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Successor Liability for Pension and Other ERISA Obligations

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One of the murky but interesting aspects of ERISA law — which has been revisited from time to time by the federal courts — has been the extent to which liability under ERISA will carry over to successors who purchase the assets rather than the stock of the business. This article explores the current state of the law regarding successor liability under ERISA.

GENERAL COMMON LAW RULES OF SUCCESSOR LIABILITY – CONTINUITY OF OPERATIONS AND CONTINUITY OF OWNERSHIP

The general common law rule is that a company that purchases assets of another company is not automatically responsible for the seller's liabilities.[1] There are generally four exceptions — where successor liability will apply to a purchaser of all or substantially all of the assets of a seller.

Express or Implied Assumption of Liabilities

The first exception is where the purchasing company expressly[2] or impliedly[3] agrees to assume the selling company's liabilities.

De Facto Merger

The second exception is where the transaction amounts to a ''de facto merger'' — i.e., buyer's existing business and target business are deemed like a merger looking to four factors which favor such a finding: (i) continuity of ownership (e.g., purchaser company pays for the assets with stock of the purchaser), (ii) continuity of the business enterprise, evidenced by continuity of management, personnel, physical location, assets and general business operations, (iii) dissolution of seller, and (iv) purchaser assuming obligations necessary for uninterrupted con-

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[1] *See, e.g., Dayton v. Peck, Stow and Wilcox Co. (Pexto)*, 739 F.2d 690, 692 (1st Cir. 1984) (successor not liable in product liability action since the purchase of assets did not meet any of the four exceptions to the general rule); *Murray v. Miner*, 74 F.3d 402 (2d Cir. 1996) (based on New York law, shareholders of successor corporation not liable for breach of employment contracts where there was no employer-employee relationship between employees and successor at the time of alleged wrong); *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006) (buyer of manufacturer's assets had no successor liability). *See generally* 15 Fletcher Cyclopedia of the Law of Private Corporations, §7122, §7124, §7124.10, §7124.20, §7124.50, and §7125.

The successor liability rules are generally applicable whether the successor is a corporation or another entity. *Graham v. James*, 144 F.3d 229, 240 (2d Cir. 1998) (traditional rule of corporate successor liability and the exceptions to the rule are generally applied regardless of whether the predecessor or successor organization was a corporation or some other form of business organization; citing 63 Am. Jur. 2d Products Liability §117 (1984)).

[2] *See, e.g., Florom v. Elliott Mfg.*, 867 F.2d 570 (10th Cir. 1989) (conduct of successor corporation shows that it specifically assumed the liability); *Hudson Riverkeeper Fund, Inc. v. Atlantic Richfield Co.*, 138 F. Supp. 2d 482 (S.D. N.Y.2001) (corporation that expressly assumed alleged polluter's liabilities could be liable under Resource Conservation and Recovery Act even though its subsidiary was current site owner).

[3] *See, e.g., Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (implied assumption of liability where language of assumption agreement is broad); *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wash. App. 590 (1993) (implied assumption of liability where acquiring company agrees to assume seller's obligations to its customers).

tinuation of normal business operations of seller.[4] Many cases require the continuity-of-shareholders prong to find a de facto merger.[5]

Mere Continuation of Seller Entity

The third exception is where the purchaser corporation is a ''mere continuation'' of the seller, i.e., merely a restructured or reorganized form of seller's corporate entity and not simply a continuation of the business operation. This exception is aimed at owners and directors who may dissolve one company and begin another to avoid debts and liabilities. Factors include: (i) common identity of officers, directors and shareholders in the selling and purchasing corporations (continuity of ownership or corporate structure), (ii) continuity of business operations, (iii) cessation of ordinary business by seller, and (iv) inadequate consideration paid for assets.[6] Common identity of officers, directors and shareholders is the key element to finding mere continuation.[7] This ''mere continuation'' exception is very similar to the ''de facto merger'' exception and they are sometimes treated together in case law.[8] Note that the ''de facto merger'' and ''mere continuation'' tests above are narrower than the ''con-

[4] *See, e.g., Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (successor liable for predecessor's negligence as express assumption of liability as well as de facto merger, where: (i) the purchaser exchanged its stock as consideration for the seller's assets so that the shareholders of the seller corporation become a part of the purchaser corporation, (ii) predecessor's management and personnel became part of successor, (iii) predecessor was required to transfer right to use its corporate name, and (iv) successor continued to operate predecessor's plants and produced same products as predecessor); *U.S. v. General Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005) (acquisition of privately-held battery manufacturer part for cash and part for stock constituted a de facto merger so that purchaser and its successor would be responsible under the Comprehensive Environmental Response, Compensation and Liability Act —Superfund law —for liability of battery manufacturer); *United States v. Sterling Centrecorp Inc.,* 960 F. Supp. 2d 1025 (E.D. Cal. 2013) (U.S. Environmental Protection Agency and California Department of Toxic Substances Control brought action against successor corporation for liability of predecessors who operated gold mine causing arsenic releases; district court held that the successor expressly and impliedly assumed predecessor corporation's liabilities relating to the arsenic release, and in addition, the acquisition by the successor was a de facto merger since there was continuity of business enterprise and continuity of shareholders, seller ceased its operations right after the sale and purchaser took over the operations upon the asset acquisition); *Lehman Brothers Holdings, Inc. v. Gateway Funding Diversified Mortgage Services, L.P.*, 785 F.3d 96 (3d Cir. 2015) (court *denied* a summary judgement dismissal of action by purchaser of home mortgage loans action against seller's successor in interest under de facto merger theory; there was a continuity of enterprise with same personnel and business operations in the same location, some continuity of ownership with seller's shareholders retaining an ownership interest in the successor by reason of contractual profit sharing entitlements, possibly cessation of business by the seller company and there was assumption of ordinary business liabilities by the purchaser). *See in contrast New York v. National Service Industries, Inc.*, 460 F.3d 201 (2d Cir. 2006) (company that bought assets of dry cleaning business was not liable for actions of seller under de facto merger theory because there was no continuity of ownership; some evidence of continuity of ownership is necessary to find a de facto merger).

[5] *E.g.,Arnold Graphics Industries, Inc. v. Independent Agent Center, Inc.*, 775 F.2d 38, 42 (2d Cir. 1985) (to find that a de facto merger has occurred there must be continuity of shareholders); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990) (there was no continuity of shareholders, which is a prerequisite for finding de facto merger); *New York v. National Service Industries, Inc.*, 460 F.3d 201 (2d Cir. 2006) (cited above; some evidence of continuity of ownership is necessary to find a de facto merger). Some cases, however, have held that no one of these factors is either necessary or sufficient to establish a de facto merger. *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1457-1458 (11th Cir. 1985), *reh'g denied*, 765 F.2d 154 (11th Cir. 1985) (successor not liable; based on totality of circumstances the court did not find a de facto merger).

[6] *See, e.g., Medicine Shoppe Intern., Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801 (8th Cir. 2003) (pharmacy was successor of franchisee; for ''mere continuation,'' factors include: (i) common identity of officers, directors and stockholders; (ii) incorporators of successor also incorporated predecessor; (iii) business operations are identical; (iv) transferee uses same trucks, equipment, labor force, supervisors, and name of the transferor; and (v) notice has been given of the transfer to employees or customers). Other cases formulate the factors as stated in the text.

See in contrast Grand Laboratories, Inc. v. Midcon Labs of Iowa, 32 F.3d 1277 (8th Cir. 1994) (successor corporation that purchased predecessor's assets was not ''mere continuation'' of predecessor under Iowa law where companies had no common shareholders or directors; in determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity of the transferor, not whether there is a continuation of the transferor's business operation); *Mickowski v. Visi-Trak Worldwide, LLC,* 415 F.3d 501 (6th Cir. 2005) (a corporation is not a ''mere continuation'' of the corporation whose assets it has purchased for purposes of successor liability just because it continues to provide the same services (continuation of business operation), but rather the key element in the mere continuation theory is the continuation of the corporate entity such as when one corporation sells its assets to another corporation with the same people owning both corporations — common identity of stockholders, directors, and stock).

[7] *See, e.g., Dayton v. Peck, Stow and Wilcox Co.* (Pexto), 739 F.2d 690, 693 (1st Cir. 1984) (purchase of manufacturing company's assets for cash did not constitute a ''de facto merger'' or ''mere continuation;'' key element of continuation is common identity of the officers, directors, and stockholders in the selling and purchasing corporations).

[8] *See, e.g., Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006) (where one company sells all of its assets to another company, the buyer is not normally liable for the liabilities of the seller, though if circumstances indicate that there was a ''de facto merger'' of the corporations or that the purchasing com-

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tinuity of operations'' condition for pension successor liability under the *Artistic Furniture* line of cases discussed below, in that de facto merger and mere continuation generally require continuity of ownership, which is not the case in the pension successor liability cases, where continuity of operations typically suffices.

Fraudulent Transfer

The fourth exception is where the transfer of assets is for the fraudulent purpose of escaping liability for the seller's debts.[9]

Product-Line Exception

A small number of jurisdictions, including California and New Jersey, recognize an additional, more expansive exception under which successor liability might attach to an asset purchaser—the so-called ''product line'' doctrine.[10]

Tax Liability on Successor

Section 6901[11] sometimes imposes tax on a successor. Specifically §6901 allows the IRS to assess and collect taxes from the transferee of property in the same manner as it does in the case of the transferor entity that originally incurred the tax liability.[12]

Free and Clear Bankruptcy Asset Sale

Bankruptcy Code §363, 11 U.S.C. 363, allows a bankruptcy trustee to sell the property of the bankruptcy estate ''free and clear'' of any interest in the property.[13]

BROADENED APPLICATION OF SUCCESSOR LIABILITY IN ERISA MULTIEMPLOYER PENSION OBLIGATIONS

Broadened Application of Successor Liability for ERISA Obligations

Minimum funding pension obligations, Title IV termination liability, multiemployer withdrawal liability, and other pension liabilities would seem to be treated like any other preexisting obligation that unless assumed by the buyer — or unless the common law exceptions for successor liability apply — the buyer of assets would not be liable for the seller's obligations.

However, case law has expanded successor liability for certain obligations under ERISA in certain circumstances. Specifically, a number of cases have found successor liability for pension obligations if there is continuity of operations, as well as knowledge, even if this is no continuity of ownership, while in the non-ERISA context successor liability also requires continuity of ownership.

A number of cases — including circuit and district court decisions in the Seventh, Sixth, Second, Third,

pany was a ''mere continuation'' of the selling company, liability would attach to buyer; the de facto merger test is similar to the mere continuation test, except that the mere continuation test focuses on situations in which the buyer is merely a restructured or reorganized form of the seller).

[9] *See, e.g., Lumbard v. Maglia, Inc.*, 621 F. Supp. 1529 (S.D. N.Y. 1985) (creditor of liquidated manufacturer adequately alleged successor liability charging that various defendants had fraudulently created new entity to carry on manufacturer's business while avoiding its debts); *Raytech Corp. v. White*, 54 F.3d 187, 192 (3d Cir. 1995) (transferee corporation could be liable for transferor corporation's liabilities for asbestos exposure even though transferor's asbestos-related assets were not part of transaction; issue was whether transfer was fraudulent attempt to avoid liability); *United States ex rel. Bunk v. Gov't Logistics N.V.*, 842 F.3d 261 (4th Cir. 2016) (successor corporation could be liable for claims against the predecessor corporation's under False Claims Act for bid-rigging and plaintiffs had offered sufficient evidence under a fraudulent transaction theory to survive summary judgment).

[10] *Ray v. Alad Corp.*, 560 P.2d 3, 19 Cal.3d 22 (Cal. 1977) (non-bankruptcy asset sale; successor that continues to market a product line purchased from predecessor assumes predecessor's liability for defective products); *Lefever v. K.P. Hovnanian Enterprises, Inc.*, 734 A.2d 290, 292 (N.J. 1999) (asset sale in bankruptcy case; acquiring a substantial part of manufacturer's assets and continuing to market good in same product line exposes purchaser to successor liability).

[11] All section references herein are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

[12] The liability of a transferee that may be enforced under §6901 may be either at law or in equity. Regardless of whether enforcement is sought at law or in equity, there are two fundamental elements to transferee liability: (1) there must be a transfer of the taxpayer's property to a third-party transferee, and (2) the taxpayer must be liable for the tax at the time of transfer and at the time transferee liability is asserted. Note that §6901 does not impose successor liability, but rather allows a collection mechanism where there is common law principles of successor liability. The Supreme Court has ruled that transferee liability is predicated on state, not Federal, law. *C.I.R. v. Stern*, 357 U.S. 39, 45 (1958). In general, the elements of transferee liability in equity in a given state are those found in that state's fraudulent conveyance provisions.

[13] *See, e.g., In Matter of Motors Liquidation Company*, 829 F. 3d 135 (2d Cir. 2016) (in 2009 General Motors (Old GM) in a Chapter 11 bankruptcy sold the bulk of its assets to a new entity (New GM) free and clear of liabilities against New GM; Second Circuit held that free and clear provisions could not be enforced to negate all of the ignition switch defect claims because some of the claimants had not received adequate notice of the sale order).

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and Ninth Circuits — have found successors in asset purchases to be liable for the predecessors' pension obligations under ERISA even where the general common law exceptions for successor liability would not ordinarily apply.

Most of the cases discussed below are in the multiemployer pension withdrawal liability contexts, but other cases expand successor liability in the context of single-employer pension plan termination liability, executive retirement plans, retiree health liability, ERISA fiduciary liability (according to some courts), labor law and unfair labor practices, and employment discrimination contexts.

ERISA Successor Liability — Seventh Circuit 1990 Artistic Furniture Case Regarding Unpaid Contributions to Multiemployer Pension Plan — Continuity of Business Operations and Notice

In *Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*, the Seventh Circuit held that under ERISA a purchaser of assets could be liable for delinquent pension contributions owed by the seller to a multiemployer pension fund maintained by the union even when the common-law successor liability exceptions do not apply; provided, that: (i) there is sufficient evidence of continuity of operations and (ii) the purchaser had knowledge of the liability of the seller.[14] There would be no requirement for continuity of ownership, as there are under the common law exceptions for successor liability.

In *Artistic Furniture*, the old employer, Pontiac Furniture, ceased making contributions to a multiemployer pension fund when it had severe financial difficulties beginning March 1984. Eventually, the main creditor of Pontiac foreclosed on Pontiac and sold its assets to Artistic Furniture, an unrelated company, in August 1985. In connection with the purchase, the buyer - Artistic Furniture - negotiated a new collective bargaining agreement with the union including the obligation to contribute to the multiemployer pension fund. However, the buyer did not specifically assume liability for the delinquent pension fund contributions that were not paid by the seller between March 1984 and August 1985. The pension fund sued both parties for delinquent pension contributions. There was apparently no claim for any withdrawal liability since the buyer bargained to continue in the pension fund.

The Seventh Circuit cited Supreme Court in *Golden State Bottling Co. v. N.L.R.B.*,[15] in finding, that liability of asset purchaser for unfair labor practice (unlawful discharge) under the NLRA could be imposed on the successor who continued the predecessor's operations and who had notice of the pending unfair labor practice charge at the time of the transaction, even though there was no continuity of ownership (and therefore no de facto merger or mere continuation). This protects Congressional intent under the National Labor Relations Act of avoidance of labor strife and fee exercise of the employees' rights under the NLRA, and are achieved at a relatively minimal cost to the bona fide successor, with minimal economic cost because the buyer is aware of the obligation. Similar conclusions have been reached for other labor law obligations and employment discrimination laws. *Artistic Furniture* applied the rationale of *Golden State Bottling Co.* to multiemployer pension liability under ERISA.[16]

ERISA §515, which requires employers to honor their obligations under the plan or the labor agreement to make the contributions to the pension fund, should be imposed on successors as well since ERISA's purpose is to protect other employers in the fund and the PBGC (and presumably employees if their benefits are affected), which applies when delinquent contributions are made. However, this successor liability will only apply where there was sufficient evidence of (i) continuity of operations, and (ii) prior knowledge by the buyer of this liability.

The Seventh Circuit held that there was sufficient evidence of continuity of operations since *Artistic Furniture*: (i) employed substantially all the workforce, (ii) operated from the same location, (iii) used predecessor's machines, (iv) produced the same products, (v) completed open work orders, (vi) honored the predecessor's warranties, and (vii) two of its officers remained with the successor. The owners, officers and directors were all different (except for one CFO who stayed on). The court stated that it did not matter that there was no continuity of ownership. The case was remanded to district court, though, to determine if there was sufficient knowledge of the liability.

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[14] 920 F.2d 1323 (7th Cir. 1990). *Artistic Furniture* in citing a 1987 Title VII case, notes as a factor "whether the predecessor is able, or was able prior to the purchase, to provide the relief requested." However, it does not consider this factor in discussing the successor liability for Artistic Furniture. The *Artistic Furniture* case does not emphasis on this provision. Most of the other cases regarding broadened successor liability do not mention this factor. Also, as noted in *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995), availability of relief from predecessor was not dispositive in successor liability case, but rather was factor to be considered along with other facts in particular case.

[15] 414 U.S. 168 (1973).

[16] ERISA refers to the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406 (ERISA).

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Comment on Artistic Furniture Case — Are ERISA Laws Like Unfair Labor Practices and Employment Discrimination Laws?

The rationale for broadened successor liability for labor law obligations and employment discrimination is that these statutes were enacted to protect employees, and where there is continuity of operations, employees should be able to expect to retain these protections from their current employer. *Artistic Furniture* expands this rationale to ERISA liability for delinquent contributions to multiemployer plans because ERISA is intended, among other purposes, to protect other employers and the PBGC. Query whether this is a good analogy — unfair labor practice rules and nondiscrimination laws are intended to protect the employee vis-à-vis the employer. But for multiemployer pension contributions the parties protected are primarily other employers in the fund and the PBGC and they should be like any other contractual obligation that is subject to the common law successor liability rules. There are some benefits to employees also, by avoiding the plan becoming bankrupt and employees losing a portion of their benefits, as stated below.

A similar question is raised by *Einhorn v. M.L. Ruberton Const. Co.*,[17] which is one of the few cases to disagree with the *Artistic Furniture* broadened successor liability, although this holding was subsequently overturned by the Third Circuit in *Einhorn v. M.L. Ruberton Construction Co.*,[18] as noted below. The district court in the above case disagreed with *Artistic Furniture* and held that ERISA obligations are different than unfair labor practice or employment discrimination laws because the unfair labor practice and nondiscrimination rules are designed to protect the employees, while successor liability for delinquent contributions or withdrawal liability to multiemployer funds is a corporate debt to multiemployer fund and is not a law directly protecting the employee. A counter-argument to *Einhorn* is that ERISA rules, while enforcing the union's pension fund, indirectly protect employees from losing benefits if the multiemployer plan does not have enough assets to meet its obligations, and the PBGC guarantees are not sufficient.[19] In any event, the district court ruling was overturned by the Third Circuit.

[17] 665 F. Supp. 2d 463 (D.N.J. 2009).

[18] 632 F.3d 89 (3d Cir. 2011).

[19] The single-employer plan limit was $72,409 a year in 2021. However, the PBGC generally guarantees a much smaller amount for multiemployer pension plan benefits, depending on the type of benefit, the dollar amount of the benefit, and the date on which the benefit provision was adopted.

It Does Not Matter That a Collective Bargaining Agreement Imposed the Obligation for the Contribution

Note that finding successor liability in the *Artistic Furniture* could not have been based entirely on the fact that a collective bargaining agreement required the contribution to the fund, because under labor law successors are generally not bound to the specific provision of the collective bargaining agreement — although they do have a duty to bargain in good faith — unless the contract was specifically assumed or the successor is found to be the alter-ego of the predecessor (see below).

Other Seventh Circuit Cases Finding Expanded ERISA Successor Liability

Several other Seventh Circuit decisions have found expanded successor liability in ERISA withdrawal liability cases. *Moriarty v. Svec,*[20] held that where the son of the owner took over operations and had knowledge of liability, there was successor liability to the multiemployer pension and welfare fund).[21] Similarly, a 2014 Seventh Circuit case, *Sullivan v. Running Waters Irrigation, Inc.,* held that where a son's businesses contained a substantial continuity of operations of the father's irrigation business, and the son had knowledge of the multiemployer pension obligations there would be successor liability.[22]

A 2015 Seventh Circuit case, *Tsareff v. ManWeb Services, Inc.*, held that in an asset sale where the buyer had notice of contingent withdrawal liability to the multiemployer pension plan, even though the asset purchase agreement specifically excluded plan liability assumption, and the notice was only contingent (no withdrawal had occurred), successor liability could nevertheless apply to the purchaser, and therefore the court denied summary judgment which the buyer had sought, and the court remanded the case to the district court to determine if there was a continu-

[20] 164 F.3d 323 (7th Cir. 1998).

[21] *Moriarty v. Svec*, 164 F.3d 323 (7th Cir. 1998) (expanded ERISA successor liability; son who took over funeral home business from father was liable for unpaid contributions to multiemployer pension and welfare fund because there was continuity of operations and knowledge of liability).

[22] *Sullivan v. Running Waters Irrigation, Inc.*, 739 F.3d 354 (7th Cir. 2014) (where a company went out of business and the son who managed that business set up two other businesses which bought equipment from the first company and bought equipment from the first company, there would be successor liability for multiemployer withdrawal liability since the successors had notice of the claim before the acquisition and there was a substantial continuity of operation of the business).

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ity of operations, which is the other prong for successor liability.[23]

A 2016 Seventh Circuit case, held that multiemployer withdrawal liability could be imposed on an asset purchaser even though the purchaser may not have had knowledge about the possibility of withdrawal liability before signing the purchase agreement because the purchaser certainly knew that the company was unionized and would have almost certainly known that the company was required to contribute to a union pension fund.[24]

A 2018 Seventh Circuit case, *Indiana Electrical Workers Pension Benefit Fund v. ManWeb Services, Inc.*, held that there could be successor liability for ERISA withdrawal obligations n an asset buyer with notice and substantial continuity of operation, even though it was a ''big buyer,'' i.e., the seller's business was only a small portion of the purchaser's operations.[25]

Expanded ERISA Successor Liability in Other Circuits

Ninth Circuit

Ninth Circuit cases (some of which predate and are cited in *Artistic Furniture*) have extended successor liability concerning ERISA pension and welfare obligations under collective bargaining agreements where there is a successor with substantial continuity between the old and new operations (even without continuity of ownership).[26]

A 2015 Ninth Circuit caseheld that an asset purchaser of a floor covering business could have successor liability for the seller's withdrawal liability as long as there was continuity of operations and the buyer had notice of potential liability. In addition, the court held that the successor employer could continue to be liable despite the ''building and construction industry'' exception of ERISA §4203(b)[27] since if there is a common-law successor liability the business and construction industry employer will be viewed as if it

[23] *Tsareff v. ManWeb Services, Inc.*, 794 F.3d 841 (7th Cir. 2015) (in sale of assets by a unionized electrical contractor (Tiernan & Hoover) to a non-union engineering company (ManWeb), multiemployer pension plan brought suit against the successor, ManWeb; court held that notice of ''contingent'' liability to the multiemployer plan was sufficient to be considered notice even though no withdrawal has occurred; court denied summary judgment for the successor company; court remanded to the district court to address the successor liability continuity of operations requirement, which was not addressed previously by the district court; the Seventh Circuit did not address the district court's holding that ManWeb's continuation of work previously done by Tiernan & Hoover should nevertheless not be imputed to Tiernan & Hoover in determining whether Tiernan & Hoover had a complete withdrawal under the Building and Construction Industry exception of ERISA §4203(b)).

[24] *Board of Trustees of Automobile Mechanics' Local No.* 701 *Union and Industry Pension Fund v. Full Circle Group, Inc.*, 826 F.3d 994 (7th Cir. 2016) (multiemployer pension fund sued asset purchaser, Full Circle Group (FCG), for withdrawal liability incurred by the target company, Hannah Maritime Corporation (HMC), when HMC became insolvent; no plan liabilities were transferred to the buyer; the buyer's owner (who was the son of the seller's owner) knew before signing the purchase agreement that HMC was unionized and therefore almost certainly knew that the company would be required to contribute to a union pension fund, which should have alerted buyer to the possibility of withdrawal liability; ERISA successor liability may be imposed if there is substantial continuity in the operation of the business before and after the sale and the asset buyer had notice of the withdrawal liability; the court held that enough evidence was presented of continuity of operations to preclude summary judgment in favor of the buyer on grounds of discontinuity, and enough evidence that buyer had notice of the seller's pension fund liability to preclude summary judgment on the ground that buyer lacked notice of possible successor liability; therefore, the district court's summary judgment for the buyer was overturned, and the case was remanded to the district court for a trial).

[25] *Indiana Electrical Workers Pension Benefit Fund v. ManWeb Services, Inc.*, 884 F.3d 770 (7th Cir. 2018) (multiemployer pension ERISA withdrawal liability could apply to the asset purchaser; in determining whether there was continuity of operations between asset purchaser and seller the district court improperly focused on dilution of employer's operations in those of larger putative successor; continuity of intangible assets, workforce, business services and customers all weighed in favor of finding successor liability).

[26] *See, e.g., Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289 (9th Cir. 1987) (in employee buyout of company there was substantial continuity between the enterprises (looking at factors such as whether there is the same basic operation, the same plant, the same workforce, the same supervisors, the same machinery and the same product), and as a successor employer the successor was requested to abide by the terms and conditions of the predecessor's collective bargaining agreement unless it has timely bargained to an impasse; in addition, there was an assumption of the collective bargaining agreement; successor is liable for delinquent contributions to health and pension trust funds under collective bargaining agreement; also held with regard to delinquent contributions to a pension plan that the six-year statute of limitations under ERISA should be used); *Trustees for Alaska Laborers-Construction Industry Health and Sec. Fund v. Ferrell*, 812 F.2d 512 (9th Cir. 1987) (member of a joint venture who continued to operate business with same employees and equipment after joint venture ceased operations was a successor employer for purposes of multiemployer withdrawal liability; company is deemed a successor if it hires most of its employees from the predecessor employer's workforce and if it conducts essentially the same business as the predecessor); *Board of Trustees of Northwest Ironworkers Health & Sec. Fund v. Tanksley*, NO. CV-07-367-RHW., 2010 BL 37579 (E.D. Wash. 2010) (company taken over in bankruptcy was successor employer since operated out of same premises, performed same type of work and used similar assets, and the same officers and partners served on both entities, and is obligated to collective bargaining agreement as alter ego).

[27] ERISA §4203(b) provides that a building and construction industry employer (e.g., a contractor) that ceases to contribute and the employer does not continue to perform that type of work in that jurisdiction of the collective bargaining agreement within five years will not incur withdrawal liability.

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had continued and there will be no ERISA §4203(b) exception.[28]

A 2018 Ninth Circuit case held that there was successor liability on a private equity group that purchased a Hawaiian hotel in an asset purchase for the seller's multiemployer withdrawal liability to a multiemployer pension plan because of constructive notice of the seller's pension liability.[29]

Second Circuit

In *Stotter Division of Graduate Plastics Co. Inc. v. District 65, UAW*,[30] the Second Circuit ruled that an asset purchaser could be liable for the predecessor's unpaid contributions to a multiemployer plan in accordance with the bargaining unit contract, and it upheld an arbitrator's decision to that effect.[31] *

Sixth Circuit

* See also addendum

A 2008 district court decision in the Sixth Circuit, *Schilling v. Interim Healthcare of Upper Ohio Valley, Inc.*, applied broad successor liability in ERISA contexts such as multiemployer withdrawal liability, like the Seventh Circuit *Artistic Furniture* case.[32] In addition, the Sixth Circuit 2018 case of *PBGC v. Findlay Industries, Inc., et al.*,[33] discussed below, has expanded successor liability even to single-employer pension termination liability.

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[28] *Resilient Floor Covering Pension Trust Fund v. Michael's Floor Covering*, 801 F.3d 1079 (9th Cir. 2015) (Studer's Floor Coverings went out of business and some of its assets were sold to Michael's Floor Covering who continued the business at the same store; Studer's contributed to Resilient Floor Covering Pension Trust for its union employees, but that ceased when Studer's closed; Michael's operated at same store front with some of same machines and some of the same workers, and with many of the same clients as Studer's; court held there could be successor liability as long as there is continuity of operations and notice of the potential liability; the construction industry exception of ERISA §4203(b) provides that for a business and construction industry employer there will be withdrawal liability only if the employer continues to perform the same type of work in the jurisdiction of the union or resumes such work within five years; broadened successor liability should apply to withdrawal liability just like previous cases have held for delinquent pension obligations; for the construction and industry exception if there is a successor there is a continuation of work and the exception should not apply; court in footnote noted that no circuit court has held contrary to *Artistic Furniture*; court stated that this is the first time a circuit court ruled regarding withdrawal liability successor liability; contrary to the district court, the Ninth Circuit gave greater weight to the successor taking over the predecessor's customer base and less emphasis on continuity of workforce; court remanded for determination of successorship factors).

See on rem'd, *Resilient Floor Covering Pension Trust Fund v. Michael's Floor Covering, Inc.*, No. 11-cv-05200-JSC, 2016 BL 321052 (N.D. Ca. 2016) (on remand, finding for successor defendant even after Third Circuit reversal because no notice of liability actually existed, even though Michael's Floor Covering owner knew there was a union since that is insufficient to support a reasonable inference of successor's knowledge since successor had no knowledge that the business was potentially liable for closing down the business and withholding from the pension fund even though it may have known the business contributed to a pension fund; court distinguished *Full Circle Group*, 2016 Seventh Circuit case, discussed below, where lack of familiarity with the concept of withdrawal liability could not be an excuse since the buyer was aware of the pension fund and he had legal counsel who must have known that most pension funds are underfunded, while in Michael's Floor Covering there was no evidence Michael's knew of the union pension fund and he had no counsel).

[29] *Heavenly Hana LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan*, 891 F.3d 839 (9th Cir. 2018) (holding that there would be successor liability on a private equity group, Heavenly Hana LLC, which purchased the Ohana Hotel in Maui, Hawaii from Ohana Hotel Company, LLC for the seller's multiemployer withdrawal liability when the seller formally withdrew from a multiemployer pension plan; there was a substantial continuity of operations of the hotel; although the seller was not given specific notice of the withdrawal liability and the attorneys advised (incorrectly) that absent an express assumption of liability the buyer would not assume the withdrawal liability, there was constructive notice because buyer had previously operated a hotel that was part of that multiemployer plan, in previous acquisitions that private equity group had instructed its agents to review any potential withdrawal liability, the asset purchase agreement indicated that the seller had contributed to a multiemployer pension plan and the plan's annual funding notice showing its underfunding was publicly available on the internet).

[30] 991 F.2d 997 (2d Cir. 1993).

[31] In *Stotter*, a manufacturer had obligations to a multiemployer pension plan which it had ceased to make and the union commenced arbitration pursuant to the collective bargaining agreement. In the meantime, the company had defaulted on loans and the bank foreclosed on the assets. The successor continued with the same employees at the same location. The arbitrator ruled that because the buyer was a successor employer to the seller, it had a duty to participate in the arbitration and it was jointly and severally liable for any delinquent contributions. An arbitrator's award is generally upheld if arguably construing the contract and acting within the scope of its authority. There was an adequate basis for its decision to hold the purchaser liable for the delinquent contributions in light of *Artistic Furniture* and other cases.

See, however, *Board of Trustees of Sheet Metal Workers Local Union No. 137 Insurance, Annuity and Apprenticeship Training Funds v. Silverstein,* No. 92 Civ. 8519 (S.D.N.Y. 1995), where the court held that liability for unpaid contributions to the Insurance, Welfare, Annuity and Apprenticeship Funds could not be imposed on an asset purchaser even under the *Stotter* and *Artistic Furniture* rationale, because there was not a sufficient continuity of identity, where there was no real continuity of workforce and the businesses were not identical.

[32] *Schilling v. Interim Healthcare of Upper Ohio Valley, Inc.*, 44 E.B.C. 1988, (S.D. Ohio 2008) (unpub. op.); which is in the 6th Circuit) (also quoting two other district cases in the Sixth Circuit; court found that under standards of the Seventh Circuit case of *Upholsterer's Int'l Union v. Artistic Furniture* there would be successor liability for ERISA and therefore the successor in Schilling was liable for the unpaid medical claims under the ERISA health plan; court looked to Artistic Furniture test whether buyer had no prior knowledge of the claim and whether there is continuity at the business operations).

[33] 902 F.3d 597 (6th Cir. 2018).

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Third Circuit – District Court case disagreed with Artistic Furniture but was Overturned by the Third Circuit

A New Jersey 2009 district court case was one of few cases and perhaps the only federal case to specifically disagree with *Artistic Furniture*. The district court held that ERISA is different than labor law unfair labor practice claims or employment discrimination laws because those laws are designed with Congressional intent to directly benefit the employees, while successor liability to a multiemployer fund for delinquent contributions or withdrawal liability is a corporate debt to the multiemployer fund and is not a law directly protecting the employee.[34]

However, the Third Circuit, in a 2011 decision, overturned the district court decision and held that a purchaser could be held liable for successor liability for the predecessor employer's delinquent multiemployer pension contributions because of continuity of operations (continuity of workforce, management, equipment and location, completion of work orders begun by predecessor, constancy of customers, and notice of the liability before the sale) even without continuity of ownership.[35]

There are also other district course cases in the Third Circuit cases providing for expanded successor liability.[36]

Other Circuits

It is unclear whether any other circuits would disagree with *Artistic Furniture*'s ERISA successor liability rule.

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[34] *Einhorn v. M.L. Ruberton Construction Co*., 665 F. Supp. 2d 463 (D.N.J. 2009) (Statewide Hi-Way Safety, which employed union workers, sold its assets to M.L. Ruberton Construction Co, a non-union company, for $1.6 million; seller had been obligated to make contributions to three multiemployer pension plans under ERISA; Ruberton agreed to take union employees but did not assume the $500,000 outstanding obligation to the Philadelphia Teamsters Pension Trust and Welfare Trust; district court stated that even with continuity of operations and notice, there was no continuity of ownership; court found that absent a general common-law finding of successor liability under the four exceptions above, there is no special ERISA successor liability; this is in contrast to unfair labor practices and employment discrimination where unfairly treated workers or victims of discrimination may have no other practical recourse than to their current employer, but ERISA plans can collect delinquent contributions from seller or from proceeds of sale under constructive trust theory; thus, an ERISA fund does not need the same protections as an individual employee, contrary to *Artistic Furniture*; summary judgment for the buyer was granted).

The district court in *Einhorn* brought support from a Third Circuit case that indicated that ERISA liability would be imposed after a merger — but not necessarily after an asset sale—because the Supreme Court Case of *Golden State Bottling Co*. applies broadened successor liability only to unfair labor practices but not to corporate debt such as pension obligation to union. *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Littlejohn*, 155 F.3d 206, 209 (3d Cir. 1998) (court notes that parties argue over application of cases re development of corporate successorship in federal labor law, such as *Golden State Bottling Co.* where the Supreme Court held that successor liability is broader when the obligation involved is a collective bargaining agreement than when an ordinary debt is involved; in other cases Supreme Court has also stated that employer may be bound by collective bargaining agreement of predecessor as long as it had notice of obligation and continued operations of predecessor even if only assets sold and not a merger; Third Circuit states that those cases are somewhat distinguishable because they dealt with the application of labor law concepts and the terms of a collective bargaining agreement, but in this case only the transfer of a valid and ordinary debt is at issue which just happens to have its genesis in the terms of a collective bargaining agreement).

The counter-argument to the *Einhorn* district court ruling is that ERISA rules, while enforcing the union's pension fund, also may lead to loss of benefits by employees if the multiemployer fund does not have enough assets to meet its obligations and the PBGC guarantees are limited (single employer limit is $60,136 a year in 2016). Also, as the Third Circuit in overturning the district court case in *Einhorn v. M.L. Ruberton Construction Co.*, 632 F.3d 89 (3d Cir. 2011), noted, absent an imposition of successor liability, the other employers will be forced to make up the difference to ensure that workers receive their entitled benefits.

[35] *Einhorn v. M.L. Ruberton Construction Co.*, 632 F.3d 89 (3d Cir. 2011) (the assets of Statewide Hi-Way Safety were sold to M.L. Ruberton Construction Company (a non-union company), and there was continuity of operations and the buyer had notice of the obligations to the Philadelphia Teamsters pension fund; the Third Circuit agreed with the Seventh Circuit Artistic Furniture case that labor law successor rules should be extended to ERISA obligations since failure to pay contributions can harm plan participants; thus the purchaser of assets would be liable for seller's delinquent ERISA fund contributions when the buyer had notice of the liability prior to the sale and there was a continuity of operations; the case was remanded to the district court for further proceedings).

[36] *See, e.g., Central Pennsylvania Teamsters Pension Fund v. Beer Distributing Company* 47 E.B.C. 1037 (unpub. op. E.D. Pa. 2009) (the asset purchaser was liable as successor for ERISA withdrawal liability; court noted that federal courts have expanded successor liability for ERISA; successor and predecessors are related entities through family ownership, successor assumed customers, took over facility, rehired nearly all employees, and there may have been an implied assumption of liability; case on its face supports *Artistic Furniture*, and contradicts the *M.L. Ruberton* district court case, though it can be distinguished in that in this case all the factors could, in any event, lead to a general common law exception such as a de facto merger). *See also Teamsters Local 469 Pension Fund v. J.H. Reid General Contractors*, No. Civ. No. 15-06185 (KM) (JBC), 2020 BL 401387 (D.N.J. 2020) (district court denied summary judgement for the Pension Fund because a number of issues remained to be clarified, including (i) whether one of the defendants (Reid Recycling) was in the same controlled group as the employer that withdrew from the Pension Fund (Reid General Contractors) at the time of such withdrawal, and (ii) whether the buyer of Reid Recycling in a transaction that occurred after the Pension Fund withdrawal could be liable under expanded successor liability in accordance with the principles set forth in the *M.L. Ruberton Construction Co.* Third Circuit decision).

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Why Should Asset Sale Trigger Withdrawal Obligation if Buyer Has Successor Liability?

Note that even though there may be successor liability on the withdrawal liability or other liability to the fund, the asset sale itself would appear to still be treated as a withdrawal under ERISA (unless an ERISA §4204 contract is entered into). This result is puzzling. If the asset sale is disregarded by having the buyer pick up liability as a successor, why should a sale of assets be treated as a withdrawal under ERISA? It would appear that by operation of law there is a withdrawal (and the parties may be bound to the form they have chosen), and although equity dictates that there should be recourse against successors this does not change the basic nature of the asset sale.

SUCCESSOR LIABILITY IN OTHER ERISA CONTEXTS

Successor Liability for Single-Employer Plan Termination Liability

A 2018 Sixth Circuit case, *PBGC v. Findlay Industries, Inc.*,[37] has applied broad successor liability for single-employer Title IV termination liability. In that case, Findlay Industries folded in 2009 and its assets were indirectly sold to companies owned by the son of the founder. The business in hands of the son's companies soon began to run the same plants, hiring many of the same employees, and selling to the former company's largest customer. The Sixth Circuit, overturning the lower court, held that the expanded successor liability should be applied to ERISA obligations, such as single-employer pension plan termination liability under ERISA, since there was a continuation of the business since this broadened successor liability services fundamental ERISA policies. The Sixth Circuit did note that several circuits have broadened successor liability in instances of withdrawal under ERISA, for example, the Seventh Circuit and Ninth Circuit cases cited above.[38]

Successor Liability for Retiree Health and Other Welfare Obligations

Regarding successor liability for retiree health or other welfare obligations in an asset sale, common-law successor liability exceptions would apply (i.e., express or implied assumption, de facto merger, mere continuation of seller, or transfer for fraudulent purposes).

However, several cases have applied broadened successor liability for retiree health or other ERISA welfare benefits where there is continuity of operations and notice of liability (even if there is no continuity in ownership), and ERISA's broadened successor liability is not limited to pension liability.[39]

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[37] 902 F.3d 597 (6th Cir. 2018).

[38] *Findlay Industries, Inc., et al.*, 902 F.3d 597 (case deals with two issues relating to the Findlay Industries pension plan formed in 1964; first, in 1986 Findlay transferred ownership of the properties on which the plants were operating to a trust for the benefit of the family of the owner of the company, and the properties were leased back by the family trust to the company; the Sixth Circuit, overturning the district court, held that the family trust that leased properties to the company were engaged in a trade or business and could be liable for controlled group liability for any pension plan underfunding; second, in 2009 after Findlay Industries folded the company was indirectly sold to companies owned by the son of the founder, and the business in hands of the son's companies soon began running the same plants, hiring many of the same employees, and selling to the former company's largest customer; the Sixth Circuit, overturning the district court, ruled that expanded successor liability should be applied to the Findlay pension plan's termination liability under ERISA as this broadened successor liability services fundamental ERISA policies, and there was a continuation of operation).

[39] *See, e.g., Schilling v. Interim Healthcare of Upper Ohio Valley, Inc.*, 44 E.B.C. 1988, (S.D. Ohio 2008) (court found that under standards of the Seventh Circuit case of *Artistic Furniture* there would be successor liability for ERISA plans where there was continuity of business operations and prior notice of the claim, and therefore the successor was liable for the unpaid medical claims under the ERISA single-employer health plan); *Moriarty v. Svec,* 164 F.3d 323 (7th Cir. 1998) (broadened successor liability under *Artistic Furniture* applies to unpaid contributions to multiemployer pension and welfare funds); *Bender v. Newell Window Furnishings, Inc.*, 681 F. 3d 253 (6th Cir. 2012) (upheld district court decision that the successor employer, Newell Window, was liable for retiree health benefits provided for under the collective bargaining agreement of its predecessor because there was an express assumption of liability by Newell Window of the prior collective bargaining agreement, and in addition "there seems to be no question that there was also a substantial continuation of operations at the plant by Newell Windows and its predecessors"); *Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289 (9th Cir. 1987) (court held that since there was continuity of operations (looking at factors such as whether: (i) there has been a substantial continuity of the same business operations, (ii) the new employer uses the same plant, (iii) the same or substantially the same work-force is employed, (iv) the same jobs exist under the same working conditions, (v) the same supervisors are employed, (vi) the same machinery, equipment, and methods of production are used, and (vii) and the same product is manufactured or the same service is offered), and in addition there was assumption of the collective bargaining agreement, the successor is liable for various multiemployer health and welfare fund obligations based on the collective bargaining agreement entered into with the predecessor). *See also Grimm v. Healthmont, Inc.*, 8 Wage & Hour Cas. 2d (BNA) 504, 2002 BL 1643 (D. Or. 2002) (court cited cases involving ERISA pension claims that buyer of assets liable for previous employer's obligations under an ERISA plan if there is continuity of operations and notice of potential liability; court applied these broadened successor liability cases to

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Successor Liability for Top-Hat Supplemental Pension Obligation

In *Brend v. Sames Corp.*,[40] the court applied the expanded ERISA successor liability of *Artistic Furniture* to obligations under a top-hat executive retirement plan since top-hat plans are generally subject to ERISA.[41] The court noted that while top-hat employees need less protection than rank and file employees, ERISA nevertheless found it appropriate to offer the protections of ERISA to all employees.

Whether ERISA Fiduciary Obligations Have Expanded Successor Liability

Concerning ERISA fiduciary liability, a 2009 district court case has held that ERISA fiduciary liability would not have broadened successor liability.[42] However, another 2003 district court case stated in dictum that ERISA fiduciary duties could have broadened ERISA successor liability.[43] Where a buyer specifically assumes the ERISA obligation, the buyer will have successor fiduciary liability.[44]

BROADENED SUCCESSOR LIABILITY IN LABOR LAW AND EMPLOYMENT DISCRIMINATION CONTEXTS

As stated above, the Supreme Court in *Golden State Bottling Co. v. N.L.R.B.*,[45], ruled that liability of asset purchaser for unfair labor practice (unlawful discharge) under the NLRA (where a union member was discharged for allegedly engaging in protected union activities) could be imposed on successor who continues predecessor's operations and who had notice of the pending unfair labor practice charge at the time of the transaction, even though there was no continuity of ownership (and therefore no ''de facto merger'' or ''mere continuation''). This protects Congressional intent under the National Labor Relations Act of avoidance of labor strife and fee exercise of the employees'

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facts in this case, which involved severance plan (which was an ERISA welfare plan)).

See in contrast Board of Trustees of Sheet Metal Workers Local Union No. 137 Insurance, Annuity and Apprenticeship Training Funds v. Silverstein, No. 92 Civ. 8519 (S.D. N.Y. 1995) (Unpub. op.) (liability for unpaid contributions to the Insurance, Welfare, Annuity, and Apprenticeship Funds could not be imposed on an asset purchaser even under the *Stotter* and *Artistic Furniture* rationale, because there was not a sufficient continuity of identity, as there was no real continuity of workforce (neither the majority of the seller's employees nor the majority of the buyer's employees were involved) and the businesses were not the same (both involved construction of signs but the specific nature of the business was different)).

Where the retiree health obligation is provided for in a collective bargaining agreement and an asset buyer assumes the collective bargaining agreement the buyer would be obligated with regard to the retiree health. *See, e.g., Bish v. Aquarion Services Co.*, 289 F. Supp. 2d 134 (D. Conn. 2003) (buyer of assets agreed to assume collective bargaining agreement which contained retiree health obligations; court held that buyer would continue to be obligated for the retiree health obligation under the LMRA and ERISA; court noted that ERISA recognizes such liability on the successor, for example, regarding ERISA §409 fiduciary liability where case-law provides that nothing precludes a later fiduciary from assuming by contract the ERISA obligations of a former fiduciary, and case-law has also held that where a successor assumed the obligation in the collective bargaining agreement to contribute to a multiemployer plan the successor would be liable under the LMRA and ERISA; therefore court denied motion to dismiss claims). See similarly, cases cited in the beginning of the footnote.

See also Williams v. Wellman Thermal Systems Corp., 684 F. Supp. 584 (S.D. Ind. 1988) (a buyer who assumes retiree health liability cannot create in the purchase agreement a right to amend or terminate the plan that did not otherwise exist under the plan itself).

[40] 28 E.B.C. 2905 (N.D. Ill. 2002).

[41] *Brend v. Sames Corp.*, 28 E.B.C. 2905, found that an asset buyer may have successor liability for a top-hat executive retirement contract even though specifically excluded in the asset purchase agreement, since as an ERISA plan it was subject to the continuity of operations and notice standards under *Artistic Furniture* for successor liability, even though there is no continuity of ownership. In this case there was notice of the liability and a genuine issue of material fact whether there was substantial continuity.

See Feinberg v. RM Acquisition, LLC, 629 F.3d 671 (7th Cir. 2011) (asset buyer was not obligated under top-hat plan because there was no continuity of operations).

[42] *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, 2009 BL 219740, 47 EBC 2505 (W.D. Wash. 2009) (whether a company can be liable based upon an expanded ERISA inherited liability for breach of ERISA fiduciary duties is a question of first impression, and the court believes that broad successor liability should not apply in this case, stating that ''while compelling in the context of issues like plan contributions, there is no reason to think the test encompasses the myriad of concerns present in the context of liability based on the duties of prudence and loyalty'').

[43] *Bish v. Aquarion Services Co.*, 289 F. Supp. 2d 134 (D. Conn. 2003) (as discussed above, *Bish* involved a seller who had promised retiree health in a collective bargaining agreement, and an asset buyer; the court held that the buyer would be subject to the retiree health obligation, since by continuing the operations the retiree health obligation would continue, and expanded ERISA successor liability is not limited only to ERISA delinquent multiemployer contributions or withdrawal liability, but applies also to ERISA fiduciary duties, and to promises for retiree health; the court denied the motion to dismiss claims).

[44] *Watson v. Deaconess Waltham Hospital*, 298 F.3d 102, 110 (1st Cir. 2002) (noting that with regard to the suits for breach of fiduciary duty under ERISA §409(b), nothing in ERISA precludes a later fiduciary from assuming by contract the ERISA obligation of the former fiduciary); *Bish v. Aquarion Services Co.*, 289 F. Supp. 2d 134 (D. Conn. 2003) (a seller promised retiree discussed above; court noted in dictum that ERISA fiduciary duties under ERISA §409 apply to a buyer who has assumed the plan obligations in a collective bargaining agreement).

[45] 414 U.S. 168 (1973)

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rights under the NLRA, and are achieved at a relatively minimal cost to the bona fide successor, because buyer is aware of the obligation. Similar conclusions have been reached for other labor law obligations and employment discrimination laws.[46]

Similarly, the courts have imposed broadened successor liability in cases involving employment discrimination.[47]

The National Labor Relations Act of 1935, which deals with the establishment of collective bargaining relationships, imposes an obligation on an employer and union to bargain in good faith.[48] When a corporation is taken over by a new employer in an asset sale with substantial continuity of operations and workforce, there is an obligation on the new employer to bargain in good faith with the existing union representatives.[49] However, unless the buyer specifically assumes the contract or is found to be the alter-ego of the predecessor, the new employer is not bound by the specific terms of the existing collective bargaining agreement.[50]

OTHER ERISA ISSUES WITH ASSET SALES

Emergence From Bankruptcy Like an Asset Sale

With regard to a stock sale or merger, the purchaser should in the ordinary course step into the shoes of the seller for any termination liability even if they resulted from termination of the plan when it was with the seller.[51] However, where a purchaser in a stock sale or merger acquires a bankrupt corporation with its pension plan, courts have held that the purchaser would not have controlled group liability because the ownership interests have been extinguished in the bankruptcy, and there would not be successor liability.[52] In a case where successor liability would apply to an asset purchaser, the purchaser from the bankruptcy could also have successor liability.[53]

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[46] *See also EEOC v. MacMillan Bloedel Containers*, 503 F.2d 1086 (6th Cir. 1974) (court held that the considerations justifying a successor doctrine to remedy unfair labor practices in *Golden State Bottling Co.* would also apply to unfair employment practices under Title VII, and therefore successor liability would apply where there was substantial continuity of the business operations and the successor had prior notice of the claim); *Teed v. Thomas and Betts Power Solutions*, 711 F.3d 763 (7th Cir. 2013) (court imposed successor liability on asset purchaser for seller's FLSA violations for unpaid overtime despite contractual language excluding the assumption of this liability).

[47] *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740 (7th Cir. 1985) (broadened successor liability doctrine was applicable in the case of employment discrimination suits); *E.E.O.C. v. Northern Star Hospitality, Inc.*, 777 F.3d 898 (7th Cir. 2015) (expanded successor liability was applied in liability for Title VII employment discrimination since successor had notice of the pending lawsuit; successor but not predecessor could provide relief after the sale or dissolution, and there was continuity of operations and work force of the predecessor and successor).

[48] NLRA §8, 29 U.S.C §158.

[49] *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987) (a company that was liquidating sold its remaining assets and rehired a number of employees; the company refused to bargain with the union, claiming that it was not a successor; the Supreme Court ruled that where a majority of the company's employees have worked for the predecessor, and there was a substantial continuity — which depends on whether the business is substantially the same, the employees were doing the same jobs, and the business was producing the same products — the new employer has a duty to bargain in good faith with the union but is not bound to the specific provisions of the existing union agreement).

[50] *See N. L. R. B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 284, 291 (1972) (even where successors held to be legal successor for purposes of bargaining, this alone is insufficient to bind the successor to the substantive provisions of the predecessor employer's collective bargaining agreement with the union); *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 258, n. 3 (1974) (not bound to substantive provisions even if it is a legal successor for purposes of bargaining, even in the presence of a clause binding successor and assigns to the terms of that agreement).

[51] *See, e.g., Teamsters Pension Trust Fund of Phila. v. Littlejohn*, 155 F.3d 206 (3d Cir. 1998) (discussed above; liability for delinquent pension contribution after a merger).

[52] *See, e.g., In re Challenge Stamping and Porcelain*, 719 F.2d 146 (6th Cir. 1983) (corporation that acquired 100% of stock of sponsoring corporation one month after it filed for bankruptcy was not considered part controlled group for pension plan's underfunding because purpose of ERISA termination liability is to avoid employer abuse of plan termination insurance and Congress did not intend to extend the liability to corporations that made contingent purchases of stock that had no practical effect; purchase of stock during bankruptcy for one dollar does not make party part of controlled group since stock is worthless; therefore, a purchase from the bankruptcy estate does not by itself bring successor liability); *PBGC v. Ouimet Corp.*, 711 F.2d 1085 (1st Cir. 1983), *cert. denied*, 464 U.S. 961 (1983) (where subsidiary went bankrupt and terminated underfunded plan after acquisition by controlled group that included another bankrupt subsidiary, termination liability was allocated only to the solvent group members, and not bankrupt corporations' estates, since applying the bankrupt's assets to PBGC's liability would have reduced assets available to their creditors and inequitably benefited group members. The court noted that ERISA provides a lien on 30% of the net worth, not asset value and a bankrupt corporation has negative net worth). *See also* Brighton, *How Free is Free and Clear*, 21 SEP Am. Bankr. Inst. J. 1 (Sept. 2002).

[53] *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995) (Seventh Circuit held that claim by multiemployer pension fund against successor entity for ERISA withdrawal liability and delinquent pension contributions to the union's pension should not have been dismissed; court notes that it was not absolutely precluded from finding successor liability against the successor where there was substantial continuity of operations and notice, despite the fact that company had just emerged from bankruptcy;

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Alter-Ego Theory as Applied to Asset Purchases

As discussed above, on occasion courts have found a shareholder liable for ERISA and other liabilities of the corporation under the doctrine of piercing the corporate veil (alter ego), for example, where there is fraud, disregard by the owner of the separate character of the corporation or shareholders undercapitalize the corporation. Courts have sometimes used alter ego theory to apply successor liability.[54]

ERISA §4069(b) and ERISA §4218 Successor Liability for Mere Changes in Form

To avoid controlled group liability, companies sometimes attempt to remove themselves from the controlled group. ERISA §4069(b) and ERISA §4218 provide that for purposes of termination liability and withdrawal liability, respectively, if an entity ceases to exist merely because of a change in identity or form, a liquidation into the parent corporation or a merger, consolidation, or division, the successor will remain liable for the liability. This provision would not, however, cover ordinary asset sales. Successor liability in asset sales would be subject to the case law discussed above.

ERISA §4069(a) Liability

To avoid controlled group liability, companies sometimes attempt to remove themselves from the controlled group. Typically, this takes the form of a company selling or spinning off a subsidiary or division and transferring severely underfunded pension plans with those sold subsidiaries or divisions. The PBGC has been successful in certain cases in having a court declare such a transaction as a sham.[55] In addition, the PBGC was successful in having ERISA §4069 enacted in 1986 as part of the Single-Employer Pension Plan Amendments (SEPPAA).

ERISA §4069(a) provides that if a person enters into a transaction with a principal purpose of evading liability under Title IV, the PBGC can assert liability on such person as if it was still a member of the controlled group for any plan termination that results within five years of the transaction.[56]

ERISA §4212(c)

If a principal purpose of a transaction is to evade or avoid liability, withdrawal liability is imposed as if the transaction had not occurred (i.e., even if the entity left the controlled group in the transaction).[57] Several cases have applied ERISA §4212(c) to impose withdrawal liability.Other cases have held that ERISA §4212(c) did not apply despite the avoidance of withdrawal liability. Courts have on occasion found individuals liable under ERISA §4212(c) for participating in a scheme to evade or avoid liability even though multiemployer withdrawal liability generally only applies to the employer.ERISA §4212 does not have the five-year limit that ERISA §4069 has (regarding attempt to evade termination liability).

Successor liability

In a corporate transaction, assuming there was no intent to evade liability and ERISA §4069 and ERISA

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successor liability after bankruptcy does not subvert bankruptcy rules since the property has already emerged from bankruptcy).

[54] In *Plumbers, Pipefitters and Apprentices Local Union No 112 v. Mauro's Plumbing, Heating and Fire Suppression*, Inc., 84 F. Supp. 2d 344 (N.D.N.Y. 2000) the Northern District of New York held that where plumbing company that signed collective bargaining agreement ceased operations and owners established a non-union company (Northeast Mechanical) three months later at the same location, the successor was liable for the predecessor's multiemployer welfare contributions as the alter ego of the first company since there was continuity of ownership and management, and employment of many of the same employees, similarity of business purposes, overlapping operations, use of office and plumbing equipment and sharing of customers. Because it found alter-ego status, court found it unnecessary to also examine successor liability status.

[55] *See, e.g., Solar v. Pension Benefit Guaranty Corporation*, 504 F. Supp. 1116 (S.D. N.Y. 1981), *aff'd*, 665 F.2d 28 (2d Cir. 1981) (holding that a transaction intended to avoid liability should be disregarded for Title IV liability purposes). *See also In Re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 681 F. Supp. 512 (N.D.Ill. 1988) (International Harvester) (predecessor that sold business with principal purpose of evading liability and delegated pension obligations to purchaser that at time lacked reasonable chance of meeting this obligation was held liable to the PBGC for the unfunded benefit payments owed).

[56] One of the transactions that persuaded Congress to enact ERISA §4069 was the sale by International Harvester of a financially crippled subsidiary, Wisconsin Steel, which sponsored grossly underfunded pension plans, to a financially weak buyer. See *International Harvester*, above. The PBGC brought suit to preclude International Harvester from avoiding liability for the terminated plans by reason of that transaction and the court eventually upheld the PBGC's claims. Nevertheless, while that case was pending, Congress enacted ERISA §4069 because it felt that such a provision was necessary to deter ''abusive schemes'' to avoid liability ''which can lead to complex, costly litigation.'' H. Rep. No. 99-241, Pt. 2, 99th Cong., 1st Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 685, 713 (House Report).

ERISA §4069 ''incorporates court decisions under current law by adding explicit statutory language to make clear that transactions, a principal purpose of which is to evade liability under the statute, are to be ignored in determining liability.'' House Report. It is arguable that if an entity was not in the controlled group of the plan before the transaction, it could not be held liable under ERISA §4069 since ERISA §4069 only operates to ignore the transaction.

[57] ERISA §4212(c).

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§4212(c) are not applicable, the general successor liability rules should apply, i.e. the ordinary common law exceptions to lack of successor liability and the broadened successor liability rules for ERISA obligations under the *Artistic Furniture* line of cases.

ASSET SALE AS WITHDRAWAL AND ERISA §4204 AGREEMENTS

Asset Sale as a Withdrawal

An asset sale will result in a withdrawal from the plan by the seller. This may be advantageous to the buyer, as the buyer will not be liable, absent some successor liability theory. For the seller, however, a stock sale would be preferable, as there would be no automatic withdrawal from the multiemployer plan. Another option is an ERISA §4204 contract discussed below.

ERISA §4204 Contracts to Avoid Multiemployer Liability in Asset Sales

As discussed above, where an asset sale occurs there has by definition been a complete withdrawal by the target since it ceases to exist, and even if the buyer continues to make required contributions, members of the controlled group of the target, e.g., the seller, could be liable for withdrawal liability. There is a statutory exception, however, in ERISA §4204, under which a complete or partial withdrawal will not occur solely because,[58] as a result of a bona fide arm's-length sale of assets to an unrelated party, the seller ceases covered operations or ceases to have an obligation to contribute for such operations, provided that the following are met: (i) the purchaser obligates to contribute a similar amount as the seller (i.e., substantially the same number of base contribution units under ERISA §4204(a)(1)(A); (ii) for a period of five plan years after the sale, the purchaser posts a bond or escrow equal to one year of the Seller's contributions, i.e., the average annual contribution required based on the greater of the previous three years or the annual contribution required over the last year, and the bond or escrow will be paid to the plan if the purchaser withdraws or fails to make contributions to the plan during the five year period under ERISA §4204(a)(1)(B); and (iii) the contract of sale must provide for the seller to be secondarily liable if the buyer withdraws within a five-year period and does not make payment under ERISA §4204(a)(1)(C). Such an arrangement is referred to as a ERISA §4204 contract.

If the purchaser withdraws before the end of the fifth year after the sale and fails to make withdrawal liability payments, the seller must pay the plan the amount that it would have been obligated to pay absent the ERISA §4204 contract.[59] There may also be a seller bond/escrow requirement in the following situation: if the seller sells substantially all of its assets or liquidates within the five-plan year period after the sale, the seller must post a bond or escrow for the amount that the seller would be liable absent the ERISA §4204 contract.[60]

If the above requirements are met so that the seller has no liability, the buyer inherits the five-year contribution history of the seller.[61] An advantage to ERISA §4204 is that if the seller has a long contribution history, taking the liability of only the last five years of contributions can shed a company of a significant portion of potential withdrawal liability.

The PBGC has the authority to waive the purchaser bond/escrow requirement and contractual seller secondary liability requirement of ERISA §4204(a)(1)(B) and ERISA §4204(a)(1)(C). Under this authority, PBGC regulations enacted in 1984 contain a class variance of the bond or escrow requirement and of the contractual requirement for the seller to be secondarily liable if a buyer notifies the plan of its intention that the sale is to be covered by ERISA §4204 and demonstrates to the satisfaction of the plan that one of the following exceptions apply: (i) the bond or escrow would not exceed the lesser of $250,000 or 2% of the average total annual contributions made by all employers to the plan for the three most recent plan years; (ii) the purchaser's average net income after taxes for the most recent three years equals or exceeds 150% of the amount of bond or escrow required; or (iii) the purchaser's net tangible assets as defined in PBGC Reg. §4204.2 equal or exceed the otherwise allocable share of unfunded vested benefits.[62] The request for a variance must contain financial or other information sufficient to establish that one of these exceptions are met, and pending the plan's decision as to whether the variance is met, the purchaser cannot be required to post the bond or escrow.[63] An individual exemption is also available pursuant to ERISA §4204(c) under PBGC Reg. §4204.21 and PBGC Reg. §4204.22.

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[58] *See Central States Pension Fund v. Georgia-Pacific LLC*, 639 F.3d 757 (7th Cir. 2011) (ERISA §4204 contract will avoid withdrawal liability and sale of one division was not culmination of withdrawal by stages from multiemployer plan; withdrawal was solely because of employer's sale of its last division in which buyer assumed employer's liability for contributions in the ERISA §4204 transaction).

[59] ERISA §4204(a)(2).

[60] ERISA §4204(a)(3)(A).

[61] ERISA §4204(b).

[62] PBGC Reg. §4204.11-§4204.13.

[63] PBGC Reg. §4204.11(b), PBGC Reg. §4204.11(c), PBGC Reg. §4204.11(d).

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ERISA §4204 and PBGC Reg. §4204 do not specifically state that seller and purchaser are each determined on a controlled group basis, but based on ERISA rules generally, seller and purchaser should be interpreted as each being determined on a controlled group basis.

Where there is no ERISA §4204 contract, purchasers of assets are generally not held liable. Also, the Seventh Circuit has held that even where there is no ERISA §4204 contract the purchaser of assets may be liable under the provisions of a particular collective bargaining agreement for withdrawal liability.[64]

CONCLUSION

Successor liability in ERISA contexts — such as multiemployer withdrawal liability — would, according to case law, be applicable if there is a continuity of operations and notice to the buyer even if there is no continuity of ownership. This expanded successor liability has been applied by courts not just to withdrawal liability, but also to other ERISA contexts, such as single-employer plan termination liability, top-hat plan, retiree health and welfare plan obligations. In addition, case law has applied broad successor liability for labor law obligations to bargain in good faith and employment discrimination claims. Care must be taken by buyers in asset acquisitions to account for possible broadened successor liability.

[64] *Artistic Carton Co. v. Paper Industry Union—Management Pension Fund*, 971 F.2d 1346 (7th Cir. 1992) (arbitrator did not err in finding that a multiemployer pension plan properly assessed withdrawal liability on a successor employer based on the predecessor employer's contributions since ERISA §4204 does not necessarily imply that there will never be withdrawal liability for asset buyers who do not sign a ERISA §4204 contract, and the multiemployer plan documents specifically provided that withdrawal liability would include all service of the employees including service with the predecessor employer).

Addendum to 2nd Circuit cases on page 7:

In *New York State Teamsters Conference Pension and Retirement Fund v. C&S Wholesale Grocers*, 24 F.4th 163 (2d Cir. **2022**), which dealt with the withdrawal liability of C&S Wholesale Grocers when it went bankrupt with regard to the Teamsters Local 317 at its Syracuse warehouse, the Second Circuit held that although it agrees with the principal in other circuit court cases that there can be expanded successor liability with regard to ERISA withdrawal liability, in this case there was no successor liability for although C&S Wholesale Grocers bought certain portions of Penn Traffic' business it did not purchase the Syracuse warehouse or the employees there who were members of the Teamsters union

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