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HIDING BEHIND THE CORPORATE VEIL: EMPLOYER ABUSE OF THE CORPORATE FORM TO AVOID OR DENY WORKERS' COLLECTIVELY BARGAINED AND STATUTORY RIGHTS

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I. INTRODUCTION

In a 1996 speech on “corporate citizenship,” then-Secretary of Labor Robert B. Reich lamented the passing of a bygone era when chief executives of large corporations gave greater consideration to the consequences of corporate actions on workers and their communities.¹ Reich quoted from a 1951 address by Frank Abrams, then Chief Executive Officer (“CEO”) of Standard Oil of New Jersey: “The job of management is to maintain an equitable and working balance among the claims of the various directly interested groups . . . stockholders, employees, customers and the public at large.”² Reich noted that Abrams’s remarks were typical of the era, and asserted that this balancing of interests was the product of an implicit social compact between companies, workers, and the communities they shared. The compact held that so long as a company made a respectable profit, it could be relied upon to remain in the community and employees could depend on keeping their jobs; anything less was “un-American.”³

Today this social compact has unraveled. The principal causes, according to Reich, include deregulation of a number of key industries, information technology that speeds commercial transactions to levels unimaginable in previous eras, the growing demands of shareholders to maximize profits, and of course the globalization of markets for capital, goods, and services.⁴ The result? Corporations have begun to engage in a new ruthlessness, maximizing profits at the expense of all other considerations. Consequently, workers and their communities have borne the brunt of a new economic order in which labor is increasingly viewed as just another cost to be squeezed at the expense of community, employee welfare, and human dignity.

Recent economic trends seem to corroborate Reich’s hypothesis. Real wages for most workers have fallen over the last twenty years, while both corporate profits and executive compensation have risen.⁵ For example, between 1979 and

¹ United States Secretary of Labor Robert B. Reich, *Pink Slips, Profits, and Paychecks: Corporate Citizenship in an Era of Smaller Government*, Address to George Washington University School of Business and Public Management (Feb. 6, 1996).

² *Id.*

³ *Id.*

⁴ *See id.*

⁵ ECONOMIC POLICY INSTITUTE, *THE STATE OF WORKING AMERICA* 140 (1996-1997).

1995,⁶ the real (adjusted for inflation) hourly wages of male blue-collar employees have fallen an average of 16.3%.⁷ Men in the service economy have been hit by this trend even harder: if security services are excluded from the category of service industries, real wages fell nineteen percent between 1979 and 1995. Wages for women in these sectors of the economy did not fall as drastically, but they did register a decline in real buying power. The wages for women fell 6.3% in blue-collar jobs and 8.6% in non-security service industries during the same time period.⁸ Even more startling is the fact that these wage reductions have been coupled with job insecurity unparalleled in times of relative health in the national economy; from 1991 to 1993, a period of economic recovery, five percent of men and four percent of women lost their jobs to downsizing, closure, or permanent layoff.⁹

Conversely, corporate profits have grown steadily in the same period. After-tax corporate profits averaged seven percent in 1995, the highest rate since 1959 (the earliest year for which a figure is available).¹⁰ This growth in profits has been at the expense of wage growth as revenues shift from workers to shareholders.¹¹ More drastic is the growth in pay for corporate executives. Total compensation for CEOs of major corporations in the United States, adjusted for inflation, rose from \$971,000 in 1965 to \$4,367,000 in 1995.¹² Thus, while in 1965 the average CEO of a major corporation earned 39.5 times more than the average worker, in 1995 those CEOs' pay had grown to be 172.5 times the average worker, reflecting an average annual growth rate of 5.16%.¹³

As these figures illustrate, any praise for the current economic state fails to account for the pressure it has put on most American workers. If the social compact

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The difference in decline for the sexes is in part attributable to a reduction in the wage gap between the sexes. Despite the narrowing of this gap, however, women still earned on average less than three-fourths the wages of men in 1989. *See id.* at 145.

⁹ *Id.* at 17.

¹⁰ *Id.* at 68.

¹¹ *Id.* at 66.

¹² *Id.* at 224. Dollar figures are in 1995 dollars. Compensation rates for CEOs include salaries, bonuses, the value of restricted stock and stock options and the time they were granted, and other long-term compensation.

¹³ *Id.*

has crumbled, it has been to the advantage of those who rely on capital, not labor, as the source of their income.

Coal miners and their communities stand in a unique position in this new global marketplace. Because of the contentious history of labor-management relations in the coal fields, Reich's "social compact" was probably less recognizable to the average coal miner than it was to employees in other sectors of the economy. Nonetheless, despite the sometimes intense differences between labor and management, coal mines were historically unlikely to close as long as the owners were making a profit. Of course, the compacts reached between the United Mine Workers of America ("UMWA" or sometimes "Union") and mine operators could never achieve for workers the degree of stability enjoyed by other industrial unions; because of the nature of coal mining, coal miners have been experiencing the uncertainty associated with the "new" marketplace for many years. Miners have inherent job instability because their employment depends on the profitable location and recovery of a limited, non-renewable resource. Coal-mining operations are constantly opening and shutting down because of considerable effects on their profitability due to geological difficulties a mine may encounter, various forms of environmental regulation, and the significant fluctuations in both the price of coal and the cost of its transportation. These various destabilizing factors have historically resulted in cycles of intense activity and prolonged layoffs.

The response to these uncertainties for workers in the coal fields was labor organizing. As a consequence, the UMWA has been a leader among labor unions in negotiating economic security for its workers. However, the struggle to maintain economic security in an extractive industry is always a challenge. Over time, the competitive pressures of the industry have led companies to target the UMWA and its hard-won concessions as a means of reducing costs. Companies are increasingly using aggressive tactics to shed their collective bargaining obligations and take advantage of a legal setting where "cheating" workers out of their hard-fought contractual rights is an available option to determined employers.

The intent of this Article is to point out how such corporate cheating of workers occurs, not by the kind of legal analysis typical of law review articles, but rather by examining the outcomes that result because of particular legal rules, and how those rules affect workers, their families, and the ability of workers to organize and bargain collectively with their employer. The Article in no way claims to be comprehensive, but is rather a collection of short case studies illustrating how companies have manipulated the law in select areas. Though the case studies are drawn from the coal industry, they illustrate scenarios that, unfortunately, may become more and more common across all sectors of the economy.

Parts II and III deal with the vexing problem of successorship, and workers' ability to maintain their jobs and their collective bargaining agreement during the transfer of their work site to another employer. Part IV addresses the use of

“double-breasting,” the practice by employers of operating two companies, one union and one non-union, to drain away the work of unionized employees into the non-union firm to reduce labor costs and enhance management control. Part V outlines coal companies’ use of subcontracting to avoid contractual liabilities. Part VI demonstrates an effort by certain companies to “launder” their obligations to pay retiree health care benefits to retired miners through a Chapter Eleven bankruptcy proceeding. The Article concludes with some general principles that should form the basis of any reform efforts to help ensure increased equity and security for workers.

II. SUCCESSORSHIP

Kenny Bergstad was forty-five years old in 1994, married with two children.¹⁴ He was in his twentieth year as a coal miner at the Glenharold surface mine near Stanton, North Dakota. Over the course of those twenty years he worked a number of jobs at the mine: general laborer, blaster, truck driver, and the oiler on the dragline. That year, however, he was doing reclamation work, restoring the mine site to its pre-mining conditions. The active extraction of coal had stopped, and in a matter of time Kenny Bergstad’s twenty-year career as an employee of Basin Cooperative Services (“BCS”) would be over.¹⁵

That is not how Bergstad had expected his coal mining career to end. BCS had plenty of coal reserves, enough coal to be mined until he retired. Its nearby Dakota Star Reserves had an expected mining life of eighteen years, enough to keep Bergstad and his fellow employees employed until retirement.¹⁶ There was also a ready market for the coal. It served its parent company, Basin Electric Power Cooperative, an eight-state network of about 140 rural electric cooperatives, which had an ongoing and constant need for coal. Bergstad understood that the Dakota Star Reserves were covered by his labor contract. In fact, in bargaining the 1988 collective bargaining agreement with BCS, the Union was assured that the reserves

¹⁴ Transcript of Trial at 130, *International Union, United Mine Workers of America v. Basin Cooperative Services*, Civil No. A1-92-114 (D.N.D. 1994).

¹⁵ *Id.* at 126.

¹⁶ *Id.* at 564; *see also* *United Mine Workers of America v. Basin Cooperative Services*, 53 F.3d 222, 225 (8th Cir. 1995). The average age of the employees at Glenharold was 45, with an average of 19 years of service at BCS.

were covered under the contract and that the miners working at the Glenharold mine would be the ones to mine the Dakota Star Reserves.¹⁷

Bergstad also understood that he was protected from job loss if his mine was sold to a new employer. He knew his Union's collective bargaining agreement had a successorship provision, designed to ensure that if BCS sold the mine, it was responsible for securing a legally binding commitment from the purchaser that it would honor the collective bargaining agreement. The promise, of course, included retaining the mine's workforce.¹⁸

Instead of honoring the contract's successorship provision and fulfilling workers' contractual expectations, Basin Electric and BCS entered into a scheme to shed the union from its coal mining operations and mine its coal non-union to reduce labor costs.¹⁹ The plan was simple: BCS sold the Dakota Star Reserves to the Coteau Properties Company, which mined the coal and sold it back to Basin Electric for their electric generation needs. The financing of the deal and the oversight of Coteau's mining operations was to be handled by Dakota Coal Company, another of Basin Electric's subsidiaries.²⁰

When the case went to trial, the Union won a judgment of \$6.5 million from defendants Basin Electric, BCS, and Dakota Coal, whom the jury found to be single employers, jointly and severally liable for violation of the contract.²¹ The Union had presented evidence that damages were approximately twelve million dollars, a figure which included approximately eighteen years worth of future wages, plus health insurance and lost pension benefits.²² The \$6.5 million judgment was upheld

¹⁷ Transcript of Trial at 127, *Basin Cooperative Services*, Civ. No. A1-92-114; see also Plaintiff's Memorandum of Law in Opposition to Defendant Basin Cooperative Services' Motion for Summary Judgment at 4, *Basin Cooperative Services*, Civ. No. A1-92-114.

¹⁸ Transcript of Trial at 125, *Basin Cooperative Services*, Civ. No. A1-92-114. The collective bargaining agreement covering the Glenharold Mine, the 1988 Surface Coal Wage Agreement, states in pertinent part that "BCS promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred to any purchaser, executor, administrator, or trustee without first securing the written agreement of the purchaser, executor, administrator, or trustee to assume BCS's obligation under this Agreement." An edited version of the language appears in *Basin Cooperative Services*, 53 F.3d at 223. Article I is discussed in more detail *infra* notes 60-61 and accompanying text.

¹⁹ Plaintiff's Memorandum of Law in Opposition to Defendant Basin Cooperative Services' Motion for Summary Judgment at 7, *Basin Cooperative Services*, Civ. No. A1-92-114.

²⁰ *Id.*

²¹ Judgment, *Basin Cooperative Services*, Civ. No. A1-92-114.

²² *Basin Cooperative Services*, 53 F.3d at 225.

on appeal, and ultimately was distributed, with each employee receiving about \$140,000.²³

Thus, Kenny Bergstad and his fifty fellow employees were relatively lucky, even though they lost jobs paying an average of \$40,000 per year, to which they devoted an average of nineteen years, and from which they had expected to retire. However, now they face the prospect of working at about half their miner's salary, and face little chance of earning fringe benefits such as health insurance and retirement pensions.²⁴ In addition, the United Mine Workers devoted three years and considerable expense to pursuing the lawsuit on behalf of these fifty employees in an environment in which hundreds of similar land transactions no doubt occur every year.

The problem exemplified in *Basin* is known as "successorship" in labor law parlance – the problem of what happens to determine the legal status of employees, their bargaining unit, and their collective bargaining agreement when their work site changes hands.²⁵ In some respects the UMWA has been able to "bargain around" this problem, because virtually all UMWA contracts in the coal industry contain a clause that requires employers to secure any purchasers' promise to honor the UMWA contract as a "successor" if it decides to sell its operations.²⁶ However, this clause is very unusual in the degree of protection it provides, because few other labor union have enough leverage to negotiate such terms. Thus, a brief analysis

²³ *Id.* at 222.

²⁴ *Id.* at 225; see also Transcript of Trial at 127, *Basin Cooperative Services*, Civ. No. A1-92-114.

²⁵ For a relatively comprehensive overview of successorship issues, see THE DEVELOPING LABOR LAW 761-850 (Patrick Hardin, ed., 3d ed. 1992); see also Gary P. Nelson, Donald E. Malecki, & Eric Sobkiewicz, *Of Profits and Perils: Acquiring the Assets of a Distressed Coal Producer*, 11 EASTERN MIN. L. INSTITUTE § 13 (1990).

²⁶ See Article I of the National Bituminous Coal Wage Agreement ("NBCWA"). The operative language is found in Article I of the NBCWA of 1998, and in prior National Agreements since 1974: This Agreement shall be binding upon all signatories, hereto, including those Employers which are members of signatory associations, and their successors and assigns. In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under the Agreement.

Id. at 1. The history and analysis of this provision, from the employer's viewpoint, is summarized in Thomas P. Geis & Ward L. Smith, *Labor Law Successorship Under the National Bituminous Coal Wage Agreement and the Union's Campaign for Job Security*, 90 W. VA. L. REV. 921 (1988).

of labor successorship issues may illustrate some of the obstacles employees face in obtaining meaningful job security guarantees.

The problems faced by workers can be summarized by an example of a fundamental corporate law principle. In a transfer of an ongoing business concern, a corporation can be sold through a stock sale or an asset sale. If the company is transferred in its entirety through a stock sale, contractual liabilities remain with the company.²⁷ However, if the company transfers all its assets instead of its stock, contractual liabilities do not generally attach to this “mere” exchange of property between two companies.²⁸ Because the law of collective bargaining is a specialized type of contract law, this general rule does not necessarily apply.²⁹ However, the rule demonstrates the law’s bias towards permitting a successor employer to shed its unionized employees, and replace them with cheaper ones, in the name of the free flow of capital.³⁰

A series of Supreme Court cases have outlined the basic analysis for determining the degree to which a successor employer must honor a predecessor’s collective bargaining agreement or recognize the bargaining unit of a newly acquired venture.³¹ As a general matter, the National Labor Relations Board (“NLRB” or sometimes “Board”) considers four basic issues in determining whether a new employer must recognize the collective bargaining unit of the predecessor employer: (1) whether there is “continuity in the workforce,”³² (2) whether there is continuity in the employing industry,³³ (3) whether there is

²⁷ See WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (per. ed. rev. vol. 1990).

²⁸ See *id.*

²⁹ See *id.* at § 7122.40.

³⁰ See, e.g., *N.L.R.B. v. Burns Int’l Security Services, Inc.*, 406 U.S. 272 (1972).

³¹ See *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987); *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974); *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168 (1973); *Burns*, 406 U.S. 272; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

³² Whether members of the bargaining unit continue to enjoy majority status.

³³ Whether the successor employer is engaged in substantially the same business venture.

“continuity in the bargaining unit,”³⁴ and (4) whether and how long the work site has been idled prior to the takeover of the new employer.³⁵

It is beyond the scope of this Article to give a full explanation of these different factors and their relative importance. What matters most is that the determining factors are all within the exclusive control of the new management. They are all subject to the decision of the new employer because under current law the employer is in control of the makeup of the new workforce. It is essentially within the new employer’s discretion whether to structure the workforce and the workplace in a way that avoids successor liability.

This criticism was articulated by Justice Douglas in his dissent in *Howard Johnson Co. v. Detroit Local Joint Executive Board*,³⁶ which involved the transfer of a hotel to a new employer.³⁷ The former employer, which owned the hotel, sold all the personal property and leased the real property to Howard Johnson, which intended to operate the hotel.³⁸ The hotel had employed fifty-three employees under the old employer, of whom Howard Johnson hired only nine.³⁹ The union that represented the fifty-three employees, who had worked under contracts with language binding both the employer and its “successors, assigns, purchasers, lessees or transferees” to the collective bargaining agreement, filed a suit against Howard Johnson to compel arbitration.⁴⁰ The issue that ultimately came to the Supreme Court was whether Howard Johnson, because of the successorship language in the contract, had to arbitrate with the union over the extent of its collective bargaining obligations.⁴¹

The Court, in an opinion by Justice Marshall, ruled that Howard Johnson had no duty to arbitrate because it had not employed the entire bargaining unit, or

³⁴ Whether the bargaining unit remains appropriate under the National Labor Relations Act (“NLRA”) and applicable Board precedent.

³⁵ See *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27; *Howard Johnson Co.*, 417 U.S. 249; *Golden State Bottling Co.*, 414 U.S. 168; *Burns*, 406 U.S. 272; *John Wiley & Sons, Inc.*, 376 U.S. 543. See also THE DEVELOPING LABOR LAW, *supra* note 25, at 777-811.

³⁶ 417 U.S. 249, 265 (1974) (Douglas, J., dissenting).

³⁷ *Id.* at 249.

³⁸ *Id.* at 251.

³⁹ *Id.* at 252.

⁴⁰ *Id.* at 251-52.

⁴¹ *Id.*

at least a substantial enough contingency of the bargaining unit, and thus there was no basis to presume that the union still enjoyed majority status among the workforce.⁴² In a lone dissent, Justice Douglas pointed out the fundamental unfairness of this criteria:

The majority, by making the number of prior employees retained by the successor the sole determinative factor (in whether the collective bargaining unit must be recognized by the new employer), accepts petitioner's bootstrap argument. The effect is to allow any new employer to determine for himself whether he will be bound, by the simple expedient of arranging for the termination of all of the prior employer's personnel.⁴³

Clearly, such a ruling provides a certain incentive for employers *not* to retain a union-represented workforce.⁴⁴ Indeed, from the worker's perspective, allowing the successor employer to avoid future obligations to the union by simply arranging for the selling company to fire all its workers seems glaringly unfair. Nonetheless, that is precisely what *Howard Johnson* holds.

An earlier case, *N.L.R.B. v. Burns Security Services*,⁴⁵ lays bare the values which dictate the Court's successorship jurisprudence.⁴⁶ *Burns* involved the takeover by a new employer of a contract to provide security services. The new security company ("Burns") hired twenty-seven of the guards formerly employed by Wackenhut, the company that had the contract prior to Burns's successful bid.⁴⁷

⁴² *Id.* at 261.

⁴³ *Id.* at 268 (Douglas, J., dissenting).

⁴⁴ Of course, Section 8(a)(3) of the NLRA prohibits terminating a worker simply because of his or her union affiliation, and Section 8(a)(5) of the same law requires that employers, and their legal successors, honor valid collectively bargained agreements. *See* 29 U.S.C. § 158(a). Both the NLRB and the courts have held that purchasers may be liable for unfair labor practices committed by their predecessor employers. *See, e.g., Golden State Bottling Co.*, 414 U.S. 168; *International Technical Products Corp.*, 249 N.L.R.B. 1301 (1980). In general, for *Golden State* liability to attach, the NLRB must first find two elements: (1) that the purchaser is indeed a successor under applicable law, and (2) that it knew of the unfair labor practices at the time that it purchased the business. *Golden State*, 414 U.S. at 176.

⁴⁵ 406 U.S. 272 (1972).

⁴⁶ *Id.*

⁴⁷ *Id.* at 274.

These twenty-seven employees were out of a total workforce of forty-two.⁴⁸ The union representing the employees under Wackenhut demanded recognition of the collective bargaining agreement that they had negotiated with Wackenhut, and Burns refused.⁴⁹ The Court ruled that although Burns must bargain with the union because it retained a majority status in the workforce (twenty-seven out of forty-two), it did not have to honor the unit's collective bargaining agreement.⁵⁰ Moreover, the Court also found that new employers could essentially never be forced to accept the terms bargained by its predecessor, (1) because it would be a violation of Section 8(d) of the National Labor Relations Act⁵¹ for the Board to enforce the substantive terms of a collective bargaining agreement against a party who had not agreed to their terms, and (2) such a rule would inhibit the free flow of capital.⁵²

The argument that the Act prohibits such recognition of a collective bargaining agreement is a shield for the real value choice that was at issue for the Court in these cases. The Court could have simply agreed with the NLRB's long standing policy in favor of labor stability, whereby a bargained-for labor contract survived a mere change in employers. Such a view could have been reconciled with Section 8(d) of the NLRA easily enough; if there was a blanket rule that collective bargaining agreements always applied to successors, the employer would be free to accept or decline that contract by choosing whether to purchase or take over the business.⁵³ The employer would always be able to negotiate a new agreement when the contract expired. However, the *Burns* Court found such a rule to be too

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 278-82.

⁵¹ 29 U.S.C. § 158(d) (1988)

⁵² *Burns*, 406 U.S. at 282, 287. Section 8(d) of the NLRA reads in part that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

⁵³ Prior to *Burns*, the general rule was that employers had to at least recognize and bargain with the union representing a predecessor's employees. *See Burns*, 182 N.L.R.B. 348 (1970). For example, in *Cruse Motors, Inc.*, 105 N.L.R.B. 242 (1953), the Board held that where a business changed ownership the successor was bound to bargain with the predecessor employees' collective bargaining agent as long as the successor was in the same "employing industry" as the predecessor. *Id.* at 248. Indeed, the NLRB's initial holding in *Burns* itself was that a successor must not only recognize the union, but must honor a predecessor's collective bargaining agreement, absent unusual circumstances. *See Burns*, 182 N.L.R.B. 348. Of course, this rule was short-lived.

restrictive. Instead, it preferred to permit corporate acquisitions to proceed “unfettered” by consideration of their impact on longstanding employees or on labor stability.⁵⁴ Of course, the flaw in the *Burns/Howard Johnson’s* approach is that it fails to protect workers who walk through the company gates on the way to work each morning and who rely on those jobs to feed their families. After the sale – from their perspective – the company gates are still there, but their jobs and their income have somehow disappeared along with their union contract.

To be fair, the Supreme Court mitigated some of the harshness of these rules in its 1987 decision in *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*⁵⁵ There, a manager of a New England textile maker formed a new company, purchased its predecessor’s assets, including its building and inventory, and hired many of the former workers. However, it refused to recognize the union. The NLRB held this refusal to be unlawful, finding that Fall River had hired a “substantial and representative complement” of employees, and that “substantial continuity” existed between the two enterprises.⁵⁶ Reaffirming the paradigm of employer free choice it had laid out fifteen years earlier in *Burns*, the Court declared that “to a substantial extent the applicability of *Burns* rests in the hands of the successor. If the new employer makes the conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated.”⁵⁷

The “substantial continuity” test set forth in *Fall River* places more emphasis on the expectations of the employees and the realities of the workplace than on the change in corporate form emphasized in the earlier cases. Indeed, the Court cited with approval the Board’s framing of the question as

whether ‘those employees who have been retained will understandably view their job situations as essentially unaltered.’[] This emphasis on the employees perspective furthers the [NLRA’s] policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their

⁵⁴ Of course, this freedom does not hurt workers in every case. As the Court points out, there may be instances where a new employer, by limiting costs and dictating new work conditions, can keep a company alive that otherwise would have had to close its doors. *Burns*, 406 U.S. at 287.

⁵⁵ 482 U.S. 27 (1987).

⁵⁶ *Fall River Dyeing & Finishing Corp.*, 272 N.L.R.B. 839 (1981), *aff’d*, *Fall River Dyeing & Finishing Corp.*, 482 U.S. 27.

⁵⁷ *Fall River Dyeing & Finishing Corp.*, 482 U.S. at 40-41.

legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest.⁵⁸

Thus, the Court moved closer to a “functional,” employee-focused analysis. If, from the employees’ perspective, the changeover does not create a “new” company, but merely attaches a new name to the old one, leaving the basic nature of the employer-employee relationship unchanged, then the purchaser should be considered a successor and will be required to bargain with the union.⁵⁹ However, it still need not retain the workforce and need not honor the existing collective bargaining agreement. Thus, this line of cases still leaves employees extremely vulnerable because it allows a purchaser to completely disregard any job protections its employees may have earned under the existing contract with the predecessor employer.

The Supreme Court’s decisions in *Howard Johnson* and *Burns* in the early 1970s⁶⁰ effectively invalidated the successorship guarantee found in prior NBCWAs up to that time, which simply imposed the contract upon any purchaser. The UMWA’s response was to negotiate a new Article I in the 1974 NBCWA, with new language designed to ensure that a mine operators’ existing collective bargaining obligations would still survive the sale or transfer of the mine.⁶¹ The “new” Article I accomplished this aim by requiring the seller of a mining operation to secure the agreement of the successor employer to honor the collective bargaining agreement as a condition of the sale, and by holding sellers contractually liable if they fail to do so. It also gave the Union a cause of action for contract violation against both the original employer if it fails to secure the commitment of a successor to honor the collective bargaining agreement and against the successor if it agrees to honor

⁵⁸ *Id.* at 43-44 (citing *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 184 (1973)).

⁵⁹ *See Geis & Smith, supra* note 26, at 929.

⁶⁰ For discussions of the history of Article I, see, e.g. *International Union, UMWA v. Eastover Mining Co.*, 603 F. Supp. 1038, 1042 (W.D. Va. 1985); *Geis & Smith, supra* note 26.

⁶¹ The relevant section of Article I reads as follows:
In consideration of the Union’s execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer’s obligations under this Agreement.

NBCWA of 1993, at 1.

the contract and then reneges. This provision has proved effective in protecting union members' jobs in many asset transfer situations.

However, as the *Basin* situation illustrates, many employers will exert enormous effort to get out from these obligations.⁶² Furthermore, even if the union files and wins a lawsuit for breach of contract, it is difficult if not impossible to secure the actual jobs at stake, and the best remedy available is usually money damages, which are no substitute for actual employment. The next section explores an even more flagrant and unfair attempt by a company to avoid its contractual obligations, this time by transferring an operation to a related company, then reopening the facility while denying that Article I applies to the transaction and refusing to rehire the union members who were laid off by the predecessor.

III. INTRA-CORPORATE TRANSFERS

One of the most egregious examples of contract avoidance occurs when coal companies engage in intra-corporate transfers to avoid the application of collective bargaining agreements. In such an instance, a coal mining operation is transferred from a company that is a signatory to the contract to a related non-signatory company that attempts to operate the site non-union. To try to evade the bargained-for obligation to acquire successorship obligations from the purchasing company, the company will rely on some action that purportedly excuses it from the provisions of Article I. For instance, it will close an operation prior to the transfer and claim that, because a mine was not actively producing coal, it was not an "operation" covered by the agreement. Or, it will transfer a tract of coal reserves that has been dedicated to a particular mine, and the purchasing company will sink a new mine shaft into the coal reserves a few hundred feet away from the old portal and claim the "operation" is a different one than the operation made up of the UMWA-represented employees who had been mining the reserve for years.⁶³

Take, for example, the case of the miners who lost their jobs at the Castle Gate preparation plant in Utah.⁶⁴ Castle Gate and the associated underground mining operations operated under the NBCWA for many years. Prior to 1979, Castle Gate was owned and operated by Blackhawk Coal Company, a subsidiary of

⁶² See *supra* notes 14-23 and accompanying text.

⁶³ Litigation over the term "operation," as used in Article I of the NBCWA, is discussed *infra* at note 78.

⁶⁴ This matter is currently being litigated in *United Mine Workers of America v. Cyprus Amax Coal*, Civ. No. 97-Z-34 (D. Colo. filed May 16, 1996) (filed in the United States District Court for the District of Utah and transferred to the United States District Court for the District of Colorado after consolidation with a case from the United States District Court for the District of Columbia).

the American Electric Power Company.⁶⁵ By 1984, both the mine and the preparation plant had been idled and the entire workforce of both locals had been laid off. As provided by the NBCWA, the UMWA members of both locals registered for their respective recall panels, and continued to accrue recall and seniority rights.⁶⁶

In 1986, Amax Coal entered into a long-term lease of the Castle Gate operations and began operating them through its newly established subsidiary, Castle Gate Coal Company.⁶⁷ Consistent with the successorship obligations it assumed under the NBCWA, Castle Gate became a signatory to the 1984 Wage Agreement and, according to the contract's layoff recall provisions, recalled the idled workforce that had previously been employed by Blackhawk. It began to mine coal, and at the end of the contract's term renewed its relationship with the UMWA by becoming signatory to the 1988 NBCWA.⁶⁸

In mid-1989, the employees at Castle Gate were again laid off; mining operations were halted in March.⁶⁹ The company attributed the work stoppage to a citation from the Mine Safety and Health Administration, issued because of a problem with rock bursts.⁷⁰ Because the mine was not producing coal, the preparation plant was idled as well. The classified employees were laid off.⁷¹

In 1993, Amax merged into Cyprus Minerals Company, forming Cyprus Amax Mineral Company.⁷² This merger created one of the largest mineral producing multinational corporations in the world, and what was at the time the second-largest coal producer in the United States.⁷³

⁶⁵ See 19 COAL OUTLOOK No. 19 at 5, May 15, 1995.

⁶⁶ Panels are the seniority lists from which employees on layoff are recalled.

⁶⁷ 10 COAL OUTLOOK No. 7, at 6 (Feb. 17, 1986); *UP&L Considering AMAX Mine Purchase*, U.P.I. WIRE SERVICE (October 19, 1989).

⁶⁸ Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment at 9, *UMWA v. Cyprus Amax*, Civ. No. 97-Z-374.

⁶⁹ *Castle Gate Suspends Production*, U.P.I. WIRE SERVICE (April 8, 1989).

⁷⁰ *Id.* "Rock bursts" are a condition in which pressure on a coal seam from the mine roof causes the coal to burst out of the seam.

⁷¹ *Id.*

⁷² Marj Charlier, *Cyprus Agrees to Buy Amax in Stock Pact*, WALL ST. J., May 26, 1993, at A3.

⁷³ *Id.*

Shortly after the merger, Cyprus Amax's subsidiary, Cyprus Plateau, began to take responsibility for Amax Coal's Castle Gate facilities. In December, 1995, Amax Coal acquired title to the Castle Gate plant and mines from Blackhawk. Two weeks later, Amax Coal sold the plant to Cyprus Plateau and the associated mines to Cyprus Western, another Cyprus Amax subsidiary.⁷⁴ Work had begun to prepare the plant for operation in the Fall of 1995, and by February or March of 1996 Cyprus Plateau had employed a small full time crew at the facility.⁷⁵ In re-staffing the Castle Gate plant, Cyprus Amax did not recognize the job rights of Amax's UMWA-represented employees. When confronted by the UMWA, the company asserted that Amax's Castle Gate employees did not have recall rights because the property was owned by Cyprus Amax subsidiary Cyprus Plateau, and that Article I successorship requirements did not apply because the plant was shut down at the time of the transfer.⁷⁶ The anatomy of this transaction provides an interesting case study into the use of the corporate structure to evade contractual liability. Although Cyprus Amax maintains that this transaction occurred between separate entities, the companies are in fact a conglomerate governed by an overlapping directorship and managed through a highly integrated, centralized decision making process.⁷⁷

The company asserts that because the preparation plant was not actively producing coal, it was not an "operation" under the terms of Article I's successorship clause, and thus no contract rights attached to Castle Gate. The proper interpretation of the term "operation" in the NBCWA has a long litigation history in which companies have argued that a facility must be actively engaged in the production of coal in order to be considered an operation, and the Union has argued that an operation covered by the contract, even if shutdown, continues to be subject to Article I's requirements.⁷⁸ Setting aside the merits of Cyprus Amax's

⁷⁴ Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 31, *United Mine Workers of America v. Cyprus Amax Coal*, Civ. No. 97-Z-34 (D. Colo. filed May 16, 1996).

⁷⁵ *Id.* at 34.

⁷⁶ Complaint at ¶ 56, *United Mine Workers of America v. Cyprus Amax Coal*, Civ. No. 97-Z-34.

⁷⁷ Plaintiff's Memorandum in Opposition to Defendant's Summary Judgment Motion at 17, *United Mine Workers of America v. Cyprus Amax Coal*, Civ. No. 97-Z-34.

⁷⁸ The definition of "operation" has been litigated in a number of court cases, with varied results. *See, e.g.*, *UMWA v. Kitt Energy Corp.*, Civ. No. 87-822 (W.D. Pa. 1987); *UMWA v. U.S. Steel Mining Co.*, 636 F. Supp 151 (D. Utah 1986); *International Union, UMWA v. Eastover Mining Co.*, 603 F. Supp. 1038 (W.D. Va. 1985); *UMWA v. North Am. Coal Corp.*, Civ. No. C-2-79-242 (S.D. Ohio 1979).

position in a more typical arms-length transaction, one is immediately confronted with the troubling fact that because of the intercorporate nature of the transaction, and Cyprus Amax's continued accrual of profits from the operation of the plant by one subsidiary rather than the other, the loss to the Castle Gate workers stands in particularly sharp contrast to the companies' gain.

One can imagine the opportunities for companies in other industries with less comprehensive contractual protections than the UMWA to shed contractual obligations at shutdown facilities in a similar fashion. Given the current state of merger activity, such shuffling of holdings could severely hamper a labor union's ability to negotiate a collective bargaining agreement for workers in fields where layoffs and shutdowns are a reality of the industry. More troubling is the opportunity for strategic behavior by corporations that shut down operations for the express purpose of transferring work to a related non-union company. The next Part deals with just that problem in the context of double-breasting.⁷⁹

IV. DOUBLE-BREASTING

Although the UMWA successfully negotiated a proactive successorship clause in the NBCWA of 1974 that protected the continuing employment rights of its members⁸⁰ in the event their mine was sold, miners still found themselves being displaced as their employers shifted production arrangements from signatory employer mine-operators to leased-mine or subcontracting arrangements. In such cases, the signatory employer often decreased or ceased coal production at its wholly owned mines, causing massive layoffs, and began "purchasing" coal mined from its own reserves by nonsignatory lessees or subcontractors. Thus, it avoided high union labor costs and was able to reap higher profits from the very same coal.

To address the loss of jobs caused by this shift of both coal production and labor away from the unionized mine to non-union operations, the Union in 1984 negotiated a work preservation clause requiring the signatory company to secure from the leasing or subcontracting company its agreement to offer all available classified-type employment to bargaining unit members.⁸¹ This work preservation language ensured that where signatory operations, which in some cases had been

⁷⁹ Double-breasting is the practice of operating two companies, one union and one non-union, to drain away the unionized employees into the non-union firm in an effort to reduce labor costs and enhance management control.

⁸⁰ Despite the use of the term "members," it is important to note that all bargaining unit members are covered by the contract's work preservation provisions, regardless of their status as Union members.

⁸¹ NBCWA of 1984, Article I(h).

shut down for years, were subcontracted to third parties, the miners would be recalled to work. If the signatory company simply leased out coal reserves, rather than the mining operation itself, the bargaining unit members would still be protected against the dislocation that could occur as coal production shifted.⁸² These provisions provided employment stability not only to the Union's members, but also to the communities whose day-to-day commerce depend on the miners' financial stability to fend off the ripple effect that had historically resulted in boom and bust economic cycles in coal communities.

In the latter half of the 1980s, the coal fields saw an increasing number of signatory coal companies opening non-union mines themselves rather than through subcontracting or leasing, in effect engaging in double-breasting. Where a signatory company had historically depended on coal production from its signatory mines to fill its coal contracts, it now could draw from both its UMWA-represented operations and non-union operations to meet its coal sale commitments. The signatory company could shift production from its union mines to its non-union mines, resulting in the shutdown of the union mines or their slower but inevitable demise. As signatory companies directed new investment away from union operations and into non-union operations, the unemployment rate for union miners climbed ever upward.⁸³ The Union addressed this continuing assault on its members in its negotiations with the Bituminous Coal Operator's Association ("BCOA") for the 1988 NBCWA.

When negotiations finally concluded in February, 1988, the BCOA had agreed that the signatory companies would offer three out of five jobs of a classified nature to its bargaining unit employees for jobs at their non-signatory mining operations.⁸⁴ While it did not protect the members against displacement from UMWA-represented jobs, it at least provided those displaced members with the

⁸² Article I(h)(2) of the NBCWA reads in part that [l]easing, subleasing or licensing out of coal mining operations covered by this Agreement shall be permitted where the lessee-licensee agrees that all offers of employment by such lessee-licensee shall first be made (on the basis of mine seniority) to the Employer's classified and laid-off Employees NBCWA of 1984, Article I(h). This language, slightly modified to require written notice to the UMWA of such leasing arrangements, is now in Article II(B) of the current (1998) NBCWA.

⁸³ For information on climbing unemployment of union miners, see COAL COMMISSION REPORT, A REPORT TO THE SECRETARY OF LABOR AND THE AMERICAN PEOPLE 11-12 (Nov. 1990) [hereinafter COAL COMM. RPT.].

⁸⁴ See NBCWA of 1988 at Art. II(A).

opportunity to find work at the non-union mines to which their companies had shifted coal production and labor.⁸⁵

While the ink dried on the signatory companies' agreement to provide job opportunities at their non-union mines, they devised a new scheme to avoid the application of these work preservation provisions. During the term of the 1988 NBCWA, the Union saw new non-union mines opened not by signatory companies, who would be subject to the three-out-five job offer program, but by their parent companies or related subsidiary companies. Coal lands that had been held directly by signatory companies were shifted to newly-created land-holding companies, and then transferred to newly-created corporate entities for development of new mines. Consequently, when the 1988 contract expired and negotiations for the successor collective bargaining agreement began, the Union's top priority was to address this corporate restructuring that had allowed signatory companies to evade their promises under Article II of the NBCWA. Negotiations were difficult and the UMWA engaged in a national strike against BCOA members companies for seven months.⁸⁶ Only after the appointment of former Secretary of Labor William Usery as mediator were the parties able to make progress toward an agreement.⁸⁷ Negotiations finally concluded with the Bituminous Coal Operators Association's agreement that, as limited agents of their parent companies, they would agree that signatories' parent companies would provide the same three-out-of-five job offer program at the nonsignatory mines of their other subsidiaries and related companies through a new agreement, the Memorandum of Understanding Regarding Job Opportunities ("Jobs MOU").⁸⁸

As described above, Article II of the NBCWA provides that if an employer who is signatory to the contract opens or acquires an operation not covered by the agreement, three out of five new hires will be from either the employer's laid-off miners or its actively employed miners who have indicated an interest in transfer

⁸⁵ See *id.*

⁸⁶ Erle Norton, *Miner's Union, Coal Producers Reach Labor Accord That Boosts Job Security*, WALL ST. J., Dec. 8, 1993, at 5A.

⁸⁷ *Usery's Persistence Pays Off*, CHARLESTON GAZETTE, Dec. 16, 1993 at 4A.

⁸⁸ The Jobs MOU reads in part that BCOA members shall act as the limited agent for their nonsignatory parents and its nonsignatory coal mining subsidiaries. Jobs MOU Preamble. The companies promised that three out of five "job opportunities for work of a classified nature shall be at existing, new, or newly acquired nonsignatory bituminous coal mining operations of the nonsignatory Companies." Jobs MOU at ¶ 1.

to the new operation.⁸⁹ This provision also applies to lessees or licensees of the signatory employer, requiring lessees to hire all of its classified workers from the panel system.⁹⁰ The Jobs MOU extends the three-out-of-five hiring provisions of Article II to the signatories' parent companies and to any of the parent's nonsignatory at the bituminous coal mining operations at which the nonsignatory company has fifty percent or more ownership or at which it has the exclusive right to control hiring. The purpose of the Jobs MOU was to close the gap in Article II's coverage that had been created by the corporate restructuring undertaken during the term of the 1984 NBCWA.

Article II and the Jobs MOU have operated to provide some miners with work, even though it is not under a UMWA contract. However, disputes under these two contractual provisions indicate that despite employers' promises and the clear intent of these provisions, some companies will engage in transactions and create business structures that, though they arguably comply with the letter of the agreement, are structured with the intent of avoiding the job promises of Article II and the Jobs MOU.

One recent case heard before the Jobs Monitor⁹¹ illustrates an example of how by subordinating function to formality, companies may still attempt to evade their promises to hire laid off bargaining unit employees. In mid-August, 1994, just a few months after signing the Jobs MOU, Peabody Holding Company, the nonsignatory parent of Peabody Coal Company, formed a new nonsignatory company, Thoroughbred.⁹² Through a series of intra-corporate transactions, Peabody Holding transferred its ownership in coal holdings in southern Indiana that had historically been mined by a UMWA-represented bargaining unit to this nonsignatory subsidiary.⁹³ At the time the Jobs MOU was entered into, these coal lands were held by a Peabody Holding subsidiary, Premier Coal Company, and Peabody Holding had expressly recognized, in communications with the Union, that any mining operation created on those reserves would be subject to the Jobs MOU. Nevertheless, by August, 1994, the permit to those reserves that were held by

⁸⁹ NBCWA of 1988, Article II.

⁹⁰ *Id.*

⁹¹ The Jobs Monitor is the designated national arbitrator of disputes that arise under Article II and the MOU.

⁹² See *In re: Black Beauty Coal Company/The Pittsburgh & Midway Coal Company/Thoroughbred (Peabody), L.C.C. Transaction at 6 (June 1, 1997)* (arbitration before the UMWA-BCOA Labor Management Policy Committee, William J. Usery, Chair) (on file with authors).

⁹³ *Id.* at 7.

Premier were transferred to Thoroughbred. Thoroughbred then contributed these coal lands in exchange for a one-third ownership in a newly formed venture with the Pittsburgh & Midway Coal Company, another UMWA signatory company subject to both Article II and the Jobs MOU, and a nonsignatory company, Black Beauty Resources.⁹⁴ The right to hire was delegated, by agreement of the new partnership, to a management committee.⁹⁵ Thus, by converting its interest in these coal reserves into a one-third stake in a partnership – reserves in which it had a 100% interest – Peabody was trying to shed the promise of jobs it had made to its unemployed miners while still reaping all its projected profits from the coal.

Within days after learning of the restructuring through company press releases, the Union brought the dispute before the Jobs Monitor, asserting that the companies had wrongfully restructured for the purpose of avoiding the application of the Jobs MOU. On June 1, 1997, Usery issued an arbitration award finding Peabody Holding Company liable for restructuring its ownership of its coal reserves and resulting mining operation to evade the application of the Jobs MOU. The matter is presently in litigation in the United States District Court for the Southern District of Indiana.⁹⁶

The Peabody case illustrates the ease with which coal companies will expressly promise the Union, in an effort to reach a contract and end a strike, that these pivotal concerns over the erosion of union work will be met with job opportunities at the new non-union mining operations, only to then restructure themselves so that their new mining operations will not be covered by those promises. From the perspective of an out-of-work miner, these sorts of transactions can be seen as nothing more than slick, calculated attempts by companies to avoid their contractual promises so they can widen profit margins at the expense of their loyal employees.

V. CONTRACTING OUT

Another increasingly common strategy used by coal companies to insulate themselves from employee-related liabilities is subcontracting. In this strategy,

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Thoroughbred, L.C.C. v. UMWA*, Civ. No. EV 97-99-C-D/H (S.D. Ind. 1997); *Peabody Holding Co., Inc. v. UMWA*, Civ. No. EV-97-155-C-H/H (S.D. Ind. 1997).

sometimes known as the “Massey Doctrine,”⁹⁷ coal companies limit their own exposure and maximize profits by mining larger, more profitable seams of coal themselves, and contracting out smaller, thinner seams (which are more expensive to mine) to independent operators. As one commentator has explained, “Contracting is a one-sided relationship. Big companies own the coal. They sell the coal. And they decide how much they will pay contractors, who actually mine the coal.”⁹⁸ Even the BCOA has admitted that such arrangements are designed to avoid paying employee benefits: “Look around in corporate America at what people are doing to avoid healthcare and other payments. They’re contracting out work. That’s the whole point of using contractors.”⁹⁹

UMWA Local 7555 member Christopher Hurley has experienced firsthand the impact of contract mining, both as an employee and as an ex-employee. He started working for Island Creek in 1977, was laid off in 1981, and since then has worked for seventeen different contractors at twenty-five different mines in the Elk Creek/Coal Mountain area.¹⁰⁰ Most recently, he was caught up in a contractor failure when Shield Mining, Inc., his employer, lost its contract with Island Creek and abruptly shut down in March, 1997. The company had been in business less than a year, and had never fully paid its wage bond, its workers compensation insurance premiums, and its health insurance.¹⁰¹ In fact, it had relied on Island Creek to finance and loan it equipment such as a continuous miner, belt heads, and belt lines as well as a series of advances in order to meet payroll and other operating expenses. When disputes arose over repayment terms, tonnage rates and reject

⁹⁷ See Paul Nyden, *Who Owes?*, SUNDAY GAZETTE-MAIL, October 1, 1995 at 1B [hereinafter *Who Owes?*]; Paul Nyden, *Communities Form, Fade with Coal Ventures*, CHARLESTON GAZETTE, Nov. 8, 1993, at 1, 6A [hereinafter *Communities*].

⁹⁸ *Communities*, *supra* note 97; see also Paul Nyden, *Contracting Out: What Price?*, 105 UNITED MINE WORKERS JOURNAL 4-9 (July 1994) [hereinafter *Contracting Out*]. The *Gazette* article was the first in a series of articles published in the *Charleston Gazette* between November, 1993 and January, 1994, entitled *Coalfield Contracts: Mining at What Price?*, which examined the trend toward shifting liability and responsibility by contracting out coal mining work. The series was excerpted in the *UMWA Journal* as Paul Nyden, *Contracting Out: What Price?*, 105 *United Mine Workers Journal* 4-9 (July 1994). Unless noted, all references herein are to the *Journal* version rather than to the original.

⁹⁹ *Contracting Out*, *supra* note 98, at 5 (quoting BCOA spokesman Thomas F. Hoffman).

¹⁰⁰ Deposition of Christopher Hurley at 6-8, *Island Creek v. UMWA*, Civ. Act. No. 2:97-0268 (S.D. W. Va. filed Mar. 19, 1994) (deposition dated Oct. 14, 1997) (on file with authors).

¹⁰¹ Deposition of Patrick Workman at 98-118, *Island Creek*, Civ. Act. No. 2:97-0268 (deposition dated Oct. 16, 1997) (on file with authors); see also Letter from Daniel L. Stickler (March 25, 1997) (on file with authors); Affidavit of Joe Berry (March 18, 1997) (on file with authors).

rates, Island Creek simply pulled the plug and ejected Shield from the property. Even more problematic, Island Creek refused to pay over \$80,000 to Shield for its last coal shipment, which in turn meant that Shield was unable to pay Hurley and his co-workers their final paychecks.¹⁰²

When the workers protested on the road leading to the mine, Island Creek expelled five of the protestors from its panel, including Hurley.¹⁰³ It also sued the Local, District, and International Unions in both federal and state courts, alleging a variety of claims, chiefly that the protest constituted a secondary boycott, and that the union had somehow tortiously interfered with its business.¹⁰⁴ For its part, Shield filed for bankruptcy, listing its debts as over a million dollars, of which it owed \$555,000 to Island Creek and another \$127,511 to its hourly workers.¹⁰⁵ In turn, the employees filed a mechanics lien and a state court action against Island Creek under West Virginia's "prime contractor"¹⁰⁶ and mechanic's lien statutes,¹⁰⁷ claiming unpaid wages, liquidated damages, benefits, and unpaid union dues and

¹⁰² Deposition of Patrick Workman at 98-118, *Island Creek*, Civ. Act. No. 2:97-0268; *see also* Stickler, *supra* note 101; Complaint and Motion to Dismiss, *Island Creek*, No.2:97-0268 (secondary boycott case); Amended Counterclaim, *Island Creek Coal Co. v. District 17*, No. 97-C-96-O (Logan County Cir. Ct. filed Oct. 28, 1997) (action seeking injunction and damages for tortious interference and counterclaim for wages and damages and to enforce mechanics lien). Island Creek also filed NLRB charges against the Union, N.L.R.B. Case No. 9-CC-1589, which were dismissed. *See* Stickler, *supra* note 101.

¹⁰³ *See* Memorandum Opinion, *UMWA District 17 v. Island Creek*, No. 2:97-0690, slip. op. at 4-5 (S.D. W. Va. Feb. 6, 1998). All five employees, including Hurley, filed grievances challenging the expulsions, and three were reinstated in decisions by two separate arbitrators. However, a third arbitrator disagreed with the other two and refused to reinstate Hurley. *See id.* As a result, UMWA District 17 filed yet another action in federal court, this time to vacate the arbitration decision, which it lost, and which is now on appeal. *See id.* (Notice Of Appeal filed on February 6, 1998). For Hurley, this loss may well result in the loss of his ability to earn a UMWA pension and health card, since he may well never be rehired by a signatory company unless he is reinstated to Island Creek's panel.

¹⁰⁴ Complaint and Motion to Dismiss, *Island Creek v. UMWA International, District 17*, No.2:97-0268; Amended Counterclaim, *Island Creek Coal Co. v. District 17*, No. 97-C-96-O; *In Re Shield Mining, Inc.*, No. 97-20411 (Bankr. S.D. W. Va. filed March 22, 1997) (summary of bankruptcy schedules).

¹⁰⁵ *In Re Shield Mining, Inc.*, No. 97-2041.

¹⁰⁶ *See* W. VA. CODE § 21-5-7 (1996).

¹⁰⁷ *See* W. VA. CODE § 38-2-32 (1997).

assessments.¹⁰⁸ The wage claims totaled over \$314,000,¹⁰⁹ while the amount posted as a wage bond was only \$59,300.¹¹⁰

Sadly, Hurley had been through this more than once. His previous employer, another Island Creek contract miner on the same property named Elk Creek Blue Eagle, had also gone out of business.¹¹¹ Mutual Mining, Inc. ("Mutual"), yet another contractor who had operated a surface mine on Island Creek's property from 1988, went belly-up in 1995 under very similar circumstances. At the time of its shutdown, Mutual owed its workers thousands of dollars in wages, health insurance payments, union dues and assessments, grievance settlements, and other ordered by the NLRB.¹¹² UMWA District 17 sued it and its lessors, Island Creek Coal Company, Island Creek Corporation, Consol, Inc., Laurel Run Mining Company, and three individual owners, and won a summary judgment that all four corporate defendants were liable for the wages, fringe benefits, liquidated damages, prejudgement interest, costs, and attorney fees.¹¹³

Although the limited legal victories in these cases may be unusual, Hurley's experiences are not. Contract mining arrangements accounted for over forty-two percent of all coal mined in southern West Virginia and surrounding regions in 1991.¹¹⁴ Island Creek and A.T. Massey are by far the heaviest subcontractors,

¹⁰⁸ Amended Counterclaim, *Island Creek Coal Co. v. District 17*, No. 97-C-96-O.

¹⁰⁹ That sum, attached to a Proof of Claim, is based on the plaintiff's mechanic's lien and a Division of Labor audit attached thereto. See *Mechanics Lien, In Re Shield Mining, Inc.*, No 97-20411.

¹¹⁰ *Id.*; Stickler, *supra* note 101.

¹¹¹ Deposition of Christopher Hurley at 6-8, *Island Creek v. UMWA*, No. 2:97-0268 (S.D. W. Va. filed Mar. 19, 1994) (deposition dated Oct. 14, 1997) (on file with authors).

¹¹² See, e.g., Decision and Order, *Taylor v. Mutual Mining, Inc.*, No. 95-C-409P (Logan County Cir. Ct. Nov. 14, 1997); *Mutual Mining, Inc.*, 322 N.L.R.B. 432 (1996) (ordering reinstatement and back pay dating back to 1992, as well as health insurance, union dues, and grievance payments); *Dotson v. Mutual Mining, Inc.*, Nos. 93-C-409, 96-C-71 (Logan County Cir. Ct. July 15, 1997) (awarding trucker over \$20,000 in wages and damages against Island Creek). However, it could not be confirmed whether and when any of these employees actually received the damages awarded.

¹¹³ *Taylor v. Mutual Mining, Inc.*, No. 95-C-409P (awarding summary judgment to plaintiff employees); *Dotson*, Nos. 93-C-409, 96-C-71 (same).

¹¹⁴ Paul Nyden, *Living Up to Coal Contracts*, SUNDAY GAZETTE-MAIL, Nov. 7, 1993, at 16A; see also *Contracting Out*, *supra* note 98, at 5.

although Arch has been increasing its reliance on them as well in recent years.¹¹⁵ Four years ago, the *Charleston Gazette* reported that Island Creek and Massey had alone hired more than 725 different contractors in Appalachia in the last two decades.¹¹⁶ Massey itself had used nearly 500 contractors since 1986, including 247 in West Virginia and 176 in Kentucky, while Island Creek hired at least 250 contractors, including 177 in West Virginia and eighty-four in Kentucky.¹¹⁷ In 1993 Massey was employing subcontractors at twenty-eight mines, and operating only twenty-two mines with its own labor.¹¹⁸

In the typical scenario, a large coal company owns all coal rights, permits, and access to the mine, and requires that all the coal produced be sold back to it at a set price, and cleaned at its own preparation plant.¹¹⁹ The coal owner/lessor provides all necessary mining plans, engineering and reclamation services (for which it may charge, directly or indirectly). It also maintains and provides the portal, bathhouse, electricity, and property improvements, as well as all coal leases, access rights, and permits. It often provides all or some of the equipment to be used by the contractor and/or installed in the mine, either loaned, sold or financed. If the owner/lessor is itself a union signatory, it may require that the contractor hire from a "panel" of UMWA miners laid off by itself or by a previous contractor, and

¹¹⁵ Nyden, *supra* note 114.

¹¹⁶ *Contracting Out*, *supra* note 98, at 6.

¹¹⁷ *Id.*

¹¹⁸ *Id.* Since then, these numbers have apparently decreased, according to UMWA Research Director Michael Buckner. See COAL DATA RESEARCH SERVICE/RESOURCE DATA INTERNATIONAL, INC., SUMMARY OF DATA (on file with authors).

¹¹⁹ *Contracting Out*, *supra* note 98, at 7; Nyden, *supra* note 114 (listing items); see also Mining Agreement Between Island Creek and Shield Mining, Inc. (Feb. 15, 1996) (on file with author). The Mining Agreement cited above is a fairly typical example. It provides that, *inter alia*, "Contractor shall be responsible in all respects for the hiring, employment and working conditions of all individuals engaged to carry on the activities and operations herein contemplated." *Id.* at 3. Shield also promised to hire from Island Creek's panel, to pay union-scale wages and benefits, to maintain workers compensation and other insurance, to post a wage bond, pay all pension and other contributions, to comply with all environmental, permitting, safety and reclamation requirements, to pay all employee-related fees and taxes, and to "hold harmless, indemnify and defend" Island Creek for any and all liability, grievances, penalties, or other costs it may be ordered to pay. *Id.* Any failure to perform any of these obligations is grounds for termination. See *id.* at 3, 4, 13, 16, 18, 20, 21-23.

demand that it pay Union-scale wages and benefits.¹²⁰ At the same time, the owner/lessor retains the rights to reduce or adjust the price it will pay per ton of raw or clean coal, to determine the reject rate, to control how, when, and where coal is to be delivered, and even to cancel the entire arrangement at will. In sum, while such arrangements are normally considered arms' length contracts between equals, the reality in the coal fields is that the lessor/landowner/coal purchaser obviously retains much more leverage and bears much less risk than the small mine operator.

The risks the coal owners and/or lessors seek to transfer by these arrangements include numerous obligations toward the workers who actually mine the coal, as well as to the UMWA and the Funds¹²¹ and to state and federal regulators. As one commentator explained, "Depending on specific circumstances, a large company can shift between \$3 and \$5 [in costs] for each ton of coal mined from its shoulders onto the small mine operator or society at large."¹²² Operators often seek to "offload" contractual and statutory obligations ranging from wages and vacation payments, health insurance premiums, and pension contributions to statutory obligations such as workers compensation taxes, unemployment and Social Security contributions, federal and state black lung liabilities, hearing loss compensation premiums, health and safety requirements, and reclamation costs.¹²³

Finally, the scheme can relieve the large operator of long-term obligations as well. For example, since 1987, Island Creek's contractors have been forced to hire from Island Creek's own "panels"¹²⁴ of laid off workers, and to pay union-scale wages and benefits, under various agreements with the UMWA.¹²⁵ As a result, those contractors then become the workers' "last signatory operator," under both

¹²⁰ See, e.g., NBCWA of 1993 Articles II, IV, and XX (on file with authors). For example, the NBCWA requires that signatory employers provide medical insurance for all active employees, a year's additional coverage for laid off employees with seniority, and lifetime coverage for retirees. Article II also requires that operators require their contractors to offer these same benefits. *Id.*

¹²¹ See COAL COMM. RPT., *supra* note 83, at 15-29.

¹²² Nyden, *supra* note 98, at 6-7 (quoting environmental attorney L. Thomas Galloway).

¹²³ *Id.* at 7; Nyden, *supra* note 114 (listing items).

¹²⁴ The "panels" are the company's recall lists under the NBCWA, Article XVII.

¹²⁵ See Paul Nyden, *Joint Contract Mining Venture Yields Legal Problems*, CHARLESTON GAZETTE, Nov. 9, 1993, at 1A (explaining history of UMWA-Island Creek Employment and Economic Security Pact ("EESP") of 1987). The EESP, like the JOBS MOU discussed in Part III above, was intended to increase employment for union workers and bar Island Creek from replacing them with non-union contractors paying substandard wages and benefits, as in the *Black Beauty* case outlined above. See *supra* notes 92-96 and accompanying text.

the NBCWA and the Coal Act,¹²⁶ and must provide the worker (and her or his spouse) with lifetime health insurance when the worker retires, and/or must pay substantial withdrawal liability and/or Coal Act premiums to the funds. The ironic result of such provisions is that the small operator thus succeeds to health care obligations that might otherwise have remained with Island Creek. As a result, when subcontractor Jagged Coal Inc. hired UMWA member Wayne Williamson, it relieved Island Creek of its duties as Williamson's "last signatory employer" and shifted responsibility for his lifetime health care costs to Jagged. Williamson explained, "When I worked one shift for Jagged, that got Island Creek out of giving me a hospital card, even though I worked for them for 19 years and I was already injured. When companies get a man in his 40s, they know he's not going to last much longer, maybe 15 years. So they get him off on a contractor."¹²⁷

The bills associated with operating a coal mine can be overwhelming, especially for a small operator. One indicator of these costs is the sheer number of West Virginia contractors who have filed for bankruptcy or simply left town and defaulted on their financial obligations. The attrition rate for these contractors is staggering. Of those identified by the *Charleston Gazette* in 1993,¹²⁸ more than eighty percent had disappeared and seventy-five had filed for bankruptcy, including fifty-two of the sixty companies who had mined coal for Island Creek on and around Elk Creek and Holden, West Virginia.¹²⁹ In so doing, they collectively left behind over \$200 million in unpaid debts: more than thirty million dollars owed to the West Virginia Workers' Compensation Fund, at least thirty million dollars to the UMWA Health and Retirement Funds, nearly eight million dollars in state environmental fines, \$665,000 in safety fines, and "tens of millions of dollars in unpaid taxes."¹³⁰ Since that time, of course, some of those monies may have been collected, but even more contractors have gone under.¹³¹ For example, Paul Nyden

¹²⁶ See generally 29 U.S.C. §§ 9701-22 (1994).

¹²⁷ See Nyden, *supra* note 125.

¹²⁸ See *Communities*, *supra* note 97.

¹²⁹ See *id.* at 6A.

¹³⁰ Nyden, *supra* note 114, at 16A.

¹³¹ For example, Eagle Delta, whose owner Ben Beverly was featured in Nyden's series in the *Gazette*, had been operating under Chapter 11 protection since September, 1992. See Nyden, *supra* note 97, at 6A. According to the *Gazette* and the company's own bankruptcy filings, Eagle Delta owed \$2.2 million to the UMWA Funds and \$727,000 to the West Virginia Workers Compensation Fund when it filed for Chapter 11. Its efforts at reorganization ultimately failed and its bankruptcy case was converted to Chapter Seven liquidation. The trustees' final report listed its available cash as \$5,370.00,

reported in 1995 that 1,200 scofflaw contractors had gone out of business, owing at least twenty million dollars to the state Workers Compensation Fund.¹³² As the *Sunday Gazette-Mail* has stated, "It should be a crime when . . . companies dodge their responsibilities by shifting them onto small contractors. Such practices cost taxpayers and more responsible businesses millions of dollars."¹³³ By 1997, not much had changed: encouraging the state to sue more such scofflaws, the *Gazette* commented that "Big coal owners who shift their obligations onto fly-by-night contractors have cost West Virginia hundreds of millions of dollars in Workers' Comp premiums, unpaid health benefits, and environmental costs. . . . It's time to halt this charade that leaves others holding the bag."¹³⁴

Even more disturbing than the enormous bills which these small contractors leave behind are the allegations that their lessors not only acquiesced in their defaults, but at least in some cases, pressured or encouraged them to file for bankruptcy and walk away from their obligations. Nyden reports that at least a dozen contractors have sued either Island Creek or Massey in the last six years, claiming breach of contract, price gouging, mismanagement, misrepresentation and fraud – such as the claim by Jagged Coal that "Island Creek's shifting of liability [for employee and retiree health care obligations] amounted to actual fraud."¹³⁵ Other suits have alleged that the companies advanced them large sums of money, kept them afloat for a year or two, then began "squeezing" them by reducing the prices paid for coal, refusing to pay for deliveries and claiming unreasonable "reject" rates and withholding their payments, often the only source of operating capital. For example, Nyden reviewed a three-foot-tall stack of bankruptcy

and its debts as over six million dollars. After five years of litigation, neither Eagle Delta's employees, the pension and health care funds, the state Workers' Compensation Fund, the Union, Blue Cross, or most other creditors received any of what they were owed, either from Eagle Delta itself or from Island Creek. Trustees Final Report and Proposed Distribution, In re Eagle Delta Corp., Inc., No. 92-20825 (Bankr. S.D. W. Va. Feb. 18, 1997) (on file with authors).

¹³² *Who Owes?*, *supra* note 97, at 1B. As Nyden reports, many of these contractors worked for Massey and other large companies, but it is unclear whether the state can force Massey to pay their debts. *Id.* at 1B, 4B. The Workers Compensation Fund did file a lawsuit in late 1996 against Island Creek and two other large coal companies in an effort to claim \$12.6 million that the contractors owed to the Fund. *Donors Owe Workers Comp Fund; Coal Operators Heavily Funded Underwood, Who Called off Suits*, CHARLESTON GAZETTE, Dec. 31, 1997 at 1C.

¹³³ Dan Radmacher, *Contract Deaths*, SUNDAY GAZETTE-MAIL, Jan. 2, 1994 at 4B (editorial).

¹³⁴ Dan Radmacher, *Contractors: Who Pays \$2.6 Million?*, CHARLESTON GAZETTE, June 6, 1997, at 4A (editorial).

¹³⁵ See Nyden, *supra* note 114, at 16A. Plaintiffs in these cases have included Rick Abraham, PayBra Mining, Jagged Coal Inc., ENI, Electric Fuels Corp., Shield Mining, and others. *Id.*

documents filed in a single case, involving Island Creek contractor Phillips Coal and seven affiliated companies. According to an accountant hired by the court, “the initial assets of Phillips Coal primarily consisted of advances made by Island Creek for start-up of the mine. . . . Most of the equipment used by Phillips Coal was either leased or otherwise provided by Island Creek.”¹³⁶ Phillips was more than twenty-five million dollars in debt when it filed for bankruptcy; needless to say, Island Creek was not responsible for any of those debts, even though it had cashed in all of Phillips’ coal.¹³⁷

This example suggests one reason for the high failure rate: Island Creek’s decision to contract with an undercapitalized, inexperienced contractor. Surely Island Creek could correct this error if it chose to do so. However, contractors like Phillips and others interviewed by Nyden believe that Island Creek intentionally forced them out of business so that it could sell its property to someone else and/or contract it out all over again.¹³⁸

Other cases reveal similar problems. For example, the creator of the infamous “Massey Doctrine” has admitted that Massey knows that the contract miners it hires on its least profitable reserves cannot survive:

[O]n poor, substandard coal reserves, it is impossible for a company to exist . . . they are certainly not going to make any money on it, . . . but there is still a lot of coal that is produced from these submarginal quality coal seams. . . . [A]ll that [we] can do is simply to purchase or to broker that coal if it’s to [our] advantage to do so.¹³⁹

Indeed, some observers, including some ex-Massey contractors, have claimed that the company deliberately recruits and creates small contractors to mine its marginal coal, advances them just enough money to open a small mine, then takes out its repayment (and equipment rental or lease payments, etc.) from the monthly amounts it would otherwise pay for the coal. After enough coal has been mined, and the

¹³⁶ Paul Nyden, *High Rolling Coal Success Story Ends in \$25.8 Million Bankruptcy*, CHARLESTON GAZETTE, Nov. 10, 1993 at 1A, 6A.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See, e.g., Transcript of Trial (vol. 14) at 43, Marrowbone Development Co. v. UMWA Int’l Union, Civ. No. 81-3332, (S.D. W. Va. Feb. 18-19, 1987) (testimony of E. Morgan Massey) (on file with authors); see also *Who Owes?*, *supra* note 97, at 1B (describing “Massey Coal Company Doctrine,” circa 1983, and “Massey Strategic and Operating Plan,” circa July 1990).

contractor begins to complain too loudly, Massey encourages it to declare bankruptcy or to simply stop doing business. Alternatively, Massey may simply cancel the contract and withhold any final payments due, leaving the contractor unable to make his last payroll, let alone pay his accumulated liabilities as outlined above.

In the end, Massey gets to sell the coal at a profit, keep its rights to any remaining reserves, and walk away with a tax write-off for a bad debt, free to start over again with a new contractor, or perhaps even the same one under a new name.¹⁴⁰ For his part, the middleman can also walk away from his obligations with impunity, because he owns neither the land, the equipment, the permit, nor any of the profits. Even the property owner disclaims responsibility for the illegal acts that were committed on his behalf. Instead, the ones who pay the price for these failures are taxpayers and legitimate businesses, as well as the miners, who may lose not only their wages but also their health insurance coverage, recall rights, and other benefits.¹⁴¹ Recovery of these debts is made even more difficult by the fact that the severed coal, the major asset produced by their labor, has been effectively sold off, beyond the reach of the workers and other claimants. Regardless of the legality of such arrangements, the bottom line is that employers should not be permitted to insulate themselves from the consequences of their enterprises, at the expense of the employees who make the enterprise productive. Since Biblical times, our laws have recognized that those who profit from a laborer's toil must pay the laborer his due.¹⁴²

In recent years, West Virginia courts have begun to agree. This basic right has been codified in the West Virginia Wage Payment and Collection Act ("WPCA").¹⁴³ The wage bond requirements, mechanics' lien provisions¹⁴⁴ "prime

¹⁴⁰ See, e.g., Grant Crandall, Memorandum of Law (Jan. 11, 1998); Susan Rosshirt, Memorandum of Law (Dec. 12, 1990) (detailing cases of Massey/Rum Creek contractors Rock Run Mining, TNT Mining, Guyan Resources, Dynasty Mine, and Berachach) (on file with authors).

¹⁴¹ And, of course, the state and federal governments, taxpayers, and the UMWA Funds, who are left holding the bag for workers compensation, unemployment, and retirement benefits respectively despite the ex-employer's failure to make contributions.

¹⁴²

Thou shall not oppress a hired servant that is poor and needy, whether he be of thy brethren, or of the strangers that are in thy land within thy gates. In the same day, thou shalt give him his hire, neither shall the sun go down upon it; for he is poor and setteth his heart upon it

Deuteronomy 24:14-15.

¹⁴³ For a detailed discussion of the act and these various provisions from an employer perspective, see Elizabeth D. Harter, *Paying the Price of Judicial Activism Under the Wage Payment and Collection Act*, 96 W. VA. L. REV. 743 (1993); see also *Rowe v. Grapevine Corp.*, 456 S.E.2d 1

contractor” liability¹⁴⁵ and damages provisions¹⁴⁶ developed under this Act have helped in some instances to tip the scale back toward holding the mine owner/lessor (a.k.a. the “parent” company) responsible for the obligations owed to coal miners and to government agencies when fly-by-night contractors disappear.

Taken as a whole, these provisions represent an attempt to prevent such abuses and hold owner-operators liable for violating contract workers’ rights, even if the “employer” itself has disappeared, filed for bankruptcy, or is otherwise judgment proof. Through a series of cases, the West Virginia Supreme Court of Appeals has adopted a broad, reality-based definition of employer under the WPCA which looks beyond contractual relationships to examine the actual relationship between the parties, the employee, and the third party.¹⁴⁷ As the West Virginia Supreme Court of Appeals has explained, the WPCA embodies “an important public policy” that

requires employers to pay the wages of working people who labor on their employer’s behalf. Wages have traditionally been afforded special protection under the law, in recognition of the fact that working people depend on wages to furnish the basic necessities of life to themselves and their families.¹⁴⁸

In brief, the WPCA accomplishes this by defining “employee” as “any person *suffered or permitted* to work by a person, firm or corporation,”¹⁴⁹ and “employer” as “any person, firm or corporation employing any employee.”¹⁵⁰ Thus, logically

(W. Va. 1995).

¹⁴⁴ See W. VA. CODE § 38-2-31 to -39 (1997); *Dunlap v. Hinkle*, 317 S.E.2d 508 (W. Va. 1984).

¹⁴⁵ See W. VA. CODE § 21-5-7 to -18 (1996); *Mullins v. Venable*, 297 S.E.2d 866 (W. Va. 1982); *Farley v. Zapata Coal Corp.*, 281 S.E.2d 238 (W. Va. 1981).

¹⁴⁶ See W. VA. CODE § 21-5-4(e) (1997); *see also, e.g., Farley*, 281 S.E.2d 238.

¹⁴⁷ See *Amick v. C & T Dev. Co., Inc.*, 416 S.E.2d 73 (W. Va. 1992); *Goodwin v. Willard*, 406 S.E.2d 752, 755 (W. Va. 1991); *Mullins*, 297 S.E.2d at 871; *Farley*, 281 S.E.2d 238.

¹⁴⁸ *Mullins*, 297 S.E.2d at 871 (citations omitted).

¹⁴⁹ W. VA. CODE § 21-5-1(b) (1996) (emphasis added).

¹⁵⁰ W. VA. CODE § 21-5-1(m) (1996).

restated, the statute broadens the definition of “employer” as anyone who “suffers or permits” anyone else to perform work.

In a series of landmark cases, West Virginia courts have held that this language can encompass not only the mine operator but its “parent” contractor, its individual owners, joint employers, and real property owner, and that each can be held liable for certain debts left by their coal mine subcontractors, depending on the facts of the case. One particularly powerful section of the WPCA is the “Prime Contractor Statute,”¹⁵¹ which was specifically written to ensure that those who are involved in and have profited from an enterprise are held responsible for paying employees’ wages. In pertinent part, it provides that

[w]hensoever any person, firm or corporation shall contract with another for the performance of any work which the prime contracting person has undertaken to perform for another, the prime contractor shall become civilly liable to employees engaged in the performance of work under such contract for the payment of wages and fringe benefits, exclusive of liquidated damages . . . to the extent that the employer of such employee fails to pay such wages and fringe benefits. . .¹⁵²

Therefore, depending on whether it played an active role in the enterprise and to the extent that it was the direct beneficiary of the plaintiffs labors, an owner and/or lessor may be held accountable for wages unpaid by its contractor, even though the two are nominally distinct corporate entities. Although the WPCA does not cover all unpaid debts and certainly does not fully correct the abuses cited above, it is better than no remedy at all. Nonetheless, it is one which most individual coal miners cannot afford to litigate on their own, without the help of a union or the state Labor Commissioner.¹⁵³ Thus, many subcontractors and their

¹⁵¹ See W. VA. CODE § 21-5-7 (1996).

¹⁵² *Id.* See, e.g., *Rowe v. Grapevine Corp.*, 456 S.E.2d 1 (W. Va. 1995) (holding that individual landowners are joint employers with “labor brokers” who recruit foreign workers to pick their crops); *Goodwin*, 406 S.E.2d at 755-57 (holding so-called “passive investor” personally liable as agent of defunct employer under WPCA because owner played an active role in the day-to-day operation of the mine). See also *Mullins*, 297 S.E.2d at 869 (holding corporate officers liable under WPCA); *Farley*, 281 S.E.2d 238 (allowing mechanic’s lien actions against mine owners under WPCA).

¹⁵³ The WPCA charges the Labor Commissioner with administration and enforcement of the Wage Act. See Harter, *supra* note 143, at 756-58.

prime contractors continue to go unpunished and many wages uncollected, simply because of the sheer difficulty of litigating the cases.¹⁵⁴

In contrast to the expansive definition of “employer” under West Virginia law, the NLRB has traditionally taken a much narrower view in interpreting the same term under the NLRA. Section 2(2) of that law defines the term “employer” as including “any person acting as an agent of an employer, directly or indirectly,” but does not further define the term.¹⁵⁵ As a result, the NLRB has developed (and federal courts have approved) a number of indicia to determine “employer” identity, focusing on whether the entity has the right of control over essential terms and conditions of employment, such as hiring, firing, supervision, wages, and hours.¹⁵⁶

However, instead of simply applying a single definition, as the West Virginia courts have done, the Board has developed at least six distinct tests or analytical frameworks for use in varying factual scenarios. Among these are “joint employers,”¹⁵⁷ “single employer,”¹⁵⁸ “alter ego,”¹⁵⁹ “piercing the corporate veil,”¹⁶⁰

¹⁵⁴ For example, remedies against a contractor, prime contractor, or landowner under the WPCA can only be enforced by individual employees, and only in state court, where contractors can easily avoid such lawsuits by filing for bankruptcy, which offers an “automatic stay” of all lawsuits. *See* 11 U.S.C. § 362 (1994). In addition, the West Virginia Department of Labor has its own auditing and administrative process. Meanwhile, unions can normally only sue (or be sued) to enforce collective bargaining agreements in *federal* court under Labor Management Relations Act, § 301, 29 U.S.C. § 185 (1988), and employers in turn can only sue unions in federal court under either Labor Management Relation Act, §§ 301 or 303, 29 U.S.C. §§ 185 or 187 (1988). Thus, the failure of a single contractor such as Shield can spawn a bewildering array of litigation, not to mention enormous legal fees, just to get payment for an individual worker. This is a system only a lawyer could love.

¹⁵⁵ *See* 29 U.S.C. § 152(2) (1988).

¹⁵⁶ This broad, functional definition was developed in a case involving security guards who had been “militarized” during World War II. *N.L.R.B. v. E.C. Atkins & Co.*, 331 U.S. 398 (1947). The question was whether the guards were still “employees” under the act, and if so who was their “employer.” The Atkins court acknowledged that the NLRA’s definition was vague, declaring that Congress had effectively granted wide discretion to the NLRB to define and apply the term. It then explained that

the terms “employer” and “employee” in [the NLRA] carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life, . . . [as well as] an appreciation of economic realities, [and] the more relevant economic and statutory considerations.

Id.

¹⁵⁷ For a clear and comprehensive explanation of these often overlapping standards and the subtle differences between alter egos, single employers, and joint employers, see Walter V. Siebert & N. Dawn Webber, *Joint Employer, Single Employer and Alter Ego*, *THE LABOR LAWYER* 873 (1987); *THE DEVELOPING LABOR LAW*, *supra* note 25, 738-46. Some useful suggestions for reforming and

and the “ally” doctrine,¹⁶¹ in addition to the “successorship” doctrine.¹⁶² Although each is applied somewhat differently, all of these tests essentially seek to evaluate whether and to what extent two nominally separate entities, such as a contract miner and its “parent” contractor,¹⁶³ actually function as a single entity, or whether they

collapsing some of these categories can be found in Craig Becker, *The Changing Workplace: Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1538-61 (1996); Larry Englestein, *Labor Law for Contract Employees: A Modest Reform Agenda*, 48 CONTEMP. ISSUES IN LAB. & EMP. L. 319, 333-42 (1996); Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 WISC. L. REV. 67, 101-05.

¹⁵⁸ See, e.g., *Pathology Institute*, 329 N.L.R.B. 1050, 1051 (1996). In *Pathology Institute*, the Board held that Alta Bates Medical Center and Corporation became a single employer with Pathology Institute when it purchased the hospital, and therefore must honor its preexisting collective bargaining agreement. *Id.* The Ninth Circuit affirmed, see *Alta Bates v. N.L.R.B.*, 116 F.3d 482 (9th Cir. 1997), and the Supreme Court declined the hospital’s petition for *certiorari*. See *Alta Bates v. N.L.R.B.*, 118 S. Ct. 625 (1997). Cf. *A.T. Massey Coal Co. v. U.M.W.A.*, 799 F.2d 142 (1986).

¹⁵⁹ See, e.g., *Mining Specialists, Inc.*, 314 N.L.R.B. 268 (1994). In *Mining Specialists*, the Board held that two putatively separate mining companies owned by the same family were alter egos of one another, and ordered the “new” company to honor the existing U.M.W.A. collective bargaining agreement. See *id.*; *Alkire v. N.L.R.B.*, 716 F.2d 1014 (4th Cir. 1983) (affirming decision that successor company was alter ego of predecessor).

¹⁶⁰ See, e.g., *White Oak Coal Co., Inc.*, 318 N.L.R.B. 732 (1995), *enforced N.L.R.B. v. White Oak Coal Co., Inc.*, 81 F.3d 150 (4th Cir. 1996); *Denart Coal Co., Inc.*, 315 N.L.R.B. 850 (1994), *enforced Vance v. N.L.R.B.*, 71 F.3d 486 (4th Cir. 1995) (holding both that two companies and sole proprietorship were single employers, and that owners were individually liable for unfair labor practices).

¹⁶¹ See, e.g., *Ramar Coal Co., Inc. v. United Mine Workers of America*, 814 F. Supp. 502 (W.D. Va. 1993).

¹⁶² See generally *supra* notes 63-79 and accompanying text and *supra* note 157.

¹⁶³ Some commentators refer to this party as the “user employer” or the “client” employer. These tests also apply to subsidiary-parent relationships, to “sister” subsidiaries or divisions of a single company, or two entirely separate companies, depending on the facts and issues involved. For example, the single employer question can arise in cases alleging breach of a collective bargaining agreement or the proper makeup of a bargaining unit in an NLRB election, while the “ally defense” is raised to defeat a claim of secondary boycott, and the alter ego issue often appears in both “veil-piercing”(liability) and successorship cases. See *Siebert & Webber, supra* note 157, at 874, 877.

should properly *both* be considered the employer of a certain employee and should be bound by each others' agreements.¹⁶⁴

N.L.R.B. v. E.C. Atkins & Company,¹⁶⁵ for example, represents an early application of what has since become known as the *Res-Care* or "government joint employer" doctrine.¹⁶⁶ There, the NLRB was faced with a situation where "the absolute power to hire and fire [and] the power to control all the activities of" a group of security guards had been assumed by the military during World War II.¹⁶⁷ Nevertheless, the Board declared that the factory owner retained key indicia of employer status, such as "the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked."¹⁶⁸ The Court approved the Board's finding that *Atkins* was in fact still the employer, observing that it had retained control over "the most important incidents of the employer-employees [sic] relationship – wages, hours and promotions."¹⁶⁹

By contrast, as we have seen, the Board has been reluctant to impose liability on modern owners/operators who consciously shift all these rights and responsibilities to a subcontractor in order to avoid being held liable to the

¹⁶⁴ See, e.g., *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *N.L.R.B. v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), *enforced* 259 N.L.R.B. 148 (1981); *Bracteal Hospital Med. Ctr.*, 313 N.L.R.B. 592 (1993); *Cf. Island Creek Coal Co.*, 279 N.L.R.B. 858 (1986).

¹⁶⁵ 331 U.S. 398 (1947).

¹⁶⁶ In *Res-Care, Inc.*, 280 N.L.R.B. 670, 673 (1986), a case involving a government contractor, the Board found that the employer was effectively precluded from engaging in meaningful collective bargaining because the government had occupied the field of setting wages and benefits through its cost-plus contract with *Res-Care*. Because the government employer was exempt from the NLRA, the Board declined to order any bargaining at all. *Id.* The case was overruled in part by *Management Training Corp.*, 317 N.L.R.B. 1355 (1995), which did permit bargaining by the private employer over those matters which it controls. Although the Board has never admitted as such, these "government employer" cases are logically indistinguishable from the so-called "joint employer" cases. Compare *Teledyne Econ. Dev. v. N.L.R.B.*, 108 F.3d 56 (4th Cir. 1997); and *Aramark Corp.*, 154 L.R.R.M. (BNA) 1169 (Feb. 28, 1997) with *Greyhound Corp.*, 153 N.L.R.B. 1488, 1494 (1965) (holding that cost-plus service contract effectively limited wage increases).

¹⁶⁷ *Atkins*, 331 U.S. at 413-14.

¹⁶⁸ *Id.* at 404.

¹⁶⁹ *Id.* at 413. For more modern applications of this test, see *Teledyne Econ. Dev.*, 108 F.3d 56; *Aramark Corp.*, 154 L.R.R.M. (BNA) 1169; *Management Training Corp.*, 317 N.L.R.B. 1355 (1995).

employees.¹⁷⁰ However, employer/contractors are not always successful. For example, in *N.L.R.B. v. Browning-Ferris Industries of Pennsylvania, Inc.*,¹⁷¹ the Third Circuit Court of Appeals affirmed the NLRB's finding that a refuse-hauling company and the broker that furnished its trucks and drivers were joint employers. The court "recognize[d] that the business entities involved are in fact separate but [found] that they share or co-determine those matters governing the essential terms and conditions of employment."¹⁷² The court explained that Browning-Ferris "retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer" to be held liable, noting that, among other factors, it set the truckers' starting times, directed their work, maintained logs, and effectively disciplined the workers.¹⁷³ Interestingly, the court rejected the company's argument that it could only be held liable if it was found to be a "single employer" with the labor broker. Although it agreed that the two companies were not fully integrated, it held that they were in fact joint employers, and upheld the NLRB's order that both employers must bargain with the union.¹⁷⁴

¹⁷⁰ See, e.g., *Island Creek Coal Co.*, 279 N.L.R.B. 858 (1986). In *Island Creek*, the Board refused to hold that Island Creek was a joint employer with its contractor, L & M. The Board declared that

[t]here is absolutely no evidence in the record to indicate that the normal functions of an employer, the hiring and firing, the processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leave of absences, were in any way ever performed by ICC. The record clearly reflects that these normal functions exclusively were performed by L & M.

Id. at 863-64. See also *G. Wes Ltd. Co.*, 309 N.L.R.B. 225, 226 (1992) (merely routine direction . . . [is] insufficient to support a joint employer finding"); *accord Chesapeake Foods, Inc.*, 287 N.L.R.B. 405 (1987).

¹⁷¹ 691 F.2d 1117 (3d Cir. 1982).

¹⁷² *Id.* at 1122-23. The NLRB later reaffirmed this test in *TLI, Inc.*, 271 N.L.R.B. 798 (1984).

¹⁷³ *Browning-Ferris*, 691 F.2d at 1123-25.

¹⁷⁴ *Id.* at 1123-24. As the court explained, the Supreme Court set forth the four-factor "single employer" test in *Radio and Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (considering the issue whether the radio station was part of larger broadcasting service; relevant factors were (1) interrelationship of operations, (2) centralized control of labor relations, (3) common management and (4) common ownership). See also *Parklane Hosiery Co., Inc.*, 203 N.L.R.B. 597, 612 (1973). By contrast, the single-factor "joint employer" test was first enunciated a year earlier in a case involving Greyhound's control over porters, janitors, and maids who worked for a contractor cleaning its bus station floors. See *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). On remand, the NLRB and the Fifth Circuit both found that Greyhound was indeed a joint employer with its subcontractor. See *Greyhound Corp.*, 153 N.L.R.B. 1488 (1965), *enforced N.L.R.B. v. Greyhound Corp.*, 368 F.2d 778, 780 (5th Cir. 1966).

Similarly, the NLRB has found joint employer liability to exist in contract coal mining situations, even where the contract purports to relieve the owner of all such liability, as in the West Virginia cases discussed above.¹⁷⁵ However, the NLRB has closely scrutinized both the industry and the particular facts involved in each case. In addition, it has been increasingly reluctant to hold owner/contractors liable absent a finding that they not only retained but actually exercised control over the day-to-day functioning of the enterprise.¹⁷⁶ For example, in *Metcalf*,¹⁷⁷ a representation election case in which the UMWA sought to represent a unit of all production and maintenance employees working in a mine, the NLRB found that Sundance, the mine operator/employer was a joint employer with Metcalf, its on-site contractor.¹⁷⁸ It based this finding on the facts that Sundance's mine manager had day-to-day responsibility for the overall operations of the mine, that he determined both where and how contractor Metcalf and his employees were to work each day, and that both companies employed similar types of employees and occasionally operated each others' equipment.¹⁷⁹ Furthermore, Sundance retained general managerial authority over the contractors' employees, even though Metcalf had his own direct supervisors.¹⁸⁰

Similarly, in *Jewell Smokeless*,¹⁸¹ the Union filed a representation petition naming both Jewell and 22 "subsidiaries" or contract operators mining coal on its property. Over Jewell's vehement objections and despite the fact that Jewell did not hire, fire, or direct the contractor's employees, the Board found that Jewell exercised "critical control" over the supplier's operations, and therefore that it is "at least the joint employer of these employees."¹⁸² As the Board explained,

¹⁷⁵ See *supra* notes 143-152 and accompanying text.

¹⁷⁶ Compare, e.g., Clayton B. Metcalf, 223 N.L.R.B. 642 (1976); Jewell Smokeless Coal Corp., 170 N.L.R.B. 392 (1968), *aff'd* 435 F.2d 1270 (4th Cir. 1970); and Norma Mining Corp., 101 N.L.R.B. 944 (1952), *enforced* 206 F.2d 38 (4th Cir. 1953) with Island Creek Coal Co., 279 N.L.R.B. 858, 863-64 (1986). This trend is also reflected outside the coal industry. See, e.g., Southern California Gas Co., 302 N.L.R.B. 456, 461 (1991).

¹⁷⁷ 223 N.L.R.B. 642 (1976).

¹⁷⁸ *Id.* at 643-44.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 170 N.L.R.B. 392 (1968).

¹⁸² *Id.* at 393.

Jewell exercises considerable control over the manner and means by which the operators extract the coal. The ownership of the coal as well as the mines, remains at all times vested in Jewell. The operators . . . must deliver the coal to Jewell's tipple at a rate which Jewell sets Finally, the entire arrangement . . . can be terminated at any time, without notice or cause Under the circumstances, and *considering the industrial realities of the coal mining industry*, the conclusion is inescapable that Jewell is a necessary party to meaningful collective bargaining and is at the least, 'an employer' of the employees¹⁸³

In a subsequent unfair labor practice case, the Fourth Circuit affirmed the NLRB's conclusion, holding that Jewell possessed sufficient indicia of control over the work of the employees of [a contractor] to be treated . . . as joint employer with [it].¹⁸⁴ Similar facts led to similar results as far back as 1952, when the Board found Norma Mining Corporation to be a joint employer with its lessees for purposes of enforcing an order to cease and desist from an unfair labor practice, another decision that the Fourth Circuit upheld.¹⁸⁵ The Board found that Norma's power to shut down the mines completely on twenty-four hours notice resulted in "the ultimate control over an employee – the power effectively to terminate his employment – [being] vested in Norma."¹⁸⁶

However, in recent years, the Board has backed away from this "ultimate control" standard, in the coal industry as well as elsewhere. For example, in 1986, it refused to hold Island Creek liable as a joint employer with its contractor, L & M, reasoning that

[t]here is absolutely no evidence in the record to indicate that the normal functions of an employer, the hiring and firing, the

¹⁸³ *Id.* (emphasis added).

¹⁸⁴ N.L.R.B. v. Jewell Smokeless Coal Corp., 435 F.2d 1270, 1271 (4th Cir. 1970). By contrast, later Boards have found that companies were joint employers for purposes of liability but applied a higher standards for representation cases. *See, e.g.*, U.S. Pipe & Foundry Co., 247 N.L.R.B. 139 (1980); *see also infra* notes 187-195 and accompanying text.

¹⁸⁵ Norma Mining Corp., 101 N.L.R.B. 944 (1952), *enforced* 206 F.2d 38 (4th Cir. 1953).

¹⁸⁶ *Id.* at 945. Of course, it should be noted that bringing, litigating, and winning such cases, while possible, is expensive and involves complex and highly contested discovery issues. Therefore, as a practical matter, sophisticated user employers have always been able to draft agreements that allow them ample power over contract workers yet protect them almost totally from NLRA obligations.

processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leave of absences, were in any way ever performed by [Island Creek]. The record clearly reflects that these normal functions exclusively were performed by L & M.¹⁸⁷

Of course, neither Jewell nor Norma Mining ever performed any of these functions either. Thus, it appears that the Reagan-era Board was clearly no longer as concerned about “industrial realities” as the 1968 Board had been.

Indeed, recent Boards have explicitly declared that they will no longer rely on a landowner’s retention of the right to control operations at its facilities, or even the right to expel a contractor’s employees, effectively terminating the employees, as evidence of joint-employer status.¹⁸⁸ Thus, the Board increasingly permits owners to reserve the right to dictate working conditions, including daily operations down to the last detail, as well as the ability to set wages through cost-plus contracts, and the ultimate authority to decide whether a worker can work on any given day or at all, yet refuses to recognize that they are, in effect acting as an employer under the NLRA. Thus, the Board’s joint employer jurisprudence bears increasingly little relationship to the realities of the modern coal industry, or to the so-called “contingent labor force” in general.¹⁸⁹

As a result, instead of a single election followed by joint collective bargaining negotiations and a single, coordinated contract governing all the workers in the mine, the NLRB’s strict adherence to its outdated rules has the effect of forcing the union into a never-ending series of disjointed, complex, uncoordinated elections, negotiations, contract terms, and enforcement problems. At best, this

¹⁸⁷ Island Creek Coal Co., 279 N.L.R.B. 858, 863-64 (1986). See also Martiki Coal Corp, 315 N.L.R.B. 476 (1994); Hobbs & Oberg Mining Co., 297 N.L.R.B. 575 (1990), enforced 940 F.2d 1538 (10th Cir. 1991), cert. denied, 503 U.S. 959 (1992).

¹⁸⁸ As it explained in *Southern California Gas*, “An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations.” *Southern California Gas*, 302 N.L.R.B. 456, 461 (1991); *Trinity Bldg. Maintenance Co.*, 312 N.L.R.B. 715 (1993).

¹⁸⁹ A recent UMWA organizing case illustrates an additional problem created by this dissonance. In *Mingo Logan Coal Co.*, Case No. 9-RC-16382 (N.L.R.B. Aug. 13, 1996) (decision on review and order) (on file with authors), the Union petitioned for an election in a single bargaining unit made up of miners employed by Mingo Logan itself and those employed by two of its subcontractors, all of whom worked side by side in the same coal mine. The NLRB refused, holding that under *Greenhoot, Inc.*, 205 N.L.R.B. 250, 251 (1973), multi-employer elections cannot be held without the consent of each joint employer.

leads to uncoordinated, duplicative and burdensome bargaining, while at worst, it fosters head-to-head competition between workers to agree to the lowest wages and fewest benefits, thus securing the most work for the least money and “winning” the race to the bottom. It is difficult to see how either scenario promotes the labor peace and efficiency that the NLRA was intended to foster,¹⁹⁰ except by making it more and more difficult to organize these workers. Fortunately, the Board is currently reconsidering the appropriateness of these rules, and may soon adopt standards which more accurately reflect economic realities.¹⁹¹

A final problem (or advantage, depending on the reader’s point of view) arising out of these subcontracting relationships is the insulation they offer the owner/lessor from labor disputes, such as picketing and strikes. Unlike the more recent cases interpreting the WPCA, the secondary boycott prohibitions found in Section 8(b) of the NLRA¹⁹² contain no exceptions recognizing the modern reality of the lessor/contractor relationship. Instead, they adhere to the traditional view that mine owners are assumed to have little or no control over their contractors’ employees, and thus the employees are barred from picketing or striking them over the contractor’s failure to honor obligations to the workers.¹⁹³

Section 8(b)(4) of the NLRA, *inter alia*, provides that it shall be an unfair labor practice for a union

(i) to induce an employee to refuse to work or (ii) to threaten, coerce or restrain any person, if an object of the behavior described in (i) or (ii) is ‘(B) forcing or requiring any person to cease doing business with any other person . . . Provided that nothing in this

¹⁹⁰ The goal of the NLRA is, among other things, to encourage “the friendly adjustment of industrial disputes,” and to “restor[e] equality of bargaining power between employers and employees.” National Labor Relations Act § 1, 29 U.S.C. § 151 (1988).

¹⁹¹ The Board recently announced that it would reconsider its *Greenhoot* rule, which requires employer consent for multi-employer bargaining units. See *Jeffboat Division, Am. Commercial and Marine Services Co., and TT&O Enterprises*, 9-UC-406 (N.L.R.B. filed Nov. 22, 1995) (Order Granting Petition for Review N.L.R.B. May 3, 1996), and *M.B. Sturgis, Inc.*, 14-RC-11572 (N.L.R.B. filed Nov. 3, 1995). In *Jeffboat*, the Teamsters had sought to include employees of a subcontractor, TT&O, to an existing bargaining unit of employees of the “main” employer. On October 4, 1996, the Board sought *amicus* briefs by interested parties on a number of specific legal questions, and it held oral argument on December 2, 1996. *Jeffboat Div., Am. Commercial and Marine Servs. Co., and TT&O Enterprises*, 9-UC-406, and *M.B. STURGIS, Inc.*, 14-RC-11572 (N.L.R.B. filed Nov. 3 1995) (notice of hearing issued October 4, 1996, order of argument dated December 2, 1996) (on file with authors).

¹⁹² See Labor Management Relations Act, § 303, 29 U.S.C. § 187 (1988).

¹⁹³ See, e.g., *Ramar Coal Co. v. UMWA*, 814 F. Supp 502 (W.D. Va. 1993).

clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.¹⁹⁴

The Supreme Court has defined “secondary boycott” as “pressure brought to bear not upon the employer who alone is a party [to a dispute], but upon some third party who has no concern in it, with the objective of forcing the third party to bring pressure on the employer to agree to the union’s demands.”¹⁹⁵ Furthermore, for purposes of this section (though not for all purposes), the Board has declared that separate corporate subsidiaries are separate persons, each entitled to protection from the labor disputes of the other, “if neither the subsidiary or the parent exercises actual or active, as opposed to merely potential, control over the day-to-day operations or labor relations of the other.”¹⁹⁶

Although it might seem obvious that a mine owner/lessor might have some concerns in disputes between their subcontractors and employees working in their mines, neither the NLRB nor the courts have been willing to make that leap. Instead, courts have often held that mine owner/operators are “neutral” or “secondary” employers, even where they are completely dependent on and in some cases intimately connected to the primary targets.¹⁹⁷ It is theoretically possible to defend charges of secondary activity where the union can prove that the secondary employer is so closely linked to the primary that it loses its neutral status, a theory known as the “ally doctrine,” but such cases are notoriously difficult to prove and win in the coal fields. The standard is whether the secondary employer is firmly allied in economic interest with the primary employer, and is often limited to situations where the secondary employer is so closely related and/or integrated with

¹⁹⁴ National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4) (1988), as summarized by then-Judge, now Justice Ruth Bader Ginsburg in *Production Workers Union of Chicago v. N.L.R.B.*, 793 F.2d 323, 330 (D.C. Cir 1986).

¹⁹⁵ *N.L.R.B. v. Operating Eng’n’s*, 400 U.S. 297, 303 (1971) (involving a strike against subcontractors in order to pressure a general contractor to execute a union contract); *see also* *National Woodwork Mfg. Ass’n v. N.L.R.B.*, 386 U.S. 612, 627 (1967); *Teamsters Local 560 (Curtin Matheson Scientific, Inc.)*, 248 N.L.R.B. 1212, 1213 (1980).

¹⁹⁶ *Los Angeles Newspaper Guild, Local 69 (Hearst Corp.)*, 185 N.L.R.B. 303, 304 (1970) (picketing of separate division of parent corporation was secondary); *cf. Teamsters Local 560 (Curtin Matheson Scientific, Inc.)*, 248 N.L.R.B. at 1214-15 (finding that the picketing of a corporate branch was lawful where parent retained final authority over collective bargaining).

¹⁹⁷ *See, e.g., Kinty v. UMWA*, 544 F.2d 706, 712 (4th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977).

the primary employer that they either constitute a single enterprise or act as co-employers (joint employers) of the same employees.¹⁹⁸

The Union bears the burden of proving that the plaintiff employer is an ally rather than a neutral, which requires, among other factors, that it prove that the contractor and the owner share a common system of managerial control, particularly over labor relations, and that the ally controls the work force of the primary.¹⁹⁹ Other factors include common ownership, integration of operations, economic dependence (relevant but not dispositive), exclusive or substantial dealing (relevant but not dispositive), common premises, common employees, commingling of funds, and separate procedural identity, each of which are weighed in what the Fourth Circuit calls a “naked exercise of judicial discretion.”²⁰⁰

In *Kinty v. UMWA*,²⁰¹ the union argued unsuccessfully that the fact that a subcontractor works solely for the mine operator (hauling coal from a mine) and that the mine is the trucker’s only customer, should establish that the trucker is an ally of the operator. Instead, the court held that economic dependence of the secondary on the primary, or exclusive or substantial dealings between the primary and the secondary are not in themselves a conclusive determination of ally status.²⁰²

Thus, in many contract mine operator cases where the owner/operator retains but does not exercise actual control over workers or control their day to day activities, the union will often be unable to meet the Board’s constricted test for “ally” status and the “secondary” or mine owner will probably be immune from collective action under Section 8(b)(4)(B). This is despite the fact that, as we have seen, mine owners like Island Creek can effectively “fire” their contractor’s employees by the simple expedient of locking out the contractor, while at the same time the NLRB considers them “neutral” and not only shields them from any

¹⁹⁸ *Kinty*, 544 F.2d at 715, or where the secondary target is performing “struck work,” *i.e.*, is providing goods or services to replace the products which are normally supplied by the primary employer whose workers are on strike. *Id.*

¹⁹⁹ *Id.* at 718 (citing *Vulcan Materials Co. v. United Steelworkers of Am.*, 430 F.2d 446, 451 (5th Cir. 1970). This, of course, is similar to the “joint employer” and single employer tests discussed above, and is precisely what a contract operator is usually careful *not* to do.

²⁰⁰ *Id.* at 716. Evidence of common management, common labor policies, actual control over workers, overlapping management functions, economic, and/or operational integration, such as where the secondary employer controls day to day activities of employees, are also helpful in demonstrating ally status.

²⁰¹ 544 F.2d 706 (4th Cir. 1976).

²⁰² *Id.* at 716.

liability, but allows them to sue the union for damages if it directs any action against them.²⁰³

Such a result does not comport with reality, where it was the owner who arguably caused the labor dispute, as in *Shield*, by withholding the contractor's last paycheck and kicking it and its employees off the property, or where a contractor has clearly taken sides. The NLRA's failure to recognize this reality virtually eliminates workers' ability to meaningfully exercise their NLRA Section Seven rights to use concerted activity to resolve these triangular employment disputes.

It seems clear that these prohibitions are outdated, and that certain revisions are in order. First, as a matter of policy, the NLRB and federal courts should follow the lead of West Virginia and similar courts and declare that third party employers and prime contractors are in fact employers, and can be picketed, sued, enjoined, and in every respect treated as such, both by the NLRB construing NLRA Sections 8(a), 8(b), and 8(e) and by federal courts construing Sections 301 and 303 of the NLRA. Such an approach would not require statutory amendment, since only the term "employer" appears in the statute itself, as opposed to the terms primary and secondary. Instead, the NLRB could simply recognize that prime contractors, owner/lessors, and user employers are just that – employers – under the NLRA, and treat them as such, abandoning the contortions it currently undergoes to determine whether an employer is a single employer, joint employer, alter ego, ally, or some other creature. As the Supreme Court explained in *N.L.R.B. v. E.C. Atkins & Co.*,²⁰⁴ Congress has granted wide discretion to the NLRB in this area, and instructed it to "draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life, . . . [as well as] an appreciation of economic realities, [and] the more relevant economic and statutory considerations."²⁰⁵

Second, if needed, the 1947 secondary boycott prohibitions should be amended, as has the West Virginia Wage Act, to reflect the reality that owner/lessors such as Pittston, Island Creek, and Massey truly act as the employers of the workers who produce their coal, that they benefit from their work, and as

²⁰³ See, e.g., *supra* note 104 and accompanying text, where Island Creek was legally permitted to throw Shield off its property and lock out its workers, but the workers were not permitted to picket or protest against Island Creek without facing charges of secondary activity. One might question just where Shield's workers were permitted to picket, since Shield had no mine, no assets, no office location, nor any rights to the mine property itself. Indeed, the only logical alternative to picketing in front of Island Creek's property might be to picket the bankruptcy court, the "situs" of the disputed wages owed to the workers. Cf. *Moore Dry Dock Co.*, 92 N.L.R.B. 547 (1950).

²⁰⁴ 331 U.S. 398 (1947).

²⁰⁵ *Id.* at 403.

such they should be held liable for those worker' wages and benefits. The authors recognize that such a recognition may require amending portions of the National Labor Relations Act and/or the Taft-Hartley Act in order to clarify that owner/contractors are to be considered third-party employers of contract employees who work on their property, or at a minimum that such persons are not neutrals, but submit that such an amendment is long overdue.²⁰⁶ Such revisions might help return the focus of the NLRB and the courts to where they should be: protecting innocent employees against unscrupulous operators, rather than protecting contract employers from the legitimate claims of those same workers. In addition, such reforms would help remove the perverse incentives present in the current system, and allow employees to file a single lawsuits in a single forum, ideally the NLRB, to collect their collectively-bargained wages and benefits from the party who can best afford to pay them – the mine owner.

VI. RETIREE HEALTH CARE OBLIGATIONS

Securing health care coverage for miners and their families has been a major issue in the Appalachian coal fields for many, many years, and a major goal of the UMWA for at least the last fifty years. The UMWA has fought for health care on the picket line, at the bargaining table, as an organizing issue and in Congress. In each of these arenas, the Union has fought time and again to obtain, protect, and ensure that its working and retired members and their families enjoy lifetime health care benefits. As UMWA President Cecil E. Roberts has declared, "coal miners and their families earned the right to decent health care with our sweat and blood. In 1946 and again in 1992 the government made a sacred promise of health care security to retired coal miners. That promise will hold because of our solidarity."²⁰⁷

The issue of health care for miners first rose to national prominence in 1946, when the Union, under the leadership of John L. Lewis, first proposed an independent health care system in national negotiations with the BCOA.²⁰⁸ The

²⁰⁶ For more specific suggestions, see Becker, *supra* note 157, at 1550-61; Englestein, *supra* note 157, at 333-42; Befort, *supra* note 157, at 101-05.

²⁰⁷ UMWA, KEEP THE PROMISE: COAL INDUSTRY RETIREE HEALTH BENEFIT ACT, (Jan. 1998) (quoting United Mine Workers Association President Cecil Roberts); *see also A Promise Kept: The UMWA Health and Retirement Funds Turn 50*, 107 UMWA JOURNAL 11-13 (May-June 1996).

²⁰⁸ MAIER B. FOX, UNITED WE STAND: THE UNITED MINE WORKERS OF AMERICA 1890-1990 403-08 (1990); *see also* Brief of Amicus Curiae United Mine Workers of America in Support of Respondents at 2-8, Eastern Enters. v. Apfel, No. 97-42, (U.S. 1997) [hereinafter *Amicus Brief*] (oral argument scheduled for March 4, 1998).

Union's goal was to replace the old "company doctor" model, paid by deductions from miners' wages but employed and controlled by the company, with an independent health insurance system, paid for by all the companies jointly, in an effort to improve both the quality and the amount of medical care available to its members.²⁰⁹

After the BCOA turned Lewis down, the UMWA called a national strike in support of its health care proposal, and 400,000 coal miners walked off the job.²¹⁰ Finally, President Truman stepped in and seized the mines, exercising his powers under the War Labor Disputes Act. At the same time, he ordered Secretary of the Interior Julius Krug to negotiate with the Union on behalf of the United States (and the industry), culminating in the signing of the historic Krug-Lewis Agreement at the White House.²¹¹ That agreement created what are now known as the UMWA Health and Retirement Funds ("UMWA Funds").²¹² In turn, the Funds created the first comprehensive, employer-funded medical care and pension system in any industry in the United States and one which other Unions sought to emulate.²¹³

Over the next few years, the UMWA Funds helped to create and finance an independent health care network serving coal miners and their families throughout the coal fields, including specialized black lung and rehabilitation clinics, ten hospitals, and numerous pharmacies and doctors' offices.²¹⁴ More recently, the UMWA Funds' role has evolved gradually from a direct health care provider into an insurer and collection agent. However, their mission remains the same: providing lifetime health care coverage for retired coal miners and their dependants using collectively-bargained contributions made by signatory employers.

The more difficult part of that mission has proved to be securing a stable and consistent funding stream to finance these benefits. If anything, funding has

²⁰⁹ Fox, *supra* note 208, at 410-11.

²¹⁰ *Id.*; see also UMWA, KEEP THE PROMISE (Jan. 20, 1998) (on file with authors).

²¹¹ Fox, *supra* note 208, at 403-08.

²¹² *Amicus Brief at 4, Eastern Enters.*, No. 97-42. The two original funds were the UMWA Welfare and Retirement Fund and the UMWA Medical and Hospital Fund. Since 1946, they have been reorganized several times, most notably in 1950, again in 1974, and in 1993 with the passage of the Coal Act. They now consist of five different trust funds or "Plans:" the 1950 Pension Trust and the 1974 Pension Trust, which offer pension benefits, and the Combined Benefit Fund, the 1992 Benefit Plan, and the 1993 Benefit Fund, each of which offers health insurance coverage to certain retirees and their dependents. *Id.* at 7.

²¹³ Fox, *supra* note 208, at 416.

²¹⁴ Fox, *supra* note 208, at 415-17; COAL COMM. RPT., *supra* note 83, at 15-29.

become increasingly less stable in the last two decades, as health care costs have spiraled upward, while at the same time employment in the mines has fallen sharply. This imbalance has created a financial crisis for the UMWA Funds which has been well-documented elsewhere.²¹⁵ The UMWA Funds, the Union, and BCOA responded to this financial pressure in a variety of ways. At one point, in the summer of 1977, the UMWA Funds temporarily cut off medical benefits, which led to a massive unauthorized work stoppage.²¹⁶ In response, the parties agreed in the 1978 NBCWA to partially decentralize the provision of health care, by requiring each individual employer to sponsor its own "individual employer plan" to cover both its current workforce and its retirees.²¹⁷

By the mid-1980s, as health care costs continued to escalate, some companies began searching for ways to escape their obligations to their retirees, and refused to pay and/or to sign successor agreements. The issue came to a head in 1989, when Pittston Coal Company refused to continue health care payment for its retirees and withdrew from the multi-employer funds. The 321-day strike which ensued has been described as "one of the most bitter strikes in recent labor history."²¹⁸ The Pittston strike drew community, national, and international attention, and led to the arrests of thousands of UMWA supporters, including labor, religious, and civil rights leaders. Finally, Secretary of Labor Elizabeth Dole stepped in and appointed a "super mediator" to assist in resolving the strike, and the parties were ultimately able to reach a new agreement and return to work.²¹⁹

By this time, both the Union and Secretary Dole realized that the issue of health care security for retirees and their families had grown too large to be resolved through collective bargaining alone, and was, in her words, "an issue larger than the Pittston dispute." As a result, Secretary Dole appointed a blue ribbon commission to recommend a long-term solution to the health care funding crisis, and to suggest a long-term, nationwide solution to the problem. The group, which became known

²¹⁵ See e.g., COAL COMM. RPT., *supra* note 83, at vii, 3, 44-47. As the Commission has documented, in 1990 the Funds faced a \$115 million deficit, threatening the health care of more than 120,000 retired miners and their families. *Id.* The average beneficiary was then 76 years old and more than half were elderly widows. *Id.*

²¹⁶ COAL COMM. RPT., *supra* note 83, at 25.

²¹⁷ NBCWA of 1978, Article XX.

²¹⁸ *Hearing Before the Subcommittee on Medicare and Long-term Care of the Senate Committee on Finance*, 102d Cong., 1st Sess. at 303 (Sept. 25, 1991) [hereinafter *1991 Subcommittee Hearings*].

²¹⁹ That mediator was William Usery, ex-Secretary of Labor, who would later chair the Coal Commission. *Id.*

as the Coal Commission, conducted an exhaustive study of the issues that confronted the UMWA retiree health care system and issued a report on November 5, 1990.²²⁰ That report laid the groundwork for what eventually became the Coal Act.²²¹

The Commission found that “the combination of skyrocketing health care costs, an increasing number of retirees who have been abandoned by their employers, and a small percentage of coal producers making contributions to the UMWA Funds have put the health care program for retirees in a financial crisis.”²²² The Commission also recognized that “[t]he escalating cost of providing adequate health care to coal miners and their families, particularly the increasing population of orphan retirees, cannot properly or fairly be solved by the parties through collective bargaining alone.”²²³ It recommended that the collective bargaining obligations of both current and past signatories be replaced by a statutory obligation to fund the long-promised health care delivery system. It also suggested a statutory mechanism to prevent future “dumping” of retirees and their concomitant health care costs onto the Funds or other coal operators, as well as additional funding sources and cost controls.²²⁴

Congress then took up the matter, led by Senator Rockefeller, one of the earliest and strongest proponents of what eventually became the Coal Act. As he explained,

²²⁰ COAL COMM. RPT., *supra* note 83.

²²¹ Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-22 (1994) [hereinafter the Coal Act]. The Coal Act guaranteed the health benefits (and in some cases the death benefits) of retirees who were age and service eligible as of February 1, 1993, and who actually retired by September 30, 1994. *See id.* § 9711. Enacted with the support of both the United Mine Workers of America and the Bituminous Coal Operators’ Association, the Coal Act requires responsible employers to provide and pay for these benefits for life. Benefits under the act are provided either directly by the retiree’s last employer, or by one of two newly-created Funds, the United Mine Workers of America Combined Benefit Fund or the United Mine Workers of America 1992 Benefit Plan. *Amicus Brief* at 20-24, *Eastern Enters. v. Apfel*, No. 97-42, (U.S. 1997).

²²² COAL COMM. RPT., *supra* note 83, at vii.

²²³ *Id.* at 3, 60, 74.

²²⁴ *Id.* At 61-67. The Commission actually proposed two alternative methods of funding retiree health insurance costs: (1) creation of a quasi-governmental corporation financed by an industry-wide tax on all coal operators, or (2) the creation of a new private multi-employer fund financed by current and former NBCWA signatories to provide health care to UMWA retirees. A more complex version of the second proposal was ultimately adopted. *See Amicus Brief* at 12, *Eastern Enters.*, No. 97-42.

this problem affects the entire industry and in fact the entire country. . . . We are talking about tens of thousands of elderly and often infirm people who long ago earned these benefits by firing the furnaces of American industry in war and in peace. The industry and national commitments to health care for these miners and their families must and will be kept.²²⁵

Several individuals testified at the Subcommittee hearing, including retired miners and their wives. Dixie Woolum, the widow of a Massey Coal Company miner, testified,

My husband, Jimmy, worked in the mines for the same coal company for 45 years. He died when he was sixty years old, three months after his last working day He gave his life in the mines. I packed his dinner bucket and got him off to work every day for 45 years. Then to show how much they cared, Massey Coal Company took my insurance card away in 1984. Finally after years without health benefits, the funds picked up my coverage. . . . I was born in a coal-company house. We raised our family in a company house, and I remember when we got the UMWA funds. . . . After we got the funds Jimmy always said to me, "Dixie, if anything should happen to me, you and the kids will be taken care of." This is what they promised him and that is what we planned on and what we believed.²²⁶

Retired miner UMWA retiree Homer Eckley agreed:

I grew up in a coal mining family, four generations of them. That was back when there was no benefits, nothing. . . . I went into the mine with the idea that when my time came, I could retire and have benefits, plus a pension. . . . Now they tell me that my mine was sold to another company and they are complaining about paying these benefits. I disagree. The entire coal industry is part of the

²²⁵ 1991 Subcommittee Hearings, *supra* note 218, at 2-3 (opening statement of Subcommittee Chairman Rockefeller).

²²⁶ *Id.* at 4.

problem and the entire coal industry should be part of the solution.²²⁷

The hearings eventually led to Congressional passage of the 1992 Coal Act, which was intended to ensure lifetime health care benefits for people like Dixie Woolum and Homer Eckley.²²⁸ The Coal Act represented a comprehensive effort to craft a permanent solution to these seemingly intractable problems. It reorganized the UMWA Funds, and carefully delineated the identities of all eligible recipients²²⁹ and the companies which would be responsible for paying their benefits. Finally, it set up a funding stream that was designed to ensure that health benefits would be guaranteed for the life of the beneficiaries, that the responsible employers would pay for those benefits, and that a fall-back plan would be in place if an employer stopped making payments, regardless of the reason. The Coal Act also adopted a permanent allocation and financing structure based on the principle that each signatory company would “pay for its own” retirees’ health care, through one of three overlapping benefit plans. First, under Section 9711 of the Coal Act, each company was required to continue its single employer plan covering its own retirees, as had been required under each successor NBCWA since 1978. Second, the act created a new plan known as the 1992 Benefit Plan to provide benefits to retirees whose former employers fail to provide such coverage under their own plans, sometimes described as “orphaned retirees.”²³⁰ Finally, the existing 1950 and 1974 Benefit Funds and their beneficiaries were consolidated and rolled into a new “Combined Benefit Fund, with a guaranteed funding stream.”²³¹

²²⁷ *Id.* at 5. *See also id.* at 10 (statements of BCOA Chairman Michael Reily) (asserting that NBCWA signatory companies “have a moral obligation to the funds”); *id.* at 48 (statements of Professor Henry H. Peritt, Jr.) (companies and government must “honor [their] commitments to retirees who worked hard to create economic prosperity for others”).

²²⁸ An earlier version of the bill had passed both Houses of Congress in March 1992, but was vetoed by then-President Bush. The final version was enacted in July as part of H.R. 776, The Energy Act, and was signed by President Bush on October 24, 1992. *See* 138 CONG. REC. S10558, S10627 (daily ed. July 29, 1992)

²²⁹ Eligible recipients were defined as those who were both age- and service-eligible to retire by February 1, 1993, and who actually did retire before October 1, 1994 and their dependents. *See* 26 U.S.C. § 9711(b)(1)-(2) (1994).

²³⁰ *See* 26 U.S.C. § 9712(b)(2) (1994).

²³¹ *See* 26 U.S.C. § 9702(a)(2) (1994). The Combined Benefit Fund covers only pensioners who had retired prior to July 20, 1992, and their dependants, and is closed to new beneficiaries. It is funded through premiums paid by each “assigned operator,” covering beneficiaries who either worked for that company or who have been “assigned” by the Secretary of Health and Human Services to that

Perhaps the most important feature of the new act is its detailed funding mechanism. In brief, it created a “reach-back” system whereby signatory employers or their successors pay a monthly per beneficiary premium, based on the number of plan beneficiaries attributable to that employer or its predecessors. Certain operators are also assessed annual pre-funding premiums to fund benefits for those “orphan retirees” whose last signatory employer(s) are out of business.²³² The goal was to allocate costs as fairly as possible by reaching back to include employers which had been signatory at any time since 1946 and have them pick up the current costs for their retirees, regardless of whether they remain signatory or even whether they remain in the coal business. As Senator Rockefeller explained, “Instead of including a broad industry wide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies.”²³³

With the passage of the Coal Act in 1992, the funds were restructured and revitalized, thousands of beneficiaries had their benefits restored, and it appeared that the promise of lifetime health care coverage was secure at last. To date, at least six circuit courts of appeals have affirmed its constitutionality and upheld its funding mechanism.²³⁴

However, the Supreme Court recently disagreed, holding in a split decision that the Coal Act was unconstitutional as applied to Eastern Enterprises, a so-called “super reach-back” company.²³⁵ The case arose out of an inter-company dispute between Eastern and its former subsidiary Eastern Associated Coal Corporation

employer, as well as from surpluses in other funds, such as the 1950 Pension Plan and the Abandoned Mine Lands Reclamation Fund. See 26 U.S.C. §§ 9701(c)(5), 9705 & 9706 (1994).

²³² 26 U.S.C. § 9712(b)(2) (1994).

²³³ 138 CONG. REC. S17633 (daily ed. Oct. 8, 1992).

²³⁴ These include the First, Second, Third, Fourth, Sixth, and Seventh Circuits, all of which have rejected constitutional challenges to the act. See *Eastern Enters. v. Chater*, 110 F.3d 150 (1st Cir. 1997), *rev'd sub nom.* *Eastern Enters. v. Apfel*, 118 S. Ct. 2131 (1998); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 298 (1995); *Lindsey Coal Mining Co. v. Chater*, 90 F.3d 688 (3d Cir. 1995); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124 (4th Cir. 1996); *Blue Diamond Coal Co. v. Secretary of Health and Human Services*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Barrick Gold Exploration, Inc. v. Hudson*, 47 F.3d 832 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 64 (1995); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 50 (1996).

²³⁵ *Eastern Enters. v. Apfel*, 118 S.Ct. 2131 (1998). The term “super reach-back company” means that the coal operator had either stopped mining coal or had not been signatory to a UMWA contract since at least 1974, thus the Act “reaches back” to assess liability. Eastern was signatory to NBCWA’s from 1947 through 1964. *Id.* at 2143.

(“EACC”), which Eastern had sold to Peabody Coal Company in 1987.²³⁶ The Social Security Administration assessed premiums to Eastern for certain beneficiaries who (or whose spouses) worked for Eastern Enterprises before the sale, from 1946 to 1965, and who today continue to receive health care benefits – originally from the 1950 Benefit Fund and now from the Combined Benefit Fund.²³⁷

Eastern argued that these Coal Act assignments violated substantive due process and resulted in an illegal taking of its property without just compensation. It claimed that it got out of the coal business in 1965, when it created EACC as a wholly-owned subsidiary, and thus could not now be held liable for any related costs; instead, it argued that EACC or Peabody (or current signatories, or no one at all) should pay for the benefits.²³⁸ It also claimed that the imposition of retroactive Coal Act liability was “arbitrary and irrational” and interfered with its reasonable investment-backed expectations.²³⁹ Finally, it argued that it transferred any remaining retiree health care obligations, including any prospective Coal Act liabilities, to Peabody when it sold EACC in 1987, and thus could not now be held liable for these retirees.²⁴⁰

The Social Security Commissioner and UMWA Combined Benefit Fund responded that Eastern had helped shape the retirees’ expectations of lifetime benefits, that it had awarded benefit credit for the work at issue, and that it had profited from the work they performed and the coal they produced. As such, they defended Congress’s allocation of benefit costs as rational, based on a fair and reasonable assessment of the underlying facts, and maintained that the assignment provisions of the act did not work an unconstitutional taking.²⁴¹

In a splintered opinion, the Court held that the Coal Act was unconstitutional as applied to Eastern, although it could not agree on the reason why. Four members found that the act impermissibly violated the takings clause, while Justice Kennedy disagreed with the plurality’s conclusion that the act worked

²³⁶ Brief of Respondent Social Security Commissioner at 16-17, *Eastern Enterprises v. Apfel*, No. 97-42 (U.S. 1997).

²³⁷ Brief of Respondents The UMWA Combined Benefit Fund and its Trustees at 4-5, *Eastern Enters.*, No. 97-42.

²³⁸ Opening Brief of Eastern Enterprises at 6, 19-21, *Eastern Enters.*, No. 97-42; see also DAILY LABOR RPT. at A1-2, March 5, 1998 (summarizing oral arguments).

²³⁹ Opening Brief of Eastern Enterprises at 20, *Eastern Enters.*, No. 97-42.

²⁴⁰ *Id.* at 21.

²⁴¹ Brief of the Commissioner of Social Security at 20-47, *Eastern Enters.*, No. 97-42; Brief of UMWA Fund, *supra* note 237.

a “taking,” but held that applying the law to Eastern violated substantive due process, because of the law’s retroactive effect.²⁴² Four Justices dissented, in two separate opinions, finding instead, as had the Court of Appeals, that “it was not fundamentally unfair for Congress to impose upon Eastern liability for the future health care costs of miners whom it long ago employed . . .,” and that “Eastern played a significant role in creating the miners’ expectations [of continuing health care benefits] that led to this legislation.”²⁴³ Although the long-term impact of the Court’s decision is unclear, it could potentially upset the Coal Act’s carefully balanced contribution scheme, and may eventually lead to further Congressional action or other changes.

Even if the Coal Act’s financing scheme ultimately survives, however, it does not cover all the UMWA retirees who are arguably entitled to lifetime benefits. As noted above, the Act was carefully crafted to cover only retirees who were eligible to retire before February 1, 1993 and actually did retire by October 1, 1994.²⁴⁴ Thus, health care benefits for future retirees were left up to future collective bargaining negotiations.

In the 1993 NBCWA, after another long and bitter strike, the Union and the BCOA negotiated new language in Article XX, which once again attempted to ensure that each employer provide lifetime health care for its own retirees. In addition, it added yet another entirely new “orphan” plan, the 1993 Benefit Plan, which was designed as a fallback to cover retirees whose last signatory employers go out of business and are financially unable to maintain their health insurance. However, no sooner was the ink dry on the contract and the trust document than battles over these obligations began anew.²⁴⁵

Ironically, the latest company to try to escape its health care obligations is Westmoreland Coal Company, which had been one of the loudest voices in the chorus assuring Congress that it would “pay for our own.” Westmoreland Coal Company operated coal mines in West Virginia and southern Virginia for over thirty years. As recently as October 1995, its President Christopher Seglem wrote to Senator Dole declaring that

²⁴² *Eastern Enters. v. Apfel*, 118 S. Ct. at 2137; *id.* at 2154 (Kennedy, J., concurring in the judgment and dissenting in part).

²⁴³ *Id.* at 2167, 2168 (Breyer, J., dissenting).

²⁴⁴ See *supra* notes 221 & 229.

²⁴⁵ See *McClung v. Westmoreland Coal Co.*, Civ. Act. No. 5:96-2068, (S.D. W. Va. filed Dec. 5, 1996).

Westmoreland has met its retiree obligations and unlike [certain other] companies . . . is committed to seeing the over \$700 million in benefits promised its employees delivered. This means paying over \$20 million per year in cash benefits on behalf of these retired and elderly former employees and their dependents for many years to come.²⁴⁶

Furthermore, Seglem argued, any Congressional action to amend the Coal Act that might require Westmoreland to pay for other companies' retirees would result in a severe set-back for Westmoreland. However, it was not long before Westmoreland itself sought to walk away from its \$700 million in future health care obligations to its own retirees and stick someone else with the bill.

In 1993, Westmoreland withdrew from the BCOA and instead signed the Independent Bituminous Coal Bargaining Alliance ("IBCBA")-UMWA Agreement, which in turn bound it to certain provisions of the 1993 NBCWA, including standard language committing the employer to maintain its individual employer health plan and to provide health insurance to its active employees and certain laid-off employees.²⁴⁷ It also agreed to provide health benefits for life to its own retirees, both those who were covered under the Coal Act and those who retired under the 1993 Agreement. Finally, it agreed to make all contributions due to each plan, including the new 1993 Benefit Plan created by the BCOA and UMWA to cover "future orphans."²⁴⁸

Despite these agreements and its active support for the Coal Act, Westmoreland soon decided that its contractual and statutory obligations were too expensive. In 1995, it decided to close its eastern operations and reposition itself as a cogeneration and terminal operation. It idled its Virginia division mines and offices and laid off over 500 miners. At the same time, it began a systematic campaign to divest itself of all remaining UMWA obligations, in particular its obligations to pay for lifetime health care coverage for its active UMWA employees, retirees, and dependants (including Coal Act retirees), and its ongoing duties to contribute to the Funds. It began negotiating with the UMWA Funds its arrearage and its failing to pay other obligations as they came due. In November 1996, these negotiations apparently failed, and it stopped making payments to its

²⁴⁶ See Letter from Christopher K. Seglem to Senator Robert J. Dole (Oct. 17, 1995) (on file with authors).

²⁴⁷ These include extended health care benefits for one year for certain laid-off, injured, or disabled employees. See Independent Bituminous Coal Bargaining Alliance-United Mine Workers Agreement of 1993, Article XX [hereinafter 1993 IBCBA Agreement].

²⁴⁸ *Id.*

health insurance company, which abruptly canceled the health cards of thousands of Westmoreland retirees and widows. The saga that ensued involved at least three separate lawsuits in three states, and remains the subject of a Chapter Eleven bankruptcy proceeding in the District of Colorado.²⁴⁹

This chapter of the story opens on the day before Thanksgiving, November 26, 1996, when Westmoreland's insurer abruptly canceled medical insurance coverage for UMWA retiree Varlin McClung and his wife Zela,²⁵⁰ along with 2,500 other retired or disabled miners, widows, and dependants. McClung was particularly worried because he was in the middle of a medical crisis. He had recently suffered a serious infection in his shoulder, and several years earlier, because arthritis had set in, the bone was removed and a metal artificial joint was implanted. He had just been released from the hospital, after an operation to remove the artificial shoulder and lance the infection. He was then sent home with his bandaged, boneless shoulder strapped to a pillow, and ordered to maintain a twenty-four-hour intravenous antibiotic pump, at a cost of over \$1000 per week. He was due to return to the hospital for a new implant in six weeks, after the antibiotic pump did its job and cleared up the infection. Despite his dire situation, neither the company nor its insurance provider gave any advance notice to the McClungs that their medical insurance was being canceled. McClung first found out when the drugstore refused to renew his prescription for antibiotics, and demanded that he agree to be personally liable for the enormous costs.²⁵¹ After contacting his insurer, the company, and the Union, McClung discovered that his insurance had been canceled as part of the larger ongoing dispute between Westmoreland, the UMWA Funds, and its insurance carrier. Because Westmoreland had stopped making payments to its health benefits administrator, the insurance carrier in turn began denying claims by McClung's health care providers, including his pharmacy and his doctor.

²⁴⁹ See *In Re Westmoreland Coal Company*, No. 96-26092 MSK, Ch. 11, (Bankr. D. Colo. filed Dec. 23, 1996). Related proceedings include, *inter alia*, *Buckner v. Westmoreland*, A.P. No. 97-1058 MSK, (Bankr. D. Colo. Sept. 5, 1997), *appeal filed sub nom UMWA 1992 Plan v. Westmoreland Coal Company*, No. 97-AP-2002 (D. Colo. filed Sept. 15, 1997).

²⁵⁰ Mr. McClung worked for Westmoreland for 23 ½ years, and had retired on March 1, 1993, at the age of 55. Had he been born a month earlier, he would have been eligible for coverage under the Coal Act.

²⁵¹ Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order at 3, *McClung*, Civ. Act. No. 5:96-2068. It did send a letter to him on December 14, 1996, after agreeing to settle the case and reinstate his benefits.

The day after the termination, Westmoreland mailed a letter to the Union, the UMWA Funds, and its 2,500²⁵² beneficiaries whose benefits are guaranteed under the Coal Act, blaming the UMWA Funds for its failure to pay its administrator and asserted that it was “extremely concerned for you and the consequences of losing your health care benefits.”²⁵³ In response, the UMWA Funds accused Westmoreland of misrepresenting the situation, and of cutting off beneficiaries’ insurance in order to put pressure on the UMWA Funds. It argued that Westmoreland had millions of dollars in cash as well as plenty of other valuable assets with which to pay its ongoing health care obligations.²⁵⁴

Both the 1992 Plan and the Union immediately filed complaints for temporary restraining orders and injunctive relief ordering Westmoreland to reinstate its individual employer health plan.²⁵⁵ In *Buckner v. Westmoreland Coal Co.*,²⁵⁶ the UMWA Funds sought an injunction ordering reinstatement of Westmoreland’s employer health plan for its Coal Act retirees who would otherwise be entitled to substitute coverage as “orphans” under the 1992 Benefit Plan. The Union’s action, filed on behalf of Mr. McClung and others similarly situated, asked for reinstatement of an additional 150 retirees who were not covered under the Coal Act guarantee²⁵⁷ and whose lifetime health care benefits were required by the 1993 collective bargaining agreement between Westmoreland and the Union.²⁵⁸

²⁵² At the time Westmoreland had approximately 2500 retirees and dependents whose benefits were guaranteed by the Coal Act. It also had about 150 non-Coal Act retirees, such as McClung. Transcript of Hearing at 10, *Buckner v. Westmoreland*, No. 96-187-A (W.D. Va. Dec. 4, 1996).

²⁵³ Letter from Westmoreland Coal Company to “1992 Medical Beneficiary” (Nov. 27, 1996) (on file with authors); *see also* 22 COAL WEEK 1-2 (Dec. 9, 1996), COAL OUTLOOK at 5-6 (Dec. 9, 1996).

²⁵⁴ Letter from David W. Allen, Funds General Counsel, to Christopher K. Seglem, President of Westmoreland Coal Company (Nov. 29, 1996) (citing Westmoreland’s 10-Q report); *see also* Transcript of Hearing at 29-33, 34, 113, *Buckner*, No. 96-187-A.

²⁵⁵ *See Buckner*, No. 96-0187-A (filed November 27, 1996 on behalf of the 1992 Plan for Coal Act retirees); *McClung*, No. 5:96-2068 (filed December 5, 1996 by the Union, McClung, and other non-Coal Act or “contract” retirees).

²⁵⁶ No. 96-187-A (W.D. Va. filed Nov. 27, 1996).

²⁵⁷ As previously explained, the Coal Act guarantee is limited to retirees who were age-and service eligible as of February 1, 1993, and who actually retired prior to October 1, 1994. *See* 29 U.S.C. § 9711 (1994). The benefits of McClung and others who retired later are guaranteed only by the 1993 IBCBA or NBCWA, depending on their employer, and by general federal labor law.

²⁵⁸ *McClung*, No. 5:96-2068.

In *Buckner*, the judge found that the plaintiffs had not demonstrated irreparable harm because the 1992 Plan was already accepting and processing retirees' applications for substitute coverage, as it was required to do under the Coal Act.²⁵⁹ As a result, Judge Jones refused to order Westmoreland to reinstate its employer plan. However, he did order that Westmoreland make weekly payments to the 1992 Plan during the pendency of the case, to preserve the plan's ability to collect on any final judgment that might eventually be ordered.²⁶⁰ This result effectively means that Westmoreland has successfully "dumped" its Coal Act retirees onto the 1992 Plan.

By contrast, the Union and the individual plaintiffs in the parallel *McClung* case fared somewhat better. On December 10, 1996, before the opening of the scheduled hearing, Westmoreland settled the case by agreeing to reinstate insurance coverage for the approximately 150 active and retired employees entitled to coverage under its employer plan.²⁶¹ With this understanding, Judge Haden dismissed the case.²⁶² To date, Westmoreland has complied with the settlement agreement by hiring a new health care administrator and reinstating its plan.²⁶³

As a result of these events, Westmoreland made one payment to the 1992 Plan in compliance with the judge's order, then filed a petition for Chapter Eleven bankruptcy reorganization on December 23, 1996, along with its four subsidiary

²⁵⁹ Section 9712 of the Coal Act requires the 1992 Plan to act as a "fall-back" for eligible beneficiaries whose last employers stop providing benefits under their own plans. See 26 U.S.C. § 9712(b)(1) (1994).

²⁶⁰ Opinion and Order, *Buckner*, No. 96-187-A (dated Dec. 5, 1996) (ordering interim payments of \$200,000 per week); Transcript of Trial at 146, *Buckner*, No. 96-187-A. Westmoreland's President had testified that its costs for health insurance premiums were running between \$200,000 and \$400,000 per week. *Id.* at 75.

²⁶¹ During the *Buckner* hearing, Westmoreland had admitted that it was in violation of its obligations under its collective bargaining agreement with the Union. In its settlement, it also agreed to pay \$10,000 into a special account for medical expenses incurred by the McClungs and others during the two weeks they were denied coverage. *Coal Company Agrees to Restore Retiree Benefits*, CHARLESTON GAZETTE, Dec. 11, 1996, at 9A.

²⁶² Order, *McClung*, No. 5:96-2068 (dated Dec. 20, 1996).

²⁶³ However, as of this writing, the company has informed the Union that it no longer intends to provide lifetime coverage to its non-Coal Act retirees, and instead plans to cancel their insurance coverage at the expiration of the 1993 Agreement. See Counterclaim and Third-Party Complaint, *Westmoreland Coal Co. v. United Mine Workers of America*, No. 96-26092-MSK, Ch. 11, Adv. No. 98-1160 RJB (Bankr. D. Colo. filed February 25, 1998) [hereinafter *In re Westmoreland*]; UNITED STATES SECURITIES AND EXCHANGE COMM'N, FORM 10K at 35-36 (Westmoreland Coal Company, for period ending Dec. 31, 1997); NEWS RELEASE (Westmoreland Coal Company, Aug. 12, 1997). This issue has not yet been resolved and is the subject of ongoing litigation at the time of publication.

companies, which allows it to avoid or postpone any and all obligations owed to both the UMWA Funds and to the Union.²⁶⁴ Since then, the companies have openly declared their intent to shed all of their Coal Act obligations to directly provide health care and/or to pay premiums for their Coal Act retirees by means of the bankruptcy case.

Following the bankruptcy filing, the Trustees of the 1992 Plan commenced a second lawsuit in bankruptcy court, known in bankruptcy parlance as an “adversary proceeding,” again seeking reinstatement of the company’s individual employer plan, as well as interim injunctive relief and a ruling that the claims of the 1992 Plan are taxes, and thus are not dischargeable in bankruptcy.²⁶⁵ On September 5, 1997, the bankruptcy court denied both requests, although it described the case as “particularly frustrating” and presenting a “painful dilemma.”²⁶⁶ Instead, it held that injunctive relief was inappropriate because the claims of the 1992 Plan would be “recognized” in bankruptcy.²⁶⁷ In other words, as the court explained, they would be accelerated, reduced to a monetary amount, and paid in accordance with their “priority” as set forth in the Bankruptcy Code (if there is any money left with which to pay them), then extinguished forever. The court also denied the plan’s request to treat the claim as entitled to administrative priority, holding instead that it arose pre-petition because Westmoreland terminated its health plan before filing its bankruptcy petition.²⁶⁸ Finally, it rejected the plan’s argument that Bankruptcy Code Section 1114²⁶⁹ requires both that Westmoreland continue making its retiree health care payments and that such payments must be treated as administrative expenses.²⁷⁰

²⁶⁴ *In re Westmoreland Coal Co.*, No. 96-26092-MSK. Such a filing offers the company an “automatic stay” of all lawsuits, including the injunction in the *Buckner* case

²⁶⁵ *Buckner v. Westmoreland Coal Co.*, A.P. No. 97-1058-MSK (Bankr. D. Colo. filed Jan. 17, 1997); *summary judgment granted in part*, 213 Bankr. 1 (Bankr. D. Colo. Sept. 5, 1997), *appeal pending*, No. 97-AP-2002 (D.C. Col. filed Sept. 5, 1997). Testimony presented in this case listed the monthly costs of providing these benefits as exceeding \$500,000 per month, or close to double the company’s estimate presented in the pre-bankruptcy *Buckner* case. *Buckner*, 213 Bankr. at 10 n.8.

²⁶⁶ Memorandum Opinion and Order, *Buckner*, 213 Bankr. 1.

²⁶⁷ *Id.* at 21, 28.

²⁶⁸ *Id.* at 24.

²⁶⁹ 11 U.S.C. § 1114 (1994).

²⁷⁰ *See* 11 U.S.C. §§ 1114(e)(2), 1129(a)(13) (1994).

Completely disregarding the ample legislative history of the Coal Act, the court found that the statutory origins of the 1992 Plan indicated that Congress intended to *exclude* it from the preferences accorded to all “voluntarily created” retiree benefit plans under Section 1114. Even more astounding, the court held that the fact that Westmoreland unilaterally canceled its plan just before filing for bankruptcy effectively eliminated any protection that it might otherwise have enjoyed under the elaborate procedural scheme set forth in that statute for terminating or modifying such plans.²⁷¹

Curiously, the court’s opinion also included the following admission:

Unfortunately, this strict interpretation of the language of § 1114 rewards Westmoreland for its prepetition breach of its duty to maintain its IEP [Individual Employer Plan] under § 9711. Had Westmoreland maintained its IEP as required, it would have been compelled to continue making retiree benefit payments during the course of its Chapter 11 case. Such payments would have been administrative expenses under § 1114 or § 503. By terminating its IEP pre-petition, Westmoreland ensured that its Coal Act obligations would be prepetition claims and removed itself from the scope of §1114.

To my eye, this result is legally correct but socially repugnant. It is unjust in popular parlance because it rewards Westmoreland’s breach of its statutory obligations. Successful evasion of § 9711 may well encourage other coal operators to shed Coal Act obligations in a similar manner.²⁷²

²⁷¹ *Buckner*, 213 Bankr. at 24-27.

²⁷² *Id.* at 19. The judge continued,
When application of statutory law does not do justice to the popular eye, the law is viewed as a collection of meaningless technicalities. Such a view inspires little respect for or compliance with the law. Legal technicalities instead encourage people to treat the law as a game in which the winner finds the loophole that excuses compliance. At either extreme, the population grows distrustful. . .

Under the circumstances presented here, I am compelled to apply § 1114 narrowly, as written. I do so with the fervent hope that if Congress intends employers to pay or reimburse retiree health benefits during the course of a Chapter 11 case, no matter the circumstances, it will take such action as necessary to clarify its intent.

Id. at 20.

The UMWA 1992 Plan has appealed this ruling, which is now pending.²⁷³ In separate litigation, all four UMWA Funds are aggressively pressing their claims for payment of all amounts they are owed, including all Coal Act obligations, complete withdrawal liability, and reinstatement of the Coal Act coverage.²⁷⁴

Interestingly, both the Fourth and the Tenth Circuit Courts of Appeals reached the opposite conclusion on very similar facts while the 1992 Plan's appeal was pending in the district court. First, in *Adventure Resources, Inc. v. Holland*,²⁷⁵ an appeal of a bankruptcy case from the Southern District of West Virginia involving several of the same issues, the Fourth Circuit affirmed the district court's holding that Coal Act claims were "taxes," and as such had to be accorded the highest priority status as administrative claims. Reasoning that the act did not take effect on February 1, 1993, after the filing of the bankruptcy petitions, the circuit court held that the claims "must necessarily have arisen postpetition," and were therefore "incurred by the [bankruptcy] estate" as required for administrative expense priority payment.²⁷⁶

The *Adventure* court also found, based on the contract between the parties, that the claims of the Pension Funds were administrative, but for different reasons: there, it reversed the district court's holding that the claims had no priority status because they had arisen pre-petition. Instead, it declared that the companies' failure to reject the collective bargaining agreement under § 1113 acted as an assumption, which in turn requires that all pre-petition defaults be "cured," and converts any failure to cure into an administrative expense under § 365(b)(1). As the court explained,

The primary question before us . . . is whether a debtor in bankruptcy operating under the aegis of Chapter 11 may . . . continue to reap the benefits of its bargain without concern that the

²⁷³ See 1992 UMWA Benefit Plan v. Westmoreland Coal Co., No. 97-AP-2002 (D. Colo. filed Sept. 15, 1997).

²⁷⁴ The litigation is expected to culminate in either reorganization or possibly liquidation of the companies. Hearings on two competing reorganization plans, the valuation of various claims, and other issues are currently scheduled for the fall of 1998. As of this writing, these matters are still pending before the bankruptcy court and Westmoreland has not yet paid any of the hundreds of millions it owes to the Combined Benefit Fund and the 1992 Plan.

²⁷⁵ 137 F.3d 786 (4th Cir. 1998).

²⁷⁶ *Id.* at 793-99 & n.11 (citing 11 U.S.C. § 503(b)(1)(B)(i) (1994) and distinguishing *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1251 (1997)). In *Leckie*, the court had held that property can be sold "free and clear" of Coal Act claims, despite the fact that the obligations are taxes. See *Leckie*, 99 F.3d at 584.

non-debtor party will be made whole for the debtor's unfulfilled prepetition obligations. We hold . . . that it may not.²⁷⁷

Thus, where the Chapter 11 debtor has assumed the benefits and obligations of an existing collective bargaining agreement [under § 1113], but does not comply with its statutory duty to cure all defaults then extant, any claims arising from the debtor's failure to cure are entitled to first priority as administrative expenses of the bankruptcy estate.²⁷⁸

Such a ruling should make it easier for the Union to assert contract-based claims for its workers against bankrupt employers in future cases.

The Tenth Circuit now agrees. In another case involving a challenge by a bankruptcy trustee to claims filed by the 1992 Benefit Plan, *In re: Sunnyside Coal Co.*,²⁷⁹ it implicitly overruled the Westmoreland court's holdings regarding the proper treatment of Coal Act claims in bankruptcy. Instead, the Tenth Circuit agreed with the Second and Fourth Circuits²⁸⁰ that Coal Act premiums are "taxes incurred by the estate," that they continue to accrue on a monthly basis throughout the bankruptcy case, even if the company is no longer "in business,"²⁸¹ and that they are entitled to first priority payment as administrative expenses.²⁸² Thus, operators such as Westmoreland cannot escape liability to the 1992 Plan simply by getting out of the coal business or by filing for bankruptcy; instead, they must continue paying those premiums as they come due. Although the impact of this decision on the Westmoreland bankruptcy is not yet known, it should operate to help insure health care funding for the "orphaned retirees" who have been "dumped" onto the 1992 Fund, at least in the short term.

²⁷⁷ *Adventure Resources*, 137 F.3d at 790-91.

²⁷⁸ *Id.* at 793.

²⁷⁹ *UMWA 1992 Benefit Plan v. Rushton (In re: Sunnyside Coal Co.)*, No. 97-1276, available in, 1998 WL 380966 (10th Cir. July 9, 1998).

²⁸⁰ *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995), cert. denied, 116 S. Ct. 298 (1995); *Adventure Resources, Inc. v. Holland*, 137 F.3d 786 (4th Cir. 1998).

²⁸¹ The court distinguished premiums payable to the Combined Benefit Fund, which cease to accrue when a company is no longer "in business," with those owed to the 1992 Benefit Plan, which continue even after a company has filed for Chapter 7 liquidation. *In re: Sunnyside Coal Co.*, 1998 WL 380966 at *14-16 (comparing 26 U.S.C. §§ 9706, 9711, and 9712(b)(1)).

²⁸² *Id.*

As for Mr. McClung and his fellow pensioners, so far, he has been lucky. Thanks to quick action by the Union back in 1996, his insurance coverage was reinstated, and he was able to afford the intravenous antibiotics he needed and the operation to replace his artificial shoulder. However, his luck may soon change again. Although the company agreed to settle the earlier case and is currently maintaining its health care plan, it has since rejected the Union's claim that its 1993 collective bargaining agreement requires Westmoreland to provide health care coverage for its non-Coal Act retirees "for life."²⁸³ Instead, the company now claims that it never promised lifetime health care benefits either to its workers or to the Union, and that all its obligations will cease when the current collective bargaining agreement expires on August 1, 1998.²⁸⁴ Thus, the issue of Mr. McClung's entitlement to a health card is now being effectively re-litigated in the Colorado bankruptcy court.

As in the earlier crisis, however, the Union is actively representing both Mr McClung and his fellow pensioners, as well as Westmoreland's 400 laid-off UMWA employees who are also entitled to extended health care coverage. It is participating both in the bankruptcy proceedings and in separate collective bargaining with Westmoreland over the effects of its shutdown bargaining with Westmoreland. After the negotiations broke down and Westmoreland declared its intentions to cancel the coverage, the Union filed a contingent Proof of Claim in the bankruptcy case in the amount of \$62 million, the estimated cost of providing lifetime benefits to Mr. McClung and his fellow pensioners.²⁸⁵ In response, Westmoreland filed yet another adversary proceeding case, this time seeking a declaratory judgment which would allow it to simply cancel all health insurance for those retirees who are not covered by the Coal Act, and require the retirees instead to receive their health benefits under the collective bargaining agreement.²⁸⁶ In the alternative, it sought permission of the court to "dump" these pensioners onto the 1993 Fund. However, it has not offered to pick up its share of their future health care costs, which have been estimated at between forty-four million dollars and

²⁸³ Westmoreland Coal Wage Agreement at 159; *see also* Opposition to Summary Judgment Motion, *In re Westmoreland Coal Co.*, A.P. No. 98-1160 RJB (filed May 20, 1998).

²⁸⁴ *See* Memorandum in Support of Motion for Summary Judgment, *In re Westmoreland Coal Co.*, A.P. No. 98-1160 RJB (filed April 30, 1998).

²⁸⁵ *See* Proof of Claim, *In re Westmoreland Coal Co.*, No. 96-26092 MSK (filed by the UMWA on November 25, 1997); Objection, Counterclaim and Third-Party Complaint, *In re Westmoreland Coal Co.*, A.P. No. 98-1160 RJB (filed Feb. 25, 1998).

²⁸⁶ *See In re Westmoreland Coal Co.*, A.P. No. 98-1160 RJB.

sixty-two million dollars (by Westmoreland and by the Funds, respectively).²⁸⁷ As of this writing, Westmoreland's Motion for Summary Judgment against the Union has been denied, and Westmoreland's claims against the 1993 Benefit Plan have been dismissed.²⁸⁸ However, the case itself is still pending, along with the other cases discussed above. To date, Westmoreland has not made any of the past due payments it owes to either the Combined Benefit Fund or the 1992 Plan, much less any of the anticipated future costs of covering either its Coal Act pensioners or its non-Coal Act retirees.

Thus, Mr. McClung's predicament is far from over. It remains to be seen whether Westmoreland will be permitted to simply cancel his insurance again when the contract expires, and whether the Colorado court will allow it to do so. Even so, at least he can count on UMWA-funded attorneys to litigate his case, and can hope that the 1993 Benefit Plan will cover him if Westmoreland ultimately is forced into liquidation. In addition, Dixie Woolum and other Coal Act pensioners can hope that the Funds remain solvent, at least through their lifetime, despite the Supreme Court's *Eastern* ruling, so that they can afford to keep going to the doctor and filling their prescriptions at the drugstore.

Of course, most retired workers are not so fortunate, never having worked under a union contract, let alone one generous enough to promise them lifetime health benefits. In addition, it is not uncommon for pensioners to outlive their employer, or for pension plans to go bankrupt, leaving the elderly without the benefits they worked so hard and so long to earn. More and more employees today cannot afford health insurance even while working, and few can even dream of lifetime, fully paid-up family coverage. Thus, the battle for health care security for both active and retired workers is likely to continue for many years to come.

VII. CONCLUSION

It is beyond the scope of this Article to suggest any specific or comprehensive legal reforms. However, having identified some examples of the problems workers face in winning economic security, it is appropriate to also identify some broad principles which should guide any attempt at systematic legal reform.

²⁸⁷ See Proof of Claim, *In re Westmoreland Coal Co.*, No. 96-26092 MSK (filed by UMWA on November 25, 1997); Objection, Counterclaim and Third-Party Complaint, *In re Westmoreland Coal Co.*, A.P. No. 98-1160 RJB; UNITED STATES SECURITIES AND EXCHANGE COMM'N, FORM 10K at 35-36 (Westmoreland Coal Company, for period ending Dec. 31, 1997).

²⁸⁸ See Order, *In re Westmoreland Coal Co.*, A.P. No. 98-1160 RJB (filed April 29, 1998) (granting motion to dismiss 1993 Benefit Plan) and Order, *In re Westmoreland Coal Co.*, A.P. No. 98-1160 RJB (filed May 27, 1998) (denying motion for summary judgment against the Union).

First, under current law, collective bargaining alone does not offer sufficient economic security to workers. Given the legal restraints on the economic weapons a union may use to pressure an employer, most employees do not have the leverage to negotiate contracts that sufficiently ensure job security. As more companies recognize their ability to shift capital into lower wage markets, forcing more and more competition between workers for jobs, it will become increasingly difficult for unions to restrain companies which choose to abandon their workers and their communities.

Second, laws protecting workers' rights have not kept pace with changes in the nature and speed of economic activity. Current business practices – as they have become more and more ruthlessly competitive – target labor as a principle source of potential cost reductions. Reform must effectively deal with the consequences of recent deregulation, globalization of markets, and the view that fiduciary duties run only to shareholders.

Finally, any reform should address the failure of current formal rules to reflect the realities of the workplace or the corporate world. Courts are often restrained from ruling in favor of workers because companies have the ability to avoid liabilities by re-structuring their corporate form and their transactions. Even though worker protection laws are numerous, and even to some, overprotective, they are all too easy to thwart with expensive and creative legal advice. Instead of such formal rules, labor laws should take a functional look at the employer-employee relationship, and attempt to pierce the corporate veil and other such legal fictions which, in the real world, allow capital to reap profits at the expense of workers, retirees, taxpayers, and society as a whole.²⁸⁹

The barriers and obstacles described in this Article should not be viewed as a road map for cheating workers, but rather as a short list of soft spots in our current system of labor and employment protections that require repairs in order to protect future generations of workers from suffering the same injustices. Laws protecting corporations and favoring considerations of capital over working people are entrenched, and will not be changed without first achieving a political and social realignment that gives real power to workers and their families. Only with the unified efforts of a broad coalition, including workers, unions, civil rights, religious and community organizations, and maybe even some progressive corporations, can such legal reform become a reality.

²⁸⁹ Several excellent articles provide an example of these sorts of reform proposals in the joint employer context, where companies have attempted to shield themselves from direct collective bargaining through the use of contractors. *See supra* Part IV; Becker, *supra* note 157; Englestein, *supra* note 157. Both the Becker article and the Englestein article discuss the use of subcontracting to avoid government regulation of the employment relationship, and propose some functional solutions to how the law should view the relationship between a company, its contractor, and the contractor's employees.

