PAUL HASTINGS

STAY CURRENT

February 2017

Follow @Paul_Hastings

Asset Buyers Beware: PBGC Attempts to Hold Asset Buyer Liable for Seller's Underfunded Single Employer Pension Plan Termination Liabilities

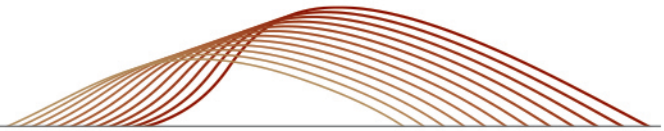
By Eric Keller

A federal district court recently rejected the Pension Benefit Guaranty Corporation's attempt to hold a buyer of assets liable for the seller's unfunded defined benefit plan liabilities under a successor liability theory.[1] While the court decided the issue in favor of the buyer, it is a cautionary tale for buyers as it appears to be the first time the PBGC has argued for the application of successor liability in this context and is a departure from its historical administrative position. Moreover, the PBGC may appeal the decision and/or continue to argue the application of the theory in future litigation where a different court may decide in its favor.

Pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), when a single employer defined benefit pension plan terminates with insufficient liabilities to pay its assets, the plan sponsor and trades and businesses under eighty percent or more common control with the plan sponsor are jointly and severally liable for the plan's unfunded liabilities. For over thirty years, the PBGC had generally taken the position that asset buyers are not liable for this termination liability.[2]

In *Findlay Industries*, the PBGC took the opposite position and argued that a buyer of assets should be liable for termination liability as a successor under federal common law. Specifically, several federal courts of appeal have held that a buyer of assets may be held liable as a successor under federal common law for unpaid ERISA multiemployer plan withdrawal liability or contributions if the buyer had notice of the liability and continued the business of seller with substantial continuity of operations.[3] The PBGC cited these cases and asked the court to apply the same doctrine in the termination liability context.

Finding that ERISA already imposed a specific statutory scheme for the collection of plan termination liabilities under ERISA, the district court declined to apply federal common law in this case. While this decision is a good result for buyers, other lower courts have been receptive to applying successor liability to buyers for other ERISA obligations outside the multiemployer plan context,[4] so buyers should not assume a different court would reach the same result.



Frequently, single employer plan termination liabilities arise in the bankruptcy context and buyers might assume they are shielded from successor liability under Section 363(f) of the Bankruptcy Code. At least one bankruptcy court has held that Section 363(f) of the Bankruptcy Code shields asset purchasers from successor liability for unpaid multiemployer plan withdrawal liability.[5] However, other courts have yet to specifically address the issue[6] and might reach a different conclusion, so buyers should exercise caution and work with bankruptcy and ERISA counsel to carefully evaluate the issue.

Buyer's should also consider the potential application by the PBGC of this doctrine to other single employer pension plan liabilities, such as liability under 4062(e) of ERISA attributable to a substantial shutdown of operations or failure to make minimum funding contributions under Section 412 of the Internal Revenue Code.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Stephen H. Harris
1.213.683.6217
stephenharris@paulhastings.com

Palo Alto

Dan Stellenberg
1.650.320.1833
danstellenberg@paulhastings.com

Washington, D.C.

Eric R. Keller
1.202.551.1770
erickeller@paulhastings.com

J. Mark Poerio
1.202.551.1780
markpoerio@paulhastings.com

---

1 *PBGC v. Findlay Industries, Inc.*, 2016 WL 7474404 (N.D. Ohio).

2 *See, e.g.*, PBGC Opn. Ltr. 81-7 ("You have asked about liability under Title IV of ERISA in connection with the sale of a division of the Company to an unrelated purchaser. You asked whether an unrelated purchaser would have any liability under Title IV if the Company were to terminate the applicable Division Plan prior to the sale. In this situation, the unrelated purchaser would have no liability to the PBGC under Title IV of ERISA.").

3 *See, e.g.*, *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323, 1327 (7th Cir. 1990) (withdrawal liability); *Einhorn v. M.L. Ruberton Constr. Co.*, 632 F.3d 89, 98–99 (3d Cir. 2011) (contributions); *Stotter Div. of Graduate Plastics Co. v. Dist. 65, UAW, AFL–CIO*, 991 F.2d 997, 1002 (2d Cir. 1993) (contributions); *Resilient Floor Covering Pension Trust Fund v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1093-94 (9th Cir. 2015) (withdrawal liability).

4 *See, e.g.*, *Schilling v. Interim Healthcare of Upper Ohio Valley, Inc.*, 2008 WL 2355831 (S.D. Ohio) (health plan benefits); *Brend v. Sames Corp.*, 2002 WL 1488877 (N.D. Ill.) (nonqualified deferred compensation plan benefits).

5 *In re Oman Corp.*, 2014 WL 3542133 (D. Del.), which relied on the Third Circuit's broad interpretation of the application of 363(f) in *In re Trans World Airlines, Inc.*, 322 F.3d 283 (3d Cir. 2003) (affirming sale under § 363(f) free and clear of successor liability claims for employment and sex discrimination under Title VII).

6 *See, e.g.*, *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 50 n.2 (7th Cir. 1995) ("We need not decide whether New Tasemkin's acquisition of Old Tasemkin's assets sufficiently approximated a trustee sale, which under § 363(f) can be made free and clear of existing interests, to overcome this distinction.").