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Seventh Circuit Makes It Easier to Tag an Asset Purchaser with Seller's ERISA Multiemployer Pension Plan Withdrawal Liability (Successor Liability)

In a recent decision, *Tsareff* v. *ManWeb Services, Inc.*,[1] the Seventh Circuit Court of Appeals again held that an asset purchaser may be liable for the asset seller's ERISA multiemployer pension plan withdrawal liability, despite an explicit exclusion of liability assumption in the asset purchase agreement. *Tsareff* expands an earlier Seventh Circuit ruling,[2] by holding that successor liability may apply even if the amount of withdrawal liability was not known to the purchaser before the sale and even if the liability was triggered by the sale itself.

Background

In *Tsareff*, a unionized electrical contractor sold all of its assets to a non-union engineering company. While negotiating the deal, the buyer learned of the seller's contingent withdrawal liability. The final sale contract included an express exclusion of liability for obligations related to the union, including pension obligations. As a result of the asset sale, the seller no longer had an obligation to contribute to the union's multiemployer pension plan – the seller no longer had employees – and the seller thereby incurred withdrawal liability under ERISA. The union pension plan sued both the seller and buyer for payment of the withdrawal liability. The claim against the buyer rested on the theory that it was a successor employer and thus responsible for the predecessor's labor-related obligations.

The Successor Liability Analysis

Under Seventh Circuit authority, courts may impose successor liability on an asset purchaser for certain federal labor and employment law claims, including those relating to multiemployer pension plan withdrawal liabilities, where "(1) the successor [was on] notice of the claim before the acquisition; and (2) there was 'substantial continuity' in the operation of the business before and after the sale."[3] The *Tsareff*

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[1] *Tsareff* v. *ManWeb Services, Inc.*, Case No. 14-1618 (7th Cir. July 27, 2015).

[2] *See Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund* v. *Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995); *see also Central States, Southeast and Southwest Areas Pension Fund* v. *Hayes*, 789 F. Supp. 1430 (N.D. Ill. 1992).

[3] *Tsareff, supra*, at *5 (citing *Tasemkin*, 59 F.3d at 49). The *Tsareff* court noted that successor liability is an equitable doctrine under federal common law, and "not an inflexible command." *Tsareff, supra*, at *12.

District Court entered judgment in favor of the buyer, holding that the judicially created requirement that the buyer have had pre-deal knowledge of the seller's liability was not met by this buyer's pre-deal awareness of seller's contingent withdrawal liability of uncertain amount. An appeal to the Seventh Circuit followed.

The Seventh Circuit reversed, finding that the requirement of successor foreknowledge of liability may be satisfied by notice of either existing or *contingent* liabilities. The Seventh Circuit maintained that, in the absence of this new rule, a "liability loophole" would exist: because withdrawal liability is ascertainable only after withdrawal occurs, plan sponsors would be foreclosed from imposing successor liability on asset purchasers if the seller's withdrawal occurred after the asset sale but would be able to do so (under Seventh Circuit precedent) if the seller's withdrawal occurred before the asset sale. It concluded that this result would not further the Congressional goal of ensuring that the responsibility for a withdrawing employer's share of unfunded pension benefits is not shifted to remaining participating employers.[4]

The Court of Appeals noted that the requirement of buyer's advance notice may be proved through evidence of actual knowledge or by presenting evidence from which knowledge could be reasonably inferred. Because the asset purchase agreement showed that the buyer had pre-deal awareness of the seller's contingent withdrawal liability (and the record showed that buyer's owners knew about the risk of withdrawal liability), the Seventh Circuit (i) reversed the district court's judgment for the buyer on the notice issue, and (ii) remanded the case to the district court for further proceedings to consider whether the successor liability substantial continuity requirement had been met.

A Few Observations

Although imposing disclaimed liabilities on an asset purchaser is generally at odds with the common law treatment of asset sale transactions – and is not provided for in ERISA – the Seventh Circuit has imposed successor liability with respect to claims arising from labor and employment relationships. In *Upholsterers' International Union Pension Fund* v. *Artistic Furniture of Pontiac*,[5] it applied successor liability principles to delinquent contributions due to an ERISA-regulated multiemployer pension plan. Relying on the Supreme Court's application of successor liability in *Golden State Bottling Co.* v. *NLRB*[6] (relating to an unlawful discharge claim under the NLRA), the Seventh Circuit in *Artistic Furniture*

[4] *Id.* at *8–*9.

[5] *Upholsterers' Int'l Union Pension Fund* v. *Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir. 1990).

[6] *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973).

reasoned that the congressional policies underlying ERISA and the MPPAA[7] were no less important than those underlying the NLRA[8] and likewise "compel the imposition of successor liability."[9]

The Seventh Circuit's conclusion in *Artistic Furniture* was arguably an unnecessary extension of *Golden State*: *Golden State* involved a claim personal to an employee, unlawful discharge; given successor continuity of operations, the Court found it appropriate to hold an asset purchaser liable for the claim against the seller, despite the general common law rule that an asset purchaser does not inherit the liabilities of the asset seller. *Artistic Furniture* extended the *Golden State* principle to unpaid contributions to union pension plans, a questionable extension although some might argue that these unpaid contribution claims could be considered "personal," like the *Golden State* claims, because the contributions were owing pursuant to hourly contribution obligations under a collective bargaining agreement. However, *Tasemkin*'s and *Tsareff*'s extension of successor liability to protect a financial institution such as a union pension plan with respect to the pension plan's claim for ERISA withdrawal liability seems far afield from the *Golden State* principle. The *Tsareff* court stated that successor liability is an equitable doctrine under federal common law, but it is not clear why ERISA's complicated withdrawal liability rules needed "equitable" supplementation by federal common law — the statute itself shows where the equities lie. The "liability loophole" identified in *Tsareff* presupposes the correctness of applying successor liability to union pension plan liabilities in the first instance. Moreover, the application of successor liability in withdrawal liability cases arguably interferes with the operation of ERISA, which has specific rules that address withdrawal liability in asset sales.

Asset purchasers should be aware that structuring a transaction as an asset purchase may not provide protection against liability for labor, employment, and pension claims against a predecessor in circumstances where federal common law may apply this successor liability principle.[10] The Third and Seventh Circuits may be particularly dangerous territory in this regard.

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[7] The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208 (1980), added to ERISA the rules which impose withdrawal liability on employers withdrawing from a multiemployer pension plan.

[8] The Seventh Circuit had previously applied successor liability to § 1981 claims and Title VII claims. *See, e.g.*, *Musikiwamba* v. *ESSI Inc.*, 760 F.2d 740 (7th Cir. 1985) (§ 1981 claim); *Wheeler* v. *Snyder Buick, Inc.*, 794 F.2d 1228 (7th Cir. 1986) (Title VII claim).

[9] *Artistic Furniture*, 920 F.2d at 1327.

[10] Some courts have applied similar reasoning as *Artistic Furniture* and *Tsareff*, applying successor liability principles to Fair Labor Standards Act claims, *see Teed* v. *Thomas & Betts Power Solutions*, 711 F.3d 763 (7th Cir. 2013); and, like *Artistic Furniture*, delinquent contributions to multiemployer pension plans, *see Einhorn* v. *M.L. Ruberton Construction Co.*, 632 F.3d 89 (3d Cir. 2011).

What Protections Exist for Asset Purchasers?

Both *Tsareff* and *Artistic Furniture* state that asset purchasers may protect themselves from successor liability claims by negotiating a lower purchase price. But, there are limitations to, and consequences associated with, this approach. Uncertainty regarding the extent of the exposure may scare off some purchasers or lead purchasers to insist on deeply discounted prices. These purchase price adjustments will leave sellers with fewer assets to satisfy the claims of their secured and unsecured creditors.

What Happens in a Bankruptcy?

Pursuing a sale transaction in bankruptcy may provide some protection against successor liability claims. Section 363(f) of the Bankruptcy Code permits a debtor to sell its property "free and clear" of interests and claims under certain circumstances, with the sale subject to court approval. Sale approval orders often expressly address successor liability issues and reflect input by purchasers.

At least one court has held that section 363(f) permits a debtor to sell its assets free and clear of a pension plan's successor liability claims. In *In re Ormet Corporation*, the Delaware Bankruptcy Court approved the sale of debtors' assets under section 363(f) of the Bankruptcy Code free and clear of any successor liability claims for underfunding of the debtor's pension plan under ERISA and the MPPAA.[11] In overruling the pension trust's objection to the sale of the debtors' assets free and clear of its successor liability claim, the court held that the policy objectives inherent in the successor liability provisions of ERISA and MPPAA do not trump the plain language of section 363(f). The court also rejected the pension trust's argument that bidders could simply reduce their bid if successor liability claims could be imposed on buyers, noting that the argument was not "practical" given the uncertain nature of the exposure and that it was contrary to the policy inherent in the Bankruptcy Code to maximize the value of the debtors' assets.[12]

Note, however, that bankruptcy sales may not be possible or advantageous in all circumstances. For example, a seller may refuse to pursue a bankruptcy strategy based on its overall financial condition, or due to reputational or cost concerns. For their part, purchasers may conclude that the risks associated with a bankruptcy auction and sale process (for example, the potential for delay, opportunity for other

[11] *In re Ormet Corp*., No. 13-10334 (MFW), 2014 WL 3542133 (Bankr. D. Del. July 17, 2014).

[12] The *Ormet* court also indicated that the trust's position was contrary to the Bankruptcy Code's priority scheme as it would allow the pension trust, an unsecured creditor, to receive more than other general secured creditors. *Ormet*, *supra*, at *3.

parties to participate, transaction subject to "higher or better" offers, and the like) outweigh the benefits. Thus, transactions should be evaluated on a case-by-case basis.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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