of failed business,"<sup>279</sup> it elevates the preservation of "industrial peace" over the new owner's managerial prerogatives in nearly all transfer of ownership circumstances.

The *Fall River* majority purportedly acknowledged that the new owner's bargaining obligation is predicated on its consent, implied by "a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor."<sup>280</sup> However, the Court

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277. *Golden State v. NLRB*, 414 U.S. 168, 182 (1973) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964)).

278. 482 U.S. 27 (1987). See *supra* notes 98-104 and accompanying text.

279. Note, *Expansion of the Successorship Doctrine—Fall River Dyeing & Finishing Corp. v. NLRB*, 23 WAKE FOREST L. REV. 549 (1988).

280. *Fall River*, 482 U.S. 27, 41 (1987).

actually imposed a continuing bargaining obligation upon a new owner who had made a conscious and nondiscriminatory decision *not* to hire a majority of its predecessor's employees in its two-shift work force.<sup>281</sup> In so doing, the Court announced a modified standard for determining continuity that minimized and declared largely irrelevant common business purpose factors which had at least partly been essential for a "successor finding." Neither the absence of any privity between the predecessor and new owner, the distinction between an ongoing operation and a defunct or moribund one, nor the existence of a lengthy operational hiatus can now serve even in combination to preclude a successorship finding. These functional realities, which reflect both how a transfer of ownership occurs and when a new operation commences in temporal relation to the seller's cessation, have been replaced with the narrow and rigid employee-focused consideration of comparative job function and reemployment expectation. The gymnastic ease with which the Court vaulted the February to September hiatus between Sterlingwale's closedown and Fall River's start up by focusing exclusively on employee job function belies its statement that an operational hiatus remains a relevant limitation upon inferences of a new owner's implied consent to assume a *Burns* union bargaining obligation.<sup>282</sup> Moreover, the Court's unconditional and unexamined acceptance of the bald assertion that Sterlingwale's employees expected to continue in employment with Fall River despite Sterlingwale's liquidation and the subsequent seven-month hiatus reflects a value judgment that all employees retain a future expectation in *any* job they can perform with minimum retraining, regardless of how far in the future those jobs are created.

The majority's minimization of Fall River's operational changes which included eliminating its predecessor's converting procedure, declining to use Sterlingwale's trade name, goodwill, or customer lists, and using a smaller plant with fewer employees working longer hours means that only the most fundamental changes, those directly affecting employee job tasks, have any possibility of overcoming a "operational continuity" find-

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281. See *supra* note 98 and accompanying text. Recall that neither the union nor the Labor Board's General Counsel ever alleged that any of Fall River's hiring was discriminatory because of prounion support.

282. 482 U.S. at 45. See also *NLRB v. Danecker Clock Co.*, 516 F.2d 315 (4th Cir. 1975) (eight months hiatus immaterial); *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459 (9th Cir. 1988) (eight months too long to wait for hiring of "full employee complement") (citing *NLRB v. Burns Int'l Sec. Serv.*, 406 U.S. 272, 295 (1970)).

ing.<sup>283</sup> Additionally, these changes must somehow have a dramatic effect upon the employees' "attitude toward continued representation."<sup>284</sup> The availability of Labor Board-conducted elections to determine definitively the question of employee attitude has, of course, been forgotten. The latent judgment in this standard is that one who seeks the operational advantage of continuing the products or services of a going concern will not be allowed to reach that objective free from the restraining influences of the seller's union. Only buyers who forswear this competitive advantage by transforming the nature of the acquired business and the manner in which the products and services are manufactured and distributed have a chance of avoiding the "successor" label.

The Court's application of the "employee continuity" standard also encourages a buyer to hire and train its own workforce and forego the cost-efficient method of hiring the seller's experienced employee or else risk the imposition of unassumed liabilities. The "substantial and representative complement" fiction transfers with the predecessor's employees a bargaining obligation whenever the new unit is composed of a majority of employees hired from the predecessor. This bargaining obligation attaches regardless of how fleeting the majority in the buyer's hiring process.<sup>285</sup> The Court also left open the question of whether a new owner

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283. 482 U.S. at 57-58 (Powell, J., dissenting). The majority opinion effectively overrules several NLRB decisions which had considered similar changes to place the new owner outside the scope of the successor doctrine. *See, e.g., id.* at 56 n.4, 58 n.6 (citing cases).

284. *United Mine Workers of America, Local 1329 v. NLRB*, 812 F.2d 741, 743-44 (D.C. Cir. 1987) ("NLRB may make reasonable presumptions to perform this task").

285. It is nearly impossible to predict at what point or how the after-the-fact finder will determine whether a "representative complement" exists. *See, e.g., NLRB v. Houston Distrib. Serv. Inc.*, 573 F.2d 260, 266 n.7 (5th Cir. 1978) ("Our holding is that the measuring day in every case is not the first day of operation."), *cert. denied*, 439 U.S. 1047 (1978). Of course, one can reasonably anticipate that it will be the first time (or only time) the predecessor's employees outnumber new hires in the buyer's unit after the predecessor's union demands recognition. *See, e.g., NLRB v. Cutter Dodge Inc.*, 825 F.2d 1375 (9th Cir. 1987) (9 of 16, not 9 of 20, is "representative"); *Hospital San Francisco*, 293 N.L.R.B. No. 25 (Mar. 13, 1989) (operational expansion held not based on reasonable certainty); *Westridge Manor, Inc.*, 291 N.L.R.B. No. 5 (Sept. 27, 1988) ("substantial and representative" complement "found" within three days of union's written demand for recognition); *Faria Ltd.*, 287 N.L.R.B. No. 136, 130 L.R.R.M. (BNA) 1140 (Feb. 26, 1988) (plan to expand workforce held "speculative"); *Miner Indus., Inc.*, 285 N.L.R.B. No. 36, 128 L.R.R.M. (BNA) 1104 (Aug. 6, 1987) ("representative complement" in place). *Cf. Myers Custom Prods. Inc.*, 278 N.L.R.B. 636 (1986) (full complement date chosen over start-up date *pre-Fall River*).

*Fall River* also *pro tanto* overrules *Pacific Hide & Fur Depot, Inc. v. NLRB*, 553 F.2d 609 (9th Cir. 1977). Today, after *Fall River*, *Pacific* would be said to have hired a "representative" complement of 11 of the ultimate total of 19 employees, seven of the 11 previously employed by the seller, the day after the union demanded recognition.

New owners who decline to hire the predecessor's employees are likely to have these hiring deci-

who hires a majority of the predecessor's employees could be deemed a "successor" regardless of the ratio of those employees to the successor's new hires.<sup>286</sup> If adopted as an alternative standard basis for determining successor status, a court could make successor findings in nearly all circumstances where the seller's employees are hired into a larger operation.

The potentially staggering significance of the Court's adoption of the "substantial and representative complement" hypothesis is that it modifies the one fundamental and hitherto absolute touchstone and prerequisite of successorship—employee continuity as reflected by a majority of the new owner's unit being composed of the seller's employees.<sup>287</sup> This is now no longer the test of successorship in circumstances where the new owner's hiring process is gradual—all those circumstances where the new owner does not hire a majority of the seller's employees into its new unit upon commencing operations.<sup>288</sup> Thus, *Fall River* may have profound significance for the entire spectrum of successor liability, for it presages that buyers who forego an experienced workforce will not only assume the higher training cost and employability risks inherent in selecting new employees, but also will acquire, without consent, remedial obligations as "successors."

This erosion of the numerical majority requirement, well under way before *Fall River*, has now received implicit sanction and can be expected to accelerate. Recall that in *MacMillan*, the Sixth Circuit adopted the "substantially the same" standard as a permissible alternative for determining successor liability under Title VII.<sup>289</sup> The Labor Board later applied the same test to impose continuing bargaining obligations upon employers who transfer or merge operations, or both.<sup>290</sup>

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sions subjected to "searching scrutiny." *Kessel Food Markets, Inc. v. NLRB*, 130 L.R.R.M. (BNA) 2761 (6th Cir. March 1, 1989) (despite hiring discrimination, other business-related considerations should have resulted in minority of predecessor's employees in successors employ); *American Ind. Cleaning Co. Inc.*, 291 N.L.R.B. No. 68 (Oct. 21, 1988) (burden on buyer to show valid business-related justification for refusing to hire predecessor's employees). See also *Scott v. El Farra Enter.*, 863 F.2d 670 (9th Cir. 1988) (§ 10(j) "reasonable cause" finding of discriminatory hiring valid basis for assuming majority of buyer's unit "would have" been hired from predecessor's complement).

286. 482 U.S. at 46-47 n.12.

287. See *supra* notes 84-88 and accompanying text where it will be recalled the Labor Board's first attempt to delute this numerical majority standard was rejected by the Ninth Circuit.

288. *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664, 669-70 n.29 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

289. *EEOC v. MacMillan Boedel Containers, Inc.*, 503 F.2d 1086, 1090 (6th Cir. 1974). See *supra* notes 130-134 and accompanying text for discussion of *MacMillan*.

290. *Westwood Import Co., Inc.*, 251 N.L.R.B. 1213 (1980), *aff'd on other grounds*, 681 F.2d 664, 667 n.2 (9th Cir. 1982); *NLRB v. Marine Optical, Inc.*, 671 F.2d 11, 17 (1st Cir. 1982) (approv-

This "substantial percentage" test is also readily transferable to changes in ownership.<sup>291</sup> Recently, the NLRB held that financial obligations imposed upon new owners no longer require the successor to have a majority of the violator's employees in its employ.<sup>292</sup> It also seems likely that under a "property right" theory, a buyer's remedial obligation to provide full restitution including reinstatement for individual employees will gradually be completely divorced from any consideration of the hiring of any other former employees. This development would ultimately impose liability upon new owners in virtually all transfer and acquisition circumstances where the buyer has a position an employee can perform, thereby creating job vesting across ownership transfers without a comparable need of the legislative sanction for pension vesting obtained in ERISA.

Although *Fall River* purports to reaffirm that portion of *Burns* that precludes wholesale contract adoption remedies,<sup>293</sup> the majority opinion also cites *Wiley*.<sup>294</sup> One therefore should presume that in a *Wiley* fact pattern, the new owner can still be required to assume the predecessor's unexpired contract under section 301 of the NLRA.<sup>295</sup> Moreover, all new owners will continue to face intensified inspection as to any acts or omissions that a court or an arbitrator can magnify into "assent" to be bound by the predecessor's contract.<sup>296</sup>

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ing "substantial percentage" standard). Cf. *Air Express Int'l Corp.*, 659 F.2d 610, 615-17 (5th Cir. 1981) (proper to presume transfer of terminated employees thereby creating majority in transferred unit). *But see Fraser & Johnston v. NLRB*, 469 F.2d 1259, 1264-65 (9th Cir. 1972).

291. The AFL-CIO and the Labor Board have already urged adoption of this minimal standard. See Brief for AFL-CIO at 3, 18-21, *Fall River v. NLRB*, 482 U.S. 27 (1987) (No. 85-1208) (substantial carryover not majority in buyers unit sufficient for successorship status); *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 260 n.6 (1974) (AFL-CIO argued where predecessor's contract has successor clause unnecessary for buyer to have hired any of predecessor's employees); *NLRB v. Burns*, 406 U.S. 272, 281 n.6 (1972) (NLRB counsel argued "substantial number," not majority, sufficient).

292. *St. Marys Foundry Co.*, 284 N.L.R.B. No. 30, n.4, 125 L.R.R.M. (BNA) 1146 (June 12, 1987) ("large number" sufficient), *overruling Airport Bus Service*, 273 N.L.R.B. 561 (1984), *enforced sub nom. NLRB v. St. Marys Foundry, Co.*, 860 F.2d 679 (6th Cir. 1988).

293. *Fall River*, 482 U.S. at 40.

294. *Id.*

295. See *Wood v. Teamsters, Local 406*, 807 F.2d 493, (6th Cir. 1986) (held no contract adoption remedy, limiting *Wiley* to its facts).

296. See, e.g., *NLRB v. Pine Valley Div. of Ethan Allen, Inc.*, 544 F.2d 742, 746 (4th Cir. 1976) (payment by trustee bank of union dues, welfare fund contributions and new plant manager's assurance that contract vacation pay would continue held to be adoption of entire contract by successor despite disclaimer of knowledge of bank's action and claim that plant manager's comment was "off hand"); *Spitzer Akron, Inc. v. NLRB*, 540 F.2d 841, 846 (6th Cir. 1976) (buyer's statement "carry

Recent developments have also eliminated the *Golden State* requirement that a buyer have *actual* knowledge of the seller's violations prior to the transfer of ownership.<sup>297</sup> Indeed, the NLRB has inferred knowledge from the buyer's prudent inquiries about the seller's liabilities<sup>298</sup> and from the buyer's equally circumspect attempts to limit its liability.<sup>299</sup> In addition, the buyer now bears the burden of proving its lack of knowledge, contrary to the *Golden State* requirement the agency or employee prove the presence of such knowledge.<sup>300</sup>

The *Fall River* extension of an NLRA bargaining obligation to a successor who had no direct contractual or other business relationship with the defunct predecessor<sup>301</sup> may also signal the eventual abandonment of the *Golden State* "privity" requirement. *Golden State* required that privity exist between buyer and seller as a precondition to the imposition of the seller's unsatisfied remedial obligations on the innocent new owner. A contractual or other business relationship with the seller allows the innocent buyer, through an indemnification or "hold harmless" agreement, to limit liability for the increased fiscal cost of remedial compliance and shifts alternate liability to the violator. The existence of such an

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on as usual" sufficient to bind buyer to existing terms and conditions), *cert. denied*, 429 U.S. 1040 (1977); *Amateyus, Ltd.*, 280 N.L.R.B. No. 21, 123 L.R.R.M. (BNA) 1341 (May 30, 1986) (compliance with dues checkoff and health and welfare contributions sufficient to require contract adoption), *cert. denied sub nom. Amateyus, Ltd. v. NLRB*, 108 S. Ct. 287 (1987). *Cf. Armco, Inc., Eastern Steel Div. Ashland Works*, 291 N.L.R.B. No. 149, 130 L.R.R.M. (BNA) 1315 (Dec. 15, 1988) (remanded for evidentiary hearing on whether successor agreed to monetary provisions of predecessor's contract with another union).

Temporary injunctions issued pursuant to § 10(j) of the NLRA are now used to require a new owner to adopt the sellers unexpired union contract. *E.g., Asseo v. Hosp. San Francisco Inc.*, No. 88-1101 (D.P.R. Oct. 7, 1988).

297. *NLRB v. St. Marys Foundry Co.*, 860 F.2d 679, 682 (6th Cir. 1988) (knowledge of allegations that "could" violate the NLRA is sufficient); *NLRB v. South Harlan Coal, Inc.*, 844 F.2d 380 (6th Cir. 1980) (circumstantial evidence supporting inference of knowledge, disagreeing that *Dominquez v. Local 64, Bartenders*, 674 F.2d 732 (9th Cir. 1982) requires *direct* knowledge); *Signal Communications, Inc.*, 284 N.L.R.B. No. 54, 126 L.R.R.M. (BNA) 1355 (June 22, 1987) (backpay liability imposed on successor although unfair labor charge not filed until *after* date of transfer).

298. *Am-Del-Co., Inc.*, 234 N.L.R.B. 1040, 1040-41 (1970) (knowledge "inferred" from sellers' indemnification clause referring generally to NLRA).

299. *NLRB v. Jarm Enterprises, Inc.*, 785 F.2d 195 (7th Cir. 1986).

300. *See, e.g., Croley Coal Corp.*, 280 N.L.R.B. No. 104, 124 L.R.R.M. (BNA) 1034 (June 24, 1986); *Cumberland Nursing & Convalescent Center*, 263 N.L.R.B. 428, 434 (1982) (knowledge of "facts," not actual unfair labor practices charges, sufficient); *Mansion House Center Management Corp.*, 208 N.L.R.B. 684, 686 (1974) (employer has burden of raising and establishing defense of lack of knowledge of unfair labor practice in successorship proceeding).

301. In the view of the dissenters, this fact was one of several that undermined the majority's "substantial continuity" finding. 482 U.S. at 59 (Powell, J., dissenting).

agreement between the buyer and seller in *Golden State* was a fundamental factor in the Court's explanation for holding an innocent and nonconsenting buyer accountable for Golden State's remedial obligations to Baker.<sup>302</sup> Expanding monetary obligations to situations in which new owners purchase failing businesses or acquire operations without assets without any opportunity to negotiate a "hold harmless" agreement and the seller retains no assets after the sale nullifies the innocent status of the buyer and transforms the buyer into a violator for remedial purposes.<sup>303</sup> The imposition of remedial obligations in these circumstances creates liability per se by virtue of the "successor" label alone.<sup>304</sup>

Finally, the Court's refusal to consider evidence of Fall River employee dissatisfaction with Sterlingwale's union suggests that the present Court is unsympathetic to claims by employers that their employees no longer desire union representation. The Court also appears unconcerned that newly hired employees are effectively disenfranchised by the Labor Board's unsubstantiated inferences of continuing majority status.<sup>305</sup> For new owners to continue resisting NLRA bargaining obligations on these grounds appears futile now that a majority of the Court has adopted earlier federal circuit court opinions rejecting such contentions.<sup>306</sup>

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302. 414 U.S. 168, 185 (1973) (citing *Perma Vinyl* where the Labor Board stated that fiscal liabilities can be "reflected in the price or [in] an indemnity clause").

303. Under Title VII, as set forth in *MacMillan*, the inability of the seller to provide "meaningful" relief is a factor favoring the imposition of remedial obligations upon a successor. See *supra* notes 130-134 and accompanying text. Significantly, there is no discussion in *MacMillan* of whether the new owner need have an opportunity to indemnify itself against the Title VII remedial obligations. Cf. *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 874 n.1 (2d Cir. 1988) (Fair Labor Standards Act liability imposed on non-party who came into existence after Department of Labor commenced action against violator).

304. A new owner, whether a "successor" or not, is directly responsible for remedying its unfair labor practices. See *NLRB v. Davis*, 642 F.2d 350, 354-56 (9th Cir. 1981); *Burke-Parsons Bowlby and Its Successor, General Wood Preservative Co.*, 288 N.L.R.B. No. 102, 130 L.R.R.M. (BNA) 1322 (May 12, 1988).

305. It is unclear after *Fall River* whether after expiration of the certification year, a successor can postpone a bargaining obligation by insisting upon a NLRB secret ballot election as set forth in *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974). Compare *Fall River*, 482 U.S. at 41 n.8 with *W & W Steel Co. v. NLRB*, 599 F.2d 934, 938 (10th Cir. 1979) (upholding successor's request for a Labor Board conducted election). See Note, *The Successor Doctrine Revisited: Fall River Dyeing & Finishing Corp. v. NLRB*, 3 ST. JOHNS J. LEG. COMMENTARY 76, 96 (1987) (suggesting such an election would be a more valid basis for transferring bargaining obligations).

306. See, e.g., *EPE, Inc. v. NLRB*, 845 F.2d 483, 486 (4th Cir. 1988), discussed *supra*, note 149 (rejecting evidence that employees no longer wished to be represented); *NLRB v. Edjo, Inc.*, 631 F.2d 604, 607 (9th Cir. 1980) (no showing that newly hired employees "in fact" reject the union); *Saks & Co. v. NLRB*, 634 F.2d 681, 686 (2d Cir. 1980) (no reason to think that predecessor's employees hired by Saks did not yet present the same measure of union support as in predecessor's

In sum, *Fall River* portends the demise of the compact implicit in *Wiley* and explicit in *Burns* that the nature and extent of labor law obligations imposed upon new owners of the "employing enterprise" would be circumscribed by the historic interest of the free enterprise system in fostering the prerogatives of owners to rearrange their businesses. Although the Supreme Court stated in *Howard Johnson* that a new owner could be a "successor" for some obligations but not others,<sup>307</sup> the reality today is that a "successor" is at least potentially the guarantor for all the seller's labor-related liabilities and obligations.

## VII. BUYER PROTECTION PLANS

Buyers of labor intensive operations now bear potential responsibility for remedying a costly variety of labor-related violations committed by the seller prior to the date of sale. In addition, union recognition and contract adoption remedies may transfer from the seller to the buyer depending upon the buyer's hiring and operational restructuring decisions. Moreover, the seller's noncompliance with plant closing notification requirements or ERISA funding requirements will also encumber the transferability of the seller's operation by creating enormously costly liabilities which neither party alone may be able to profitably absorb.

Shortly after *Wiley*, attorneys advised prospective buyers that protection of the considerable investment involved in the purchase of a labor-intensive operation required a thorough investigation of the seller's labor relations history and current labor situation.<sup>308</sup> In the aftermath of the liability explosion since *Golden State*, such an investigation has become a "due diligence" checklist,<sup>309</sup> even though such general inquiries are considered "evidence" of knowledge of specific violations. A "due diligence" investigation of the seller requires time, and access to the seller's books, records, financial statements, and affected properties. Unless the seller agrees to condition the transaction upon an investigation satisfac-

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bargaining unit); *Valmac Indus., Inc. v. NLRB*, 599 F.2d 246, 247-48 (9th Cir. 1979) (recent Labor Board election not necessary to trigger presumption of majority status and rejecting successor's evidence of employee dissatisfaction with the union).

307. 417 U.S. 249, 262 n.9 (1974).

308. Sangerman, *The Labor Obligations of the Successor to a Unionized Business*, 19 LAB. L.J. 160 (1968); Spelfogel, *Labor Liabilities in Purchases, Acquisitions and Mergers: The NLRB's Successor and Accretion Doctrines*, 21 LAB. L.J. 577 (1970).

309. Dilworth, *Business Reorganizations and Non-NLRA Issues*, 10 INDUS. REL. L.J. 59 (1988). See also Emanuel, *supra* note 149, at 68; Fasman, *supra* note 65, at 33-38 (listing "decisional criteria" in question form that focus on liability issues).

tory to the buyer and grants the necessary access in exchange for protection from disclosure of confidential information, the purchase price likely will not reflect even a minimum liability risk. Consequently, the buyer will assume full responsibility for satisfying the seller's unremedied violations. Indeed, unless the seller agrees to these covenants, the significant cost of transferred labor and employment law obligations alone may dictate that the liability risk outweighs the benefits of acquisition.

As more liabilities are imposed upon buyers, the "due diligence" checklist expands. Prudence requires that the checklist also anticipate potential, novel liabilities to protect against costly surprises. At a minimum, a search of the seller's existing liabilities should include examination of consent decrees, administrative and judicial violation decisions, arbitration awards, employment contracts with managers and senior executives, severance pay programs, welfare and pension plan commitments, and the provisions of current collective bargaining agreements.<sup>310</sup> The potential buyer should further review pending litigation, particularly if injunctive relief is available, employee handbooks, and affirmative action plans. In addition, because cases have held buyers liable to remedy violations not in complaint form at the time of sale,<sup>311</sup> a potential buyer should specifically inquire as to the likelihood that employment-related issues—such as workman compensation claims—will surface before the sale. Where the parties agree to due diligence checks, they can then negotiate a sale price which reflects the actual and potential liabilities respectively retained or assumed.

Another protective option is an indemnification agreement which holds the buyer harmless for the costs of the seller's failure to comply with remedial orders, statutory requirements, or collective bargaining violations up to the date of sale. These agreements, however, are often unsatisfactory because imprecise draftsmanship allows the seller to assert contractual defenses. Moreover, the duration of the hold-harmless period is difficult to measure against the risk of unknown liabilities that may not surface until long after the sale. In addition, an indemnification agreement assumes the continuation of a viable seller, at least for the duration of the agreement. Frequently, the seller ceases operations before the indemnification period expires, leaving the buyer without recourse under the agreement. On balance, then, a buyer can best protect

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310. See *supra* Part III(A).

311. See *supra* notes 144, 171, 297 and accompanying text.

against the seller's financial liabilities by reducing the purchase price proportionably to the potential remedial risks.

In many transactions, however, the new owner has no contact with the predecessor and therefore has no opportunity to conduct a due diligence investigation, to negotiate a set-off in the sale price, or obtain an indemnification clause. Neither Burns nor Fall River had any negotiations with their predecessors. In these circumstances the new owner assumes the risk of vicarious liability.

### VIII. CONCLUSION

Prospective purchasers now confront a bewildering maze of increased monetary costs and restraints on operational flexibility in transfer of ownership situations. Moreover, the open-ended nature of the successorship doctrine increases the probability that the legal obligations upon new owners will be further increased. These anticompetitive restraints created by judicial and administrative action conflict with the elimination or curtailment of regulatory market entry barriers and price controls in the air, truck and rail industries, telecommunications, oil and gas exploration and refining, and in the insurance and banking areas.

The most burdensome aspect in this evolving transfer of labor-related obligations to innocent new owners is that the nature and extent of these unassumed liabilities are unascertainable at the time of purchase. This inability to reliably anticipate or forecast the operational and financial impact upon either the seller's or the purchaser's anticipated narrow margin of profit directly retards transferability. Every unconsummated prospective sale consigns all the putative seller's employees to the job market instead of allowing these employees to continue their employment with the new owner. Under these harsh economic realities fewer and fewer entrepreneurs can invest their limited resources in the purchase of declining businesses or in the revitalization of stagnated industries.

It is improbable that relief from this escalating liability upon innocent purchasers will come from Congress or administrative agencies.<sup>312</sup> In-

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312. The enactment of W.A.R.N., congressional hearings on what is characterized as "takeover mania," and the AFL-CIO's demand that collective bargaining agreements survive all transfers of ownership signal further legislative impediments upon ownership transfers. *Testimony of AFL-CIO President Lane Kirkland Before Senate Finance Committee on Leveraged Buyouts*, DAILY LAB. REP. (BNA) No. 17, at D-1 (Jan. 27, 1989).

In addition, the hypothesis that employees have an extraordinary "property interest" in their jobs

stead, purchasers must seek redress for and retrenchment of the successorship doctrine in the courts. One would hope the judiciary would be willing to reexamine a liability created incrementally by federal "common law." Perhaps employers could trigger this overdue review by demonstrating through econometric statistics that these obligations stagnate the economy by artificially increasing the cost of market entrance and expansion and thereby reduce employment levels and curtail the creation of new jobs. Until then, the successor doctrine will continue to burden, and as now expanded, ultimately to nullify a prospective purchaser's willingness to assume the economic risk of acquiring existing operations or reopening closed ones.

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regardless of who owns the enterprise is now advanced as the justification for eliminating the traditional legal distinction between buyers and sellers. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988) (employees have property interest in their jobs). *Contra* Cooper v. General Motors Corp., 651 F.2d 249, 250-51 (5th Cir. 1981) (seniority rights are created by contract and do not survive beyond the life of the contract).

