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Who is an Employer Under WARN in the Arena of Creditor-Debtor Relationships?

C. Maxwell Rizzo*

"Every day workers are losing their jobs with little or no notice, . . . Advance notice is the fair thing to do, and it is the pragmatic thing to do. . . . [O]ver 10 million Americans . . . have lost their jobs over the period of the last 6 years, 40,000 factories that have closed, two-thirds of them without any kind of notification whatsoever. We are talking about families, . . . husbands, wives, and children, whose lives will be bettered by this piece of legislation."1

I. INTRODUCTION

When large businesses shut down or plants institute mass layoffs, it can throw a wrench into the economy of a community. To help communities deal with these happenings and adjust to these conditions, Congress enacted the Worker Adjustment and Retraining Notification Act ("WARN") in 1988.2 In general, WARN is a United States labor law that protects employees, their families, and communities by requiring most employers with 100 or more employees to provide sixty days' advance written notification of plant closings and mass layoffs of employees.3 The purpose of WARN is to protect these workers, their families, and communities "by providing notice so that workers who will be terminated may seek other jobs or retraining."4 The advance notice gives workers and their families' transition time to adjust to the prospective loss of employment, to seek and obtain other employment, and, if necessary, to enter skill-training programs that will allow these workers to successfully compete in the job market.

*Coppola v. Bear Stearns* is an important decision under WARN addressing whether a creditor can become an employer.5 In *Coppola*, a debtor of Bear Stearns closed its doors without giving sixty days' ad--

* J.D., DePaul University College of Law, 2010; B.A., Economics, University of Texas, 2007
3. See id. § 2102.
vanced notice (as required under WARN), and a subsequent class action suit was filed against the creditor, Bear Stearns.\textsuperscript{6} The Second Circuit addressed the question of whether Bear Stearns was an “employer” under WARN (and thus, subject to the statute), and, in turn, what test to apply when analyzing who qualifies as an “employer” under WARN.\textsuperscript{7} This decision confirmed that a conflict exists between the circuits with respect to the legal issue of who is an employer under WARN in creditor-debtor relationships.\textsuperscript{8} Looking at the statute, the definition of an employer is unhelpful and conclusory. This Article will analyze WARN’s language and history, discuss the present circuit split and each test’s ramifications, and, in the end, conclude as to which test should prevail.

The first section details the circumstances surrounding WARN’s enactment. Further, it describes the problems the Legislature identified with the system in place prior to WARN, as well as possible solutions, and it explains why the Legislature believed that WARN would solve these previously-identified problems. The next section presents an overview of the circuit split concerning the meaning of the word “employer” under WARN and the tests used to determine who is an employer in the context of a creditor-debtor relationship. This section briefly contrasts the majority view employed by the Second, Eighth, and Ninth Circuits with the minority view used by the Third Circuit. The following section provides necessary background of lender liability. This background is helpful because the majority test is based, in part, on these principles in order to determine whether a creditor is an employer and thus, subject to liability under WARN. The final two sections dive into a more specific analysis of the circuit split. These sections discuss the majority and minority tests, illustrating the benefits and detriments of each. After analyzing the tests in greater detail, the sections demonstrate why the majority test is better tailored to meet the requirements and purposes of WARN. Further, the majority test provides the creditors with predictability; this predictability will likely induce creditors to save capital-starved businesses.

\textsuperscript{6} Id. at 147-48.
\textsuperscript{7} Id. at 148-50.
\textsuperscript{8} Id. But see Pearson v. Component Tech. Corp., 247 F.3d 471, 493 (3d Cir. 2001).
II. OVERVIEW OF WARN, ITS HISTORY, AND ITS REQUIREMENTS

A. The Legislative History and Circumstances Surrounding the Enactment of WARN

On August 4, 1988, WARN became law. WARN was groundbreaking because, when enacted, it became the first federal law requiring large employers to provide advance notice of plant closings and mass layoffs. Congress settled on a sixty-day notice requirement, reasoning that such advance notice would provide sufficient time for workers, unions, and local and state governments to react to worker displacement and layoffs.

At the time Congress enacted WARN, worker dislocation was a major problem. The information from the Department of Labor's Bureau of Labor Statistics (BLS) supports this fact; between 1981 and 1988, on average, 1.9 million adult workers (those 20 and older) lost full-time jobs (1) because their employers closed or relocated, (2) because their position or shift was eliminated, or (3) because of slack work. Moreover, during this eight-year period, the data indicates that each year, 830,000 to 1,060,000 workers were displaced because of plant closings alone. In addition to the staunch number of employee layoffs, the evidence indicates that worker displacements create negative public health effects. These substantial health risks demonstrate the need for advance notification of mass layoffs and plant closings, and they illustrate why Congress adopted WARN. Accordingly, one central purpose of Congress enacting WARN was to curb these negative health effects that could potentially destroy communities and their families.

Before settling on requiring advance notification, some legislators, seeing the gravity of the problems associated with mass layoffs and plant closings, proposed alternative solutions to prevent these

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13. Id. at 4-5.
14. Id. at 5 (citing to M. Harvey Brenner, Economy, Society and Health (paper prepared for the Conference on Society and Health, New England Medical Center, Boston, MA, Oct. 16, 1992) (finding a statistical relationship between increased unemployment and overall mortality, heart attacks, suicide, homicide, arrests, incarcerations, and mental hospital admissions)).
Legislators proposed all of the following: "(1) providing technical and financial assistance to troubled firms and affected communities; (2) requiring advance consultation with unions and local governments; (3) requiring disclosure of financial data; and (4) providing adjustment assistance and training for workers, in conjunction with a considerable period of advance notice." The legislators who supported legislative plant closings eventually came together and focused their efforts on promoting the issue of advance notice for worker dislocations.

In October 1985, Labor Secretary William Brock appointed a Task Force on Economic Adjustment and Worker Dislocation to evaluate and study evidence regarding possible effects of advance notice legislation. After extensive collecting and evaluating of data, the Task Force concluded that "advance notification is an essential component of a successful adjustment program." The Task Force Report further noted that advance notice aided workers in seeking employment prior to being laid off from their jobs. In particular, the Task Force looked at the system already in place in Canada with regard to plant closings: the Canadian system called for rapid response to plant closings and layoffs. The Task Force concluded that the Canadian model "appeared to offer the highest degree of replicability for the United States."

A second report helped gain supporters for WARN. That report came from the Congressional Office of Technology Assessment (OTA). The OTA examined when to start projects for displaced workers. In the report, the OTA found that the "best time to start a project for displaced workers is before a plant closes or mass layoffs begin; advance notice makes early action possible . . . ." The OTA report turned out to be a great asset for the supporters of WARN because it disposed of two central arguments used by critics: (1) that

17. Id.
18. Id. at 8.
19. Id.(quoting U.S. Dep't of Labor, Economic Adjustment and Worker Dislocation in a Competitive Society: Report of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation 1, at 22-23 (1986)).
20. U.S. Dep't of Labor, supra note 19, at 20.
22. Id.
23. Id.
after receiving notice of a plant closing a worker will cause problems or lower productivity; and (2) that there would be problems complying with the notification requirements.

The last significant report was performed by the General Accounting Office (GAO). The GAO's report illustrated the widespread practice of large firms and factories not giving advance notice to their workers. It demonstrated that 32% of firms gave no notice of plant closings or mass layoffs and that an astonishing 81% of firms gave thirty days' or less notice. This report further indicates that if factory and large firm owners are not mandated to give extensive advance notice, they will choose not to do so at the expense of their workers. This gave policymakers and other WARN supporters the evidence necessary to show Congress that it needed to step in and pass a law to avoid or reduce the period of dislocation between jobs and the negative health effects associated with this displacement.

The abundance of information surrounding the events leading up to WARN's enactment illustrates the strong public interest in deterring large layoffs and plant closings, as well as in providing workers in these large plants and factories enough notice to recover from the problems associated with these firings. This information and data set the stage for WARN's enactment and further demonstrate the statute's significance. Moreover, the information and data illustrate the overall importance of clearly defining an "employer" in the context of a debtor and secured creditor relationship under WARN.

B. General Background and Purposes of WARN

The late Senator Ted Kennedy stated several purposes in support of WARN, the first one being that "advance notice is essential to the successful adjustment of workers to the job loss caused by changing economic conditions. . . . An advance notice provision ensures that large numbers of workers will not be displaced without warning and without planning." His final purpose, "and perhaps most important, [asserted that] an advance notice requirement assures fair play for American workers." Congress believed that WARN would provide necessary protection to employees and their families from the set-

30. Id.
backs of situations where employers gave no notice of layoffs or even sometimes concealed these layoffs or closings from the employees; "[t]he thrust of WARN is to give fair warning in advance of prospective plant closings."

With some exceptions, WARN forbids an employer to "order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." Section 2104 states that "[a]ny employer who orders a plant closing or mass layoff in violation of [the notice requirements of] section 2102" is liable to affected employees for back pay up to a maximum of sixty days of work plus benefits. A "mass layoff" is any other work force reduction that results in an "employment loss" for either (1) 50 to 499 full-time employees, if the number laid off equals thirty-three percent of the work force; or (2) 500 full-time employees. Before the penalty provided by WARN applies, the plaintiff must demonstrate that the defendant is an "employer" responsible for the employment loss.

For purposes of WARN, the term "employer" is defined as "any business enterprise that employs (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." The simplicity of the definition emphasizes its apparent breath but still divides courts regarding the best test to define "employer" in the context of the debtor and secured creditor relationship. Courts often disagree on statutory interpretation, and the present situation is no exception. Several courts of appeals have explored the issue of which test to apply when deciding whether a secured creditor is an "employer" under WARN, but as previously stated, there presently is a circuit split.

31. Hotel Employees & Rest. Employees Int'l Union Local 54 v. Elsinore Shore Ass'n, 173 F.3d 175, 182 (3d Cir. 1999); see 20 C.F.R. § 639.1(a) (1998).
34. See § 2101(a)(3).
35. See § 2102(a).
36. See § 2101(b)(1).
38. See Weslock, 66 F.3d at 244.
III. The Courts' Interpretation of the Meaning of "Employer" under WARN

Four circuits have addressed the liability of a creditor under WARN for the plant closing or mass layoff of its borrower. 39 However, in these circumstances, these circuits are split over how to define, and who is, an "employer" under WARN.

The test used by the Eighth and Ninth Circuits, and recently adopted by the Second Circuit, is "whether, at the time of the plant closing, the creditor was in fact 'responsible for operating the business as a going concern'" and "'preserv[ing] the business asset for liquidation or sale.'" 40 This test is consistent with the traditional principles of lender liability. 41 The essential part of the inquiry is whether the creditor has joined in or assumed control of the borrower's business as a going concern, rather than as a means to protect its security for repayment. In Coppola, the court noted that the test "accords with traditional principles of lender liability." 42 "Under those principles, a creditor that has not assumed the formal indicia of ownership may become liable for the debts of its borrower if the lender's conduct is such as to cause it to become the debtor's agent, partner, or alter ego." 43

The Third Circuit adopted a different test in Pearson v. Component Technology Corporation. 44 In Pearson, the court believed that a "more targeted inquiry" than that found in general lender liability cases was appropriate in the WARN context. 45 The Pearson court adopted factors identified by the Department of Labor as relevant to whether, for the purposes of WARN, independent contractors and subsidiaries are treated as separate employers or as a part of the parent contracting company, as an appropriate method of determining lender liability as well as parent liability. 46 These factors include "(i) common ownership, (ii) common directors and/or officers, (iii) de

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40. Coppola, 499 F.3d at 148 (quoting Weslock, 66 F.3d at 244); see also Adams, 87 F.3d at 272 (stating "[o]nly when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business will the degree of control necessary to support employer responsibility under WARN be achieved").
41. See Coppola, 499 F.3d at 148.
42. See id.
43. Id.
45. Id.
46. See id. at 494-95.
facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.” The court noted that this list of factors is nonexhaustive, reminding the trier of fact that the inquiry is a balancing test.

IV. Overview of Principles of Lender Liability

Traditional principles of lender liability influenced the majority of courts’ decisions in implementing the majority test. The following cases were cited by the court in *A. Gay Jenson Farms Company v. Cargill* and give a general background of lender liability in cases where the lender became the debtor’s agent, partner, and alter ego. In each of the following theories, an essential part of the inquiry is “whether the creditor has joined in or assumed control of the borrower’s business as a going concern rather than as a means to protect its security for repayment.”

A. Agency Relationship: *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981)

This case stemmed from the financial collapse of defendant Warren Seed & Grain (“Warren”), and “its failure to satisfy its indebtedness to plaintiffs.” Warren operated a grain elevator and was involved with purchasing cash or market grain from local farmers. Warren applied for financing from Cargill in 1964. Cargill’s officials investigated Warren’s operations and recommended that Cargill finance Warren. The major issue in *Cargill* was “whether Cargill, by its course of dealing with Warren, became liable as a principal on contracts made by Warren with plaintiffs.” Cargill claimed that “no agency relationship was established with Warren, notwithstanding its financing of Warren’s operation and its purchase of the majority of Warren’s grain.” However, the court found that Cargill’s control and influence over Warren turned Cargill into a principal with liability.

48. See Pearson, 247 F.3d at 490.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 290.
55. Cargill, 309 N.W.2d at 290.
for the transactions entered into by its agent Warren. Therefore, the court concluded that an agency relationship existed.

The Cargill court noted that a creditor that has not assumed the formal indicia of ownership may become liable for the debts of its borrower if the lender’s conduct is such as to cause it to become the debtor’s agent. First, a creditor who assumes control of his debtor’s business may become liable as a principal for the acts of the debtor in connection with the business. A creditor becomes a principal when he assumes de facto control over the conduct of his debtor, despite what the terms of the formal contract state. In Cargill, the court found that Cargill was more than simply a financier; it was an active participant in the debtor’s operations. Lastly, the court found, and Cargill agreed, that Cargill and Warren had a “paternalistic relationship in which Cargill made the key economic decisions and kept Warren in existence.” The court concluded that there was a “unique fabric in the relationship between Cargill and Warren which varies from that found in normal debtor-creditor situations.”

B. Partnership Relationship: Martin v. Peyton, 158 N.E. 77 (N.Y. 1927)

In Martin, the Plaintiff claimed that the Defendants became partners in a firm doing business as bankers and brokers. Because an actual partnership was claimed, the court referred to circumstances surrounding certain documents’ execution. The Martin court ruled in favor of lender Defendants and described the issue as “whether in fact [the lender defendants] agree[d] to so associate themselves with

56. Id. (The court listed many factors indicating Cargill’s control over Warren: “(1) Cargill’s constant recommendations to Warren by telephone; (2) Cargill’s right of first refusal on grain; (3) Warren’s inability to enter into mortgages, to purchase stock or to pay dividends without Cargill’s approval; (4) Cargill’s right of entry onto Warren’s premises to carry on periodic checks and audits; (5) Cargill’s correspondence and criticism regarding Warren’s finances, officers salaries and inventory; (6) Cargill’s determination that Warren needed “strong paternal guidance”; (7) Provision of drafts and forms to Warren upon which Cargill’s name was imprinted; (8) Financing of all Warren’s purchases of grain and operating expenses; and (9) Cargill’s power to discontinue the financing of Warren’s operations.”) Id. at 291.
57. Id. at 291.
58. Cargill, 309 N.W.2d at 292-93.
59. See id. at 293.
60. See id.
61. Id. at 292.
62. Cargill, 309 N.W.2d at 292-93.
63. Id. at 293.
64. Martin v. Peyton, 158 N.E. 77, 78 (N.Y. 1927)
65. Id.
the firm as to 'carry on as co-owners a business for profit.'" The Martin court noted that a creditor may become liable for the debts of a borrower because the lender's conduct may lead a court to conclude that the lender was the debtor's partner. The court used partnership rules to conclude, however, that no implied partnership existed between the creditor and the debtor, despite the fact that the lender imposed a complex set of arrangements giving them substantial control over the firm and its principals. The court reasoned that the creditor's precautionary measures taken to safeguard the loan were "ordinary caution" and did not imply an association in the business.


The Krivos case stands for the proposition that a creditor may become liable for the debts of its borrower if the lender's conduct establishes that the lender is the debtor's alter ego. Here, the creditors sued the corporation to recover debt from their subservient corporation, alleging that liability was predicated upon the rule that when one corporation controls and dominates another corporation to the extent that the second corporation becomes the mere instrumentality of the first, the dominant corporation becomes liable for all of those debts of the subservient corporation attributable to an abuse of that control. The court concluded that the evidence was "not of such quality and weight that reasonable and fairminded [sic] men in the exercise of impartial judgment might reach different conclusions." Here, the creditor needed to show "actual, operative, [and] total control of the subservient corporation." The court concluded that the evidence failed to show that the debtor corporation had "no separate mind, will or existence of its own and [was] but a business conduit" for the defendant; therefore, the court affirmed the trial court's judgment.

These cases set the stage for the majority test. In each of the previous cases, the creditors avoided liability where they could show that they possessed no more control than necessary to secure repayment of

67. Martin, 158 N.E. at 78-79.
68. Id. at 80.
69. Id. at 79.
71. Id. at 1110.
72. Id. at 1109.
73. Id.
74. Id.
their loan to the debtor. This is the framework that sets the stage for the majority test, its reasoning, and its benefits, all of which are discussed below.

V. CASES AND ANALYSIS

A. The Majority Test

As previously mentioned in this article, the Second, Eight, and Ninth Circuits have explicitly examined the issue of who is an “employer” under WARN in the arena of debtor-creditor relationships, and they have come to form the majority test among the circuits. This majority believes that the central inquiry should be “whether, at the time of the plant closing, the creditor was in fact ‘responsible for operating the business as a going concern’ and ‘preserv[ing] the business asset for liquidation or sale.’” It is important to become familiar with each of these three cases to gain a better understanding of the methodology behind the majority test as well as its bounds. The Coppola case will be discussed first because it is the most recent of the three decisions and because of its extensive analysis may be considered the most persuasive. The Coppola court incorporates the reasoning and analysis of the prior decisions rendered by the Eighth and Ninth Circuits. These prior cases are discussed following an analysis of the Coppola decision.

1. Coppola v. Bears Stearns and Company

Bear Stearns (creditor) was providing National Finance Corporation (employer/debtor, hereinafter referred to as “NFC”) some financing in connection with certain deals even though this company had earlier defrauded Bear Stearns in order to collect money that NFC owed Bear Stearns. The court concluded that Bear Stearns was not an employer under this statute. Bears Stearns was not itself an “employer” within the meaning of WARN, and thus, it was not liable to employees when the NFC’s principal offices were closed without warning. Bear Stearn’s conduct of temporarily taking over NFC’s failing business, installing a manager at NFC’s headquarters,

75. See generally Coppola v. Bear Stearns & Co., 499 F.3d 144 (2d Cir. 2007); Adams v. Erwin Weller Co., 87 F.3d 269, 271 (8th Cir. 1996); Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp., 66 F.3d 241 (9th Cir. 1995).
76. Coppola, 499 F.3d at 148 (quoting Weslock, 66 F.3d at 244); see also Adams, 87 F.3d at 272.
77. Coppola v. Bear Stearns & co., 499 F.3d 144 (2d Cir. 2007).
78. See Coppola, 499 F.3d at 146.
79. See id. at 151.
and firing and replacing NFC's officers, was done for the purpose of salvaging NFC's business for the short term in order to facilitate the sale of the business and recovery of Bear Stearns' $5.6 million in loans.\textsuperscript{80} Further, Bear Stearns took no long-term interest in the operation of NFC as a business.\textsuperscript{81}

The court in \textit{Coppola} applied a test in line with the legislative history of and congressional intent behind WARN.\textsuperscript{82} "Congress foresaw that WARN liability and the needs of a capital-starved business might be inconsistent and provided a defense for employers where giving timely notice would have impaired an employer's active efforts to obtain capital that would eliminate the need for a shutdown."\textsuperscript{83} The court in \textit{Coppola} aptly recognized that Congress did not intend for creditors, there to aid failing businesses, to submit to WARN liability when acting simply as a creditor.\textsuperscript{84} This likely includes creditors who exercise substantial control over the debtor, not surprisingly, because they want to protect their investment. As stated in \textit{Coppola}, "Congress could hardly have also intended an expanded definition of employer that would impose WARN liability on lenders who seek appropriate protective controls on borrower behavior."\textsuperscript{85} Further, the court recognized that WARN was enacted to protect employees.\textsuperscript{86} Therefore, protecting creditors who try to keep these businesses and factories from closing is one way to further this purpose; this test, according to the court, furthers this objective.\textsuperscript{87} The court recognized that if Bear Stearns believed it was to be subject to liability under WARN, it likely would have walked away from the venture in 1999, which would most likely have meant a business closure for the debtor company, NFC.\textsuperscript{88}

While the court seems to lessen the potential for creditor liability under WARN, it does not create a full exemption for all creditors. A creditor who exercises control over a debtor beyond that necessary to

\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} See \textit{id.} at 150.
\textsuperscript{83} \textit{Coppola}, 499 F.3d at 150-51; \textit{see also} 29 U.S.C. § 2102(b)(1) (2000) ("An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business").
\textsuperscript{84} \textit{Coppola}, 499 F.3d at 150-51.
\textsuperscript{85} \textit{Coppola}, 499 F.3d at 151.
\textsuperscript{86} \textit{See generally id.} at 147-50.
\textsuperscript{87} \textit{See id.}
\textsuperscript{88} \textit{Id.}
WHO IS AN EMPLOYER UNDER WARN?

Recoup some or all of what is owed and is operating the debtor as the de facto owner of an ongoing business is liable under WARN. This test grants the creditor substantial leeway to exercise control in order to secure its money owed, but the test also instructs the creditor not to implement so much control as is unnecessary. In the situation where the creditor exercises excess control, the creditor is no longer simply acting like a creditor; now, the creditor is acting like an employer. Accordingly, the purposes of the statute are furthered by subjecting the creditor to liability. Also, this test does not discourage creditors from pursuing future ventures because the test allows creditors to exercise as much control as necessary to recoup the money owed. However, it is precisely when the creditor goes beyond protecting its interest that the creditor becomes subject to WARN liability.89

2. Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corporation90

In Weslock, a secured creditor whose interaction with a delinquent debtor was primarily limited to financial controls was declared not to be an employer under WARN.91 In Weslock, the creditor agreed to lend working capital to a manufacturing plant.92 There was no indication that the creditor participated in decisions concerning plant production, marketing, or employment practices.93 The creditor did maintain an ongoing involvement in the debtor’s financial problems, but the court concluded that this type of control (over financial matters) was consistent with the type a secured creditor may exercise over a defaulting debtor to protect collateral securing a loan.94 The court stated that “where the creditor does no more than exercise that degree of control over the debtor’s collateral necessary to protect the security interest, and acts only to preserve the business asset for liquidation or sale, the notice requirement of WARN will not apply ‘precisely because the [creditor has not] continue[d] the business in operation.’”95 The court looked to the Department of Labor’s final regulations to help determine WARN’s scope:

Although the regulations do not directly address a situation where a secured creditor takes possession of a debtor’s business assets, the

89. Id.
90. Chauffeurs, Sales Drivers, Warehousemen & Helpers Union Local 572 v. Weslock Corp., 66 F.3d 241 (9th Cir. 1995).
91. Weslock, 66 F.3d at 245.
92. Id. at 242.
93. See id. at 242-43.
94. Id. at 245.
95. Id. at 244 (quoting 54 Fed. Reg. 16,045 (April 20, 1989)).
comments acknowledge that the application of WARN to a “fiduciary”... in a bankruptcy proceeding is dependent on whether the fiduciary has in fact operated the debtor’s assets as a business enterprise...  

Further, the court concluded that without some evidence showing the lender’s involvement in the functional operations of the facility, “there can be no finding that [the lender] is an employer under WARN.”  

It noted that defining “employer” under WARN is not dissimilar to defining a fiduciary under bankruptcy proceedings. Therefore, under the court’s reasoning, a creditor must go beyond exercising that degree of control over the debtor’s collateral necessary to protect his security interest. Accordingly, the court held that the creditor was not an employer for the purposes of WARN.  

Once again, this reasoning is consistent with the purpose of WARN because the purpose of the statute was to help reduce the number of displaced workers and lower the unemployment period for workers who did lose their jobs by requiring advance notice. The majority test encourages creditors to issue credit freely, while still vigorously protecting their financial interest without being subject to liability under WARN. Further, the test explicitly grants creditors the ability to exercise substantial financial control to secure their debt when the debtor finds itself in financial trouble. The upshot of more freely given credit is that more factories will stay in business and will be given a chance to survive because more creditors will be willing to offer credit. It seems intuitive that a creditor would be more apt to lend if it knew it had leeway to control and protect its investment. Moreover, this will likely lead to less mass layoffs of employees. Therefore, the majority test for defining an employer under WARN in creditor-debtor relationships furthers the congressional intent of WARN.  

3. Adams v. Erwin Weller Company

In Adams, the court asked the question “whether a lender’s involvement with its borrower’s business affairs makes the lender an em-

96. Weslock, 66 F.3d at 244.
97. Id. at 245.
98. Id. at 244 (“DOL agrees that a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a ‘business enterprise’ in the normal commercial sense. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation.”) Id. (quoting 54 Fed. Reg. 16,042 (1999)).
99. See id. at 245.
In Adams, the commercial lender, Westinghouse Credit Corporation ("WCC"), made a series of secured loans to the debtor, Erwin Weller Company ("EWC"). From the beginning, EWC experienced financial problems and nothing worked to reverse its financial fortunes. WCC refused to furnish additional credit, and eventually, EWC closed its plant without giving its employees any advance notice. The discharged employees brought suit, alleging that WCC was their employer at the time of the plant closing and that it had violated WARN.

The court, pursuant to WARN, analyzed the issue of whether WCC was an employer for purposes of determining liability. First, it noted the mere fact that the loan documents gave some control over the borrower to protect the lender's security interest did not automatically make the lender an employer under WARN. Further, citing Westlock, it concluded that "only when a lender becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business will the degree of control necessary to support employer responsibility under WARN be achieved." A lender only becomes an employer under WARN "[when] the [lender] operates the [borrower's] asset[s] as a 'business enterprise' in the normal commercial sense." In Adams, WCC dominated EWC's financial affairs, management, and business functions in the following ways: (1) placing various restrictions in the loan documents; (2) maintaining a security interest in EWC's assets; (3) maintaining a lockbox arrangement for EWC's cash receivables; and (4) monitoring EWC's assets, inventory, and expenditures and banned changes in EWC's capital structure. The court concluded that WCC was not an employer for purposes of WARN, despite its use of financial leverage to protect security interest, as WCC never operated EWC's plant as a business enterprise in the normal commercial sense. WCC and EWC's relationship was no more than a debtor-creditor relationship.

The court's conclusion that WCC was not an employer for the purposes of WARN again demonstrates the benefits of the majority test.

101. Adams, 87 F.3d at 271.
102. Id.
103. Id.
104. Id.
105. Id.
106. Adams, 87 F.3d at 271.
107. Id. at 272.
108. Id.
109. Id.
110. Id.
111. Id.
The employees could not point to any facts that illustrated that WCC was anything more than a "major lender[ ] attempt[ing] to work with a troubled borrower and nurse it back to financial health." This furthered the notion that the majority test reinforces creditor confidence when issuing credit, allowing creditors to exert enough control to protect their financial interest without subjecting them to WARN liability. As the court appropriately stated, "WCC"s position as . . . [a] financial life-line undoubtedly gave it the capacity to exert influence over EWC's decisions." This is precisely the type of control normally allowed under debtor-creditor relationships and should lead to liability and constitute "decision-making control" under WARN's employer rule. Creditors should not have to "timidly sit on the sidelines" and watch their loan disintegrate or otherwise subject themselves to WARN liability. The majority test assures the creditor adequate protection.

B. The Minority Test

The minority test, employed by the Third Circuit, states that a court should look to several factors when deciding who is an employer under WARN. These factors include (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source, and (5) the dependency of operations. The test is further discussed in the following analysis of the Pearson decision.

1. Pearson v. Component Technology Corporation

Pearson caused the initial circuit split because it applied a different test to define an employer under WARN when dealing with a transaction between a debtor and a secured creditor. In Pearson, the Third Circuit held that a secured creditor was not liable under WARN for the employer's unnoticed plant closure. The test for determining whether an employer's secured creditor was liable under WARN for the employer's unnoticed plant closure was the multi-factored test

112. Adams, 87 F.3d at 272.
113. Id.
114. Id.
115. Id.
119. Id. at 496-97.
120. See id. at 506.
promulgated pursuant to WARN by the Department of Labor. The creditor was held not liable, even though it may have monitored much of the employer's activity. At all times, the employer remained "an entirely separate business entity that did not rely on the creditor to supply it with personnel, equipment, facilities, clients, administrative services, or any of the other various resources typically 'shared' between companies that are ultimately found liable for each others' debts." In *Pearson*, the court reasoned that "by directing courts to examine these particular factors, the Department of Labor was highlighting those aspects of corporate functioning that are most closely tied to the particular problems the WARN Act was intended to address."

The *Pearson* court looked at the legislative history and stated that WARN was enacted to protect workers. Further, the court recognized the need for a test that is both workable and predictable. The court decided to settle on the Department of Labor's factors because they were created with WARN policies in mind. However, while these factors may further legislative purpose, they do not bring the predictability the court hoped for when applying these factors. The court's test requires a balancing of the factors in order to decide whether the creditor is subject to liability under WARN. A balancing of a myriad of factors (these five factors are illustrative, not exhaustive) creates almost no predictability for a creditor looking to partake in a future business venture. Further, this uncertainty would likely discourage creditors from taking business risks because of a real fear that it would be subject to liability under WARN. Thus, capital-starved businesses would be left with access to fewer creditors. Therefore, after a deeper evaluation of the test, this test may actually undermine the purpose of WARN. Less available creditors for failing businesses would lead to more mass layoffs and plant closings, likely without sufficient notice required under WARN. Accordingly, the people the statute seeks to protect, employees and their families, may be the group hurt most by an unpredictable and inconsistent test such

121. See *id.* at 495-506.
122. See *id.* at 506.
123. *Id.* at 505.
125. *Id.* at 488.
126. See *id.* at 489-90.
127. See *id.* at 490.
128. See *id.*
129. See *Coppola v. Bear Stearns & Co.*, 499 F.3d 144, 150 (2d Cir. 2007).
as this one. Further, the fact that judges are given a *non-exhaustive* list of factors substantially advances notions of unpredictability.

The Third Circuit attempts to further the purpose of WARN, but the means it uses to get there need to be refined and more narrowly tailored. The court recognizes that creditors should be liable as an employer under WARN where the lenders so control the borrowing corporation that the corporation is functionally being run by the lenders, or solely for the lenders' benefit. However, unlike the court in *Coppola*, the *Pearson* court does not address the fact that some creditors need this control in order to protect their investment. Thus, as previously stated, this would deter creditors from partaking in ventures necessary for failing companies solely because a court following this minority test will apply factors similar to those of "piercing the corporate veil" in order to determine liability. Numerous legal scholars have written about the unpredictability present when courts address the issue of whether the corporate veil has been pierced and the ad hoc nature of its application. Because this minority test uses these factors to determine who is an "employer" for the purposes of WARN, this test's applications would result in the same murkiness. Accordingly, the test's shortcomings may ultimately lead to harming laid-off employees and their families.

2. The Murky Waters of Piercing the Corporate Veil

As previously stated, courts have had an exceedingly difficult time determining whether the corporate veil has been pierced. Under the veil-piercing test, courts must determine whether a corporation has a "separate mind of its own." One prominent legal scholar candidly states that the "arbitrariness of these nominal tests casts further doubt on the utility of the [piercing the corporate veil] doctrine." Further, the "laundry list" of factors for courts to consider also makes it, as mentioned above, exceedingly difficult to predict when courts will pierce the veil. Thus, in the present situation under WARN, the

130. See Pearson, 247 F.3d at 491.
131. See Frank E. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) (stating "[t]here is a consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law"); see also Carsten Alting, *Piercing the Corporate Veil in American and German Law — Liability of Individuals and Entities: A Comparative View*, 2 TULSA J. COMP. & INT'L L. 187, 250 (1995) (describing veil piercing as producing "unpredictable and random decisions").
133. Id.
predictability that is so essential for creditors to know when deciding whether to extend credit will be destroyed under the minority test. Professor David Millon, in his law review article, put it best: "[t]he unweighted laundry list method, combined with the inherent vagueness of many of the items on the list, gives the cases an ad hoc, fluky aspect."135 Further, when courts apply veil-piercing factors, "results often seem conclusory and based on the court's instinctive reaction to the morality of the defendant's conduct."136 The problem with this type of ad hoc testing is obvious. How will a court define morality? What is moral and just to one judge may be completely different to another judge. Moreover, how is a company, or in this situation, a creditor, supposed to act to ensure the veil-piercing factors do not destroy the creditor's defense? The answer to that is relatively simple: they cannot prepare for this because this test is subjective in nature.

The murky waters of piercing the corporate veil indicate the problems with the minority test and illustrate why it should be discarded. As scholars and courts have demonstrated, tests that incorporate a laundry list of factors, none dispositive, create unpredictability and results that are often predicated on a judge's notion of fairness and morality.137 Here, the minority test may be even cloudier than the test used when piercing the corporate veil. For instance, the list of factors is non-exhaustive. This leads to greater unpredictability because an endless list of factors gives judges carte blanche to rule in whatever direction they believe is right, giving more subjectivity to an already murky test.

Accordingly, judges should look at the problems courts and scholars have encountered when dealing with the problem of piercing the corporate veil, and they should discard this minority test in favor of the majority's more predictable test. Only after achieving predictability will creditors be able to make fully informed decisions to issue credit. In turn, these informed decisions will trickle down and help prevent displaced workers, which is one of the purposes of enacting WARN.

VI. SUMMING UP THE APPROACHES AND THE REPERCUSSIONS OF BOTH TESTS

The majority test offers a better approach because the majority test uses traditional principles of lender liability. The minority test, on the
other hand, has little direct bearing on classic relationships between lenders and borrowers.

The majority test furthers the legislative purpose and is consistent with the text and policy of WARN. Warn was meant to prevent employers from shutting down large plants with a substantial number of employers to stop potential community-wide employment crisis. Creditors are seldom referred to as "employer" so courts need to be careful when applying tests that could place them in the category of employers and subject them to liability under WARN. If a court's test is too easily applicable to large creditors, creditors will be reluctant to workout. The Coppola court recognized this concern; it realized that the policy of WARN would be "turned on its head" by a test similar to the minority tests, which imposed liability under WARN based on the exercise of control by creditors during a workout. Warn's purpose is to cushion the blow to workers of mass layoffs or factory closings by requiring sixty days' notice by the employer. If liability under WARN hinges on an exercise of control, creditors cannot undertake projects that require an exercise of control without a significant risk of subjecting itself to liability. This could lead to fewer workouts and more business closures, many without the required WARN notice. Many times the exercise of control is essential to persuade creditors to agree and to attempt a workout. Accordingly, the minority test could undermine the purpose of the statute.

The majority test gives courts and creditors predictability to make the decision of whether to provide credit. If the creditor can prove that it needed to exercise the present amount of control in order to recover the money owed, then the creditor will be free from WARN's clutches. Conversely, if the creditor goes beyond the necessary control, the creditor will be subject to liability. While a court using this test may look at factors like commonality of ownership or dependency of operations, the central inquiry always remains "whether a creditor is exercising control over the debtor beyond that necessary to recoup some or all of what is owed." Thus, this approach grants a creditor predictability as well as flexibility in the creditor's actions. Further, creditors will be less fearful from engaging in business ventures if the

139. See id.
141. Coppola, 499 F.3d at 150.
142. Id.
143. See id. at 150.
144. Id.
majority rule is applied than if a test that fosters unpredictability towards liability is used.

VII. SHOULD COURTS READ THE DEFINITION OF EMPLOYER MORE BROADLY?

One question that may be posed when defining an "employer" under WARN is whether courts should interpret who is an "employer" broadly. Looking at the legislative history, it is clear that the major concern when enacting WARN was the harm suffered by displaced workers as a result of mass layoffs and plant closings. Therefore, at first thought, it may seem that the more advance notice the better in every situation. However, this does not seem to be the case. One must also look at this statute from the viewpoint of a creditor. Earlier portions of this article discuss the deterrence creditors would experience with a test that would produce uncertain and possibly variable results. This likely would be the situation here, as well. If all creditors believed that they would be within the grasp of WARN, they might routinely decline to issue credit to employers with urgent financial difficulties, eventually leading to higher rates of company failures and necessitating mass layoffs. Further, this would trickle down to the employees because they would be laid off and sent searching for new jobs without any advance notice. This would run opposite of Congress's intent to help these unfortunate situations and the harms that occur as a result.

Accordingly, the best result is not to expand the definition of employer to include nearly all creditors in creditor-debtor relationships, but instead to implement a test that ensures predictability. As stated earlier, predictability allows creditors to extend credit to failing companies, while also knowing the consequences of their actions at the time they extend credit. Further, it allows creditors to take enough control as necessary to increase the likelihood of a profitable return, or at least recoup the money invested.

VIII. CONCLUSION

WARN is arguably more important than it was when it was first enacted in 1988. According to the United States Department of Labor, the national unemployment rate was 5.5% in 1988.145 Compare that figure with the rates being expressed in the final third of 2009.

The unemployment rate reported in September of 2009 was 9.8%. To put that figure in perspective, in the last year in which the unemployment rate was that high, September 1992, Bill Clinton was still campaigning to be the forty-second President of the United States.

This illustrates that worker layoffs and plant closings are as big a concern now as they were at the time of WARN’s enactment. Moreover, the need to uniformly define the breadth of who is an “employer” under WARN is essential to help curtail this unemployment and the problems that can potentially ensue as a result.

The concerns present when legislators enacted WARN have not disappeared. The state of the United States economy is on the minds of every American citizen because of its exceedingly poor performance. One of President Barack Obama’s first accomplishments as President was to pass an incredibly expensive and extensive stimulus bill ($787 billion) to support the struggling economy, private citizens, and major public corporations. Included in the corporations are major automakers that employ thousands of people, all potentially losing their jobs if these American automakers are not “bailed out.” The fact that factory workers, plant employees, and many other Americans working in large facilities are being laid off brings WARN to center stage. While the stimulus bill tries to keep factories afloat, mass layoffs are still a regular occurrence.

With all of these plant closings and mass layoffs, there are sure to be disputes between workers and their “employers.” Therefore, there is a necessity for courts to fully define the scope of WARN and come to a consensus on its interpretation in terms of all of its provisions. Further, with the need for creditors higher than ever due to a struggling economy, the need to define the breadth of an “employer” under WARN in the arena of creditor-debtor relationships becomes imperative. The majority test offers predictability as well as the freedom to creditors to protect their own financial interests. In contrast to the majority test, the minority test muddies the water by giving judges subjective free reign to decide who


is an “employer” under the statute based on a judge’s notions of morality and justice. Based on the aforementioned considerations, the minority test should be discarded in favor of the majority test.