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BENEFIT NEWS BRIEFS

Asset Sales, EWL and the Successor Liability Doctrine

Buyer Beware!!!

In a recent 7th Circuit Court of Appeals case, the Court applied the federal common law doctrine of successor liability to hold a purchaser of the assets of a contributing employer liable for the contributing employer's withdrawal liability to a multiemployer pension plan. In short, a contributing employer sold its assets to a purchaser, a non-contributing employer, the Plan assessed withdrawal liability against the seller due to its actions constituting a "complete withdrawal" from the Plan, the seller failed to respond and the assessed liability became due and owing to the Plan pursuant to the *ERISA* withdrawal statute. The Plan filed a collection action against the then defunct seller and also added the purchaser as a defendant under theory of successor liability.

The District Court granted judgment to the Plan against the seller, but ruled against the Plan in regard to the purchaser, holding the "notice" requirement under the successor liability doctrine was not met since the seller had no knowledge of the *actual amount* of withdrawal liability owed by the seller. On appeal, the 7th Circuit Court held that the "notice" requirement could be fulfilled by notice, *express or implied*, of the fact the seller had a "*contingent liability*" regarding its potential withdrawal liability debt, even if no liability had yet been assessed.

The case is *Tsareff v. Manweb Services, Inc.*, 794 F.3d 841 (7th Cir 2015). Manweb was the purchaser, Tsareff was a trustee suing on behalf of the Plan. Before examining the specific holding of the court, let's review the concept of successor liability.

By way of background, one should be aware that other courts have applied the doctrine of successor liability to the collection of unpaid employer contributions owed to a multiemployer pension plan and a few district courts had applied the doctrine to employer withdrawal liability in the early 1990s. However, the *Tsareff* case appears to be the first case which explicitly deals with the "notice" prong which must be fulfilled before successor liability can attach to a purchaser. The general common law rule of successor liability holds that, except for *certain*

Prepared by Mike Ewing, J.D.
Director of Research
United Actuarial Services, Inc.
(317) 580-8659 • Fax (317) 580-8651
email: mewing@unitedactuarial.com

exceptions, when one company sells its assets to another company, the latter is not liable for the debts and liabilities of the seller.

However, the Supreme Court and the 7th Circuit have imposed liability upon successors beyond the bounds of the common law rule in a number of different employment-related contexts when (1) the successor had *notice of the claim* before the acquisition; and (2) there was '*substantial continuity' in the operation of the business before and after the sale*. Successor liability is an equitable doctrine, and in every instance where the courts have found the imposition of federal successor liability to be appropriate, it has done so after carefully balancing the need to vindicate important federal statutory policies with equitable considerations.

As noted, in the *Tsareff* case, the question of whether to impose successor liability on the purchaser hinged on whether or not *notice* of a contingent liability satisfies the successorship notice requirement in the context of employer withdrawal liability. In order to make that determination, the Court undertook an analysis of the underlying policy goals as implicated in the matter.

The Court held that imposing successor liability for unpaid multiemployer pension fund contributions and withdrawal liability effectuates the congressional policies and goals behind the *Multiemployer Pension Plan Amendments Act of 1980 (MPPAA),* a determination in line with the same policy reasons that supported the use of successor liability in regard to unpaid employer contributions.

In so concluding, the Court noted that withdrawal liability cannot be assessed until the plan sponsors have determined that the employer has withdrawn under the statute. The Court continued reasoning that:

> Because the assessment of withdrawal liability is triggered by an employer's withdrawal from a multiemployer plan, whether or not the precise amount of withdrawal liability is ascertainable prior to the employer's asset sale depends on whether withdrawal occurs before or after the asset sale takes place. The precise amount of withdrawal liability is not ascertainable pre-acquisition if, as here, the employer is found to have withdrawn *after* it has sold its assets. However, if the employer withdraws from the plan before selling its assets (*e.g.*, ceases operations due to bankruptcy) and the plan assesses withdrawal liability in the interim period between the withdrawal and subsequent asset sale, the precise amount of withdrawal liability may be known prior to the asset sale.
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> Consequently, were the successor liability notice requirement to exclude notice of contingent liabilities in this narrow context, a liability loophole would exist: multiemployer plan sponsors would be foreclosed in some situations (but not others) from seeking withdrawal liability from asset purchasers who would otherwise qualify as successors, and the plans would be left "holding the bag.

Accordingly, the Court concluded applying the doctrine of successor liability was proper, as holding to the contrary would not:

> "….further Congress's goal of ensuring that the responsibility for a withdrawing employer's share of unfunded vested pension benefits is not shifted to remaining employers."

The Court then examined the facts supporting its conclusion that the purchaser had notice of the seller's contingent withdrawal liability as being both "*reasonably inferred and directly proven*" by evidence in the record (and listed in detail in the case). While the facts here supported that conclusion, what about the case where the buyers could be clueless of a seller's contingent withdrawal liability? Some wonder if contributing employers could be required to notify a buyer of the seller's contingent withdrawal liability by placing such a requirement in the collective bargaining agreement, trust or Plan? In any case, plans now have a solid basis to assert notice of a contingent liability is sufficient in this type of fact pattern.

Holding there was sufficient notice, the 7th Circuit remanded the case back to the District Court to determine if the "*substantial continuity*" requirement was met. "Substantial continuity" is decided based on the totality of the circumstances.

In determining whether there was *substantial continuity* between the predecessor and the successor corporations, one court considered factors such as:

- the successor's employment of "substantially all" of the predecessor's workforce,
- its use of the predecessor's plant, machinery, and equipment to produce the same products,
- its completion of the predecessor's unfinished work orders, and
- its agreement to honor the predecessor's warranties.

Another court analyzed *substantial continuity* by considering these and other factors relevant to collectively-bargained plans:

- anti-union motivation;
- continuity of workforce;
- continuity in management;
- continuity of equipment and location;
- retention by the successor of accounts and customers;
- changes in the type and amount of work performed; and
- the successor's assumption of the predecessor's liabilities.

We will report on the District Court's subsequent opinion. In the interim, this is a powerful, clarifying case to add to the collection of cases regarding the assessing and collecting of employer withdrawal liability, particularly in the asset sale arena where the only party with money to pay the withdrawal liability is the purchaser.

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