Legal Update Article

Constructive Notice Enough for Successor Withdrawal Liability, Ninth Circuit Holds

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The expansion of the multiemployer pension plan successor withdrawal liability doctrine continues for asset purchasers. Establishing a constructive notice standard, the federal appellate court in San Francisco has ruled that a common law successor of a seller that withdrew from a multiemployer pension plan covered by the Employee Retirement Income Security Act (ERISA), as amended by the Multiemployer Pension Plan Amendment Act (MPPAA), had constructive notice of, and was therefore liable for, withdrawal liability incurred by the asset seller. *Heavenly Hana, LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan*, No. 16-15481 (9th Cir. June 1, 2018).

The Court reversed the lower court's holding that successor liability did not attach in the absence of actual notice. It ruled that successor liability may attach if the asset purchaser had sufficient constructive notice. The Court also suggested how, with some diligence, the asset purchaser could have determined the seller's potential withdrawal liability.

This decision is the latest evidence of the strong trend extending the availability of the successor liability doctrine to impose successor withdrawal liability on asset purchasers.

The Ninth Circuit has jurisdiction over Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

Background

Heavenly Hana LLC and Amstar-39 acquired the Ohana Hotel and related assets. Ohana's bargaining unit members were represented by Local 5 of UNITE HERE. Its collective bargaining agreement with Local 5 required it to make contributions to the Hotel Union & Hotel Industry of Hawaii Pension Plan. While Amstar recognized Local 5 as the bargaining unit's representative after the closing of the transaction, it did not assume the previous collective bargaining agreement and was not obligated to contribute to the Plan at any time.

Ohana's withdrawal from the Plan at closing triggered withdrawal liability in excess of $750,000. The Plan asserted this withdrawal liability against Amstar as Ohana's common law successor.

Withdrawal Liability

It is well-established, at least within the U.S. Courts of Appeals for the Seventh and Ninth Circuits, that an asset purchaser is liable for withdrawal liability incurred by the asset seller if:

1. The purchaser is a successor; and
2. The purchaser had notice of the withdrawal liability prior to the transaction.

The Seventh Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

In *Heavenly Hana,* Amstar had conceded that it was a successor. Therefore, the sole issue

before the Ninth Circuit was whether Amstar had sufficient notice of the withdrawal liability to be liable as Ohana's successor.

Lower Court Decision

The U.S. District Court for the Northern District of California held that the requisite notice was absent. Accordingly, it ruled Amstar was not liable for Ohana's withdrawal liability.

Holding that Amstar lacked actual notice, the court rejected the constructive notice standard to determine successor liability advocated by the Plan. Further, the court found that even under the proposed (and rejected) constructive notice standard, Amstar lacked notice because "it acted diligently and reasonably under the circumstances and still did not discover the withdrawal liability."

Ninth Circuit Decision

On appeal, the Ninth Circuit phrased the questions in this case as follows:

1. Whether constructive notice is sufficient to impose successor withdrawal liability, and
2. Whether Amstar was placed on constructive notice in this case.

The Court ultimately answered "yes" to both questions.

The Court noted that, while successor liability is not addressed in MPPAA, a constructive notice standard is consistent with the statute's intent. The purpose of MPPAA is to protect multiemployer plans from the adverse consequences that resulted under prior law when individual employers terminated their participation in (*i.e.,* withdrew from) multiemployer plans. This remedial purpose has led courts to construe the statute liberally in favor of multiemployer plans.

The Ninth Circuit found that a constructive notice standard is consistent with MPPAA's intended purpose and liberal construction. The Court also noted that several other circuits had imposed a constructive notice standard for successor liability in other contexts (such as employment discrimination). It concluded that "constructive notice of withdrawal liability is sufficient to trigger successor withdrawal liability under" MPPAA.

On whether Amstar had constructive notice of the withdrawal liability, the Court concluded the standard was met because "a reasonable purchaser would have discovered" the withdrawal liability. It found the following facts significant:

- Amstar had previously operated a hotel that participated in a multiemployer plan;
- Amstar had instructed its agents in previous acquisitions to determine whether it could incur withdrawal liability;
- Amstar was well-aware that Ohana's workforce was unionized; and
- The Plan's annual funding notices (not provided, but publicly available on the internet) indicated a state of underfunding.

Amstar argued that Ohana had represented to Amstar that, "to their knowledge," the Plan was not underfunded. It also argued that it had received and relied upon the erroneous advice of counsel that, "absent an express assumption of liability, the Buyer does not assume the withdrawal liability." The Court made quick work of these defenses, finding any reliance thereon unreasonable. Indeed, the Court pointed out that while "Amstar did not rely on the seller's representations regarding termites" (it sent a team of engineers to inspect the property), it "surprisingly did rely on the representation over a multimillion-dollar issue

like withdrawal liability." With respect to Amstar's alleged reliance on the advice of counsel, the Court was similarly unsympathetic, noting that "ignorance of the law will not excuse any person, either civilly or criminally."

The Court concluded that the "undisputed facts indicate that Amstar should have determined that, like most withdrawing employers, Ohana would incur withdrawal liability." These circumstances, the Court said, would have caused a reasonable purchaser to take additional actions to determine if withdrawal liability existed. Under the applicable constructive notice standard, the Court found this sufficient.

Implications

This case clarifies prior guidance on successor withdrawal liability, establishing a rule that constructive notice is the applicable standard (at least within the Ninth Circuit). Potential asset purchasers must diligently investigate whether a transaction will trigger the imposition of withdrawal liability on the buyer and, therefore, on them (potentially) as a successor.

The amount of withdrawal liability to be incurred by an asset seller may be determined by a potential buyer, the Ninth Circuit said. It this case, according to the Court, Amstar could have reviewed publicly available plan documents, asked Ohana to provide all plan funding notices (rather than rely on Ohana's representation), or contacted the Plan directly.

Unfortunately, contrary to the Court's assertions, these avenues often do not reveal whether a plan is underfunded *for withdrawal liability purposes.* Multiemployer plans often use different actuarial assumptions for withdrawal liability (as opposed to funding) purposes, and the information available publicly (such as funding notices and IRS Form 5500) generally is irrelevant to withdrawal liability.

The Ninth Circuit also suggested that Amstar could have required that Ohana request an estimate of its withdrawal liability from the Plan. However, while an employer is entitled to request a withdrawal liability estimate once each year, the plan has six months to provide the requested estimate. This timeframe may not be practicable in many transactions, which often proceed much more rapidly. Further, the estimate provided is calculated "as if such employer withdrew on the last day of the plan year preceding the date of the request." Thus, the information would be at least one year "stale" and, therefore, not necessarily determinative of the actual withdrawal liability.

The most viable avenue available to a potential asset buyer may be to retain a competent actuary knowledgeable of withdrawal liability to calculate the withdrawal liability. While this will be more costly than requesting an estimate from the plan, it will provide a faster and more current estimate of the seller's (and the buyer's successor) withdrawal liability. This would allow the buyer to address the potential withdrawal liability in the transaction documents, via purchase price adjustment, indemnification, or otherwise.

Please contact Jackson Lewis if you have any questions regarding the Ninth Circuit decision or withdrawal liability in general.

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