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News & Types: Employment, Labor & Benefits Update

Buyer Beware of Pension Plan Withdrawal Liability

7/19/2018

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Practices: Employment, Labor & Benefits

We have written before on our experience, generally, with the 4 main areas of successor liability that can arise in asset acquisitions in the U.S. We call them the "4Es of Successor Liability" and they generally arise in the area of (1) employment, (2) employee benefits, (3) environmental, and (4) export.

With respect to employee benefits, we previously wrote:

> Successor liability can also arise for Acquirer for union pension or non-union retirement plans in the U.S. Although no amount of due diligence can uncover all potential liabilities in the employee benefits area, if the U.S. Target has made payments to a union pension plan, it is important to understand what the withdrawal liability will be from the union pension plan, particularly if the transaction is structured so that the union will not be present at Acquirer after the transaction closes. If the withdrawal liability is paid to the union pension plan as part of the acquisition, Acquirer will not be liable for the withdrawal liability going forward.

Our advice above continues to ring true based upon the decision of the United States Court of Appeals for the Ninth Circuit in *Heavenly Hanna LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan*, 891 F.3d 839, 2018 EBC 194023 (9th Cir. 2018).

The Hotel Union & Hotel Industry of Hawaii Pension Plan ("Plan") is a multiemployer plan for hotel workers in Hawaii. Ohana Hotel Company, LLC ("Ohana"), pursuant to a collective bargaining agreement with its hotel employees, contributed to the Plan.

Heavenly Hanna LLC and its affiliates Green Tree Management and Amstar-39 (collectively, "Amstar") entered into a purchase and sale agreement for the assets of Ohana. The purchase agreement indicated that Ohana had made contributions to a multiemployer pension plan indicating that Amstar had knowledge of the existence of the Plan and Ohana's participation in the Plan.

In addition, the Court noted that

> "Amstar had prior experience with multiemployer pension plans. It had previously owned and operated a hotel that participated in a multiemployer pension plan. In prior business transactions, Amstar had also 'instructed its agents to inquire about whether Amstar could incur liability to a multiemployer pension plan'".

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Although the purchase agreement required Ohana to provide Amstar with notice of funding deficiencies of the Plan, Amstar did not receive any funding deficiency notices to review.

It further noted that Amstar also secured legal advice prior to closing, which turned out to be incorrect, that "[a]bsent an express assumption of liability, the Buyer does not assume the [withdrawal] liability." And that Amstar had a four-person due diligence team undertake an investigation of the Hotel and relevant documents and the condition of the Hotel.

Ten days prior to the closing of the purchase agreement, Ohana ceased contributions to the Plan and formally withdrew from the Plan at closing. The withdrawal by Ohana from the Plan resulted in withdrawal liability for Ohana under the Employee Retirement Income Security Act ("ERISA"). The Plan demanded payment from Amstar of withdrawal liability in the amount of $757,981, of which, Amstar paid $372,780 before filing a lawsuit to contest that Amstar was liable for the withdrawal liability.

The District Court held that Amstar was not responsible for the withdrawal liability because Amstar lacked "actual notice" of the withdrawal liability.

The Court of Appeals reversed the District Court decision, and held that "actual notice" was not a requirement of ERISA for a purchaser of assets to be liable for withdrawal liability. Instead, the Court held that "constructive notice" is the standard to be used in the Ninth circuit to ascertain if withdrawal liability is the responsibility of the purchaser of assets. Based on the facts mentioned above, the Court found Amstar had constructive notice and held Amstar responsible for the withdrawal liability.

Thus if a purchaser of assets meets the following, the purchaser is responsible for the withdrawal liability: "(1) the purchaser qualifies as a successor; (2) the relevant pension plan is underfunded; and (3) a purchaser using reasonable care or diligence would have discovered the withdrawal liability."

The ruling of the Court is consistent with other jurisdictions that have held that "constructive notice" is sufficient for a purchaser of assets to be liable for withdrawal liability from a pension plan.

Therefore, it is important for a purchaser and its legal counsel to determine if there were any contributions to a union pension plan by the seller within 5 years prior to the purchase and demand that the seller obtain from the pension plan the amount of withdrawal liability. Then, the purchaser can use a portion of the proceeds to be paid to the seller to pay the withdrawal liability to the pension plan and avoid an unexpected and very expensive surprise.

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