LABOR CONSIDERATIONS IN CORPORATE DIVESTITURES AND PLANT CLOSINGS AFTER FIRST NATIONAL MAINTENANCE CORP. v. NLRB†

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I. INTRODUCTION

All too often, in assessing a corporate acquisition or divestiture, a company will look only to the financial statements. Thoughtful and thorough planning, however, should take careful account of practical problems of labor relations and potential liability under the labor laws as well.

A. Acquisitions Considerations

Although this article will focus on the divestiture and plant closing side, there are practical considerations on the acquisition side which should prove useful to consider. During acquisition negotiations, the prudent corporation often finds it essential to seek counsel regarding a wide variety of labor problems in five basic subject areas:

1. The personnel and labor relations climate of unionized and union-free plants of the acquisition target;
2. Management restrictions and labor costs under the target company's collective bargaining agreements;
3. Potential for future liability, especially class action liability, arising from protective federal, state, and local legislation covering equal employment opportunity and affirmative action, as well as oc-

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cupational safety and health, minimum wage and overtime pay, and labor-management relations; ¹

4. The actuarial stability of the target company's pension plans including, in particular, the substantial hidden costs of withdrawal liability should the target company be participating in a multiemployer pension plan; and

5. The special labor obligations imposed on government contractors, including a strategy for isolating the acquired government contractor from the remainder of the purchaser's enterprise.

The seasoned practitioner can often uncover potentially serious labor and employment problems of the company being acquired by reviewing its labor agreements, auditing its published equal employment statistics (in order to disclose and assess the impact and estimated costs of outstanding and potential claims), and discreetly inquiring, through private and public sources, into its labor relations climate and labor litigation record.

If appropriate, particularly troublesome issues may even be discussed directly with the company being acquired. Direct attention to these problem areas from the beginning may help avoid an injudicious purchase and, if done early enough, it may also resolve labor problems which may have otherwise made the acquisition unattractive. For instance, if the target company is unionized, renegotiation of burdensome economic terms and union-imposed restrictions on utilization of manpower may be undertaken in advance of acquisition.² If the tar-

¹. It should be noted that purchasers have been held liable for the sellers' violations of Taft-Hartley, the sellers' violations of civil rights legislation, and other protective labor laws. In the area of Taft-Hartley, alone, the acquiring company should be aware that a successor who continues operations with knowledge of pending unfair labor practices may be required to remedy the predecessor's violations, including satisfaction of back pay awards. Perma Vinyl Corp. v. NLRB, 164 N.L.R.B. 968 (1967), enforced sub nom. U.S. Pipe Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968) (successor ordered to remedy unfair labor practices of predecessor by reinstating four employees); Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) (Brennan, J.) (employee unlawfully discharged because of union activity ordered reinstated with back pay—predecessor and successor employer jointly and severally liable for back pay). See also, e.g., NLRB v. Winco Petroleum Co., 668 F.2d 973 (8th Cir. 1982) (successor employer ordered to remedy unfair labor practices committed by the former employer; also ordered to bargain with the union previously recognized by the seller). EEOC v. Sage Realty Corp., 507 F. Supp. 599, 612 (S.D.N.Y. 1981) (successor employer held liable for back pay in sex discrimination action—female lobby attendant had been required to wear revealing and sexually provocative Bicentennial costume). Petros Coal Co., 257 N.L.R.B. 282 (1981), supplementing 229 N.L.R.B. 410 (1978) (successor employer held liable for back pay to employees who were discriminatorily not rehired from preferential hiring list in violation of 29 U.S.C. § 8 (a) (1) and (5)).

². One prospective purchaser, Joe L. Allbritton, has asked the unions at the Daily News for an $85 million cut in its $200 million payroll and a wage freeze for at least two years of a new five-year labor contract. N.Y. Times, Apr. 8, 1982, at B3, col. 3
get company is union-free, courses of action, including remedial and preventive labor relations programs, can be pursued from the outset to help it remain so.

The critical importance and success of concession negotiations in today's economy is demonstrated by the fact that in many cases these settlements are the only alternative to sale or closure. In others, they are the linchpin to purchase by a healthy successor. While this type of labor analysis and consultation is most desirable and prudent prior to acquisition, it remains worthwhile, as well, after the acquisition in order to isolate and solve any trouble spots or "smoking-gun" situations.

B. Divestiture Considerations

The thrust of this article is on labor relations considerations when divesting a subsidiary or division or closing a plant or office. In these situations, other labor law considerations must be weighed.

In a divestiture or plant closing there are five critical questions:

1. Must the employer disclose to the union the pendency of the sale or closing? And, if so, when?
2. Must the employer negotiate with the union or fulfill any other obligations to the union prior to sale? And, if so, to what extent?
3. What is the potential liability, if any, of the former employer under a successors and assigns provision of an existing labor agreement once the sale of the business to the successor takes place?
4. What is the potential liability of the former employer which arises out of divestiture if the employer was obligated to contribute to a multiemployer pension plan?
5. What steps should the divesting company take to insulate itself from potential liability to the union following the sale?

In addition to these five factors, increased emphasis must be placed upon local law regulating the closing, relocation, and sale of a business. Although most states have not confronted the issue directly, there is evidence that in light of the increasing number of industrial plant and office closings and relocations, states may attempt to usurp what was previously within the untrammelled prerogative of management and, in effect, preempt organized labor's role in protecting members when such events take place.

Maine, for example, now requires mandatory severance pay under certain conditions in the event of a plant closure or relocation.3 Maine also requires companies to give sixty days advance writ-
ten notice of a plant relocation to employees and municipalities, and separate notice to the Bureau of Labor of a relocation or closure. 4 Wisconsin requires sixty days notice to the state Labor Department for closures, relocations, mergers, and liquidations. 5

The New Jersey Legislature "continues to consider" a notification law which would require one year's notice where a defined material change of operations affects fifty or more persons over an eighteen month period. 6 The New Jersey Department of Labor also recently issued a report recommending that the state undertake a program educating employers, financiers, and unions about employee stock ownership plans for the purchase of facilities which are about to close. 7 The Connecticut General Assembly has considered a measure that has been deprecatorily referred to as the "industrial hostage bill." If it should ever become law, Connecticut would require companies to give sixty days notice of plant closings, one week's severance pay for each year of employment, and training for new jobs. 8 Other proposals for notification have been raised from time to time in the California and Minnesota legislatures, but no action has been taken. 9 In addition, there has been proposed federal legislation which would provide notification and relocation assistance to employees. 10

It is too early to determine whether the Maine and Wisconsin laws and the other states' bills, if passed, will provide any basis for monetary and injunctive relief if the notice provisions, in particular, are ignored.

II. DUTY TO BARGAIN

Of the labor issues an employer must confront when planning a major change, such as a plant closing or sale, none has engendered as much discussion lately as the employer's duty to bargain over business

4. Id. at § 625-B (6), (6-A).
6. H.R. a-1171, 200th Leg., 1st Sess. N.J. Legis. Index a-31 (Mar. 14, 1983). Notice provision would be triggered by termination or transfer of operations or by a reduction of 30% in the number of employees for a period of six months or more.
7. That report, the Worker Owned Corporation Study Act, was issued pursuant to legislation. See N.J. STAT. ANN. (West Supp. 1982). Although the report did not propose specific legislation, it did recommend state assistance in the areas of interest payment subsidies and tax-exempt status for interest on employee ownership plan loans.
decisions. One reason for this renewed interest is the June 1981 decision of the Supreme Court in *First National Maintenance Corp. v. NLRB*, in which the Court addressed the scope of an employer's duty to bargain over a partial closing of its operations.

In this case, First National, a maintenance contractor, terminated its contract with a nursing home because of a fee dispute. That termination constituted a partial closing of its business. In the middle of the dispute, but apparently unrelated to it, the Hospital Employees Union was certified as bargaining representative for First National's employees at the nursing home.

First National refused the union's request to bargain over both the decision to terminate the contract and its effects upon its employees. The company later conceded, however, that there was a duty to bargain over the latter. Despite the coincidence of the union election, there was no allegation of anti-union animus.

In response to the union's section 8 (a) (5) charge, the National Labor Relations Board found that First National had an obligation to bargain over the partial closing decision. The Second Circuit agreed, finding in section 8 (d) a presumption of mandatory bargaining to be overcome only if, on balance, the purposes of the Act would not be furthered by imposition of bargaining.

The Supreme Court, however, rejected that presumption and concluded, in a seven to two decision, that First National had no duty to bargain over its decision to terminate the particular maintenance agreement. "Management," Justice Blackmun wrote, "must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."

In a strongly worded conclusion which will enhance the position of management in future litigation, he continued that "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the... union... would become an equal partner in the running of the business enterprise..."

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12. Id. at 677 n.15.
15. 627 F.2d 596, 601-02 (2d Cir. 1980).
18. 452 U.S. at 666.
20. 452 U.S. at 676.
The Supreme Court reversed the Second Circuit and adopted its own balancing test which presumed no duty to bargain over an economically-motivated decision to close part of a business. The test was stated by Justice Blackmun:

Nonetheless, in view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.\(^21\)

The Court reasoned that a union, through its right to bargain over the effects of a decision to close, could indirectly ensure "that the decision itself is deliberately considered" and that the prohibitions of section 8 (a) (3) \(^22\) would protect employees against partial closing decisions motivated by an intent to harm them.\(^23\)

A. Partial Closings

The impact of First National Maintenance on the courts has already been felt. It was immediately relied upon by the Sixth Circuit in NLRB v. Gibraltar Industries, Inc.\(^24\) for the proposition that a company need not bargain over its decision to terminate its business operations for economic reasons. The Fifth Circuit also recently applied First National Maintenance in modifying a Board order that would have required a company to bargain over all departmental closings.\(^25\) Although it enforced the bargaining order as to a particular closing where anti-union animus was found, the court held that extending such an order to all future closings regardless of the reason was erroneous under the First National Maintenance decision.\(^26\)

The Board's embrace of First National Maintenance began when the Board consented to a decree in the Third Circuit denying enforcement of the bargaining order it had sought against Brockway Motor Trucks for its refusal to bargain over a partial closing deci-

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\(^{21}\) Id. at 679.


\(^{23}\) 452 U.S. at 682.

\(^{24}\) 653 F.2d 1091 (6th Cir. 1981) (court denied enforcement of Board order requiring employer, a New York sleeping bag manufacturer that had closed its Kentucky plant, to bargain with union).

\(^{25}\) NLRB v. Robin Am. Corp., 667 F.2d 1170 (5th Cir. 1982).

\(^{26}\) Id. at 1171.
sion. The acceptance was completed when, in \textit{U.S. Contractors, Inc.},\textsuperscript{28} the Board wrote: "[W]hen economic reasons compel an employer to decide whether or not to shut down a part of its business, the employer's need to operate freely outweighs any incremental benefit that might be gained through a union's participation in the decision-making."\textsuperscript{29} Finally, in an Advice Memorandum from the Board's General Counsel, a regional director was ordered to withdraw a section 8 (a) (5) complaint where, for economic reasons, including labor costs, an employer closed one of its plants without bargaining over the decision.\textsuperscript{30}

\textbf{B. Core Management Decisions}

The limits of \textit{First National Maintenance} outside the context of a partial closing remain to be seen. One federal district court in \textit{UAW v. Acme Precision Products} \textsuperscript{31} said that "[a]t the very least, this case [\textit{First National Maintenance}] indicates that union participation in the core management functions is not a part of the national labor policy."\textsuperscript{32} This bold statement must be assessed in light of the fact that the Supreme Court specifically limited its holding to partial closings and took "no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which [are] to be considered on their particular facts."\textsuperscript{33}

\textbf{1. Subcontracting}

The Court distinguished \textit{First National Maintenance} on its facts from its 1964 decision in \textit{Fibreboard Paper Products v. NLRB} \textsuperscript{34} in which the Court upheld the requirement that employers bargain about decisions to subcontract unit work. The Court pointed out that the employer had no intention of replacing its discharged employees, in contrast to many subcontracting cases where employees of a

\textsuperscript{27} Brockway Motor Trucks v. NLRB, 656 F.2d 32 (3d Cir. 1981).
\textsuperscript{28} 257 N.L.R.B. 1180 (1981) (no refusal to bargain over partial closing found where employer offered to bargain over decision and impact but union did not avail itself of the opportunity).
\textsuperscript{29} \textit{Id.} at 1181.
\textsuperscript{31} 521 F. Supp. 1358 (E.D. Mich. 1981) (not an enforcement action but the denial of a motion to compel arbitration over decisions to partially sell, partially close, and subcontract as they were not covered by the arbitration agreement).
\textsuperscript{32} \textit{Id.} at 1363.
\textsuperscript{33} 452 U.S. at 686 n.22.
\textsuperscript{34} 379 U.S. 203 (1964).
subcontractor were to perform the work of unit employees. Where subcontracting does not significantly, materially or immediately, impact upon unit employees' job interests or conditions of employment, no bargaining may be necessary. This has been the established Board law at least since Westinghouse Electric Corp. in 1965.

2. Relocations, Automation, Consolidation

As for other core operational decisions, the general Board rule has been that plant relocations, automation, and consolidation and transfer of operations are all decisions subject to mandatory bargaining. In November 1981, however, in light of First National Maintenance, the Board's General Counsel released a "guide for the investigation and administrative disposition of all pending and future cases" dealing with management decisions, other than partial closings, which may have an impact on employment. The guide ostensibly directed the regional offices to analyze each such case before it under the First National Maintenance test, balancing the factors that would make bargaining burdensome against those which could be beneficial to labor-management relations, before citing an employer for refusing to bargain.

The directive, overlooking the Supreme Court's presumption against decision bargaining, adopts a pure balancing approach for cases believed dissimilar to a partial closing. Although this approach can be criticized as overly narrow, the directive acknowledges that, in the absence of a fact pattern markedly different from "the facts and assumptions" of First National Maintenance, other partial closings

35. 452 U.S. at 667.
36. 150 N.L.R.B. 1574 (1965) (§ 8 (a) (5) complaint dismissed where the contracting out of work was not a departure from previously established operating practices nor did it have any significant effect on the work opportunities of employees).
38. Holiday Inn of Benton, 237 N.L.R.B. 1042 (1978), enforced in pertinent part, 617 F.2d 1264 (7th Cir. 1980) (employer's economically motivated decision to change restaurant from full service to self-service cafeteria was subject of mandatory bargaining).
39. Morco Indus., Inc., 255 N.L.R.B. 146 (1981) (decision to transfer production of simple items from a Florida plant to one in Mississippi to make room for more sophisticated work held to be mandatory subject of bargaining).
41. Id.
42. 452 U.S. at 684.
and similar actions would be controlled by the Supreme Court's decision.\textsuperscript{43}

Thus, the regional offices may be expected to treat as non-bargainable those economically-motivated decisions to go wholly or partially out of business, to eliminate a discrete line of business, or to sell all or a portion of a business.\textsuperscript{44}

### III. Obligation To Notify

#### A. Basic Notification Rule

In addition to an employer's duty to bargain regarding the decision to sell or close its business, an employer is legally obligated by the Taft-Hartley Act to give advance notification of the pendency of a sale or closure.\textsuperscript{45} Advance notice is generally required whether or not a labor agreement is in effect.\textsuperscript{46} Notification to the union may not be essential where the sale is simply a transfer of ownership of an ongoing and substantially unchanged enterprise. For example, in \textit{Topinka's Country House, Inc.},\textsuperscript{47} the Board held that the labor agreement survived the sale of the employer's stock and transfer of its liquor license because the transfer had not altered the manner in which the employer conducted its business and had not created a new employing entity.\textsuperscript{48} Nevertheless, even under such circumstances, notification may be prudent if only to maintain credibility in the eyes of the union and avoid additional liability.

Another narrow exception to the notification rule might arise where the parent company is not the "employer" in that it is simply selling an ongoing division or subsidiary which is autonomous in its conduct of labor relations. Regardless of the structure of the sale,

\textsuperscript{43} See supra note 41, at E-2 n.19.

\textsuperscript{44} Id. at E-2.


\textsuperscript{46} Id.

\textsuperscript{47} 235 N.L.R.B. 72 (1978), \textit{enforcement granted}, 624 F.2d 770 (6th Cir. 1980) (per curiam) (sale of all of the stock of the employer corporation, a restaurant, did not abrogate existing collective bargaining agreement).

\textsuperscript{48} 235 N.L.R.B. at 75. See also Miller Trucking Serv., Inc., 176 N.L.R.B. 556 (1969), \textit{enforcement granted in pertinent part}, 445 F.2d 927 (10th Cir. 1971) (transfer of all stock in a trucking company did not change corporate entity which would be responsible for unfair labor practices; however, enforcement of an order calling for reinstatement of employees discharged for legitimate business reasons was denied); General Teamsters, Local Union No. 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3d Cir. 1974) (case remanded for fact finding as to possible alter-ego status of purchaser of employer's stock. Court held that bargaining agreement between corporation and union was not necessarily terminated by sale of stock if alter-ego status found).
however, if the employer is described in the collective bargaining agreement as "Division X of Parent Y," it is clear that Division X should give the legally required notice to the union if that division were sold.49

B. Timing of Notification

1. Timing of Notice for Sale or Closure of an Entire Business

The timing of notification is controlled by the fact that the employer generally has no obligation to negotiate with the union over its decision to sell or close an entire business.50 Theoretically, since a decision of this type is so uniquely managerial, notice need not be given until the sale of the company is complete.51 The union, however, is entitled to notice with respect to the impact, if any, of the decision on the employees. In fact, such notice might be required prior to the time when the effects of the sale are expected to be felt.

For example, in J-B Enterprises, Inc.,52 the Board held that failure to notify the union of a decision to close prior to terminating the employees was an unfair labor practice. Of such failure, the Administrative Law Judge wrote that "[a]cting so precipitously that a union cannot act before the event occurs which gives rise to a bargainable situation is inconsistent with a duty to bargain in good faith." 53 A similar result was reached in Ozark Trailers, Inc.54 indicating that the J-B decision was not an isolated one. In both the J-B and Ozark cases, however, the employer not only had given untimely notice but had also refused to bargain.55 It seems unlikely that the Board would have imposed affirmative sanctions for untimely notification alone if the employer nevertheless had bargained over the "effects" of a deci-

50. Apart from the requirements of the Taft-Hartley Act, the parties' collective bargaining agreement may contain specific time limits for advance notification of intent to sell or cease operations. If those contractual provisions are ignored, there may be a basis for damages and, perhaps, injunctive relief.
51. GMC Truck & Coach Div., 191 N.L.R.B. 951, 952 (1971) (a decision to sell a business is at the very core of entrepreneurial control).
52. 237 N.L.R.B. 383 (1978) (vending machine business discontinued after the results of an election won by union became known—§ 8 (a) (5) violation found as a result of failure to notify union over decision and to bargain over effects).
53. Id. at 387.
54. 161 N.L.R.B. 561, 564 (1966) (manufacturer and seller of refrigerated truck bodies violated § 8 (a) (5) when it closed a plant for economic reasons without giving notice or bargaining over decision and effects).
sion to cease operations. This must necessarily follow since the standard remedy for a refusal-to-bargain is a back-pay order, which expires as soon as agreement is reached or a bona fide bargaining impasse occurs.

As a practical matter, in the absence of a contractual provision, the timing of notice will depend on a host of business judgments peculiar to the particular operation. Many times early notice is desirable to avoid rumors and assure continuity. In addition, early notice will often enable the purchaser to have the necessary time to formally undertake the obligations of the labor agreement and have the seller released from the agreement by the union.

If secrecy is desired, it may be best if notice is withheld as long as possible. In the case of a publicly-held company, for example, advance disclosure to the union of a “material transaction” would generally require immediate public disclosure in order to avoid rumors and tips which might give rise to problems under securities law.

2. Partial Sale or Closing

Prior to the Supreme Court's decision in First National Maintenance, a different notification rule generally applied in the case of a partial sale or closing of a unionized business. In this situation, the Board and some federal courts had previously required notification to the union prior to the time when the sale was irrevocable. Earlier notification was required in order to provide time for the union to negotiate effectively with respect to the decision itself and possibly to convince management to rescind the partial closing or sale.

As noted, however, in First National Maintenance, the Court concluded that the decision to close part of an employer's operations is not bargainable. Presumably, therefore, an employer need not notify the union of a partial closing until it is completed. There is one caveat, however, in First National Maintenance; the Court limited its holding to closings and “intimate[d] no view” as to sales.

Thus, as a practical matter, until the ambiguity created by First National Maintenance is resolved in the context of an economically motivated partial sale, it would be prudent to give notice of a partial

56. 452 U.S. at 671.
57. Id.
58. See supra note 2.
61. 452 U.S. at 686.
62. Id. at 686 n.22.
sale as early as feasible, keeping in mind the same sound business and legal considerations, already mentioned, for the sale of an entire business.

IV. BARGAINING OBLIGATION

A. Sale of Entire Business

The decision to sell an entire business requires considerations of economics, secrecy, flexibility, and timeliness which are antithetical to collective bargaining. Consequently, the Board and the federal courts have held that a decision to sell a business is not a mandatory subject of bargaining although, at the request of the union, the employer must bargain about the impact and effects of the decision on its employees. The right to bargain over the impact of the decision to sell is normally limited because, with the possible exception of commencing an arbitration or injunction proceeding, the union will generally have no real power to exercise when faced with the employer's position.

The employer's obligation usually is fulfilled by negotiating such subjects as severance pay or payments to pension and welfare funds for actuarial damage sustained as a result of the employer's action. Of course, a union may wish to bargain over other impact subjects including pro rata vacation pay, employer recommendations, continued insurance coverage, relocation of employees, and relocation allowances.

Still, the employer has no obligation to initiate such discussions and no obligation to make concessions. To refuse to negotiate, however, may invite an unfair labor practice charge or, possibly, a slow down in an attempt to impede the sale. In addition, withholding of information relevant to employment opportunities, such as the fact that bargaining unit work may be performed at another location, may evoke similar responses. For example, in the Soule Glass &

64. See generally 452 U.S. 666 (1981). See Royal Typewriter Co. v. NLRB, 533 F.2d 1030 (8th Cir. 1976). A fairly complete list of impact subjects includes vested pension rights, preferential hiring at another plant, refunds on savings bonds, apprenticeship certificates, tool purchases, establishment of dates for unemployment eligibility, performance of bargaining unit work, possible dismissal of pending litigation, and disposition of pending arbitration cases. Id. at 1039.
Glazing Co., 67 the First Circuit, in enforcing the Board's bargaining order in pertinent part, found a duty to notify the union of, and bargain over, the diversion of bargaining unit work to a non-union subsidiary of the same parent corporation.

If an impasse is reached in negotiations over impact subjects, the union may have a contractual basis for arbitration under its labor agreement. 69 Indeed, the union might also successfully seek arbitration of a dispute regarding the employer's right under the labor contract to sell its operation. 70 The determination of whether the impasse is arbitrable usually depends upon the wording of the arbitration and successorship clauses of the labor agreement.

There is federal court authority compelling predecessor employers to arbitrate such disputes under some circumstances. In IAM v. Howmet Corp., 71 after negotiations failed to result in an agreement, Howmet was ordered to arbitrate the effects of its decision to close a plant which manufactured aircraft landing gear, despite its claims that the arbitration clause did not encompass such issues. 72 Likewise, the predecessor may be ordered, following impasse, to arbitrate issues arising from the sale although the labor agreement has expired. 73 To this effect, District Judge Thompson of the Third Circuit in United Steelworkers v. American Smelting & Refining Co., 74 or-

67. 246 N.L.R.B. 792 (1979), enforced in pertinent part, 652 F.2d 1055 (1st Cir. 1981) (company which distributed and installed auto and window glass violated § 8 (a) (5) by permanently assigning bargaining unit work to employees outside the unit without giving union adequate notice or opportunity to bargain fully on effects of changes).
68. 652 F.2d at 1088-89.
69. Where the parties have agreed to submit all questions of contract interpretation to the arbitrator, the function of the court upon review is limited. The court is confined to ascertaining whether the parties seeking arbitration are making a claim which, on its face, is governed by the contract. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 567-68 (1960).
70. Bressette v. International Talc Co., 527 F.2d 211 (2d Cir. 1975) (arbitration compelled where agreement had very broad arbitration clause and union contended that company's decision to close violated several contractual provisions).
71. 466 F.2d 1249 (9th Cir. 1972).
72. The court stated that explicit language in collective bargaining agreements covering each specific claim alleged to be arbitrable is not required. The court reasoned that the action which gave rise to the dispute was not, in all probability, expressly contemplated by the parties when the agreement was entered into. Id. at 1252.
73. United Steelworkers of Am. v. Fort Pitt Steel Casting, 635 F.2d 1071 (3d Cir. 1980) (manufacturer of steel castings required to arbitrate effect of plant shutdown which occurred after parties could not agree to a new contract and the union struck, despite the fact that the labor agreement requiring arbitration had expired).
74. 648 F.2d 863 (3d Cir. 1981), cert. denied, 102 S.Ct. 567 (1981). The court relied upon the Supreme Court's decision in Nolde Bros. v. Bakery & Confectionery Workers Union, 430 U.S. 243 (1977) (Burger, C. J.) where an employer, who closed a bakery in the face of a threatened strike after the contract had expired and negotia-
dered enforcement of an award of severance and "security" pay which, the arbitrator had determined, continued to accrue during the six-month strike between the expiration of the contract and the termination of employees upon plant shutdown. This award was not, the court found, an irrational interpretation of a contract. Although *American Smelting* involved a plant shutdown and not a sale, it is particularly instructive of the potential consequences of arbitration.

In addition, there is limited authority for enjoining a sale pending an arbitration over impact subjects (and perhaps over the decision to close or sell depending upon the contractual language) although a monetary remedy would be available if the union ultimately prevailed in arbitration. In *Bakery Drivers Union v. S. B. Thomas, Inc.*, a preliminary injunction was granted against an employer, who sold and delivered bakery products, from discontinuing its delivery service to restaurants and from restructuring its routes, pending arbitration. Although injunctions of this type are rare, a more recent decision, *Maram v. Alle Arencibo Corp.*, similarly enjoined a garment company from disposing of any of its assets until a series of unfair labor practice charges pending against the company when it went out of business, were resolved by the Board.

Furthermore, in an arbitration between Pabst and the Brewery Workers Union, Arbitrator Sidney Wolff concluded that Pabst violated its labor agreement by closing its Peoria Heights, Illinois, facility. His decision, based upon the contractual restriction against reassignment of bargaining unit work, directed the company to reopen the plant or negotiate a settlement of all claims under the contract set to expire July 1983. As a result, Pabst's liability may total more than $25 million.

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75. 648 F.2d at 870.
78. Id. at 2258. The court found the necessary elements for granting an injunction to be present. First, that the parties were contractually bound to arbitrate the dispute in question; second, assuming *arguendo* the employer did discontinue or reconstruct its rates, such action would be in derogation of the contract rights and; third, the union has a likelihood of success in arbitration. *Id.* at 2256.
80. *Id.* at 2498.
B. Partial Sale

Until First National Maintenance, the Board's "decision" bargaining rules applied unless the partial sale constituted a significant withdrawal of capital which would "affect the scope and ultimate direction of an enterprise," or it took the employer out of a discrete line of business. As a consequence of the First National Maintenance decision, the bargaining obligation in the case of a partial sale or closing may now be limited only to impact subjects. As a practical matter of strategy, should the union ever raise the "decision" issue, the employer should assess the desirability of discussing that issue if it determines that going to impasse would not affect it adversely. Moreover, to negotiate over the "decision," in some cases, may ultimately benefit the employer and employees alike. In many situations, management's full, polite but firm discussion of the "decision" issue at the union's request may enable the union, at little risk to the employer, to show its members that it has done everything possible under the most liberal interpretations of the law.

In applying First National Maintenance, there may be confusion and consequences arising from whether the sale of a wholly-owned subsidiary constitutes a "partial" sale or the sale of an "entire business." To make this determination, the Board's framework for analyzing parent-subsidiary relationships is instructive. In Royal Typewriter Co., the Board found that the main elements of single-employer status are "common ownership, common management, actual control of the subsidiary's operations by the parent company and centralized control over labor relations." 86

82. General Motors Corp., 191 N.L.R.B. 951, 952 (1971), enforced sub nom. UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972) (sale of a company-owned retail outlet selling trucks to an independent franchisee considered a decision at the "core of entrepreneurial control" and not a mandatory subject of bargaining). See also National Car Rental Sys., Inc., 252 N.L.R.B. 159 (1980), enforcement granted in pertinent part, 674 F.2d 1182 (3d Cir. 1982) (decision to close and sell one of its truck leasing operations deemed not a mandatory subject of bargaining when transaction involved major sale of nearly half the total inventory of trucks).

83. Kingwood Mining Co., 210 N.L.R.B. 844 (1974), aff'd mem. sub nom. UAW v. NLRB, 515 F.2d 1018 (D.C. Cir. 1975) (decision of company, which processed coal mined by itself and other companies, to cease its own mining operations was not a mandatory subject of bargaining); see also Royal Typewriter Co., 209 N.L.R.B. 1006 (1974), enforcement granted in pertinent part, 533 F.2d 1030 (8th Cir. 1976).

84. See, e.g., Ozark Trailers, Inc., 161 N.L.R.B. at 564 (plant closing deemed partial only, where three commonly-owned corporations "operated as a single, integrated, multiplant enterprise").


86. Id. at 1011.
In *Royal Typewriter*, the immediate employer, Royal, whose entire operations were closed down, was a division of a wholly-owned subsidiary of Litton Industries. Litton appointed division heads, approved their budgets and operating plans, and maintained control through frequent visits. While day-to-day labor matters were handled at the local level, Litton's participation in labor negotiations over the close down resulted in it being considered a single-employer together with the subsidiary. Accordingly, the parent and the subsidiary were liable for Royal's failure to bargain in good faith about the effects of the plant closing. The court found all the elements of a single-employer status existing between Litton and Royal, therefore, Litton was subject to a remedial order requiring it to offer preferential employment, as available, to qualified Royal employees at any of its "controlled plants" in the relevant geographical area. A footnote in the Board's decision suggests, however, that a different result might obtain if the parent, although considered a single-employer with its subsidiary, did not actually participate in the bad faith negotiations.

If the union pursues its claims against a parent-subsidiary group through arbitration, there is authority for limiting the scope of relief to the immediate employer named in the labor agreement. For example, in *Masonite Corporation*, the arbitrator rejected the union's contention that terminated employees of a closed warehouse division were entitled to exercise seniority rights and transfer to the parent's manufacturing plant nearby. The only party to the contract, and thus the "Company" referred to in the seniority clause, was the division itself.

In sum, a parent corporation selling an integrated subsidiary or division should be particularly cautious in relying on *First National Maintenance*'s elimination of the duty to bargain over a partial closing. And, if representatives of the parent participate in negotiations with the union, the potentially broadened scope of a Board order resulting from a finding of unfair labor practices should be borne in mind.

87. 533 F.2d at 1033.
88. *Id.* at 1041.
89. *Id.* at 1042.
90. 209 N.L.R.B. at 1012.
91. *Id.* at 1015.
92. *Id.* at 1012 n.13.
93. 45 Lab. Arb. (BNA) 551 (1965) (Kagel, Arb.).
94. *Id.* at 554.
95. N.L.R.B., Office of the General Counsel, Memorandum 81-57 n.21.
V. Successors and Assigns

Another pre-sale consideration arises if the employer is party to a collective bargaining agreement with a "successors and assigns" clause, such as: "This agreement shall be binding upon the parties hereto, their successors and assigns." On occasion, this type of clause may provide that the employer sell the business only to a "purchaser" who expressly assumes performance of the collective bargaining agreement in writing, or, as an alternative, agrees to hire all of the employees in the bargaining unit.96

If, prior to sale, the potential purchaser refuses to assume the agreement or hire the employees, the union may have the basis for an action, ancillary to an arbitration with the present employer, alleging breach of agreement and seeking to enjoin the sale to the potential purchaser.97 For example, in Howard Johnson Co. v. Hotel & Restaurant Employees, the Supreme Court explained that the union might have successfully sought to enjoin the sale based upon the purchaser's refusal to assume the labor agreement which, by its terms, was "binding upon the successors, assigns, purchasers, lessees or transferees of the Employer." 98

In 1981, the Seventh Circuit seized upon the Court's language in Howard Johnson to issue an injunction in IAM v. Panoramic Corp.99 In this case, the seller, Panoramic, notified all employees that they were to be terminated and would have to reapply for employment under the new owner. The purchaser, however, had already done extensive interviewing on the outside.100 Furthermore, the labor agreement contained a broad arbitration provision and its preamble made it binding on the "successors and assigns" of the corporation.101 Under these circumstances, the court held:

96. See Kallmann v. NLRB, 640 F.2d 1094, 1100 (9th Cir. 1981).
98. 417 U.S. 249, 258 n.3 (1974) (Marshall, J., dictum) (Supreme Court suggested that a union alleging a similar breach of the collective bargaining agreement might have been able to obtain an injunction prohibiting a proposed sale of assets by the employer).
99. 668 F.2d 276 (7th Cir. 1981).
100. Id. at 278 n.4.
101. The preamble to the collective bargaining agreement reads as follows: THIS AGREEMENT was made and entered into this 1st day of July 1979, by and between the PANORAMIC CORPORATION, its successors and assigns, of Janesville, Wisconsin (hereinafter referred to as the "Company") and LOCAL LODGE NO. 1266 of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO (hereinafter referred to as the "Union"). Id. at 278 n.3.
[C]onsummation of the sale before an arbitrator had an opportunity to rule on the Union's contention that the sale violated the labor agreement would have presented the arbitrator with a fait accompli, leaving him without any real power to award an adequate remedy in the event that the Union's claim was sustained.102

The Seventh Circuit in Panoramic concluded that a duty to preserve the status quo pending arbitration may be implied in order to prevent frustration of the arbitral process.103

The court in Panoramic did not act alone in taking such extraordinary action. In at least one other reported case, Amalgamated Food Employees Union, Local No. 590 v. National Tea Co.,104 the District Court for the Western District of Pennsylvania enjoined the sale of a business pending arbitration of the issue of whether a standard "successors and assigns" clause required an employer to insert a provision in the sales agreement binding the purchaser to carry out the terms of a labor agreement with sixteen months to run.105 Since this case was later remanded by the Third Circuit without opinion,106 its precedential value is unclear.

In an odd interpretation of the National Tea contract, an arbitrator later concluded that the "successor and assigns" clause was meant only to obligate each party to continue with the successor of the other. It was not intended, said the arbitrator, to obligate the divesting employer to have the successor assume that contract.107 In another somewhat anomalous case, Teamsters, Local 961 v. Graves

102. Id. at 286.
103. Id. at 282.
105. The "successors and assigns" clause at issue provided: "This Agreement shall be binding upon the parties hereto, their successors and assigns. It is the intent of the parties that the Agreement shall remain in effect for the full Term of the Agreement and shall bind the successors of the respective parties hereto." 346 F. Supp. at 877 n.2.
106. 474 F.2d 1338 (3d Cir. 1972).
107. 59 Lab. Arb. (BNA) 1195, 1198 (1972) (Joseph, Arb.) (employer discontinued its operation of retail food stores in one of its divisions. Proposed sale of stores had been enjoined pending arbitration of several related grievances. One of the grievances stated that the proposed contract of sale did not include a commitment by the purchaser to be bound by the existing labor agreement. Arbitrator held that the predecessor employer would not be liable under a common "successors and assigns" clause for lost or reduced wages and fringe benefits subsequent to a closing and sale if the purchaser did not accept the terms of the existing agreement. In what appears to be a peculiar interpretation, the arbitrator decided that the sole purpose of the "successors and assigns" clause was to obligate "each party to continue the Agreement in effect with any successors to the other." The arbitrator reasoned that just as the union could not reject a successor to the employer as a party to the contract, the em-
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Id.


109. Id. at 1297 (emphasis added).

110. Id. at 1296.

111. 529 F.2d 1073 (9th Cir. 1976), vacated and remanded, 429 U.S. 807 (1976), rev'd, 550 F.2d 1237 (9th Cir. 1977), cert. denied, 434 U.S. 837 (1977) (injunction, which would have prohibited employer from implementing changes in work schedules pending arbitration, denied).

112. This approach has been followed in other circuits as well. See, e.g., United Steelworkers of Am. v. Fort Pitt Steel Casting, 635 F.2d 1071 (3d Cir. 1980); Texaco Indep. Union v. Texaco, Inc., 452 F. Supp. 1097 (W.D. Pa. 1978).

113. See, e.g., Sexton's Steak House, Inc., 76 Lab. Arb. (BNA) 576 (1981) (Marshall Ross, Arb.) (sale enjoined where employer breached collective bargaining agreement by selling restaurant without obtaining agreement from buyer to be bound by terms of the labor agreement) and Hosanna Trading Co., 74 Lab. Arb. (BNA) 128 (1980) (Jesse Simons, Arb.) (sale enjoined where terms of bargaining agreement were violated by proposed sale of children's apparel business).
A. Defining "Successor"

If the labor agreement provides that it will be binding only upon "the parties, their successors and assigns," a question arises as to whether the seller must secure assumption of the agreement from a purchaser or transferee. Under the Taft-Hartley Act, the NLRB has ruled that every purchaser is not necessarily a successor for purposes of requiring the seller to secure the buyer's assumption of the duties set forth in the labor agreement. It would appear, however, that arbitrators are not unwilling to interpret the term "successors" in a labor agreement so as to include purchasers within its scope.

1. Taft-Hartley Definition

As interpreted by the NLRB, the Taft-Hartley Act offers no hard and fast rules for a finding of successorship. There are, however, some major factors which the Board will consider in making the determination as to whether the purchaser is bound by the labor obligations of his seller. At one end of the spectrum of factual possibilities suggesting successorship status, are those situations where the former operational structure and practices continue substantially unchanged after corporate transfer. Conversely, situations arise in which the purchaser has assembled the enterprise, absorbing certain facets in a layer operation while eliminating other facets, the net result being that the character and integrity of the operation has been materially obliterated. In addition, the Board will consider whether or not a majority of the former employees of the seller make up the buyer's workforce.

117. See supra note 116.
118. NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 280 (1972) (White, J.) (where bargaining unit of security guards remained unchanged and a majority of the employees hired by the new employer were represented by a recently certified bargaining agent, successor was obligated to bargain with the incumbent union but was not bound by the provisions of the predecessor's agreement); NLRB v. Polytech, Inc., 469 F.2d 1226 (8th Cir. 1972), enforcing in part, 186 N.L.R.B. 984 (1970) (successorship found where majority of employees were employed by the predecessor, there was no substantial change in nature of operations, and successor purchased the physical assets of the predecessor). Cf. NLRB v. Marine Optical, Inc., 671 F.2d 11 (1st Cir. 1982), enforcing 255 N.L.R.B. 158 (1981).
119. See NLRB v. Marine Optical, Inc., 109 L.R.R.M. 2593 (1982). In that case, a company that relocated 17 miles away in the same state was held to have violated §§ 8 (a) (1) and (5) by repudiating an existing bargaining agreement. The
2. Contractual Definition

The term "successor" as used in a labor agreement is sometimes interpreted more broadly by arbitrators than by the NLRB. In such cases, the term successor has been found to encompass purchasers who would not otherwise be regarded as such under the Taft-Hartley Act. In fact, arbitrators have even regarded the terms "successor" and "purchaser" as synonymous, when viewed in the context of other provisions in the labor agreement as well as the bargaining history involved. 120 Moreover, it seems clear that if the wording of the particular contract refers to "purchaser or transferee," the employer's contractual obligation to have the buyer assume the agreement would appear even more difficult to avoid.

B. Predecessor's Liability

This raises the significant question of the predecessor employer's potential liability subsequent to the sale. In general, "successors and assigns" clauses range from relatively simple and standard statements to more explicit requirements typified by these two examples:

Example A: "The parties agree that this agreement shall be binding upon them and their respective successors and assigns."

Example B: "The parties agree that this agreement shall be binding upon them and their respective successors and assigns, and that they shall faithfully comply with its provisions. In the event the employer sells or transfers all or any part of its business, including all or any part of an affiliate or subsidiary, the employer shall nevertheless continue to be liable for the performance of this agreement until and unless the purchaser or transferee expressly in writing assumes such performance and agrees to be fully bound by the terms of this agreement. Upon such assumption the employer shall be discharged from any liabilities or obligations accruing under the agreement on and after the date of assumption."

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As in the Panoramic\textsuperscript{121} and National Tea\textsuperscript{122} cases, the language of either example might provide a basis upon which the union could obtain an order enjoining the sale.

With respect to Examples A and B, the question of the predecessor's liability is often uncertain. Assuming the existence of a so-called "successor" or "assign" within the coverage of these examples, and also assuming that the successorship provisions have not been waived by the union, the predecessor's potential liability can be illustrated by these four distinct situations:

\textit{Case 1}: The successor assumes and complies with the predecessor's labor agreement during its unexpired term.

\textit{Case 2}: The successor assumes the predecessor's labor agreement but fails to comply with its terms and conditions.

\textit{Case 3}: The successor refuses to assume the predecessor's labor agreement and, instead, negotiates with the union, reaches an impasse and unilaterally changes the terms and conditions of employment.

\textit{Case 4}: The successor refuses to assume the predecessor's labor agreement and, instead, by sheer force of its economic power, convinces the union to agree upon a new labor agreement which changes the terms and conditions of employment.

In \textit{Case 1}, the predecessor unquestionably is relieved of liability. Courts have refused to grant relief to a union which is dissatisfied with the new employer, regardless of the objections asserted.\textsuperscript{123} With respect to the predecessor's liability in Cases 2, 3, and 4, there is no such definitive answer. The federal courts, for example, usually submit to arbitration the issue of interpretation of the scope of predecessor liability imposed by clauses contained in Examples A and B.\textsuperscript{124}

\textsuperscript{121} 668 F.2d 276 (7th Cir. 1981).
\textsuperscript{123} See, e.g., Carpenters' Dist. Council v. W. O. Kessel Co., 487 F. Supp. 54 (W.D. Pa. 1980) (following sale to a buyer who assumed the labor contract, the seller opened a new, non-union business and the union sought to have its contract applied at the new facility—held, the new corporation was not an alter ego or a successor, and the union's only loss was the chance to obtain additional dues; therefore, there had been no breach of any contract. Although the union has a legitimate interest in ensuring that employers comply with the collective bargaining agreement, it has little concern with whom that employer is).
\textsuperscript{124} If the sale takes place after expiration of the labor agreement, the obligation to arbitrate may continue under the Nolde Brothers line of cases. 480 U.S. 249 (1977) (Burger, C. J.). \textit{But see} Ward Foods, Inc. v. Local 50, Bakery & Confectionary Workers Union, 360 F. Supp. 1310 (S.D.N.Y. 1973) (where collective bar-
The few reported arbitration cases are split on the matter of the seller’s continuing liability. In *Hosanna Trading Co.,* the arbitrator construed the language of the agreement, which was similar to that of *Example B,* as continuing to bind the seller. Nevertheless, the arbitrator concluded that the seller was relieved of liability for full performance once the purchaser had agreed to be bound in writing, even though, after having assumed the agreement, the purchaser failed to comply with its terms. In *Walker Brothers,* however, another arbitrator construed a successorship provision, although the clause was more akin to *Example A* and thus more likely to relieve the seller of liability, to hold the predecessor liable. Here, the purchaser, after having assumed the seller’s contractual obligations, did not pay employees their accrued earnings and benefits, which came due during the balance of the predecessor’s labor agreement.

If the predecessor corporation is liquidated, or ceases to be “a viable entity,” it may be absolved of liability for failing to require a buyer to assume its labor agreement. In *Schneier’s Finer Foods, Inc.,* the predecessor had breached its duty to obtain the buyer’s assumption where the contract had a “successors and assigns” clause. The arbitration clause terminated sixty days after union gave notice of intention to terminate agreement, the bakery employer was not required to submit to arbitration of controversies arising from its post-termination decision to sell. However, specific language in the labor agreement, such as language subjecting to arbitration a dispute over whether the purchaser is a successor, could arguably survive the expiration of the agreement.

127. See also the Arbitrator’s decision in High Point Sprinkler Co. of Boston, 67 Lab. Arb. (BNA) 239, 248 (1976) (George P. Connolly, Arb.) (fabricator and installer of fire control systems transferred assets in satisfaction of a debt to its major supplier. Arbitrator concluded that the predecessor was liable for contributions to various welfare funds and for lost wages through the term of the collective bargaining agreement. In addition to a common “successors and assigns” clause, the agreement provided that “[i]t shall be understood that the parties hereto shall not use any sale, transfer, lease, assignment, receivership or bankruptcy to evade the terms of this Agreement.” Since there had been an assignment, and even though the predecessor’s bargaining position would not have enabled it to insist that the buyer assume the contract, the failure to obtain the union’s assent to the substitution of the assignee constituted a breach).
128. 72 Lab. Arb. (BNA) 881, 885 (1979) (Jeffrey A. Belkin, Arb.) (contract stated it would “be equally binding on its successors and assigns and it is the intent of the parties that this Agreement shall remain in effect for its full term and bind the successors of the respective parties”) (seller was a purveyor of foods, engaged in the preparation and processing of meat products as well as the warehousing and distribution of other foodstuffs. Seller ceased to be a corporate entity after the sale, and purchaser’s liability seemed to turn on the fact that it became a legal “successor.” In dictum, arbitrator wrote that purchaser could have avoided liability by not having hired predecessor’s employees or by not changing its original pre-purchase operations from wholesaling to “purveying”).
trator held, however, that the buyer alone, whom the arbitrator determined to be a legal successor, was the only party responsible for reme-
dying that breach.

In the final analysis, the potential liability of the predecessor em-
ployer will rest upon whether the purchaser is in fact a "successor" or
whether the agreement encompasses purchasers other than a legal
"successor." In addition, there may be a question as to whether the
employer under contract with the union is sufficiently autonomous so
as to insulate the parent from liability following the sale to a third par-
ty.

VI. WITHDRAWAL LIABILITY

Regardless of the presence of a "successors and assigns" clause, a
relatively new issue known as withdrawal liability confronts an em-
ployer who sells all or part of its assets or shuts down all or part of its
facilities. Such an employer is now potentially liable under the Mul-
tiemployer Pension Plan Amendments Act of 1980.129 That law pro-
vides that an employer who is obligated to contribute to a multi-em-
ployer pension fund becomes liable for a share of the unfunded vested
pension immediately upon a complete or partial withdrawal from the
fund. Thus, a business that closes, sells, or buys a plant, which has a
relationship with a multi-employer pension fund, has a major prob-
lem.

Under the Act, a seller will generally be relieved of primary with-
drawal liability only if the purchaser obligates itself to continue simi-
lar contributions to the plan and provides, for a period of five years af-


130. Id.
131. Id.
crow equal to the value of its withdrawal liability had it withdrawn before liquidation or sale. 133

The rules for determining withdrawal liability based on the seller's allocable share of unfunded vested liability, or a number of alternative computations, are complex. 134 Withdrawal liability under this Act may cost more than the corporate assets to be sold and has run into six figures for some moderate-sized companies. This causes particular problems in those industries which consist of many small employers. This potentially substantial cost should not be easily overlooked.

VII. PRACTICAL STEPS

The most critical question can now be answered: what practical steps will help minimize the employer's potential liability from a sale or closing?

It is clear that the prudent seller should initially take the following five basic steps:

Step 1: The applicable collective bargaining agreement should be reviewed to determine:

(a) notice requirements,
(b) any benefits applicable to a sale (e.g., severance pay or relocation rights),
(c) the specific language and meaning of any "successors and assigns" clause, and
(d) the "employer" status of the parent in relation to the division or subsidiary being sold.

Step 2: The seller should provide the union with as much information and notice of the sale as business and other legal considerations permit. In order to minimize the possibility of a dispute between the union and the employer over either the decision to sell or the consequences of that decision, the seller should carefully consider the methodology and strategy for notification. As an additional precaution, alternative strategies for possible negotiations should be determined at the time the notification strategy is set.

133. 29 U.S.C. § 1384 (a) (3) (1980).
134. A partial withdrawal is deemed to have occurred if (a) an employer's contribution base declines by 70% or more for each of three consecutive plan years, or (b) there is a "partial cessation of the employer's contribution obligation." Such a cessation occurs if the employer, while continuing to perform the same type of work for which contributions were previously required, permanently ceases to have an obligation to contribute with respect to at least one, but not all of its facilities or under one or more, but not all, of its collective bargaining agreements. 29 U.S.C. § 1385 (1980).
Step 3: The contract of sale should contain a clause committing the purchaser to assume the labor agreement and indemnifying the seller against any claim, dispute, action or other proceeding brought by the union or the employees following the sale.

Step 4: In cases where the seller would likely be considered the "employer," the seller should seek from the union and purchaser a novation agreement by which the purchaser is substituted as the party to the labor agreement and the seller is released from liability. Success in getting this substitution and release is dependent upon the degree of care with which a strategy has been developed for approaching the union. For example, if hypothetical Division X were sold, the purchaser's assumption of the labor agreement and indemnification of Parent Y, as contemplated by the third step just mentioned, might insulate Parent Y from future liability under a "successors and assigns" clause. The substitution and release recommended in step four, however, would virtually guarantee freedom from future liability.

Step 5: Finally, with regard to potential withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980, the seller of assets can, when negotiating the selling price, take into account the possibility of a purchaser's breach of its statutory obligations, or even more prudently, sell only to a financially viable purchaser. If selling stock, liability under the Act may be avoided altogether. The advance timing of this and the preceding step is critical; a well-planned strategy is a prerequisite for the proper implementation of these steps.

XI. Conclusion

Once a divestiture is planned, an analysis of the seller's legal and contractual obligations to the union should be made. The preparation of a strategy in response to those obligations should take into consideration the precise language of the collective bargaining agreement and the circumstances of the particular situation.

The law, as demonstrated by the decisions in First National Maintenance and Panoramic, is expected to remain in a state of flux. Since each case is different, there are no perfectly clear cut rules. However, as this article shows, the analysis of a corporate divestiture and acquisition must include more than balance sheet financials; the impact on labor relations must be given careful consideration.