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Successor Liability for Claims Arising Under Labor, Employment and Pension Plans

BY RICHARD M. BENDIX, JR.

Congress has passed numerous laws protecting (1) bargaining rights of labor unions, (2) employees from (a) unfair labor practices and (b) harms such as discrimination in the workplace; (3) rights to benefits under employer-sponsored pension plans; and (4) multi-employer pension plans from underfunding caused by a member's withdrawal. In order to further the policies which those laws are designed to promote, courts have, under certain circumstances, imposed successor liability on purchasers who acquired assets from sellers that violated one or more of those laws.

When it enacted the bankruptcy code, 11 U.S.C. § § 101 *et seq.* (the ''Bankruptcy Code''), Congress intended to promote a different set of policies relating to insolvent businesses, including (1) effectuating equality of distribution among similarly situated creditors, and (2) maximizing the value of a debtor's assets for the benefit of creditors.

This article will discuss (1) the circumstances under which purchasers who acquire sellers' assets outside of bankruptcy also acquire sellers' labor, employment, and pension liabilities, (2) the specific liabilities that courts impose on such purchasers, (3) the conflict between the policies underlying labor, employment and pension laws, on the one hand, and bankruptcy law on the other hand, that occurs when debtors sell their assets free and clear of interests under section 363(f) of the Bankruptcy Code, including interests such as claims under (a) the National Labor Relations Act, 29 U.S.C § 151 *et seq.* (the ''*NLRA*''); (b) various federal statutes designed to protect specific rights of employees; (c) the Employee Retirement Income Security Act, 29 U.S.C. § 1001-1461, *et seq*. (''*ERISA*''), and (d) the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381-1461 (''*MPPAA*''); and (4) how bankruptcy law generally trumps labor law in the context of such sales.

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I. SUCCCESSOR LIABILITY

A. The General Rule. Under the general rule of successor liability, a purchaser of assets acquires them free of the seller's liabilities unless: (1) the purchaser expressly or impliedly assumes a liability; (2) the transaction amounts to a consolidation, merger or similar restructuring of two corporations; (3) the purchaser is a ''mere continuation'' of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977).

B. Successor Liability Under Federal Labor, Employment and Pension Laws. Federal courts have developed an exception to the common law rule of successor liability in certain transactions where purchasers acquire assets from sellers who have violated federal labor, employment or pension laws. *Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48,49 (7th Cir. 1995).

When applicable, this exception (1) strikes a balance between the need to (a) effectuate federal labor, employment and pension policies and (b) facilitate the fluid transfer of corporate assets, and (2) holds a successor whose business is a substantial continuation of its predecessor's business legally responsible for that predecessor's obligations under federal labor, employment and pension laws when the successor has notice of those violations and the predecessor is unable to provide adequate relief. *Einhorn v. M.L. Ruberton Construction Co.*, 632 F.3d 89 (3d Cir. 2011); *Upholsterers'*

International Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323, 1326 (7th Cir. 1990).

The primary test for imposing successor liability for violations of federal labor, employment and pension laws is whether there is " substantial continuity" between the businesses of the purchaser and the seller. *Haw. Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 822 F.2d 289, 294 (9th Cir. 1987). Courts consider the following factors in determining whether such substantial continuity exists:

- Whether there has been substantial continuity of the same business operations;
- Whether the new employer uses the same plant;
- Whether the same or substantially the same work force is employed;
- Whether the same jobs exist under the same working conditions;
- Whether the same supervisors are employed;
- Whether the same machinery, equipment, and methods of production are used; and
- Whether the same product is manufactured or the same service is offered.

NLRB v. Jeffries Lithograph Co., 752 F. 2d 459 at 463 (9th Cir, 1985).

Decisions as to whether a particular asset purchaser is or isn't a successor require analysis of the interests of the new employer, the employees and the policies of labor laws in light of the facts of each case and the particular legal obligation at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc." *Howard Johnson Co. v. Detroit Local Joint Exec. Bd. Hotel & Rest. Emps. & Bartenders Int'l Union, AFL-CIO*, 417 U.S. 249, 262 n.9 (1974). The individual successorship factors outlined in *Jeffries* are given greater or lesser weight depending on the statutory context. *Resilient Floor Covering Pension Trust Fund Board of Trustees; Resilient Floor Covering Pension Trust Fund v. Michael's Floor Covering, Inc.* (9th Cir. 2015).

1. Federal Labor Laws

In determining whether an asset purchaser is a successor for purposes of a duty to bargain in good faith with the chosen representative of the seller's employees, the NLRB assesses "substantial continuity" of the buyer's and seller's businesses from the perspective of the seller's employees. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). This emphasis on the employees' perspective stems from the rebuttable presumption of majority support a union obtains once it has been certified as the unit's bargaining representative. *Id*. at 37-38. This presumption supports the NLRA's "overriding policy of "industrial peace" by promoting stability in collective-bargaining relationships. *Id*. at 38. "Requiring a successor to bargain with the incumbent union even after a change in corporate structure assures employees that their choice of representative is "not subject to the vagaries of an enterprise's transformation," and so promotes industrial peace" *Resilient Floor Covering Pension Trust Fund Board of Trustees, supra.* at *22 quoting *Fall River Dyeing*, 482 U.S. at 39-40.

The doctrine of successor liability for violations of federal labor laws grew out of a series of Supreme Court decisions holding that the NLRA imposes "liability upon successors beyond the confines of the common law rule when necessary to protect important employment related policies." *Einhorn v. M.L. Ruberton Construction Co.*, 632 F. 3d. 89, 94 (3d Cir. 2011).

For example, *John Wiley & Sons, Inc. v. Livingston* , 376 U.S. 543, 11 L.Ed. 2d 898, 84 S.Ct. 909 (1964) involved the merger between Wiley, a company whose employees were not union members, and Interscience, a company whose unionized employees were covered by a collective bargaining agreement that required arbitration of certain disputes. Interscience ceased to exist after the merger. Wiley hired most of Interscience's employees, and there was a substantial continuity in Interscience's business enterprise before and after the merger. The Supreme Court held that even though Wiley was not a party to Interscience's collective bargaining agreement, Wiley had to arbitrate with Interscience's union. The Court's ruling represented a recognition of both the key role that arbitration plays in promoting the federal policy of encouraging peaceful settlement of labor disputes, and employees' inability to protect their rights in a merger. *Id.,* 376 U.S. at 549. Notably, the rule requiring a successor to arbitrate with its predecessor's union does not require the successor either to hire its predecessor's employees or to arbitrate with an incumbent union when the successor hires only a few of a predecessor's employees. *Howard Johnson Co. v. Hotel Employees,* 417 U.S. 249, 41, L.Ed. 2d. 46, 94 S. Ct. 2236 (1974).

In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 32 L.Ed. 2d 61, 92 S. Ct. 1571 (1972), the Court held that a purchaser who hired a majority of a seller's employees and was found to be a successor had a duty to bargain with the seller's union. However, the successor "is ordinarily free to set the initial terms on which it will hire the employees of a predecessor," and is not bound by the substantive provisions of the predecessor's collective bargaining agreement. *Id.*, at 280. This decision recognized that binding a successor to the substantive terms of a predecessor's collective bargaining agreement would be inconsistent with federal labor policies favoring bargaining without compulsion and the free transfer of capital. *Id*. 406 U.S. at 281-91. A successor is only obligated to bargain "when the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor . . . [and] intends to take advantage of the trained work force of its predecessor." *Fall River Dyeing*, 482 U.S. at 41.

In *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 182, 38 L.Ed. 2d 388, 94 S.Ct. 414 (1973), the Supreme Court found that an asset purchaser was the seller's successor where (1) the purchaser "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations . . ." and (2) the purchaser had notice of a pending unfair labor practice charge at the time it acquired the seller's assets. *Id.*, 404 U.S. at 171. *See NLRB v. Burns International Security Services, Inc.* supra, 406 U.S. at 280. Whether there is a substantial continuity of business is based on the totality of the circumstances and requires the NLRB to focus on whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors, and whether the new entity has the same production process, produces the same products, and has the same body of customers. As a result of its successor status and its knowledge of an unfair labor practice claim, the asset purchaser in *Golden State Bottling* was held liable for the seller's unlawful discharge of an employee, and was also required to comply with the NLRB's judgment requiring reinstatement of the employee with back pay.

In *Golden State Bottling Co.*, the Court stated that its decision effectuated the purposes of the NLRA:

> Avoidance of labor strife, prevention of a deterrent effect to the exercise of rights guaranteed employees by § 7 of the Act, *29 U.S.C. § 157,* and protection for the victimized employee—all important policies subserved by the National Labor Relations Act, *see 29 U.S.C. § 141*—are achieved at a relatively minimal cost to the bona fide successor. Since the successor must have notice before liability can be imposed, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practice [citation omitted].

Id. 414 U.S. at 171. The Supreme Court also emphasized the importance of providing ''protection for the victimized employee'' who is left without a remedy against the now defunct predecessor entity. *Id.* 414 U.S. at 181 (cited by *Einhorn v. M.L. Ruberton Construction Co.*, *supra*. at 94). On the other hand, imposing liability for the seller's unfair labor practice on the purchaser who had notice of that liability was equitable; the purchaser could reduce its purchase price by the amount of the anticipated liability.

Practice Pointers

In order to avoid or minimize the risk of being considered a successor for purposes of a duty to bargain and other federal labor laws, a purchaser that acquires substantially all of a seller's assets or a seller's product line should:

- if possible, make material changes in business operations, such as alterations that will reduce losses and increase productivity;
- hire less than a majority of the seller's workforce;
- conduct operations at a plant other than the seller's plant;
- use a workforce that is materially different than the seller's workforce;
- avoid using the seller's supervisors; and
- to the extent possible, use different machinery, equipment and methods of production.

2. Federal Employment Laws

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Based on the Supreme Court's decisions regarding a successor asset purchaser's duty to bargain with its predecessor's employees, federal courts of appeal and district courts have extended the reach of relaxed successor liability rules for claims against asset purchasers under numerous federal employment statutes when the purchaser has notice of the violation and the seller is unable to provide effective relief. These include:

- claims for employment discrimination under the Civil Rights Act of 1866, 42 U.S. C § 1981 (*Musikiwamba v. ESSI Inc.*, 760 F.2d 740, 746 (7th Cir. 1985) (court motivated by existence of an overriding federal policy against unfair employment practices, the recognition that the victim of an illegal employment practice is helpless to protect his rights against an employer's change in the business, and recognition that a successor can provide relief at minimum cost));
- claims under the Pregnancy Discrimination Act (*E.E.O.C. v. Vucitech*, 842 F.2d 936, 945 (7th Cir.1988) (if successor knows of his potential liability, he can demand compensation in the form of a lower price for the assets, thereby shifting the burden of liability back to the original owners of the assets, where it belongs);
- claims under the Fair Labor Standards Act (*Thompson v. Bruister & Assocs.* (M.D. Tenn. 2013));
- claims under Fair Labor Standards Act notwithstanding language in a state court order providing that a sale of assets was free and clear of successor liability claims. (*Teed v. Thomas & Betts Power Solutions, LLC,* 711 F. 3d. 763 (7th Cir. 2013)); and
- claims under Title VII – Family Medical Leave Act *(EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.3d 1086, 1086, 1090-91 (6th Cir. 1974)); *See Einhorn v. M.L. Ruberton Construction Co.*, 632 F.3d 89 (3d Cir. 2011) (imposition of successor liability in employment discrimination context appropriate because successor was on notice, there was sufficient continuity of operations and workforce, predecessor was unable to provide adequate relief and the successor-employer had ample opportunity to insulate itself from liability during negotiations; imposition of financial burden on the successor has not restricted imposition of liability). *But see*, *Wheeler v. Snyder Buick, Inc.* 794 F.2d 1228, 1237 (7th Cir. 1986) (successor liability for a predecessor's violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000e-2000e-17 *not* imposed even when there was sufficient continuity in the business operations of the predecessor and the successor where the successor employer had no notice of the claim against the predecessor and, therefore, could not take the claim into account in negotiating the purchase price and the predecessor was able to provide the relief requested prior to the purchase).

Practice Pointers

If a an asset purchaser might be deemed its seller's successor, then, in addition to taking the steps described above to minimize the risk of successor status under federal labor law, the purchaser should take additional steps to offset the purchaser's cost of satisfying its seller's liabilities for violation of federal employment statutes. Specifically, the purchaser's due diligence process should identify all claims that employees have asserted against the purchaser, and all lawsuits and arbitrations to which the seller and its employees are parties. After identifying those claims and proceedings, the purchaser should reduce its purchase price by an amount sufficient to offset both the expense of future litigation and the risk of an adverse judgment. Alternatively, the asset purchaser should include an indemnity for successor liability claims in the asset purchase agreement together with a holdback of sale proceeds to pay amounts for which the purchaser is entitled to indemnification.

B. Successor Liabiility Under Federal Labor and Employment Laws in Bankruptcy Cases. In a bankruptcy case, a debtor's ability to sell its assets free and clear of interests under section 363(f) of the Bankruptcy Code gives an asset purchaser significant protection from successor liability claims by the debtor's creditors. This protection flows from the Bankruptcy Code's recognition that prohibiting such claims (1) promotes equality of distribution among similarly situated creditors by preventing certain unsecured creditors from having their claims paid in full by an asset purchaser while other unsecured creditors obtain only partial payment of their claims from proceeds of the asset sale, and (2) maximizes the value of assets being sold for the benefit of creditors by dissuading an asset purchaser from reducing its purchase price by the expected amount and the cost of defending post-closing successor liability claims. *In re NE Opco, Inc.*, 513 B.R. 871, 876 (Bankr. D. Del. 2014)(citing *Morgan Olson, LLC v. Frederico (In re Grumman Olson Indus., Inc.),* 445 B.R. 243, 247-48 (Bankr. S.D N.Y 2011), *aff'd*, 467 B.R. 694 (S.D.N.Y 2012). In other words, assertion of successor liability claims following a debtor's sale of assets thwarts two of the Code's fundamental policies—promoting equality of distribution among similarly situated creditors, and maximizing the value of a debtor's assets for the benefit of creditors.

1. Collective Bargaining Agreements

A purchaser who acquires a debtor's assets in a sale under Bankruptcy Code § 363(f) free and clear of interests, and then hires a majority of the debtor's employees, has an obligation to bargain with the debtor's union if the purchaser qualifies as a successor, *i.e.*, if there is substantial continuity between the businesses of the purchaser and the seller, the unit of employees comprising the new operation remains the appropriate unit for collective bargaining, and the new employer's workforce contains a majority of the debtor's former employees at a time when the new workforce has reached a substantial and representative complement. *Shares v. NLRB*, 433 F. 3d 939 (7th Cir. 2006); *Erica, Inc. v. NLRB*, 200 Fed. Appx 344 (5th Cir. 2006). This duty to bargain exists even if the purchaser does not take an assignment of the debtor's collective bargaining agreement. Thus, the NLRA's policy of encouraging collective bargaining as a means of promoting industrial peace trumps the Bankruptcy Code's policies of promoting equality of distribution among creditors and maximizing the value of a debtor's assets. *See*, *In re Carib-Inn of San Juan Corp.*, 905 F.2d. 561 (1st Cir. 1990)(bankruptcy court order approving sale of assets free and clear of encumbrances did not bar unfair labor practice charges by NLRB based on (1) failure by asset purchaser that hired majority of debtor's employees to recognize and bargain with seller's union, and (2) purchaser's threat to discharge debtor's former employees if they supported debtor's union). An individual debtor/employer's chapter 7 discharge does not relieve him of a post-discharge duty to bargain with a union if he is found to be the alter ego of a new company that hired a majority of his former employees. *In re Goodman*, 873 F.2d 598 (2d Cir. 1989).

2. Claims Based on Federal Employment Laws

Notwithstanding the relaxed test for successor liability applicable in non-bankruptcy cases under federal employment laws, bankruptcy courts have held that a sale free and clear of interests under Bankruptcy Code § 363(f) protects an asset purchaser from successor liability claims arising under a multitude of those laws:

- claims under the Coal Industry Retiree Health Benefit Act of 1992, which statute expressly provides for successor liability *(UMWA 1992 Benefit Plan v. Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573 (4th Cir. 1996), cert. denied 520 U.S. 1118, 117 S.Ct. 1251, 137 L.Ed. 2d 332 (1997));
- employment discrimination claims settled with travel vouchers (*In re Trans World Airlines, 322 F.3d 283 (3d Cir. 2003)*));
- taxes based on a debtor's unemployment contribution rate (*Mass. Dep't of Unemployment Assistance v. OPK Biotech LLC (In re PBBPC, Inc.*), 484 B.R. 860 (1st Cir. BAP 2013));
- wrongful termination (*In re NE Opco, Inc.*, 513 B.R. 871, 876 (Bankr. D. Del. 2014)); *In re Christ Hospital* (Bankr. D. N.J. May 22, 2014)(same);
- claims under the American With Disabilities Act (Dunope v. Weirton Steel Corp. (W.D. Pa. 2012));
- claims for age discrimination (Maguire v. Capmark Finance, Inc. (E.D. Pa. 2010)); claims for employment discrimination (Brosnan v. Pittsburgh Brewing Co. (W.D. Pa. 2009)); and
- (7) claims for racial discrimination (*Faulkner v. Bethlehem Steel/International Steel Group,* (N.D. Ind. 2005)).

II. Successor Liability for ERISA and MPPAA Claims

A. Outside of Bankruptcy.

ERISA imposes liability on an employer for, among other things, failing to make required contributions to an employer-sponsored pension plan. 29 U.S.C. § § 1132(g)(2)(A), 1145. *Hudson County Carpenters Union Local No. 6 v. V.S.R. Constr. Corp.,* 127 F. Supp. 2d 565, 568 (D.N.J. 2000) (It is well-established that the failure to make contributions to a union trust fund as required by a collective bargaining agreement constitutes a violation of ERISA § 515 [29 U.S.C. § 1145] . . .''). A central policy goal of ERISA is ''to ensure that employees and their beneficiaries are not deprived of anticipated retirement benefits due to termination of pension plans before sufficient funds have been accumulated in the plans.'' *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *Teamsters Pension Trust Fund of Phila. & Vicinity v. Littlejohn*, 155 F.3d. 206, 208-210 (3d Cir. 1998).

An employer that withdraws from a multi-employer pension plan is liable for its allocable share of the plan's unfunded pension liabilities. 29 U.S.C. § § 1381(a), 1391(c). This liability reflects a strong congressional desire to minimize contribution losses and the resulting burden such losses impose on other plan participants. *Upholsterers' Int'l Union Pension Fund v. Artistic Fur-*

niture of Pontiac, 920 F.2d 1323 (7th Cir. 1990) (discussing Congress' purpose in enacting the MPPAA). If some employers fail to make their required contributions, others must make up the difference in order to ensure that workers receive their designated benefits. *Id.*; *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Trucking Service, Inc.*, 870 F. 2d 1148, 1151 (7th Cir. 1989 (en banc).

Like the successor liability standard for labor-related claims, the rule for determining successor liability for ERISA and MPPAA claims is more relaxed than the common law rule described in *Travis v. Harris Corp*, 565 F.2d 443, 446 (7th Cir. 1977) *supra.* at p. 2. Outside of bankruptcy, a purchaser of assets from an employer that has either failed to make required pension plan contributions, or that has withdrawn from a multi-employer pension plan without paying the employer's withdrawal liability, also acquires liability for the seller's delinquent pension contributions or withdrawal liability if a court finds that the buyer is the seller's successor and had notice of the seller's liability. *See, Bright Construction, Inc. v. Carpenters District Council of Kansas City Pension Fund* (W.D. Mo. 2014) (citing cases imposing seller's multi-employer pension fund withdrawal liability on asset purchasers that were found to be successors of the sellers). Thus, in *E.E.O.C. v. G-K-G, Inc.,* 39 F.3d 740, 748 (7th Cir.1994), the court stated:

> [i]n order to protect federal rights or effectuate federal policies, this [broader] theory allows lawsuits against even a genuinely distinct purchaser of a business if (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.

Applying the relaxed rule for successor liability, courts regularly impose liability for a seller's ERISA and MPPAA violations on asset purchasers who satisfy the definition of successors and who have notice of potential liabilities . *Einhorn v. M.L. Ruberton Construction Co.*, 632 F.3d 89 (3d Cir. 2011) (asset purchaser may be liable for a seller's delinquent ERISA fund contributions to vindicate important federal statutory policy where buyer had notice of liability prior to sale and there was sufficient evidence of continuity of operations between the seller and the buyer; absent imposition of successor liability on successor, other employers would be forced to make up seller's unfunded liability to ensure that seller's workers receive their benefits); *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7thCir.1995) (predecessor's liability for unpaid pension fund contributions imposed on successor that purchased assets at sale under Article 9 of the Uniform Commercial Code even though seller subsequently filed chapter 7 bankruptcy); *Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F. 2d 1323, 1327 (7th Cir. 1990) (purchaser of assets at foreclosure sale under Article 9 of the Uniform Commercial Code could be held liable for multi-employer pension plan withdrawal liability imposed on original owner of assets if purchaser had prior notice of withdrawal liability); *Central States, Southeast & Southwest Areas Pension Fund v. Ehlers Dist., Inc.* (N.D. Ill. 2012) (purchaser of assets from company against which judgment was entered for MPPAA withdrawal liability held liable for amount of that judgment where purchaser had notice of the MPPAA claim before closing on the purchase and there was substantial continuity in the operation of the business before and after the sale); *Central States Pension Fund v. Hayes*, 789 F. Supp. 1430, 1435-36 (N.D. Ill. 1992) (imposing successor liability for seller's unpaid pension fund contributions on asset purchaser).

The MPPA itself creates a narrow exception to withdrawal liability for employers in the construction industry. 29 U.S.C. A. § 1383(b). Under this exception, ''employers in the construction industry who entirely cease operations are not subject to the withdrawal liability that § 1381 would otherwise impose, unless they resume construction work within 5 years without also renewing their obligations to contribute to the plan.'' *Resilient Floor Covering Pension Trust Bd. of Trs. v. Michael's Floor Covering, Inc.*, 2015 U.S. App LEXIS 16160 at *16 (9th Cir. 2015). The Ninth Circuit described the reason for this exception as follows:

> In enacting the MPPAA, Congress 'recognized the transitory nature of contract and employment in the building and construction industry.' [quoting *Carpenters Pension Trust Fund for N. Cal. v. Underground Constr. Co.*, 31 F.3d 776 778 (9th Cir. 1994]. The exception is rooted in the understanding that '[construction industry] employers [will]come and go[,] [but] as long as the base of construction projects in the area covered by the plan [continues] funding the plan's obligations, the plan is not threatened' by an individual employer's departure. *Id.* It is on this premise that § 1383(b) 'aims to extract withdrawal liability contributions only from those employers who may threaten the plan by reducing the plan's contribution base,' that is, those employers who continue to work in the area covered by the plan without contributing to it.' *Id.* The ''contribution base'' concept is thus at the core of the MPPAA construction withdrawal liability concept .

Resilient Floor Covering Pension Trust Bd. of Trs. at *16-17.

In Resilient Floor Covering, the Ninth Circuit reversed a District Court decision holding that Michael's Floor Covering, LLC, which had purchased the assets of Studer's Floor Covering, Inc., a construction industry employer, when Studer's ceased doing business, was not Studer's successor. Therefore, the District Court found that Michael's was not liable for Studer's MPPAA withdrawal liability. The Ninth Circuit held that the District Court had not properly weighed market share capture as a prime consideration in determining successorship, and had not made any finding whether Michael's had retained a significant portion of Studer's business or body of customers. Rather, the District Court had incorrectly viewed composition of Michael's workforce as the most crucial factor. According to the Ninth Circuit, the District Court should have focused ''on the relative revenue generated by Studer's former customers rather than on a simple head count of all of Michael's customers, including one-time customers.'' *Id. at *37.* Analyzing ''billings on jobs worked for continuing customers by the old and new companies is more useful, as pension contributions are usually made based on the total employee hours worked.'' *Id.*. at *38.

The Ninth Circuit also held that the District Court had made two errors of law in its method of determining workforce continuity. ''First, the appropriate test for determining 'continuity of the workforce' is whether 'a majority of the new workforce once worked for the old employer,' not whether the successor employs a majority of the predecessor's workforce. *Id.* at *41 (quoting *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 463 (9th Cir. 1985)). The District Court's second error was to look at Michael's entire workforce. Instead, in determining continuity of workforce, the District court should only have considered those employees in the bargaining unit – "that is, the installers actually employed by Michael's who are the individuals as to whom pension fund contributions would be due. *Id.* at *41.

The Ninth Circuit remanded the case so that the District Court could apply the proper tests for determining whether there was substantial continuity between the businesses of Studer's and Michael's and whether Studer's qualified for the construction industry exception to MPPAA withdrawal liability.

B. In Bankruptcy.

In *In re Ormet Corp.* (Bankr. D. Del. 2014), debtors sought to sell their assets under Bankruptcy Code section 363(f) free and clear of ERISA liabilities for unpaid pension contributions and MPPAA withdrawal liability. The Steel Workers' Pension Trust (the "Trust") objected to the sale. Unlike sales free and clear of tort liabilities, the Trust argued that ERISA and MPPAA reflected strong public policies to (1) protect the rights of employees in multi-employer pension plans from under-funding caused by withdrawal of member/employers, and (2) impose successor liability on a purchaser of substantially all of the empoyer/seller's assets if the buyer has notice of the liability and there is a continuity of operations between the seller and the buyer. The bankruptcy court rejected the Trust's arguments, finding no reason to distinguish between a sale free and clear of pension liabilities, and a sale free and clear of liabilities under other federal statutes reflecting strong Congressional policies (1) prohibiting sex and employment discrimination, as in *In re Trans World Airlines, Inc.*, 322 F.3d. 283 (3d Cir. 2003), and (2) protecting medical benefits of coal workers, as in *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir.2003). In addition, all of the cases on which the Trust relied involved non-bankruptcy sales.

Further, both Courts [*TWA* and *Leckie*] expressed concern that making an exception to the provisions of *section 363(f)* would depress the prices that parties bid for a debtors' assets. They noted the important policy inherent in the Bankruptcy Code to maximize the value of the debtor's assets for distribution to creditors in accordance with the priority scheme in the Code *TWA, 322 F.3d at 293* (noting that without the protection afforded by *§ 363* the buyer may have offered a lower price, particularly since the EEOC claims were not even estimated); *Leckie 99 F.3d at 586-87* (noting that the Coal Act obligations were more than three times the purchase price and without the protections of *§ 363,* the sale as a going concern would likely not have occurred resulting in a piecemeal sale of assets generating far fewer funds for creditors.

The court went on to note that the debtors had been unable to obtain any bids for their assets that did not include the protections of Code § 363(f). The court was also concerned that accepting the Trust's position would result in the Trust's claim receiving a greater percentage distribution than the claims of other unsecured creditors in violation of the Code's priority scheme.

Practice Pointer

Counsel representing a successful bidder at a sale under section 363(f) of the Bankruptcy Code should include language in the asset purchase agreement conditioning its obligation to close on entry of a bankruptcy court sale approval order containing express language:

- providing that the assets being acquired are being transferred free and clear of all liens, claims, encumbrances and interests including, without limitation, successor liability claims,
- enjoining lawsuits against the purchaser by creditors of the debtor/seller, and
- retaining exclusive jurisdiction in the bankruptcy court to enforce the sale approval order.

III. Conclusion

Federal courts have fashioned relaxed successor liability rules in order to effectuate the polices underlying the NLRA, ERISA, the MPPAA and numerous other laws designed to protect employees. Bankruptcy law effectuates different policies—achieving equality of distribution among similarly situated creditors and maximizing the value of a debtor's assets. The sale of a debtor's assets free and clear of interests under Code § 363(f) creates a conflict between successor liability rules for violation of labor, employment and pension laws, on the one hand, and, on the other hand the policy goals of the Bankruptcy Code. Preserving labor, employment and pension law claims against an asset purchaser in a bankruptcy sale can result in employees recovering a greater percentage of their claims than other unsecured creditors, and can also cause a purchaser to reduce the price he will pay for the debtor's assets. With the exception of the duty of a purchaser who qualifies as a successor to bargain with the debtor's union after hiring a majority of the debtor's employees, bankruptcy law trumps successor liability for a debtor's violation of labor, employment and pension laws.

Bankruptcy courts do not give specific reasons for this result. The most likely explanation for this outcome is that outside of bankruptcy, imposing successor liability on a solvent successor asset purchaser does not affect the ability of seller's creditors to receive full payment of their claims. Moreover, a purchaser's reduction of his purchase price by the estimated amount of the seller's labor, employment and pension liabilities affects only the amount of sale proceeds that the seller's equity holders will receive after the seller's creditors have been paid in full. In the context of an asset sale under Bankruptcy Code § 363(f), however, creditors are almost never paid in full from sale proceeds. As a result, those creditors have a collective interest in (1) preserving equality of distribution among similarly situated creditors, and (2) maximizing sale proceeds for creditors who will not be paid in full. That collective interest outweighs the interests of individual creditors who are entitled to be paid in full for the debtor's violations of labor, employment and pension laws.

A plausible case can be made for the opposite result, at least in the case of MPPAA withdrawal liability. Thousands of employees have a significant stake in receiving pension benefits from multi-employer pension plans. If an employer with a large MPPAA withdrawal liability files a bankruptcy case and then sells its assets under section 363 of the Bankruptcy Code free and clear of that withdrawal liability, the holder of the MPPAA claim will likely be paid little or nothing on account of that claim. Consequently, the multi-employer pension plan will have fewer assets with which to pay pension benefits. As previously noted, outside of bankruptcy, the policy of protecting multi-employer pension plan beneficiaries leads courts to impose an asset seller's MPPAA withdrawal liability on a purchaser that is a successor with notice of that liability. In an asset sale under section 363 of the Bankruptcy Code by a debtor against whom an MPPAA withdrawal liability claim has been filed, a bankruptcy court could also decide that the policy of protecting multi-employer pension plans beneficiaries trumps the bankruptcy policies of (1) maximizing the value of a debtor's assets and (2) achieving equality of distribution among similarly situated creditors. Creditors can take steps to protect themselves from the risk of a customer's bankruptcy. Neither the trustees nor the beneficiaries of a multi-employer pension plan can do so. Similarly, it can be argued that the harm to multi-employer pension plan beneficiaries from their plans' inability to obtain full payment of MPPAA withdrawal liability claims (especially in industries experiencing multiple employer bankruptcies) outweighs the harm to creditors from a reduced price a buyer will pay for a debtor's assets in order to offset MPPAA withdrawal liabilities that the buyer must assume.

It will be interesting to see if future bankruptcy court decisions on successor liability for MPPAA withdrawal liability following a sale under Bankruptcy Code § 363(f) will re-consider in whose favor the balance of equities tips when the Bankruptcy Code and the MPPAA conflict. Perhaps recent requests by multi-employer pension plans to reduce pension payments to their beneficiaries as a result of underfunding will tip the balance of equities in favor of successor liability for MPPAA withdrawal liability claims.