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# IMPLIED CONTRACTS AND CREATING A CORPORATE TORT, ONE WAY STATE AND LOCAL GOVERNMENT ARE STARTING TO FIGHT PLANT CLOSINGS

J. BRADLEY RUSSELL\*

## I. INTRODUCTION

Increases in capital mobility and the frenzy of corporate acquisitions have caused a restructuring of the American economy that manifests itself through the closure of plants and other facilities. Because of the devastating impact these closures have on communities, state and local governments are feeling increased pressure to intervene. This article examines four lawsuits recently filed by state and local governments against corporations that have closed or plan to close a plant within the jurisdiction of the particular governmental unit. A brief initial discussion of the problem—merger mania and increased capital mobility—and a short review of past efforts to contain the problem provide the context for examination of these lawsuits.

## II. THE PROBLEMS OF RESTRUCTURING

The last decade has seen increased restructuring of all facets of the American economy. The results of this restructuring are rarely felt by corporate shareholders, but rather are felt by the communities where the plants and businesses are closed. The problems faced by these communities and by the scores of displaced workers are self

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evident.<sup>1</sup> One particular facet of restructuring, “merger mania,” is especially destructive to the economy.

Two decades of managerial energies devoted to sterile paper entrepreneurialism and the merger game are, at the same time, two decades during which management attention has been diverted from the critical task of investing in *new* plants, *new* products, and *new* state-of-the art manufacturing techniques. Billions of dollars spent on shuffling ownership shares are *not* spent on productivity-enhancing plant, equipment, and research and development.<sup>2</sup>

Since 1980, the annual number of corporate acquisitions has more than doubled, and the value of the companies being acquired on

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1. The following is an excerpt from one of many letters received by West Virginia Governor, Arch A. Moore, Jr., regarding the plant closing and its impact.

I am writing in regards to the Anchor Hocking employees.

I am concerned about the middle aged people who worked there. The younger people can and are most able, and most likely, to get rehired. The older people, over 55 years of age, can get their pensions.

What about the middle people? People ranging in age, mostly 45 to 55. Most of them started at the plant when they were 18 years old, and as far as occupation, they know nothing else! Most of them have been there 30 to 35 years. Over the years a lot of them have developed many medical problems. Some of which were brought on by their work.

Now with their age and medical history who is going to hire them?

I know several people, ladies and men, who are in this category.

I hope you really read this, because I want to tell you about one of them.

He has worked at the plant since he was 18 years old to date, he has been employed at the plant 36 years!

He has hearing loss. One nerve in his ear is damaged so bad, it has affected his eye sight. He has just started wearing glasses. He is a diabetic, taking 2 insulin shots a day. He has worked the last 2 years with large sores on the bottom of his feet. (How, I do not know.) His feet and legs are blue from loss of circulation and dead nerve. He gets nauseous and vomits 3 or 4 times a day and has for the past 2 years.

In April he will be 54 years old. With his medical history who will hire him???

. . . . .

I think there should be some bargaining done for these people! I don't know what; maybe total years worked plus age.

So where do these people stand? They can't get welfare, (no dependent children), they worked all these years to gain a home, plus necessities to live. Most of them own a home and a car or two. So they are not eligible.

It is a shame. You have to lose what you worked for your whole life in order to get any help.

. . . . .

Now, when I tell you who the man I have mention is you will say I am prejudice. I am!! He is my husband . . . . .

2. Brock, *Bigness is the Problem, Not the Solution*, CHALLENGE, July-Aug. 1987, at 11, 14 (emphasis in original).

an annual basis has increased five-fold.<sup>3</sup> During this same time period, the amount of money spent on mergers and acquisitions has far exceeded industry-financed research and development; and in recent years the amount spent on mergers and acquisitions has even exceeded net nonresidential private domestic investment.<sup>4</sup>

Because corporate acquisitions are presumed to be in the best interest of the shareholders and the economy, the interests of communities and employees have been subordinated.<sup>5</sup> Only recently have commentators started to challenge the presumption that acquisitions

3. Professor Brock, reports the following statistics:

Year	Number of Acquisitions	Total Reported Value (\$ in billions)
1980	1,565	33.06
1981	2,326	66.96
1982	2,295	60.39
1983	2,345	52.25
1984	3,064	125.23
1985	3,165	139.13
1986	4,022	190.00

*Id.* at 12 (citation omitted).

4. To prove this point, Professor Brock, offers the following table (\$ in billions):

Year	M & A	Industry Financed R & D	Net Nonresidential Private Domestic Investment
1980	\$ 44.3	\$30.9	\$ 88.9
1981	82.6	35.9	98.6
1982	53.8	40.1	65.5
1983	73.1	43.2	45.8
1984	122.2	48.0	92.0
1985	179.8	53.2	117.2

*Id.* at 14 (citation omitted).

5. Generally speaking, the literature recognizes four theories of why acquisitions occur. Summary of Staff Study, *Determinants of Corporate Merger Activity: A Review of the Literature*, 73 FED. RES. BALL. 270 (1987). The first hypothesis concludes that "mergers and takeovers primarily reflect efforts to wrest corporate control from inefficient entrenched management in order to realize the full potential of a firm's assets." *Id.* A second hypothesis concludes that tax considerations, e.g. increased depreciation through increasing the basis of assets, tax-loss carryovers, etc., form the basis for corporate acquisitions. *Id.* at 270-71. A third theory "maintains that mergers are motivated by the desire to limit competition and gain market power." *Id.* The final hypothesis suggests that mergers and acquisitions are the result of market inefficiencies that leave the asset value of a corporation undervalued, thus, a bargain purchase can occur. *Id.* All of these hypotheses reflect a belief that acquisitions promote market efficiency and increase shareholder value.

are good for the shareholders.<sup>6</sup> The costs of corporate acquisitions to other segments of the economy are more frequently becoming the focus of articles.<sup>7</sup> More importantly, the harms occasioned by merger mania and the general restructuring of the economy<sup>8</sup> are becoming the focus of government intervention, primarily on the state and local levels.

The experience of West Virginia with corporate acquisitions has not been favorable. In August of 1987, West Virginia was faced with a plant closing that was the direct result of a corporate acquisition. On July 1, 1987, the Newell Co. acquired the Anchor Hocking Corporation.<sup>9</sup> Anchor Hocking Corporation is primarily

6. See Weiderbaum & Vogt, *Takeovers and Stockholders, Winners and Losers*, 29 CALIF. MANAGEMENT REV. 157 (Summer 1987). This article suggests that contrary to the "prevailing folklore" there are shareholder losers in the takeover game. The article also suggests some personal motives in acquisitions: "in a market for corporate control where transactions costs are present, the management of the acquiring firms can pursue acquisition strategies that satisfy their individual interests at the expense of shareholders." *Id.* at 162.

7. There are numerous insightful articles which question the value of the current level of corporate acquisition. See, e.g., Alexander, *Is the United States Substituting a Speculative Economy for a Productive One?*, 20 J. ECON. ISSUES 365, 374 (1986); Drucker, *To End the Raiding Roulette Game*, ACROSS THE BOARD 30 (April 1986). Professor Alexander, in his article, focuses on: "the decline of basic producing sectors of the economy, and the increasing diversion of financial resources, capital equipment, and human talent into activities that do not produce goods or services designed to raise the general standard of living, that do not improve the capacity of the economy to provide such increases in the standard of living, but, rather, that amount to speculation." Alexander, *supra*, at 365. Professor Alexander predicts dire peril for the American economy, and particularly its currency, if the trend continues. *Id.* at 372-73. Professor Drucker criticizes the impact of the raiding roulette game: "There is a great deal of discussion about whether hostile takeovers are good or bad for shareholders. There can be absolutely no doubt, however, that they are exceedingly bad for the economy." Drucker, *supra*, at 30. Professor Drucker predicts government intervention, through the courts or otherwise, will restore a balance of the competing interests involved in takeovers. *Id.* at 38-39.

8. The general restructuring problem is often characterized as plant closings. Included within plant closings is a subset of actions taken as a result of an acquisition or as a necessary step to keep a company from becoming a target. In *Raiding Roulette*, Professor Drucker notes that merger mania forces management to operate in the short term. "More and more of our businesses, large, medium-size, and small, are being run, not for the best business results, but, for protection against the hostile takeover." *Id.* at 30. The short term profitability focus often results in plant closings and transfer of operation for only marginal profitability gains. The impact of plant closings, in even large sunbelt states, is astounding. "During three years, 1980, 1981 and 1982, in California alone, a sunbelt state, 979 plant closings resulted in 105,171 lost jobs . . ." Rhine, *Business Closings and Their Effects on Employees-Adaptation of the Tort of Wrongful Discharge*, 8 INDUS. REL. L.J. 362, 364 (1986) (citation omitted).

9. Newell Co., based in Freeport, Illinois, has an extensive history of corporate acquisitions.

In 1968 the Newell Co. acquired E. H. Tate Co. (Bulldog home hardware) and Dorfile Mfg.

engaged in the manufacture of glassware. One of its facilities, plant #90, is located in Clarksburg, West Virginia, and, at the time of acquisition, employed 940 persons. On August 10, 1987, the Newell Co. announced it would close this plant effective November 1, 1987. In the weeks after this announcement, government leaders scrambled to find alternatives. When discussions between the corporation and the state yielded no alternatives, the state and Governor Arch A. Moore, Jr. filed suit on September 23, 1987, in the United States District Court for the Northern District of West Virginia and, later, on October 7, 1987, filed suit in the Circuit Court of Harrison County. This latter lawsuit, similar lawsuits in other states, and the causes of actions they assert will be discussed, *infra*.

### III. PAST RESPONSES OF GOVERNMENT

Currently in the United States there is a great effort being made to limit merger mania and plant closings. Many states have enacted plant closing legislation, which routinely requires advance notice of the shut down and, in some instances, requires severance pay.<sup>10</sup> The

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Co. (shelving systems). In 1971 the Boyle Needle Co. (art needlework) was acquired. In 1972 Newell Co. went public. 1973 marked the acquisitions of the EZ Paint Corp. (paint sundries) and Jordan Industries (home hardware). Newell took a brief rest and in 1978 continued its acquisition strategy by taking over Dixon Red Devil, Canada (paint sundries), the Edgcraft Corp. (shelving systems), and Baker Brush Co. (paint sundries). In 1979 the Newell Co. became a NYSE company. In 1980 it acquired the Brearley Co. (Counselor bathroom scales). In 1981 the company swallowed two other entities, Jiffy Enterprises (home hardware) and Judd Drapery Hardware, a division of the Stanley Works. In 1982 the acquisition strategy continued to burn with the acquisition of BernzOmatic Corp. (propane/oxygen hand torches) and the Handi-Man Corp. (home hardware). 1983 the Mirro Corp. (cookware and bakeware) was added to the Newell group of companies. 1984 saw the acquisition of Foley-ASC, Inc. (cookware and bakeware) and Lilo-Rail of Canada (drapery hardware). In 1985 the Newell Company acquired Ignitor Products International, Inc. (hand torches) and Androck, Inc., Canada (paint sundries and home hardware). A 39% interest in American Tool (vise-grip locking plier) was also accomplished in 1985. The William E. Wright Co. (ribbons, lace and trimming) was acquired in 1987 along with the Anchor Hocking Corporation. NEWELL Co., 1986 ANNUAL REPORT 13 (1987); NEWELL Co., 1987 FIRST QUARTER REPORT AND INVESTOR FACT SHEET 2-3 (1987).

10. Various legislative proposals have been advanced to soften the impact of closings on the workers and communities left behind, but few have been enacted. In 1982 there were 16 such proposals pending in various states. All of them required advance notification to employees, unions, and representatives of the affected communities by employers proposing to terminate, relocate, or drastically reduce operations. Notice requirements ranged from 60 days to two years. . . .

Actual passage of closing legislation has, however, been limited to only four states: Maine, New Jersey, Rhode Island, and Wisconsin.

Rhine, *Business Closings and Their Effect on Employees-The Need for New Remedies*, 35 LAB. L.J. 268, 272 (May 1984) (footnotes omitted).

second area of government intervention in problems of restructuring is the attempt to restrict mergers and acquisitions. "Historically, federal takeover policy has been the narrow aim of protecting the shareholders of target companies. However, many states' takeover policies, while seeking to protect their residents as investors, also seek to protect a much broader array of interests."<sup>11</sup>

In 1982 the United States Supreme Court dealt a blow to the ability of states to regulate takeovers when it decided *Edgar v. Mite Corp.*<sup>12</sup> In that case the Court struck down an Illinois statute that attempted to regulate, and effectively deter, corporate acquisitions.<sup>13</sup> Legislation passed subsequent to the *Mite* decision has been generally unsuccessful.<sup>14</sup> Recently, however, the Supreme Court upheld an Indiana acquisition statute against both a Williams Act and a commerce clause challenge.<sup>15</sup> Thus, at the time of this writing, new life has been given to state takeover regulations. Its impact has yet to be seen. Both plant legislation and takeover regulations deal with the broad picture of restructuring without addressing specific instances. While general treatment of the subject may yield the best results, recently governments, including West Virginia, have begun to challenge, through the courts, specific plant closings.

#### IV. LITIGATION BY UNIONS TO STOP PLANT CLOSINGS

Starting in the late 1970's and continuing into the 1980's, judicial challenges to plant closings were made by employee groups and unions. Generally speaking, these challenges were unsuccessful. The most famous case, *United Steelworkers Local 1330 v. United States Steel Corporation*<sup>16</sup> (hereafter *Youngstown Steel*) involved the closure of two steel mills by U. S. Steel and the attempts by the union

11. Note, *The Constitutionality of State Business Combination Legislation: New York's Section 912*, 8 CARDOZO L. REV. 1025, 1027 (1987) (footnotes omitted).

12. *Edgar v. Mite Corp.*, 457 U.S. 624 (1982).

13. *Id.*

14. See, *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986); *Dynamics Corp. v. CTS Corp.*, 794 F.2d 250 (7th Cir 1986), *rev'd*, 107 S. Ct. 1637 (1987); *Ichan v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1986).

15. *CTS Corp. v. Dynamics Corp.*, 107 S. Ct. 1637 (1987).

16. *United Steelworkers Local 1330 v. United States Steel Corp.*, 492 F. Supp. 1 (N.D. Ohio), *aff'd in part, rev'd in part*, 631 F.2d 1264 (6th Cir. 1980) [hereinafter *Youngstown Steel*].

and the community to stop the closure.<sup>17</sup> The Court of Appeals for the Sixth Circuit recognized the problem and clarified the articulated cause of action:

This appeal represents a cry for help from steelworkers and townspeople in the City of Youngstown, Ohio who are distressed by the prospective impact upon their lives and their city of the closing of two large steel mills.

. . . .  
The primary issue in this case is a claim on the part of the steel worker plaintiffs that United States Steel made proposals to the plaintiffs and/or the membership of the plaintiffs to the general effect that if the workers at the two steel plants concerned put forth their best efforts in terms of productivity and thereby rendered the two plants 'profitable,' the plants would then not be closed. It is clear that this claimed contract does not rest upon any formal written document, either authorized or signed by the parties to this law suit.<sup>18</sup>

The representations by the company and the detrimental reliance on them by the employees were well documented.<sup>19</sup> The "cry for help" went unheeded as both the district court and Sixth Circuit concluded that the condition precedent to continued operation, the profitability of the plant,<sup>20</sup> had never been met.

Another cause of action asserted in *Youngstown Steel* derived from some comments the district judge made at a pretrial hearing. This cause of action was called the "community property claim" and, generally, suggested that the community, because of its long relationship with the plants and the company, had acquired a property right in the plants.<sup>21</sup> Neither the district court nor the Sixth

17. The United States District Court for the Northern District of Ohio granted a preliminary injunction keeping the plants open and then held a prompt trial, days later, at which point the injunction was dissolved. *Youngstown Steel*, 492 F. Supp. at 2.

18. *Youngstown Steel*, 631 F.2d at 1265, 1267.

19. *Id.* at 1271-77; *Youngstown Steel*, 492 F. Supp. at 5-11.

20. *Youngstown Steel*, 492 F. Supp. at 11; 631 F.2d at 1279.

21. United States District Judge Thomas Lambros articulated this theory:

It would seem to me that when we take a look at the whole body of American law and the principles we attempt to come out with—and although a legislature has not pronounced any laws with respect to such a property right, that is not to suggest that there will not be a need for such a law in the future dealing with similar situations—it seems to me that a property right has arisen from this lengthy, long-established relationship between United States Steel, the steel industry as an institution, the community in Youngstown, the people in Mahoning County and the Mahoning Valley in having given and devoted their lives to this industry. Perhaps not a property right to the extent that can be remedied by compelling U.S. Steel to remain in Youngstown. But I think the law can recognize the property right



Circuit felt that recognizing this asserted cause of action was within the role of the courts.<sup>22</sup>

One success by unions in the litigation of plant closings is the enforcement of arbitration clauses where a legitimate dispute as to a contractual provision regarding the plant closing arises. In *Lever Brothers Company v. International Chemical Worker's Local 217*,<sup>23</sup> the court affirmed a lower court injunction that prevented Lever Brothers from transferring a soap production operation from Baltimore, Maryland, to Hammond, Indiana, until arbitration over a "due consideration-full information" contractual prerequisite was met. The Fourth Circuit adopted a "frustration of arbitration" standard and affirmed the injunction, inasmuch as arbitration would have been meaningless and frustrated had the plant transfer been allowed to take place.<sup>24</sup>

The crux of the problem of restructuring is determining what duty a corporation has to the community it vacates and the employees it terminates. The intervention of governmental units to legally challenge plant closings implicates both considerations.

## V. STATE AND LOCAL GOVERNMENT FIGHTS BACK

There are four suits currently pending in which governmental units challenge a plant closing.<sup>25</sup> All four suits base action on inducements granted by the government to the corporations.

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*to the extent that U.S. Steel cannot leave the Mahoning Valley and the Youngstown area in a state of waste, that it cannot completely abandon its obligation to that community, because certain vested rights have arisen out of this long relationship and institution.*

*Youngstown Steel*, 631 F.2d at 1280 (emphasis in original).

Needless to say the United Steel Workers then moved to amend their complaint to reflect this new "cause of action."

22. In rejecting this "community property" cause of action, the Sixth Circuit stated: "In the view of this court, formulation of public policy on the great issues involved in plant closings and removals is clearly the responsibility of the legislatures of the states or of the Congress of the United States." *Id.* at 1282.

23. *Lever Bros. v. International Chem. Workers Local 217*, 554 F.2d 115 (4th Cir. 1976).

24. *Id.* at 122. See also, *Lowe Lodge No. 1226, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 283 (7th Cir. 1981), where that court adopted the *Lever Brothers* standard and affirmed the enjoining of the sale of an industrial facility pending resolution of a grievance over whether Panoramic was required to condition the transaction on the purchaser recognizing the local union under the collective bargaining agreement.

25. *City of Yonkers v. Otis Elevator Co.*, No. 83 Civ. 5944 (S.D.N.Y.), appeal docketed, No.

### A. *City of Yonkers v. Otis Elevator Company*<sup>26</sup>

The first of these suits was filed by the City of Yonkers against the Otis Elevator Company and its parent, United Technologies Corporation. In 1971 Otis Elevator considered moving from Yonkers, New York, to a site in New Jersey due to limitations on its ability to expand and modernize its Yonkers facility because of the non-existence of available land contiguous to its plant. Otis approached city officials regarding this problem and eventually reached an agreement whereby the City of Yonkers, through its appropriate agencies, exercised its urban renewal powers to condemn the existing houses and business in the vicinity of the Otis plant. The city then razed the existing structures and gave the land to Otis for a token price. In return, Otis agreed to expand and modernize its production and remain in Yonkers.

The City of Yonkers spent in excess of \$16,000,000 in fulfilling its end of the deal and transferred the land to Otis for \$554,000.<sup>27</sup>

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87-7092 (2d Cir. 1987); *City of Norwood v. General Motors Corp.*, No. A8705920 (C.P. Hamilton Co., Ohio); *In Re: Indenture of Trust Dated as of March 1, 1982, re: City of Duluth \$10,000,000 Indus. Dev. Revenue Bonds, Series 1982-1 (The Triangle Corp. Project)*, Court File No. 158 (6th Dist. Minn.); *West Virginia v. Anchor Hocking Corp.*, No. 87-C-759-1 (Cir. Ct., Harrison Co., W. Va.).

26. *City of Yonkers*, No. 87-7092.

27. The complaint filed in the action alleges, in pertinent part:

13. Prior to 1972, Otis considered moving its operations from Yonkers because Otis's physical plant in Yonkers was antiquated and becoming inefficient.

14. Otis informed Yonkers and the Development Agency that in order to be competitive Otis would require more land than it owned in Yonkers in order to construct new and efficient facilities to carry out its future elevator manufacturing operations.

15. Otis said it could not expand its facilities within Yonkers because acquisition of land would be too complex, and because it could not acquire the public thoroughfares within Yonkers required to put together a proper land package.

16. On March 7, 1972, based upon the representations by Otis and in an attempt to retain Otis in Yonkers and, in addition, to retain employment as well as to provide opportunities for training and further employment of residents of Yonkers and surrounding areas through development of the industrial site, and to eliminate some substandard and deteriorating areas, Yonkers and the Development Agency proposed, in writing, to assume financial, administrative and governmental responsibilities to obtain, transfer, and make available to Otis land in Yonkers of sufficient size, condition, and continuity to its existing holdings to enable Otis to construct the new facilities Otis said it required in order to modernize and make more efficient and competitive its operations in Yonkers.

17. The proposal by Yonkers and the Development Agency was contingent upon Otis's continuing its operations in Yonkers.

Between 1974 and 1976 Otis spent approximately \$14,000,000 to

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18. The proposal by Yonkers and the Development Agency was extended with the understanding that if accepted by Otis, Yonkers and the Development Agency would expect that Otis would remain for a period of time to provide Yonkers and the Development Agency a reasonable opportunity to realize and recover its investments and expenses on behalf of the general public and for the better welfare and good of the community.

19. On June 5, 1972, Development Agency (then known as Yonkers Urban Renewal Agency), Yonkers, and Otis executed a "Letter of Intent" whereby Otis agreed, in acceptance of the March 7, 1972 proposal, *inter alia*, to remain in Yonkers; accept the Urban Renewal Plan dated May 31, 1972; accept the land package involved; improve and expand its facilities; and continue its opportunities for employment and job training.

20. Development Agency and Yonkers agreed by the "Letter of Intent" to convey or transfer substantially the same land offered to Otis in the March 7, 1972 proposal at prices set forth in the "Letter of Intent", regardless of the value of the public thoroughfares owned by Yonkers or of the actual cost incurred by Yonkers and the Development Agency in obtaining, clearing, and preparing the land.

21. By execution of the June 5, 1972 "Letter of Intent" and a September 13, 1974 contract for sale of land, and by subsequent acceptance of the land package and construction of facilities in Yonkers, Otis accepted the March 7, 1972 proposal and agreed to continue its operations in Yonkers for a reasonable period of time, and to remain for a period of time to provide Yonkers and the Development Agency a reasonable opportunity to realize and recover their investments and expenses on behalf of the general public and for the better welfare and good of the community.

#### *Implied Contract*

22. The acceptance by Otis in 1974 of the land package from Yonkers and the Development Agency carried with it an implied acceptance by Otis of the condition precedent to the offer and sale of the land, to wit: Otis would continue its operations in Yonkers for a reasonable period of time, and that Otis would remain for a period of time to provide Yonkers and the Development Agency a reasonable opportunity to realize and recover their investments and expenses on behalf of the general public and for the better welfare and good of the community.

#### *Quasi Contract*

23. Acceptance by Otis of the land at a price far less than the cost or value to Yonkers and the Development Agency, with the knowledge by Otis that Yonkers and Development Agency were willing to accept a price for the land at much less than its full cost or value, in an effort to retain Otis's operations in Yonkers for a reasonable period of time, provides Yonkers and the Development Agency a contract by law to obtain fair value of difference between the amount paid by Otis and the cost and value to Yonkers and the Development Agency, as well as the public in general, when Otis prematurely removed its operations from Yonkers as hereinafter set forth.

#### *Breach of Contract*

24. The period of time for performance by Otis and United of these obligations due to Yonkers and the Development Agency is for a reasonable time to be set by law, and is alleged to be at least sixty years.

expand and modernize its facility in Yonkers.<sup>28</sup> In 1983 Otis closed its Yonkers plant and the city filed suit to recover the \$16,000,000 it spent to condemn and raze the properties that it had provided to Otis. In addition, it sought \$5,000,000 in punitive damages.

The *Yonkers* case presents a governmental unit seeking to recover the value of the inducement granted to the corporation. The central issue is how long Otis was obligated to remain in Yonkers by receiving the inducement from the city. No time was expressly provided by any agreement; thus, Yonkers relies on general contract law for the principal that the law will supply a "reasonable time." Yonkers further argues that the New York Court of Appeals decision in *Haines v. City of New York*<sup>29</sup> is controlling: "[W]here the parties have not clearly expressed the duration of a contract, the court will imply that they intended the performance to run for a reasonable time."<sup>30</sup> The length of that "reasonable" time<sup>31</sup> is a jury question.

The *Yonkers* cause of action would seem to be meritorious.<sup>31</sup> The voluntary acceptance of inducements by a corporation in return for its agreement, express or implied, to operate a plant or business (and thereby provide economic benefits to the community) should create a right of action to satisfy the governmental unit's *quid pro quo*. Interestingly, Yonkers seeks to be made whole for its expen-

25. All terms and conditions of the "Letter of Intent" were fulfilled by Yonkers and the Development Agency; title to the property was transferred and conveyed to Otis in 1974.

26. Otis completed expansion and construction of its facilities in Yonkers in 1976 and started operations in the expanded facilities that same year.

27. The value of the public thoroughfares and the cost to Yonkers and the Development Agency of meeting the requirements of the proposal, "Letter of Intent", and agreements with Otis exceeded \$16,500,000.

28. The property was sold to Otis for the net sum of \$554,000 pursuant to the terms of the "Letter of Intent" and the contract for sale of land.

Complaint at 4-8, *City of Yonkers*, No. 83 Civ. 5944.

28. Brief of Otis Elevator at 1, *City of Yonkers*, No. 87-7092.

29. *Haines v. City of New York*, 41 N.Y.2d 769, 364 N.E.2d 820, 396N.Y.S.2d 155, (1977).

30. *Id.* at 772, 364 N.E.2d at 822, 396 N.Y.S.2d at 158.

31. The United States District Court for the Southern District of New York granted Otis Elevator's motion for summary judgment on December 11, 1986. The district court applied the statute of frauds to the "agreement", i.e. because the "reasonable time" was greater than one year, the statute of frauds prohibited proof by oral testimony. *City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716, 725-30 (S.D.N.Y. 1986). Alternatively, the district court held that the time Otis was to remain in Yonkers was terminable at will. *Id.* at 732. The City of Yonkers appealed the ruling to the Second Circuit and the case has been submitted for decision for nearly a year.

ditures as opposed to seeking the value of the benefit it was to receive as its part of the bargain, *i.e.* the financial impact of the Otis plant on the community for the "reasonable" period of time. That measure of damages, which would clearly be greater than the value of the inducement, may have been rendered negligible by the sale of the plant by Otis to the Port Authority of New York and New Jersey and the subsequent investment and provision of jobs by the Port Authority at the Yonkers facility.<sup>32</sup>

### B. *City of Norwood, Ohio v. General Motors Corporation*<sup>33</sup>

The largest employer in Norwood, Ohio, was General Motors (hereinafter "G.M."). In August 1987, as part of an ongoing modernization effort, G.M. closed its Norwood facility and transferred the full operation to its Van Nuys, California, plant. Several thousand workers were idled by this closing, and the City of Norwood filed suit. Norwood's complaint alleges, generally, that G.M. has been unfair and irresponsible in its treatment of Norwood in light of the devastating consequences of this closing. Norwood filed suit under several different theories.<sup>34</sup>

32. Brief of Otis Elevator at 24, *City of Yonkers*, No. 87-7092.

33. *City of Norwood*, No. A 8705920.

34. The complaint provides in pertinent part:

7. The Defendant, General Motors Corporation, first established an assembly plant in the City of Norwood in 1923. The size of the plant grew continuously, until the plant became the City of Norwood's largest employer, employing in excess of four thousand two hundred (4,200) individuals. The city of Norwood encouraged the growth of the General Motors' Norwood plant, and the General Motors Corporation became a vital and integral part of Norwood's community.

8. The City of Norwood encouraged the growth of the Norwood GM plant by granting numerous concessions to the Defendant, General Motors Corporation, including, but not limited to, the building of an underpass at Forest Avenue in 1982, at a cost to the Plaintiff of Seven Hundred Fifty Thousand (\$750,000.00) Dollars, to accommodate trains bringing rail cars into the Norwood GM plant, upon the assurances and representations of the Defendant, General Motors Corporation, that the Defendant was spending Two Hundred Million (\$200,000,000.00) Dollars to modernize the Norwood GM plant. Further, the Plaintiff vacated several streets in and around the GM plant, at great cost to the Plaintiff, to permit the Defendant, General Motors' Norwood property to be contiguous. Other concessions included assisting General Motors in the purchase or attempted purchase of property adjacent to the Norwood Plant, assisting with traffic problems and, in general, doing anything that General Motors requested.

9. In November of 1986, the Defendant, General Motors Corporation, announced,

A breach of contract theory relates that Norwood provided several concessions and inducements to G.M. and consequently, G.M.

without warning, that the Norwood GM plant would close in 1988; all operations would be moved at that time to Van Nuys, California. Then, again without prior notice, in March of 1987, General Motors announced that the Norwood GM plant would close instead in August of 1987.

10. The closing of the Norwood GM plant has had and will have a catastrophic economic effect upon the City of Norwood; the Defendant, General Motors Corporation, is the City's largest employer and taxpayer, and the City derives nearly one-third of its tax revenues from the Defendant.

11. The City of Norwood, in the ordinary course of its business, prepares its budgets five years in advance, and bases its hiring decisions, wage and benefit packages, purchasing decisions, public works decisions and other matters of a similar nature, on projected revenues. The City of Norwood had thus originally anticipated total tax revenues for the years 1986 to 1991 as follows:

1986 : \$9,278,455	1989 : \$8,888,707
1987 : \$8,372,269	1990 : \$9,185,231
1988 : \$8,472,356	1991 : \$9,494,302

In light of the closing of the Norwood GM plant, the City of Norwood now anticipates a gross reduction of revenue, for the years 1986 to 1991, in the amount of Fifteen Million Six Hundred Eighty Eight Thousand Seven Hundred Eighty Six (\$15,688,786.00) dollars.

12. To begin adjusting for the sudden, and unexpected, termination of operations at the Norwood GM plant, the City of Norwood has instituted a number of immediate, emergency cost saving measures, including:

- a.) A ten percent (10%) reduction in salary for all administrative personnel;
- b.) Termination of approximately ten percent (10%) of the City's work force, with the termination of an additional seven percent (7%) through the process of attrition;
- c.) Elimination of the City's Waste Collection Department;
- d.) A ten percent (10%) reduction in the budget of the Police Department;
- e.) A ten percent (10%) reduction in the budget of the Fire Department;
- f.) Reduction in senior citizens' social services;
- g.) Elimination of most liability insurance coverage;
- h.) A thirty percent (30%) increase in water rates; and
- i.) A decrease, due to attrition, of the City's police and fire departments.

Despite the foregoing measures, the City of Norwood will still suffer a substantial deficit, which will further affect adversely the quality of life of the citizens of the City of Norwood.

13. The Defendant, General Motors Corporation, has also informed the city of Norwood that at the time of the GM plant closing, the Defendant, General Motors Corporation, will remove its fire and plant protection personnel from its property, and that the City of Norwood must assume the full responsibility for fire and police protection for General Motors' Norwood property. Thus, the City of Norwood must offer additional services, previously unrequired, to General Motors at a time when the Plaintiff's police and fire forces have been seriously depleted, due to the acts of General Motors. The cost of the additional services which Norwood will be required to furnish to General Motors will exceed Four Hundred Fifty Thousand Dollars (\$450,000.00) per year.

14. At the time of the announcement by General Motors that its Norwood plant would close, officials of the City of Norwood sought to deter General Motors' decision by offering additional concessions to the General Motors, but to no avail. Thereafter, in an effort to

was to retain a viable manufacturing facility in Norwood.<sup>35</sup> Addi-

mitigate the economic impact upon the City of Norwood, caused by the closing of the Norwood GM plant, the City of Norwood formed a citizen's Task Force to study the City's financial crisis and to propose a plan for relief to the Defendant. A plan was submitted to the General Motors in April, 1987 followed by a June 26, 1987 meeting with General Motors' representatives. General Motors proved uncooperative and uninterested, and took the position the General Motors would do nothing for the City. General Motors' attitude was one of callous indifference towards the community which had supported General Motors for the past sixty four (64) years.

15. The overwhelming size of the General Motors' Norwood plant, in relation to all other businesses in the City of Norwood, conferred upon the General Motors Corporation a virtual monopoly of power in its dealings with the City of Norwood, such dealings including General Motors' requests for concessions. Other American automakers, such as the Chrysler Corporation, having comparable relationships with cities in which major plants are located, have recognized their position of power and at the time of plant closing have offered generous transitional aid to the affected communities and have paid all obligations due the communities. The Defendant, General Motors Corporation, has refused to act in a like manner.

16. Due to the economic crisis facing the City of Norwood caused by the acts and omissions of the Defendant, General Motors Corporation, and due to its refusal to make a good faith effort to resolve the differences which have arisen between the Plaintiff and the General Motors, the Plaintiff, City of Norwood, has no option but to pursue its legal rights against the Defendant, for the purpose of protecting and assuring the well being of the citizens of the City of Norwood.

Complaint and Jury Demand at 2-7, *City of Norwood*, No. A-8705920.

35. In "Plaintiff's response to Defendants' Motion to Dismiss" Norwood outlines some of its inducements or concessions:

The following examples are given as an illustration of the kinds of concessions which were given by the citizens of Norwood over the years. This list is by no means all inclusive, but is indicative of the kind of power which General Motors was able to wield in the City of Norwood.

1. In 1981 the City of Norwood passed an ordinance requiring employers in the City to withhold an earnings tax. General Motors chose to ignore this requirement. Norwood sought to enforce this ordinance against General Motors but General Motors informed the City that it would by no means comply with the ordinance. Norwood had no choice but to give in to General Motors.

2. In 1982, at the request and urging of General Motors, Norwood built an underpass on Forest Avenue. It is true, as asserted by General Motors, that others used and continue to use this underpass. However, it was erected at the behest of the defendant and on the assurances that two hundred million dollars would be spent to modernize the Norwood Assembly plant. Without such assurances the underpass would not have been built. Norwood's share of the cost of the underpass was seven-hundred and fifty thousand (\$750,000.00) dollars. Matching funds from governmental agencies would not have been available without cooperation by the City of Norwood. The principal reason that the underpass was built was to accommodate rail traffic to and from the Norwood Assembly Plant.

3. Over the years, Norwood has vacated several streets around the Assembly Plant in order to accommodate GM's wishes that its property run contiguously. General Motors indicated to Norwood that if the property was joined contiguously the plant would run more efficiently thus benefitting both Norwood and General Motors. General Motors can hardly complain that Norwood relied on such assurances. Norwood quite naturally assumed

tionally Norwood alleges promissory estoppel and nuisance theories. For a period of time, Norwood received a temporary restraining order under the nuisance theory. The allegation was that the Norwood plant contained dangerous and flammable chemicals that had been stored there during its 60 year life, and G.M.'s withdrawal of fire protection and guards constituted a nuisance.<sup>36</sup>

In its prayer for relief, Norwood asks for \$56,000,000 for loss of tax revenues and commerce, \$9,000,000 for increased costs of police and fire protection, \$750,000 for the construction of an overpass, \$2,500,000 to rededicate previously vacated streets, and \$250,000,000 in punitive damages.

The Norwood suit seeks to create a common-law standard requiring corporations to deal fairly with communities they vacate. Norwood relies heavily on policy arguments contained in law review articles<sup>37</sup> and upon the articulation of U.S. District Judge Thomas Labros in the *Youngstown Steel* case discussed *supra*. G.M. responds that the Sixth Circuit expressly rejected that particular cause of action.<sup>38</sup>

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that by granting such requests GM would remain a going concern in Norwood.

4. 80% of Norwood is designated as an Enterprise Zone. This zone includes the entire General Motors Assembly Plant property. The existence of the Enterprise Zone gave GM an astronomical tax advantage. The designation of the property as an Enterprise Zone would not have been possible without the acquiescence [sic] of the City of Norwood.

5. Norwood was instrumental in implementing expansion plans for the Assembly Plant; Norwood assisted General Motors in acquiring property adjacent to the existing grounds. In particular, the City was instrumental in the acquisition of the Globe-Warke property. This property was a substantial acquisition for General Motors and Norwood assisted in this purchase on the implicit understanding that it was insuring the economic future of the City.

6. In compliance with the desires of General Motors, the City of Norwood refrained from actively soliciting for the location of other large [sic] in Norwood thus severely restricting the potential tax base of Norwood. The result is that when GM pulled out the city was economically devastated.

Plaintiff's Response to Defendants Motion to Dismiss at 4-6, *City of Norwood*, No. A-8705920.

36. The temporary restraining order was granted on August 7, 1987, modified on August 10, 1987, and vacated by an undated agreed order sometime in late August or early September, 1987, apparently as a result of the lack of factual basis for the allegation that dangerous and hazardous chemicals were stored on site, or a lack of factual basis that there was some violation of state or federal environmental laws.

37. See, e.g., Rhine, *Business Closings and Their Effect on Employees - The Need for New Remedies* 35 LABOR L.J. 268 (1984).

38. Motions to Dismiss and for Summary Judgment were filed by General Motors in November 1987 and were briefed and submitted to the court in late December. No ruling has yet issued.



*C. In Re: Indenture of Trust:<sup>39</sup> Duluth, Minnesota and the Diamond Tool Company*

This case began with the takeover of Diamond Tool and Horsehoe Company of Duluth, Minnesota, by the Triangle Corporation in the early 1980's. At the time of the acquisition, Triangle operated another tool manufacturer in Orangeburg, South Carolina, under the aegis of another wholly-owned subsidiary, Utica Tool Company, Inc. In October of 1981, Triangle approached the City of Duluth for assistance in financing the takeover and with a proposal to modernize and expand the manufacturing plant located in Duluth. On March 1, 1982, the City of Duluth, Triangle, Utica, and Diamond entered into a loan agreement whereby the city issued \$10,000,000 in Industrial Development Revenue Bonds and loaned that amount to the corporations for the project. In addition, an Indenture of Trust was entered between the city and the First Bank, N.A. of Duluth. Norwest Bank Minneapolis, N.A.,<sup>40</sup> issued a letter of credit to the Trustee to secure repayment of the principal and some of the interest of the Industrial Development Revenue Bonds. The corporations executed a Mortgage, Fixture Financing Statement, Assignment of Leases and Rents, and a Security Agreement relating to the Duluth plant. A Second Mortgage and similar security documents were also executed for the Orangeburg, South Carolina, facility of Utica Tool. The project proceeded as anticipated until March, 1987.<sup>41</sup> At that time, the corporation announced major relocations of warehouse and shipping functions, and the transfer of some manufacturing from the Duluth plant to the South Carolina plant. The corporations made this decision based upon a labor cost advantage and more flexible work rules at the Orangeburg facility. In December, 1987, the corporation announced the transfer of almost all operations from Duluth to Orangeburg. Predictably, a dispute arose

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39. *In Re: Indenture of Trust*, Court File No. 158.

40. At the time of the transaction Norwest was known as the Northwestern National Bank of Minneapolis.

41. The City also obtained an Urban Development Action Grant ("UDAG") from the U.S. Department of Housing and Urban Development in the amount of \$750,000 to assist in the modernization of the plant. Due to a downturn in the economy, the modernization plans were modified and an amendment to the agreement was executed by the parties to reflect this event.

between the city and the corporations as to whether the corporations were in violation of the 1982 contract, agreements, and security documents; accordingly, the Trustee commenced an action in state court to construe the documents and ascertain if a violation has in fact occurred.<sup>42</sup>

42. The petition filed in the state court alleges in pertinent part:

7. In October, 1981, Triangle and its wholly owned subsidiary Diamond, proposed to acquire all of the outstanding capital stock and assets of Diamond Tool and Horseshoe Co., a Minnesota corporation, and to expand, re-equip and modernize the existing manufacturing facility located in West Duluth, and applied to the City for help to finance such project through the City's issuance of \$10,000,000 of Industrial Development Revenue Bonds. Triangle, Diamond and Utica (collectively, the "Company") and the City entered into a Loan Agreement (the "Loan Agreement") dated as of March 1, 1982, a copy of which is appended hereto as Attachment B and incorporated by reference. Pursuant to the Loan Agreement, the City agreed to loan to the Company the proceeds of its \$10,000,000 Industrial Development Revenue Bonds, Series 1982-1 (The Triangle Corporation Project) dated March 1, 1982 (the "Bonds"). In connection with the issuance of the Bonds, the City and Trustee entered into the Indenture. Northwestern National Bank of Minneapolis (now known as Norwest Bank Minneapolis, National Association) ("Norwest") issued its Letter of Credit in favor of the Trustee to secure repayment of the principal and a portion of the interest on the Bonds. The obligations of the Company were secured by (1) a Mortgage, Fixture Financing Statement, Assignment of Leases and Rents and Security Agreement dated March 1, 1982, was granted from Triangle and Diamond to the Trustee and Norwest (the "Diamond Mortgage"), a copy of which is appended hereto as Attachment C and incorporated herein by reference, and (2) a Second Mortgage, Fixture Financing Statement, assignment of Leases and Rents and Security Agreement dated March 1, 1982, from Triangle and Utica to the Trustee and Norwest (the "Utica Mortgage"), a copy of which is appended hereto as Attachment D and incorporated herein by reference.

8. In addition to the loan pursuant to the Loan Agreement, the City obtained an Urban Development Action Grant for such project and the City loaned the Proceeds of such grant to the Company pursuant to an Action Grant Loan Agreement dated as of March 1, 1982, by and among the City, Triangle, Diamond and Utica (the "Action Grant Loan Agreement"), a copy of which is appended hereto as Attachment E and incorporated herein by reference, and such loan was secured by a Mortgage, Fixture Financing Statement and Security Agreement dated March 1, 1982, from the Triangle and Diamond to the City (the "City Mortgage").

9. The Loan Agreement contains, in part, the following representations of the Company:

(8) Subject to the other provisions of this Agreement and the Diamond Mortgage and City Mortgage, it is presently intended and reasonably expected that the equipment to be purchased from the proceeds of the Bonds will be permanently located and exclusively used on the Project Premises and that the Company will operate the Project on the Project Premises throughout the Term of this Agreement in the normal conduct of the Company's business.

Loan Agreement, Section 2.02 (8).

(11) . . . nor will the Bond proceeds be used in any other fashion which would violate provisions of the [Municipal Industrial Development] Act.

Loan Agreement, Section 2.02 (11).

On February 17, 1988, the district court set the case for hearing on March 30, 1988, and issued a restraining order prohibiting the

10. Project is defined in Section 1.01 of the Loan Agreement as . . . including all Project Equipment, as [it] may at any time exist. 'Project Equipment' is defined in Section 1.01 of the Loan Agreement as:

*Project Equipment:* any and all (i) fixtures of tangible personal property now or hereafter attached or affixed to the Project Premises, (ii) other tangible personal property now or hereafter located within or used in connection with the Project Premises or the Facility acquired, in whole or part, from Bond proceeds (which items are generally described in Exhibit B attached hereto), and (iii) any additions to, replacement of and substitutions for any of the foregoing as may be permitted or required by the Diamond Mortgage or this Agreement; but excluding (i) property installed pursuant to Section 3-3 of the Diamond Mortgage (if proper notice is given to the Trustee and the Bank, as Mortgages, pursuant to the provisions of said Section) and (ii) any other property released or taken by Condemnation as authorized or contemplated by the Diamond Mortgage.

"Project Premises" is also defined in Section 1.01 of the Loan Agreement and describes the real estate located in Duluth, Minnesota, on which the Company operates its manufacturing facilities.

11. Section 3.4 of the Diamond Mortgage contains the following provision governing removal of Project Equipment:

Section 3-4. *Removal of Project Equipment.* The Mortgagor [Triangle and Diamond] will not . . . without the prior written consent of the Mortgagee [the Trustee and Norwest], remove or permit the removal or sell or otherwise surrender its right to possession of any item of Project Equipment unless (1) the Mortgagor first determines that such item has become inadequate, obsolete, worn out, unsuitable, undesirable or unnecessary for the operation of the Mortgaged Property and that such disposition will not otherwise materially impair the operating unity or structural unity of the Mortgaged Property, and (2) if the estimated fair market value of such item exceeds \$500,000, the Mortgagor (1) either (a) substitutes for such item, machinery or equipment of substantially equivalent utility to that replaced, or (b) pays to the Trustee for deposit in the Bond Fund (as defined in the Indenture) a sum equal to the fair market value of the item to be replaced, and (2) notifies the Mortgagee of the action the Mortgagor intends to take with respect to such item of Project Equipment . . . This Mortgage shall immediately attach to and constitute a lien or security interest against any substituted item without further act of deed of the Mortgagor.

12. The Certificate of Company states in relevant part:

With respect to certain 'capital expenditure' limitations affecting the tax exempt status of the Bonds, we further certify . . . [t]he proceeds of the Bonds are to be used with respect to facilities located wholly within the boundaries of the City [of Duluth] (§ 9(f), page 13).

13. Since the acquisition of the Project, certain additional equipment has been installed at the Diamond facility in West Duluth and certain Project Equipment has been removed from the facility. A substantial portion of the Project Equipment which was removed from the Diamond facility has been transferred to Utica's Orangeburg, South Carolina, plant for use in the manufacture and sale of hand tools. Appended as Attachment F are unverified schedules prepared by Triangle of the Project Equipment added and removed from the Diamond facility.

14. Representatives of the city have asserted that removal of Project Equipment from the Diamond facility and the transfer of that Project Equipment to the Utica facility constitutes an event of default under both the Diamond Mortgage and the Loan Agreement and constitutes a violation of Minnesota Statutes Chapter 474 (now codified as part of

removal of any "Project Equipment" from the Duluth plant until resolution of the case. Owing in large part to the disqualification of the corporation's law firm in the matter, the hearing was continued for an additional thirty (30) days.<sup>43</sup>

The Duluth suit sets up the classic confrontation between the right of a corporation to transfer operations to a more profitable location (due to decreased labor costs, etc.) and the obligations that arise as a result of economic inducements received by corporations from local government. Duluth has an excellent suit as a result of an express contractual provision restricting transfer of "project equipment,"<sup>44</sup> a Minnesota statutory requirement that restricts such publicly financed corporate activities to Minnesota locales,<sup>45</sup> and the

Minnesota Statutes Chapter 469). Triangle is not in default on loan repayments under the Loan Agreement.

15. The Company has not obtained consent from the Trustee for removal of any item of Project Equipment from the Diamond facility.

16. The Company, through its attorney, stated that Triangle has made the determinations required by Section 3-4 of the Diamond Mortgage with respect to each item of Project Equipment removed from the Diamond facility.

17. The City alleges that the Company's removal of Project Equipment from the Diamond facility is in violation of Minnesota Statutes Section 474.03, Subd. 2 (now codified in Minnesota Statutes Section 469.155, Subd. 2), which only authorizes the City to finance the acquisition of 'capital equipment to be located permanently or used exclusively on a designated site . . .' in the city of Duluth.

18. The Company denies that Minnesota Statutes Section 474.03, Subd. 2, applies to the Project.

19. Section 8-1 (6) of the Indenture states that 'if an Event of Default as defined in the Loan Agreement or Mortgage [the Diamond Mortgage and the Utica Mortgage] has occurred and is continuing', that such event shall constitute an Event of Default under the Indenture.

20. Section 9-16 (1) of the Indenture authorizes the Trustee to proceed in accordance with the provisions of Minnesota Statutes, Section 501.33 through 501.38, as amended, if:

(D) There is a disagreement between any of the parties to the Indenture or any other related document as to whether a proposed action may be taken or is required to be taken;

21. Both the City and Triangle have requested that the Petitioner, as Trustee, seek the instructions of this Court to resolve the disputed assertion of the existence of events of default under the Diamond Mortgage and Loan Agreement, and by virtue of cross-default provisions, the Indenture itself.

WHEREFORE, Petitioner invokes the jurisdiction of this Court and prays for an Order of this Court. . .

Petition for Constitution of Indenture of Trust and Instructions at 2-7, *In Re: Indenture of Trust*, Court File No. 158.

43. Telephone interview with Niki Newman, counsel for the City of Duluth (April 6, 1988).

44. See *supra* Note 42 at ¶¶ 9-12.

45. At the time of the issuance of the Bonds, the Minnesota Municipal Industrial Development

proverbial "smoking gun." Apparently, the corporations decided in 1983 to close Duluth and transfer to more cost-advantageous South Carolina and went to work to find a way around its contractual arrangements with Duluth.<sup>46</sup>

Act authorized:

"Any Municipality . . . shall have the power to:

(1) acquire, construct, and hold any lands, buildings, easements, water and air rights, improvements to lands and building, and *capital equipment to be located permanently or used exclusively on a designated site* and solid waste disposal and pollution control equipment, and alternative energy equipment and inventory, regardless of where located, which are deemed necessary in connection with the project to be situated within the state, whether wholly or partially within or without the municipality of redevelopment agency, and construct, reconstruct, improve, better, and extend the project;

(2) issue revenue bonds, in anticipation of the collection of revenues of the project, to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment or extension thereof . . . ;

MINN. STAT. § 474.03 (1982) (emphasis added).

In 1984 the act was amended and now reads:

Any municipality or redevelopment agency has the powers set forth in the section.

It may issue revenue bonds, in anticipation of the collection of revenues of a project *to be situated within the state*, to finance, in whole or in part, the cost of the acquisition, construction, reconstruction, improvement, betterment, or extension thereof.

MINN. STAT. § 469.155(1) & (3) (emphasis added).

The City argues that these statutory provisions restrict the mobility of the property which underlines the loans in question.

46. The City of Duluth, in its memorandum of law submitted to the state district court, quotes documents obtained through discovery to expose this particular scenario:

Within a year of acquiring the Diamond Plant the Company began formulating a detailed plan to phase out the plant. Exhibit S (Doc. No. A02714-787). This plan, entitled 'Project Alpha,' was prepared in June 1983. It proposed a complete shutdown of manufacturing at the Diamond Plant over three years. Under such plan, by January 1, 1986, 'Utica manufactures all products; Diamond Plant ceases operation and is closed.' *Id.*

Project Alpha was the subject of considerable discussion over the ensuing year. Exhibit T (Doc. No. CI034); Exhibit U (Doc. No. A02709-11). The financing agreements connected with the public subsidies received by the Company were viewed as a major impediment to implementation because over \$370,000 worth of equipment was required to be shipped from Duluth to Orangeburg under the plan. Exhibit V (Doc. No. CH003-8); Exhibit W (Doc. No. CH025-31). In a December 1, 1983 memo, the Company's president, H. Arthur Bellows, stated that they must '[e]xamine "legal escape" from bond location restrictions - Define method/cost of avoiding location restrictions (Duluth area only) inherent in Duluth \$10 million Industrial Revenue Bonds. . . . ' Exhibit T (Doc. No. CI037). Similarly, a memo dated March 15, 1984, from the Company's vice president, R. W. Metzger, notes that the additional equipment required for completion of the Alpha Project 'is currently restricted from being moved' and suggests that the Company must 'develop [a] loophole in existing financing agreement that will allow movement of capital [equipment] directly or on an equal dollar trade basis, be it transfer, lease or loan.' Exhibit W (Doc. No. CH026-27).

City's Memorandum of Law at 6-7, *In Re: Indenture of Trust*, Court File No. 158.

The reason any governmental unit grants an inducement to a business is to keep that business operating in its jurisdiction. Duluth notes:

The purpose of the Loan Agreement and related documents is unquestionably to finance an economic development project to enhance employment and the tax base of the City. Construing the above quoted provisions of the Loan Agreement in light of this public purpose, it is clear that the City and Company intended that the Company operate and maintain the Diamond Plant with increased production capabilities and employment while the Bonds are outstanding.<sup>47</sup>

The City of Duluth is going to be denied its quid pro quo for having granted the loan to the corporations as a result of the decision of the corporations to transfer operations; and the corporations should be held to have breached the contract for that reason.

#### *D. State of West Virginia v. Anchor Hocking Corporation*<sup>48</sup>

In late 1978 the Brockway Glass Company announced its decision to close its Clarksburg, West Virginia, glass plant. State leaders received a reprieve on the announced closing date and, with the help of Brockway, began a search to find a purchaser. The ultimate purchaser was the Anchor Hocking Corporation, a leader in the field of consumer glassware. On August 31, 1979, West Virginia, through its Economic Development Authority (hereafter EDA), executed a loan document and security agreements whereby \$2,500,000 was provided to Anchor Hocking for a twenty (20) year term at an interest rate of 1.126 percent. The 2.5 million dollars was part of a 14.5 million dollar economic development package provided to Anchor Hocking to finance the purchase of this plant.<sup>49</sup>

From 1979 through 1987 West Virginia provided additional economic incentives to the Anchor Hocking operation in Clarksburg

47. *Id.* at 14.

48. *Anchor Hocking*, No. 87-C-759-1.

49. *Breakdown of Financing*

\$ 2.5 million from EDA

\$ 2.0 million from the Clarksburg Association for Industrial Development

\$ 10.0 million from proceeds of Industrial development revenue bonds sold by Harrison County

Loan Agreement among West Virginia Economic Development Authority, Association for Industrial Development of Harrison County, and Anchor Hocking Corporation (Aug. 31, 1979).

including \$2,000,000 in tax incentives and \$163,000 in job training funds. In 1985, Anchor Hocking sought financing to modernize its Clarksburg plant and went to the local community and the state.

By letter dated February 8, 1985, Anchor Hocking formally applied to the EDA for a \$1,000,000 loan and made an express representation that:

As you are aware foreign competition and depressed business conditions have caused Anchor Hockings current total employment at the facility to be reduced to approximately 500 hourly and 75 salary employees. Within one year after the completion of the improvements and additions to the facility, Anchor Hocking anticipates that total employment at the facility will increase to approximately 750 hourly and 100 salary employees. Approximately 85% of the new jobs will be filled from the Clarksburg, West Virginia labor market with the remaining 15% being filled by transferring employees from other Anchor Hocking locations or recruiting them elsewhere.<sup>50</sup>

On March 1, 1985, Anchor Hocking supplied estimates to the EDA as to the impact of the plant on the local community. The projected impact three years in the future (March 1, 1988) was estimated to be 850 employees with an average annual wage of \$20,800 constituting a \$17,650,000 annual payroll coupled with \$59,100,000 in annual sales. By letter dated April 23, 1985, the EDA approved the loan and set forth the conditions, which provided: "(1) *Conditional Approval*. This approval is based upon the continued validity and accuracy of the facts set forth in the letters of the Company to WVEDA dated February 8, 1985. . . .<sup>51</sup> The conditions set forth in the April 23, 1985, letter were accepted by the Anchor Hocking Corporation. On August 31, 1986, the EDA entered into a loan agreement whereby Anchor Hocking received \$1,000,000 for a term of ten (10) years at an interest rate of 4%.

On July 1, 1987, the Newell Co. acquired the Anchor Hocking Corporation and on August 10, 1987, announced the Clarksburg plant would close on November 1, 1987. On September 23, 1987, the Governor of West Virginia filed suit in federal court and received

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50. Letter from Anchor Hocking Corporation to West Virginia Economic Development Authority (Feb. 8, 1985).

51. Letter from West Virginia Economic Development Authority to Anchor Hocking Corporation (Apr. 23, 1985).

a temporary restraining order preventing the corporation from removing any of the equipment from the Clarksburg plant.<sup>52</sup> On October 7, 1987, a state court action was filed and a preliminary injunction was issued restraining the equipment in the Clarksburg plant.<sup>53</sup>

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52. The federal court action was dismissed for want of federal jurisdiction on October 7, 1987, at which time the parties travelled from the federal court house to the state court house to hold a preliminary injunction hearing.

53. The complaint filed in the action provides in pertinent part:

*COUNT I*

5. On August 31, 1979, the State of West Virginia, through its Economic Development Authority, entered into a loan agreement with defendant Anchor Hocking Company, ("Anchor") whereby the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) was provided to Anchor. Such loan provided for a repayment term of twenty (20) years at an interest rate of 1.126 percent, which was substantially below the prevailing market rates at the time, and at all times subsequent.

6. The purpose of the loan was to assist Anchor in its acquisition of the Brockway Glass Company, and more particularly, the facility described herein as Anchor Plant #90.

7. On April 3, 1986, the State of West Virginia, through its Economic Development Authority, entered into a loan agreement with Anchor, whereby the amount of One Million Dollars (\$1,000,000.00) was provided to Anchor. Such loan provided for a repayment term of ten (10) years at an interest rate of 4 percent, which was substantially below the prevailing market rates at the at the time, and at all times subsequent.

8. The consideration which the State of West Virginia was to receive for the entirety of the loan agreements described in paragraphs 5 and 7, was the continued existence of a manufacturing operation located in Harrison County, West Virginia, more particularly described as Anchor Plant #90. Such consideration was to continue unabated for the full term of the contracts, *i.e.*, until August 31, 1999 or April 3, 1996.

9. On August 10, 1987, the defendants announced plans to close Anchor Plant #90 effective November 1, 1987. In the time period subsequent to such announcement the defendants have commenced to dismantle the equipment and proceed with the closing.

10. The closing of Anchor Plant #90 will deprive the State of West Virginia of the benefits which it was to receive under the contracts entered between its agencies and Anchor dated April 3, 1986, and August 31, 1979.

11. The closing of such plant constitutes a breach of contract by which the State of West Virginia and its citizens will be damaged. The damage cannot be measured in the award of damages to reflect the true value of the cost of the money loaned to Anchor. The State of West Virginia relied upon the good faith of the defendants to carry through with its end of the agreements, and thereby the State allocated Three Million Five Hundred Thousand Dollars (\$3,500,000.00) of a scarce pool of economic development resources and consequently the State has lost the opportunity of developing other industries in the Clarksburg area between 1979 and 1987. The true measure of damages is the value of the consideration the State will not receive as a result of the defendants' breach, *i.e.*, the value of the continued operation of Anchor Plant #90.

*COUNT II*

12. The State of West Virginia and its Governor, the Honorable Arch A. Moore, Jr., hereby incorporate by reference paragraphs 1-11 as paragraph 12 of this complaint.

13. During the years 1979-1987, the State of West Virginia has extended economic incentives



The state has taken the position that an implied provision of the 1979 and 1986 economic development loans was the continued operation of the plant in Clarksburg. In asserting its position the state relies upon certain well established principles of commercial contract litigation:

Under familiar rules a promise that a party will continue to remain in business may be implied in fact as a part of an agreement for the rendition of services to a business.

. . . .

Such a promise to remain in business will be implied particularly where the promisee had undertaken certain burdens or obligations in expectation of and reliance upon the promisors continued activity.<sup>54</sup>

The state argues that its provision of low interest loans, job training monies, and tax incentives is an allocation of scarce resources and

to the defendants as an adjunct to its ongoing operation of Anchor Plant #90 and the aforementioned contracts.

14. The State of West Virginia, by allocating part of a discrete pool of job training funds for the defendants, has been damaged in the direct amount of One Hundred Sixty-two Thousand Six Hundred Ninety-two Dollars (\$162,692.00) which represents the costs of training 202 employees of the defendant corporations.

15. The State of West Virginia, by its Tax Department, has provided tax incentives to the defendants for the period of time 1979 through 1987. Such incentives were provided as an adjunct to defendants continued ongoing operation. The State has been directly damaged by the amount of Two Million Dollars (\$2,000,000.00), which represents the value of tax incentives granted to the defendants during this time period.

16. The State of West Virginia's allocation of economic incentives to the defendants was based upon the State's reliance upon the good faith of defendants to continue to operate a long-term manufacturing facility in Harrison County, West Virginia, known as Anchor Plant #90. Such long-term commitment to continued operation of Anchor Plant was the consideration for which the State allocated this scarce pool of job training funds and for which the State provided tax incentives.

17. The closing of Anchor Plant #90 represents a breach of an implied contract by the defendants by which the State of West Virginia has been damaged directly in the amount of One Hundred Sixty-two Thousand Six Hundred Ninety-two Dollars (\$162, 692.00) for job training and Two Million Dollars (\$2,000,000.00) for tax incentives. The actual damage to the State of West Virginia far exceeds the value of the services provided, as a discrete pool of scarce resources were allocated to the defendants and the State thereby lost the opportunity to utilize these resources in bringing about other economic development. The measure of damages to the State of West Virginia is the loss of the value of the consideration the State was to receive for its provision of training and tax incentives, *i.e.*, the value of continued operation of Anchor Plant #90.

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54. 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 280, 244 N.E.2d 37, 40, 296 N.Y.S.2d 338, 342 (1968). See *A. W. Fiur Co. v. Ataka & Co.*, 71 A.D.2d 370, 422 N.Y.S.2d 419 (App. Div. 1st Dept. 1979); *Tele Communications Corp. v. Franchises Int'l, Inc.*, 332 F. Supp. 469 (S.D.N.Y. 1971).

a lost opportunity cost that constitutes “burdens or obligations” undertaken “in expectation of and reliance upon” Anchor Hocking’s continued operation of a glass plant in Clarksburg.<sup>55</sup> The state further notes that it relied upon the express representation of Anchor Hocking as to the impact on the community of the plant in the years subsequent to the loan.<sup>56</sup> The state bundles the express and implied contractual arguments together with its detrimental reliance, and the allocation of a scarce pool of economic resources and seeks, in compensatory damages, \$614,610,000. This amount reflects the value of the quid pro quo the state would have received had the corporation continued the operation of the facility for the full term of the loan.

This portion of the West Virginia cause of action is somewhat similar to the *Yonkers* case as it relies upon a promise to remain in business, either express or implied, for a specified period of time. The *Duluth* case likewise relies upon the implied term of continued operation as a quid pro quo for economic inducements. Where West Virginia departs from the *Yonkers* and *Duluth* cases is in the measure of damages. *Yonkers* and *Duluth* seek the value of the lost inducement, *i.e.* \$16 million and \$10 million, whereas West Virginia, arguing detrimental reliance and lost opportunity costs, seeks to receive the benefit of its bargain, *i.e.* the value of the continued operation of the plant.

Anchor Hocking, like the Triangle Corporation in the *Duluth* litigation, argues business exigency for the closure and transfer decisions. Once again the classic confrontation is between allowing

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55. In 1979 and again in 1985, the State of West Virginia allocated part of a pool of scarce resources to Anchor Hocking Corporation. In total, this pool consisted of \$3,500,000.00 in loans to Anchor Hocking at rates of 1.126 percent and 4 percent respectively. Additionally, during this time period, the State allocated a portion of a scarce pool of job training funds to Anchor Hocking. All of these allocations of scarce resources were predicated upon the good faith on Anchor Hocking to provide a continuing on-going facility in Clarksburg. If Anchor Hocking had advised the State it would close the plant, gut it and move out in 1987, no such allocation would have occurred.

Brief of the State of West Virginia in Support of The Continuance of a Preliminary Injunction at 4, *Anchor Hocking*, No. 87-C-759-1.

56. *Id.* at 3-4. This included an impact in 1988—after the plant closed—of 850 employees and a \$17,650,000 annual payroll.

corporations to have free rein on capital mobility versus obligations created by the acceptance of inducements from state and local government.

West Virginia, Yonkers and Duluth are all attempting to establish that a corporation, by accepting government inducements, has an implied obligation to continue activity for a specified time period. It is perhaps a jury question to determine the length of that time period of continued operation. Norwood is attempting to establish a standard of corporate behavior for plant closing situations. West Virginia is also attempting to establish such a standard but upon a different legal basis.

## VI. THE DUTY OF GOOD FAITH AND FAIR DEALING

The duty of "good faith and fair dealing" is implicit in every contract and has been adopted by virtually every court that has had occasion to consider the subject.<sup>57</sup> Perhaps the most quoted articulation of this duty comes from the New York Court of Appeals in *Kirk La Shelle Co. v. Paul Armstrong Co.*:<sup>58</sup>

[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.<sup>59</sup>

The fruits of the 1979 and 1986 EDA loans for West Virginia were the jobs to be generated by the plant and its impact on the community. The *quid pro quo* to governmental entities for the granting of economic incentives to corporations is the positive economic impact that results from continued or increased employment. The state has taken the position in Count V of its complaint that Anchor Hocking, by virtue of its acceptance of economic incentives and the contractual relationships vis-a-vis the low interest loans, has thereby triggered a duty to exercise good faith and fair dealing to assure

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57. A good general discussion of the duty of good faith and fair dealing can be found in Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

58. *Kirk La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 188 N.E. 163 (1933).

59. *Id.* at 87, 188 N.E. at 167.

that the state receives the benefit of its bargain, *i.e.* the value of the continued operation of the plant.<sup>60</sup> This duty extends to making a good faith decision on whether business exigency requires closure, and it also requires the corporation to explore, in good faith, all alternatives available to continue operation of the plant. In the event of the futility of such acts then the corporation has a duty to make a good faith effort to sell the plant to another identical or similar manufacturer thereby providing the state with the benefit of the bargain. The duty of good faith and fair dealing is a well established legal principle and does not place an unreasonable burden upon a business that would close a plant.

West Virginia, like many "rust belt" states, has experienced its share of shutdowns and plant closings. The experience with Anchor Hocking and its parent, the Newell Co., is the exception to corporate dealing, rather than the rule. During the six day preliminary injunction hearing several examples of "good faith and fair dealing" by companies closing plants in West Virginia were noted. The experience generally held out as exemplary related to a decision by Volkswagen of America to close a stamping plant in South Charleston, West Virginia. Volkswagen provided the state an 18 month advance notice of the closing; worked with the state in finding a purchaser; agreed to leave specific equipment at the plant that was needed by a subsidiary; loaned the subsequent purchaser \$3,500,000;

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60. Count V of the complaint states in pertinent part:

27. The duty of good faith and fair dealing requires a party to attempt to guarantee that a contract is fulfilled and the consideration delivered. That such duty to seek fulfillment of consideration exists even if business exigency requires termination of business.

28. The defendants thereby have a duty to exercise good faith and fair dealing to see that Anchor Plant #90 continues to operate.

29. Such duty extends to providing for a sale of the facility and its equipment to other investors.

30. The defendants have commenced a process of dismantling key equipment and destruction of molds which will effectively gut Anchor Plant #90.

31. The defendants have at no time fairly dealt with the State in attempting to execute a transfer of ownership to the State or to any other investor.

32. The State of West Virginia is damaged by this breach of the duty of good faith and fair dealing. Mere monetary damages cannot compensate the State of West Virginia for this violation, thus injunctive relief in the nature of specifically requiring this good faith and fair dealing is appropriate.

Complaint at 6-7, *Anchor Hocking*, NO. 87-C-759-1.

and guaranteed the \$14,600,000 loan the state granted to the purchaser.<sup>61</sup>

Many examples of good and bad faith abound in the literature.<sup>62</sup> For every U.S. Steel that levels plants and leaves communities like Youngstown high and dry<sup>63</sup> there is a Wheeling-Pittsburgh Steel that, despite Chapter 11 bankruptcy, continues to pay \$1,500,000 per year to maintain the furnaces in its Monessen, Pennsylvania, plant so as to keep the plant viable and attractive to a purchaser, and keep alive the possibility of jobs returning to the community.<sup>64</sup>

The West Virginia suit attempts to establish a "good faith and fair dealing" standard of corporate conduct in plant closings by

61. Andrew A. Payne III, the financial strategist for the West Virginia Governor's Office of Community and Industrial Development, outlined the Volkswagen effort in a February 15, 1988 memorandum:

Outlined below are the major items which Volkswagen of America has done to assist the State of West Virginia's efforts in reopening their South Charleston stamping facility.

1. Agreed to leave 80-85% of their equipment in South Charleston while the State of West Virginia attempted to find a purchaser for the equipment and the facility. They agreed to do this even though some of their foreign subsidiaries had a need for the equipment.

2. Once we found a buyer for the equipment, Volkswagen agreed to guarantee \$14.6 million of the state's loan to the new company. This project would not have been able to move forward if it were not for the guarantee.

3. Volkswagen agreed to lend the purchaser \$3.5 million based on the same terms and conditions of the state incentive package, which has a below market interest rate.

4. To assist the state in our efforts, Volkswagen announced the plant shutdown 18 months before they actually ceased production. This was of a tremendous benefit to the state's efforts in locating another company to purchase the South Charleston stamping plant.

These are the major items which Volkswagen has provided to the Volkswagen/Park Corporation project in reopening the plant. It goes without saying that they expended a tremendous amount of time, money and personal effort in working with the State of West Virginia, Park Corporation and the other companies which were interested in the facility. Their cooperation had a particularly strong emphasis and individual attention from the highest levels of Volkswagen of America and Volkswagen A.G., which is the parent company located in West Germany.

Their efforts demonstrate to me that they are a corporation with a social conscience. Memorandum from Andrew A. Payne III to Brad Russell (Feb. 15, 1988).

62. See, e.g., Wolf, *The Closing of Firestone's Albany Plant: A Case Study*, 37 LAB. L.J. 466 (1986).

63. See *Youngstown Steel*, 492 F. Supp. 1, and *supra* text accompanying notes 16-22. Additionally in a case in Illinois, a lawsuit was filed by the Attorney General of Illinois over the closure of the U.S. Steel's South Works facility and *inter alia* attempt to exercise the condemnation power of Illinois vis-a-vis this particular plant. U.S. Steel mooted the issue by razing the plant. See Note, *Eminent Domain: The Ability of a Community to Retain an Industry in the Face of an Attempted Shutdown or Relocation*, 12 OHIO N.U.L. REV. 231, 237-39 (1985).

64. *Wheeling-Pitt keeps ovens on 'hot idle.'* Charleston Gazette, Mar. 29, 1988, at 8C, col. 1.

applying "black letter" contract law to an area where it has not heretofore been applied. Unlike *Norwood*, the West Virginia case does not require the creation of a new cause of action, merely the application of an existing cause of action in a new area.

## VII. CONCLUSION

The problems created by increased capital mobility and merger mania are going to haunt society for many years. The devastating impact of the resultant plant closings cry out for government intervention. State governments began to respond through regulating mergers to slow the takeover frenzy and through plant closing legislation. These particular avenues have yet to be successful. Accordingly, state and local governments are now moving to litigate plant closings under various theories. Despite the lack of success in piecemeal litigation by unions, the state and local government efforts seem to have a greater chance at success.

Can business take the money of state and local government and run? Probably not. In 1985, the last year comprehensive statistics were reported, state and local governments granted low interest loans to businesses totalling approximately 24.6 billion dollars.<sup>65</sup> The acceptance of these loans by businesses creates contractual obligations, both express and implied. It is exceedingly clear that government

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65. All fifty states have authorized the issuance of Industrial Development Bonds (IDBs) either through state or local government. Additionally, many states have direct loan programs for business from state pension funds or other sources. A state by state report of these inducements given to business totaled in 1985: (\$ in millions) (1) Alabama-\$1,552; (2) Alaska-\$176; (3) Arizona-\$296; (4) Arkansas-\$112; (5) California-\$250; (6) Colorado-\$475; (7) Connecticut-\$725; (8) Delaware-\$848; (9) Florida-\$1,544; (10) Georgia-\$859; (11) Hawaii-\$90; (12) Idaho-\$30; (13) Illinois-\$250; (14) Indiana-\$750; (15) Iowa-\$381; (16) Kansas-\$313; (17) Kentucky-\$427; (18) Louisiana-\$273; (19) Maine-\$57; (20) Maryland-\$710; (21) Massachusetts-\$1,138; (22) Michigan-\$787; (23) Minnesota-\$1,096; (24) Mississippi-\$564; (25) Missouri-\$684; (26) Montana-\$100; (27) Nebraska-\$98; (28) Nevada-\$27; (29) New Hampshire-\$218; (30) New Jersey-\$1,068; (31) New Mexico-\$53; (32) New York-\$1,200; (33) North Carolina-\$388; (34) North Dakota-\$138; (35) Ohio-\$1,509; (36) Oklahoma-\$86; (37) Oregon-\$142; (38) Pennsylvania-\$ unable to be ascertained from the reported statistics, maximum allocation was \$1,777; (39) Puerto Rico-\$114; (40) Rhode Island-\$78; (41) South Carolina-\$482; (42) South Dakota-\$63; (43) Tennessee-\$608; (44) Texas-\$1,414; (45) Utah-\$ unable to be determined from reported statistics-maximum allowable for 1985 was \$233; (46) Vermont-\$119; (47) Virginia-\$1,830; (48) Washington-\$ unable to be ascertained from statistics-1982-1986 activity \$356; (49) West Virginia-\$190; (50) Wisconsin-\$474; (51) Wyoming-\$305. NAT'L ASS'N OF STATE DEV. AGENCIES, DIRECTORY OF INCENTIVES FOR BUSINESS INV. & DEV. IN THE UNITED STATES (2d ed. 1986).

does not grant the loans to receive the 1% interest, but rather to generate jobs and positive economic effects on communities. The businesses that take the government inducements may have made an implied contractual commitment to provide those jobs and the positive impact on the communities for a period to be set by the law and a jury.

The application of existing contract law to this new area is young and untested. Whether any of these suits or the others that are sure to be filed will succeed is yet to be seen. Some positive impact has occurred and corporate raiders in particular and corporate leaders in general are on notice that state and local governments will not permit them to take the money and run.<sup>66</sup>

It is likely that one or more courts will conclude that the acceptance of economic incentives from government does create an implied duty to operate for a reasonable period of time. It is also likely that one or more courts will permit a business to close a plant because of business exigency, but then will require the corporation to exercise good faith and fair dealing in trying to preserve the jobs that were lost by the closure. These legal concepts are not radical, and they should be adopted.

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66. The Wall Street Journal on March 8, 1988, in a front page article detailed the "Battle of Clarksburg" as it called the West Virginia Suit and noted an increasing hostility by government to plant closings. It also reported that Wisconsin Governor Tommy Thompson had learned about the West Virginia suit from West Virginia Governor Arch A. Moore, Jr., and thus when Chrysler Corporation announced the closure of the AMC Plant in Kenosha, Governor Thompson threatened to file a similar implied contract and breach of good faith and fair dealing lawsuit. Chrysler Chairman Lee Iacocca responded by setting up a \$20,000,000 fund to assist displaced workers and negotiations on lawsuit avoidance between Chrysler and the State then commenced. White, *Worker's Revenge*, Wall St. J., Mar. 8, 1988, at 1, col. 6.