The basic allegation here is that a breach of duty occurred when Board members determined that no "change of control" occurred with respect to the employee stock ownership plan after the merger. Named as defendants were the CEO and Chairman of the Board, as well as 11 other Board Members. The lawsuit seeks class certification for some 13,000 employees participating in the Barnett employee savings and thrift plan, as well as another 6,500 employees who were eligible to participate in the ESOP.

Change of Control Determination

To avoid paying the acquisition loans and making the ESOP discretionary distribution, the Board of Directors of Barnett decided not to treat the approval of the merger (and its implementation) as a change of control, alleges the suit. The question whether this action constituted such a change in control is critical to the case. Interestingly, the plaintiffs are relying upon the Section 415 limits of the Code that result in senior executives having limited pension contributions. As a result of these limitations, the senior members would apparently not have received additional benefits in any event.

The suit thus claims that the change of control decisions by the Board members constituted a failure to act solely in the best interests of the participants of the plan. While the Board allegedly allowed supplemental retirement benefits to senior executives to be accrued and vested upon approval of the merger/change of control, the same Board allegedly determined that no change of control had occurred with respect to the Barnett employee savings and thrift plan.

Word to the Wise

Obviously, this dispute is only in its inception. However, it does point out a relatively little stressed point: that employee relations—and ERISA liabilities—can be huge following an acquisition. Indeed, compare this to the situation described above with respect to the First Dakota Bank (where there were some tax liabilities, but they did not amount to very much). (See Wood, "Successor Bank Held Liable for Audited Banks' Taxes," above, p. 1.) Here, the damage, if the allegations can be proven, could be enormous. ■

Watch Out for Breach of Fiduciary Duty Claims After Merger

by Robert W. Wood • San Francisco

Although companies are used to worrying about the liabilities of a target in the acquisition process, and to claiming appropriate and complete indemnities (on this topic, see Wood, "Successor Liability in Bank Acquisition," p. 1 this issue), some liabilities may be more serious than at first they might appear. Fiduciary liabilities arising under the long arm of the Employee Retirement Income Security Act of 1974 (ERISA) may present just such a case.

In a recent lawsuit, the Board of Directors of Barnett Banks is alleged to have breached its fiduciary duty when the Board failed to distribute some $200 million in common stock to the 401(k) retirement plans of the bank's employees. The distribution was to have followed Barnett's acquisition in January by NationsBank. This lawsuit was filed on March 16, 1998 in Federal Court in Jacksonville, Florida (*Burns v. Rice*, (D.Ct. M.D.Fla.) No. 98-233-CIV-J-21A (filed March 16, 1998).