



# Acquisition and Integration Issues From an Employment Perspective

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# Overview

- Start With the End in Mind
  - The WHY behind the merger
  - Getting out in front
- Avoid Liability
- Protect the Assets
- Remember Culture/Integration Issues





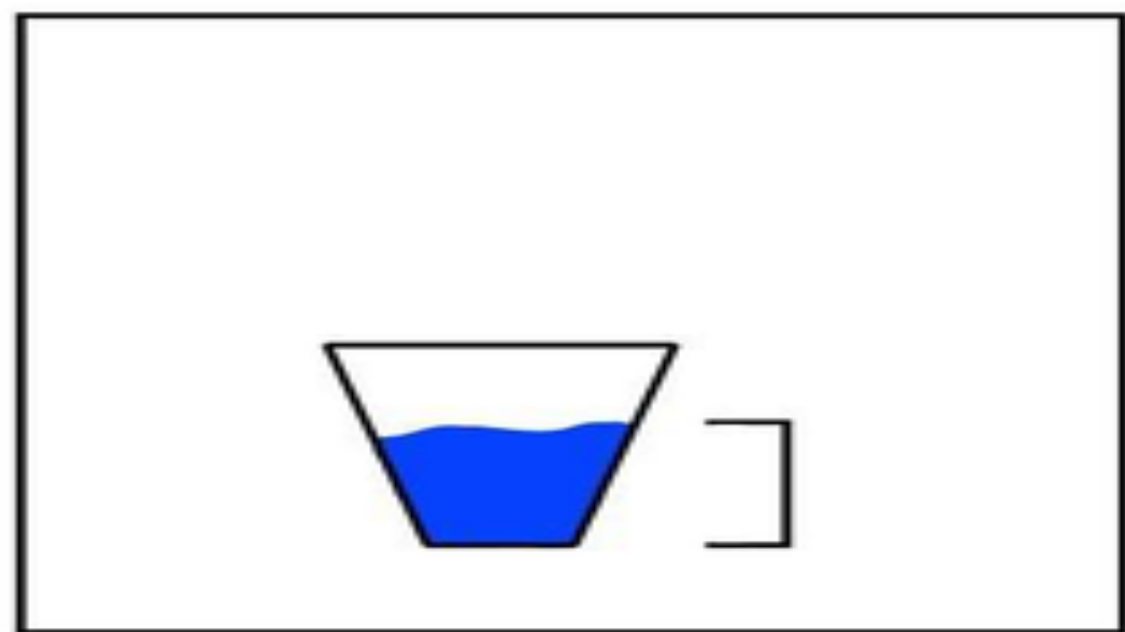


**HELLO**  
**MY NAME IS**

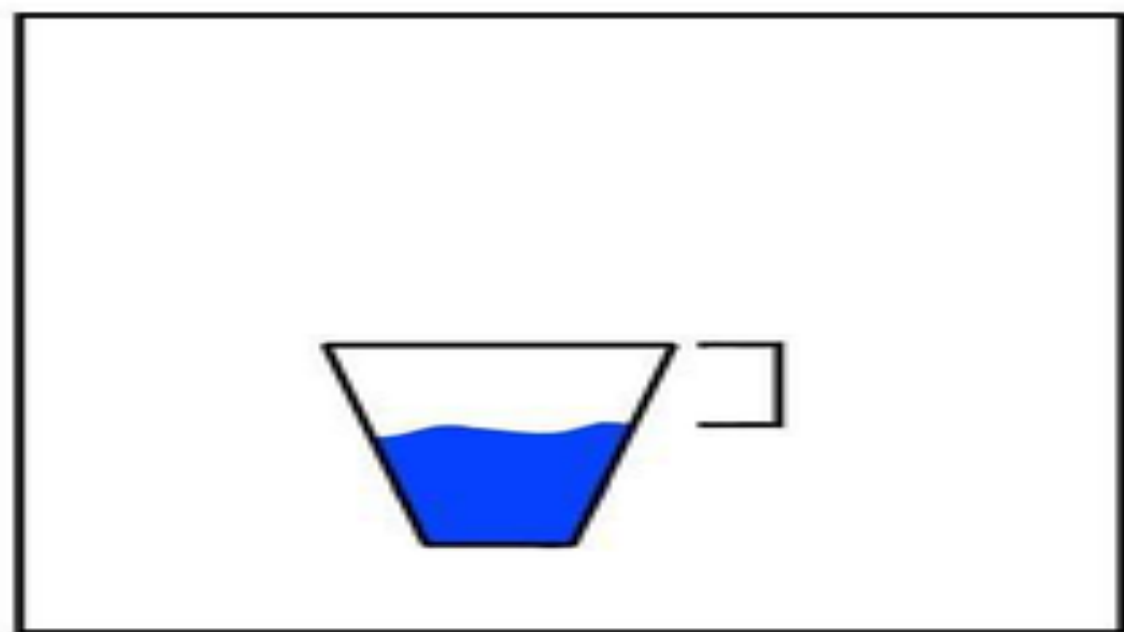
**PROJECT**



# Optimism vs Pessimism



WHAT OPTIMISTS SEE

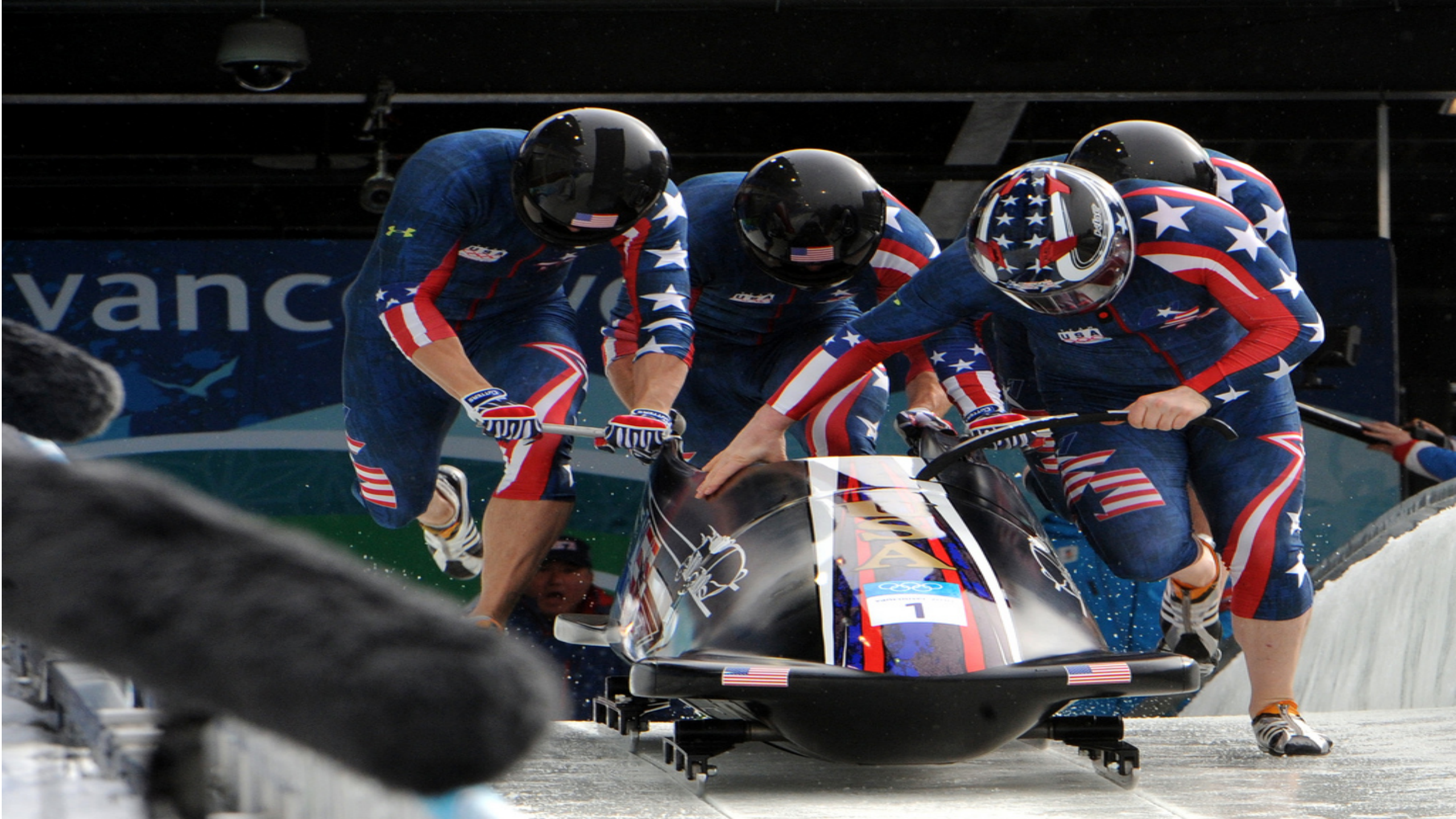


WHAT PESSIMISTS SEE

A close-up photograph of a red t-shirt. The shirt is laid flat, and the text is printed in white. The top line of text is in a large, bold, sans-serif font. The bottom line is in a smaller, lowercase, sans-serif font. The background is a solid, vibrant red color.

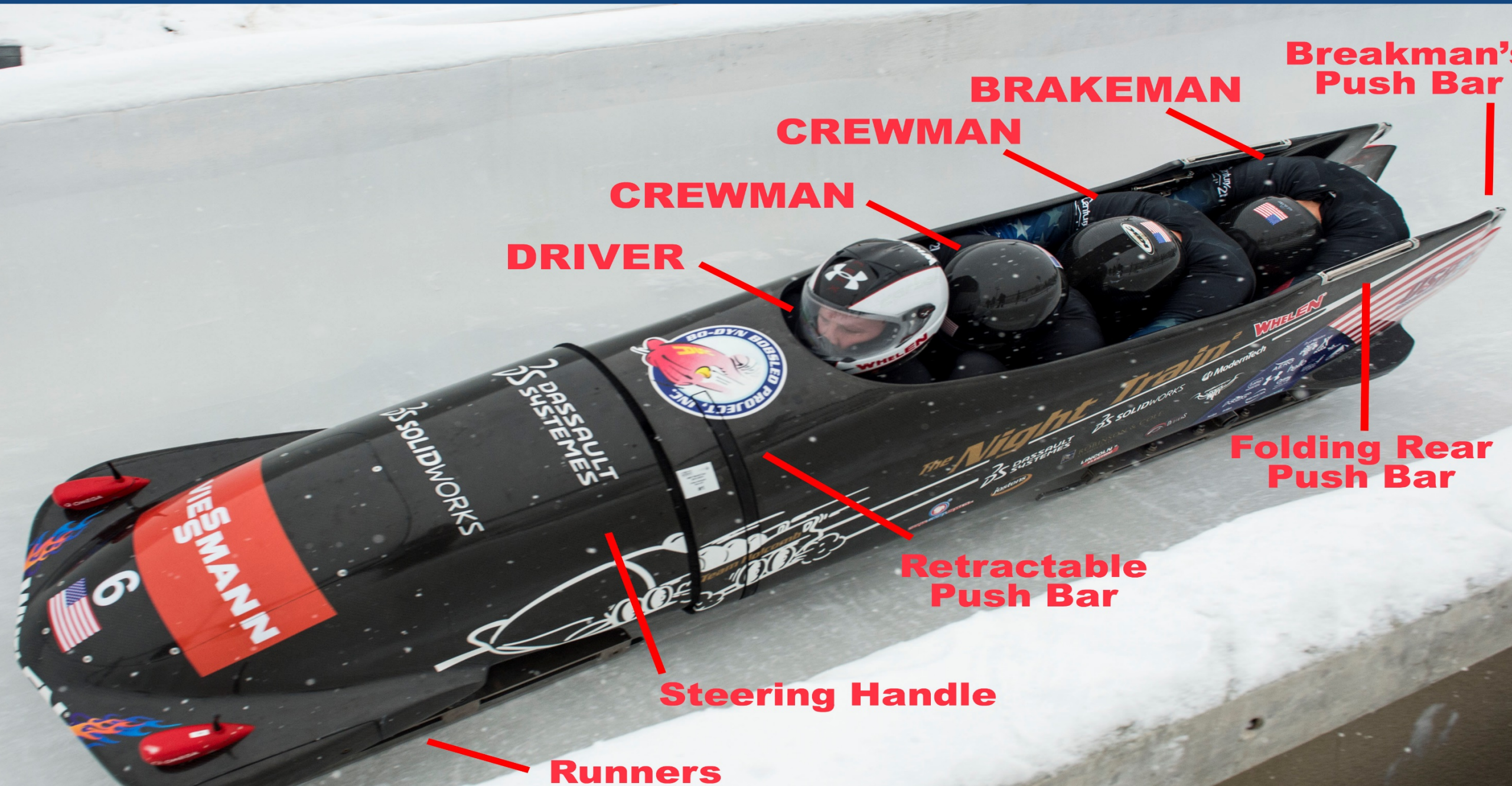
**I'M NOT A PESSIMIST**  
I'm an optimist with experience







# How Bobsledding Works









**Propulsion**





# Propulsion

- The why behind the deal
- The non-disclosure agreements and other protections
- Who are the stakeholders that should be included?







**Deal Structure**

# Analyze the Deal Points

## Asset Purchase, Stock Purchase, Merger

Watch asset purchases - successor liability still exists if continuing the seller's business (e.g., under the FMLA, potentially multi-employer pension plans) or where the "asset purchase" is deemed to be a *de facto* merger.

### The *De Facto* Merger:

- Is there a continuation of the enterprise?
- Is there a continuity of shareholders?
- Has the selling company ceased its ordinary business operations?
- Has the purchasing company assumed the seller's obligations?



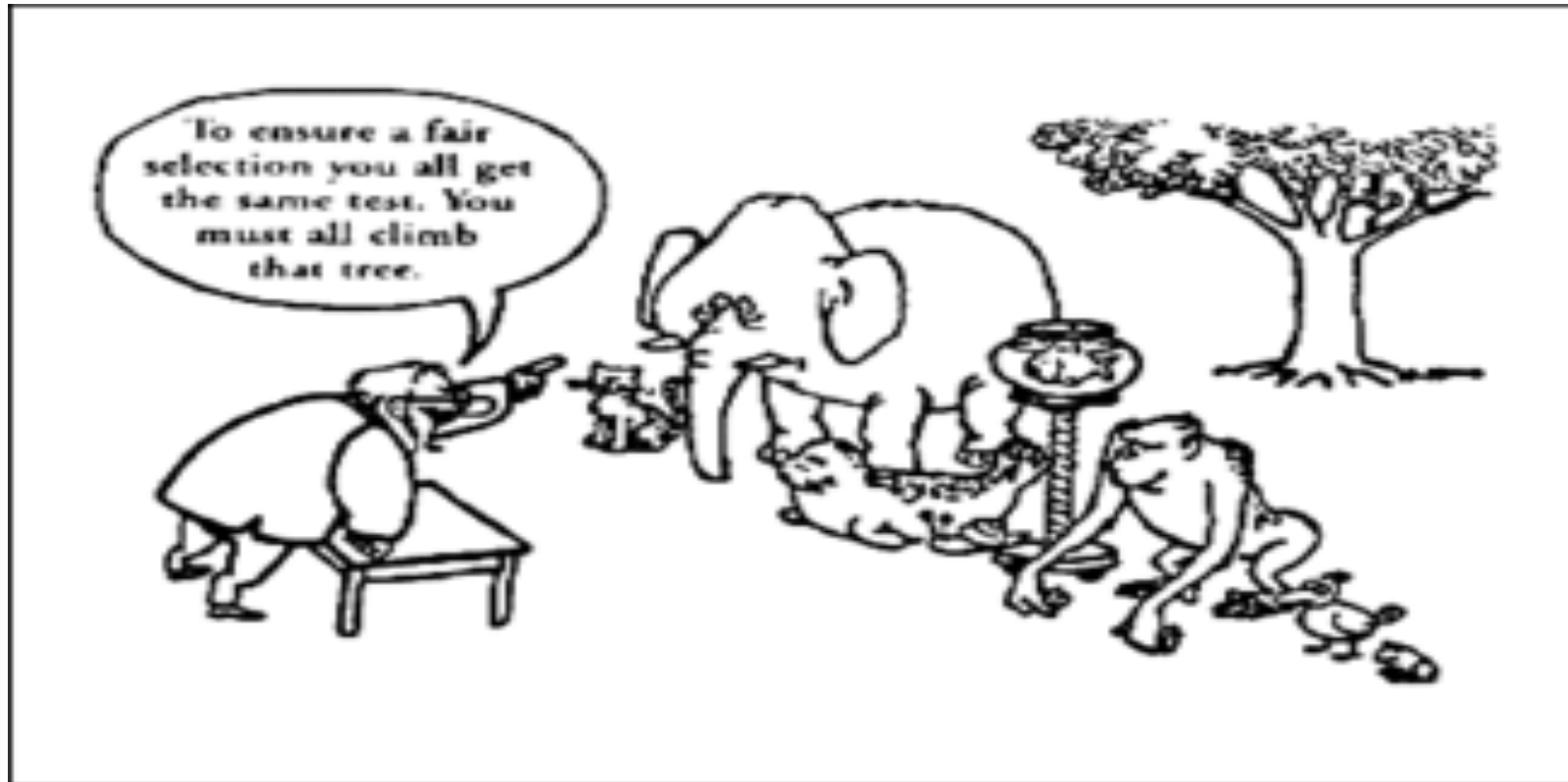
# Analyze Deal Points

- Are the principals a threat?
- Are we putting those who are standing to benefit from the sale under non-competes?
- Change in control, golden parachutes, poison pills
- Are we trying to drive price down by giving an earn-out? If so, do we have procedural safeguards in place?
- Do we plan to make changes after the deal? If so, and the principals will stay involved, are they on board?

An aerial night photograph of a ski resort. The scene is dominated by a dense forest of evergreen trees, many of which are covered in snow. Several ski trails are visible, illuminated by warm yellow lights that create a glowing path through the dark landscape. In the lower-left and upper-right areas, there are clusters of buildings, likely lodges or ski huts, also brightly lit. The overall atmosphere is serene and festive, typical of a winter sports destination at night.

**Liability**

# Overseeing Due Diligence





# Major Hurdles

- Litigation that threatens the Company's deliverables or product
- Collective/Class Actions (of any kind)
- Use of questionable workforces
  - I-9 compliance

# Labor Issues

- Withdrawal Liability issues with multi-employer pension plans
- Lingering medical plan issues (carrying retirees or other pension-esque liabilities)
- History of strikes, lock-outs, ULPs
- Pending/backlogged arbitrations
- Collective bargaining obligations
  - Successorship provisions
  - Neutrality provisions
  - Noncompetitive wage provisions
- Taking over a unionized workforce?





# Hot Button Employment Issues

- FLSA and applicable state wage and hour law – minimum wage, overtime, recordkeeping, etc.
- Worker classifications – exempt/non-exempt, employee/independent contractor, intern/volunteer
- Federal and State laws prohibiting discrimination, harassment and retaliation
  - Any pending actions
  - If there is smoke then, at the very least, there is a workforce that believes there is fire

# Hot Button Employment Issues

- Affirmative Action Plans
  - Assess the value of Federal contracts
- Workplace Safety
- Benefit Plans
- WARN
- Payroll Taxes
- Grievances and Compliance Hotlines
  - Looking for patterns
  - High turnover



# The Usual Suspects

- Litigation
- Workers' compensation claims
- Governmental investigations and/or consent decrees
- Benefit plan funding
- Retention and consulting agreements; other multi-year obligations



**Hidden Liability**



# Hidden Liabilities

- Benefit Plans
- FMLA
- ADA accommodations
- Latent FLSA issues
- Latent Title VII issues
- Vacation and sick leave plans



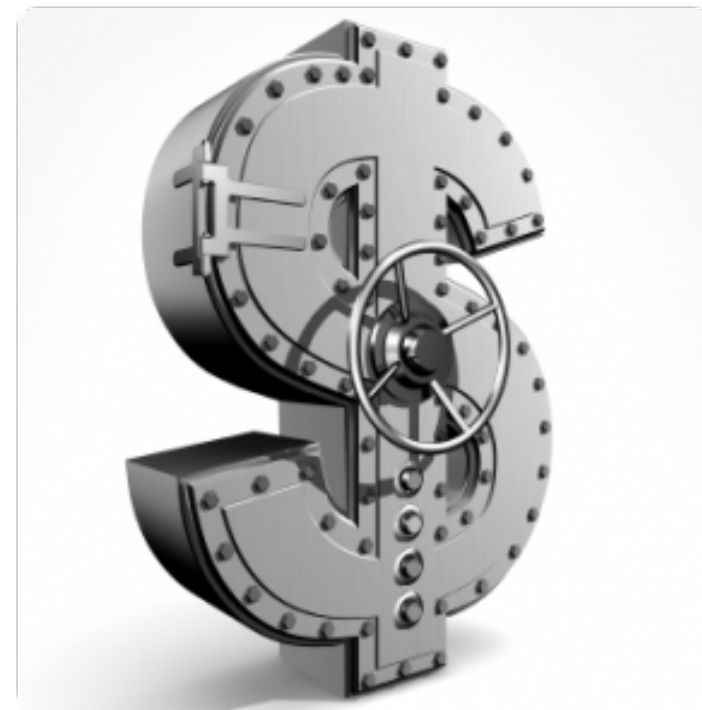
An aerial night photograph of a ski resort. The scene is dominated by a dense forest of evergreen trees, many of which are covered in snow. Several ski trails are visible, illuminated by warm yellow lights that create a glowing path through the dark landscape. In the lower-left and upper-right areas, there are clusters of buildings, likely lodges or ski huts, also brightly lit. The overall atmosphere is serene and majestic, capturing the beauty of a winter mountain resort at night.

# Protecting the Company Assets



# Protecting the Company Assets

- Confidentiality Agreements
- Non-Compete Agreements
  - Are they under them now?
  - Are they enforceable?
  - Are they assignable?
  - New consideration?



# Restrictive covenant agreements for those receiving proceeds of purchase/sale

- New restrictive covenant agreements for those selling the Company
- Research whether you should tie the covenants to a specific portion of the deal proceeds
- Utilize forfeiture provisions in addition to injunctive relief
- Critical that analysis is jurisdiction specific (one size does not fit all)
- A thorough evaluation of choice of law, exclusive jurisdiction, and potentially arbitration provisions is critical



# Other Considerations To Protect The Company's Receipt Of All Assets

- Inclusion of discretionary language within “cause” definitions
- Inclusion of fiduciary language in “duties” clauses to assist in dealing with duty of loyalty disputes

An aerial night photograph of a ski resort. The scene is dominated by a dense forest of evergreen trees, many of which are covered in snow. Several ski runs and trails are illuminated with warm, yellow lights, creating a stark contrast against the dark blue night sky and the snow-covered ground. In the lower-left and upper-right areas, there are clusters of buildings, likely lodges or hotels, also lit up. The overall atmosphere is serene and majestic, showcasing the resort's infrastructure amidst a natural winter landscape.

Culture



# Culture Considerations

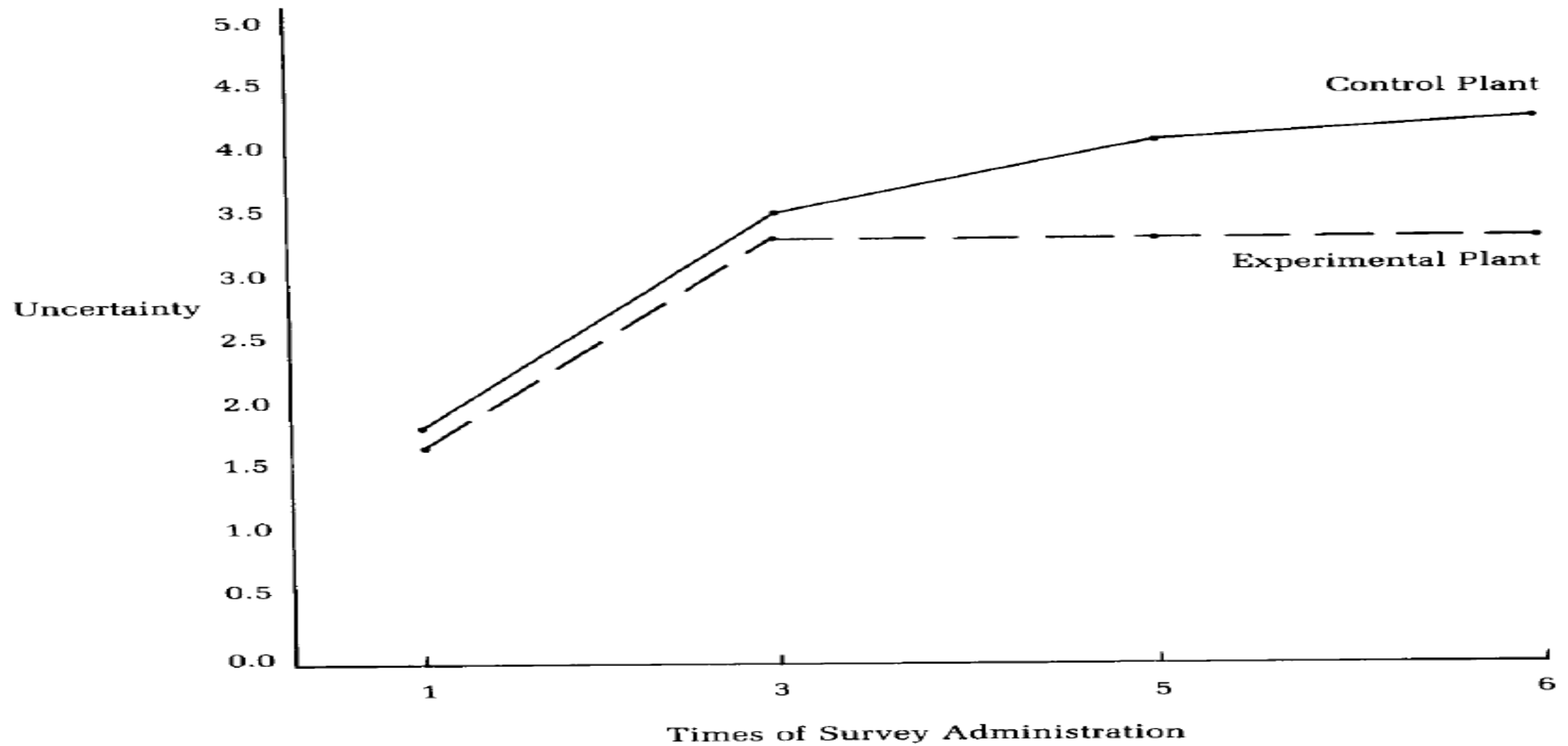
- Training Needs
- Buying Time/Holding Hands
- Potential Trouble Spots



FILL  
THE  
VOID



**FIGURE 2**  
**Longitudinal Effects of Merger and Realistic Merger Preview on**  
**Uncertainty**



**Communication with Employees Following a Merger: A Longitudinal Field Experiment**

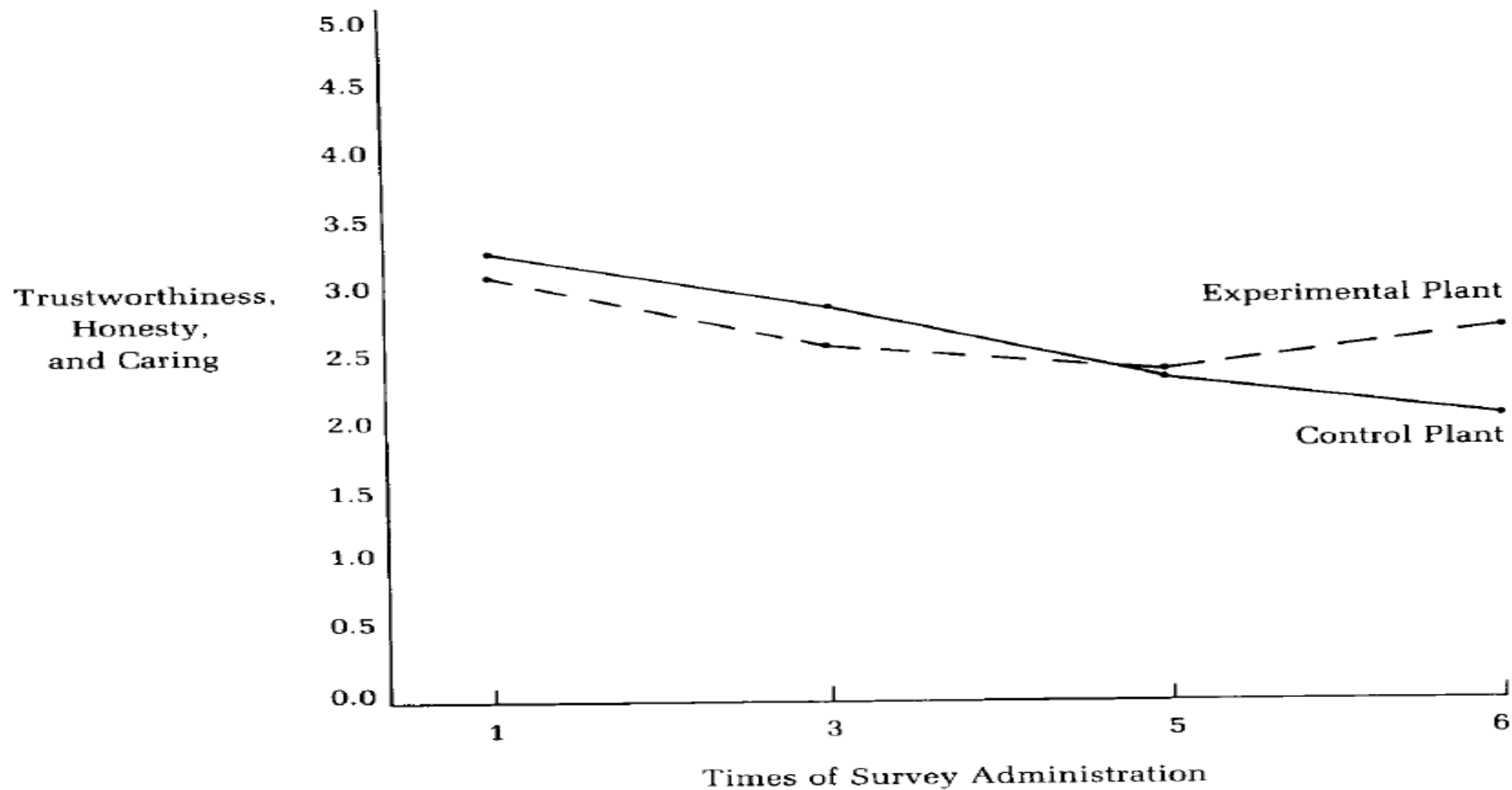
Schweiger, David M.; Denisi, Angelo S.

*Academy of Management Journal*; Mar 1991; 34, 1; ABI/INFORM Global





**FIGURE 4**  
**Longitudinal Effects of Merger and Realistic Merger Preview on Perceived Trustworthiness, Honesty, and Caring of the Company**







An aerial night photograph of a ski resort. The scene is dominated by a dense forest of evergreen trees, many of which are covered in snow. Several ski trails are visible, illuminated by warm yellow lights that create a glowing path through the dark landscape. In the lower-left and upper-right areas, there are clusters of buildings, likely lodges or ski huts, also brightly lit. The overall atmosphere is serene and majestic, capturing the beauty of a winter mountain resort at night.

# Post-Acquisition Pitfalls

# The Pitfalls



- Unintended MEWA
- Leave payouts
- FMLA
- Healthcare plans
- FSAs
- 401k and other pension plans

# Benefits

## Service Credit

- Control groups
  - Whether retaining pension plans or rolling everyone into Buyer plan, discrimination testing issues arise
- FSA wind downs
- Loans from 401k plans and other pension plans
- COBRA



# COBRA - Successor Rule

General Rules – If purchase agreement is silent, “default” rules in regulations apply

- Stock or Asset Sale – If seller, or any member of its controlled group, continues a health plan after the sale, seller (or the related company) has COBRA responsibility
- Asset Sale – If neither seller nor related company has a group health plan after closing, and buyer continues the business operations associated with the purchased assets without interruption or substantial change, buyer is a “successor employer” and responsible for COBRA coverage

**What if Purchaser is not a successor?**

# Immigration-Related Issues

These two different steps within an M&A have different immigration consequences under U.S. immigration law

- Foreign personnel engaged in a due diligence can enter the U.S. under a B-1 visa, which they usually already possess
- B-1 visas allow for entry into the U.S. for purposes of business. Entry is allowed for up to 90 days per visit
- Personnel from 23 specific Countries do not need a visa to enter the U.S. for business (“VWP Countries”)

# Immigration-Related Issues

After the closing of the transaction, all foreign executive and technical personnel who will work in the U.S. (even part time) need a work visa

- There are multiple visas available for personnel involved in an M&A. Which one is correct depends on cost, timeframe, Nationality, and expertise of the individual
- Visas available include E-1, E-2, H-1B, L-1A, L-1B, NAFTA and (rarely) O visas
- Visas for executives are usually granted much more easily than visas for technical personnel



# Immigration issues for employees currently in US

Changes in ownership may have a significant impact on the foreign workers that are already working in the U.S. at the time of the M&A

- Changes in ownership usually disqualify E and L visa holders from working for the surviving entity
- On the contrary, H-1B visas are “portable” – and getting USCIS approval to work for the surviving entity is generally not an issue
- Likewise, NAFTA workers just need to renew their visa under the surviving entity, which is a relatively straightforward process

# Questions



# Acquisition and Integration: An Employer's Perspective

Presented by:

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