Tax Management
Compensation Planning Journal

[Includes 1-26-11 addendum on the last page.]

Successor Liability Under ERISA

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INTRODUCTION

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 a business. This article explores the current state of the law regarding successor liability under ERISA.

GENERAL COMMON LAW RULE OF SUCCESSOR LIABILITY

The general common law rule is that a company that purchases assets of another company is not automatically responsible for the seller's liabilities.[2] There are four exceptions under which successor liability will apply to an asset purchaser.

A. *Express or Implied Assumption of Liabilities.* The first exception is if the purchasing company expressly [3] or impliedly [4] agrees to assume the selling company's liabilities.

B. *De Facto Merger.* The second exception is if the transaction amounts to a "de facto merger" (buyer's

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[2] *See, e.g., Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 692 (1st Cir. 1984) (successor not liable in product liability action as purchase of assets did not meet any of the four exceptions to the general rule); *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3d Cir. 2006) (buyer of manufacturer's assets had no successor liability); *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 time of alleged wrong). *See generally,* 15 Fletcher, *Cyclopedia of the Law of Private Corporations* §7122, *et seq.*

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 exceptions are generally applied regardless of whether predecessor or successor organization was corporation or some other form of business organization, citing 63 Am. Jur.2d *Products Liability* §117 (1984)).

[3] *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 v. Atlantic Richfield Co.*, 138 F. Supp.2d 482 (S.D.N.Y. 2001) (corporation which expressly assumed alleged polluter's liabilities could be liable under Resource Conservation and Recovery Act even though its subsidiary was current site owner).

[4] *See, e.g., Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985) (implied assumption of liability where language of assumption agreement is broad).

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existing business and target business are deemed like a merger), looking to four factors that favor such a finding:

1. continuity of ownership (e.g., purchaser company pays for assets with stock of purchaser);
2. continuity of the enterprise, evidenced by continuity of management, personnel, physical location, assets and general business operations;
3. dissolution of seller; and
4. purchaser assuming obligations necessary for uninterrupted continuation of normal business operations of seller.[5]

Many cases require the continuity of shareholders prong to find a de facto merger.[6]

C. *Mere Continuation of Seller Entity.* The third exception is if 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:

1. common identity of officers, directors and shareholders in the selling and purchasing corporations (continuity of ownership or corporate structure);
2. continuity of business operations;
3. cessation of ordinary business by seller; and
4. inadequate consideration paid for assets.[7]

Common identity of officers, directors and shareholders is the key element to finding mere continuation.[8]

The ''mere continuation'' theory is very similar to the ''de facto merger'' theory and they are sometimes treated together in caselaw.[9] Note that the ''de facto merger'' and ''mere continuation'' tests are narrower than the ''continuity 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.

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[5] *See, e.g., 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 de facto merger so that purchaser and its successor would be responsible under Comprehensive Environmental Response, Compensation and Liability Act — Superfund law — for liability of battery manufacturer); *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985) (successor liable for predecessor's negligence as express assumption of liability as well as de facto merger, where: (i) successor acquired all assets of predecessor in exchange for stock in successor 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). *Compare 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 de facto merger).

[6] *E.g., 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 de facto merger); *Arnold Graphics Indus. v. Independent Agent Center, Inc.*, 775 F.2d 38, 42 (2d Cir. 1985) (to find that 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). Some cases, however, hold 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, 1457–8 (11th Cir. 1985), *reh'g denied*, 765 F.2d 154 (11th Cir. 1985) (successor not liable; court did not find de facto merger based on totality of circumstances).

[7] *See, e.g., Medicine Shoppe International v. S.B.S. Pill Dr.*, 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 transferor; and (v) notice has been given of transfer to employees or customers). Other cases formulate the factors as stated in the text.

Compare Mickowski v. Visi-Trak Worldwide, LLC, 415 F.3d 501 (6th Cir. 2005) (corporation is not ''mere continuation'' of corporation whose assets it has purchased for purposes of successor liability just because it continues to provide same services (continuation of business operation), but rather, key element in mere continuation theory is continuation of corporate entity, such as when one corporation sells its assets to another corporation with same people owning both corporations — common identity of stockholders, directors and stock); *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, test is whether there is continuation of corporate entity of transferor, not whether there is continuation of transferor's business operation).

[8] *See, e.g., Dayton v. Peck, Stow & Wilcox Co.*, 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 officers, directors and stockholders in selling and purchasing corporations).

[9] *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, buyer is not normally liable for liabilities of seller, though if circumstances indicate that there was ''de facto merger'' of corporations or that purchasing company was ''mere continuation'' of selling company, liability would attach to buyer; de facto merger test is similar to mere continuation test, except that mere continuation test focuses on situations in which buyer is merely restructured or reorganized form of the seller).

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D. *Fraudulent Transfer.* The fourth exception is if the transfer of assets is for the fraudulent purpose of escaping liability for the seller's debts.[10]

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.[11]

Tax Liability on Successor. Section 6901 of the Internal Revenue Code 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]

SEVENTH CIRCUIT *ARTISTIC FURNITURE* CASE APPLYING BROADENED APPLICATION OF SUCCESSOR LIABILITY FOR ERISA OBLIGATIONS

Broadened Application of Successor Liability in ERISA Context

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 so 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 with respect to certain obligations under ERISA in certain circumstances.

Several cases — including circuit and district court decisions in the Seventh, Sixth, Ninth and Second Circuits — have found successors in asset purchases to be liable for the predecessors' pension obligations under ERISA, even if the general common law exceptions for successor liability would not ordinarily apply. Most of these cases are in the multiemployer pension plan liability context, but some cases apply to retiree health and top-hat retirement plans (and there is a split regarding ERISA fiduciary liability).

ERISA Successor Liability — Seventh Circuit *Artistic Furniture* Case re Contributions to Multiemployer Pension Plan — Continuity of Business Operations and Notice Are Sufficient

1. *Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*.[13] 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:

a. there is sufficient evidence of continuity of operations, and

b. the purchaser had knowledge of liability of the seller.[14]

There would be no requirement for continuity of ownership, as there is under common law exceptions.

In *Artistic Furniture*, the old employer, Pontiac Furniture, ceased making contributions to a multiemployer pension fund. The main creditor of the company sold the assets to Artistic Furniture, an unrelated company. The owners, officers and directors were all

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[10] *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).

[11] *Ray v. Alad Corp.*, 560 P.2d 3, 7 (Cal. 1977) (non-bankruptcy asset sale; successor that continues to market 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 substantial part of manufacturer's assets and continuing to market good in same product line exposes purchaser to successor liability).

[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. The Supreme Court has ruled that transferee liability is predicated on state, not federal, law. *Comr. 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] 920 F.2d 1323 (7th Cir. 1990).

[14] Citing a 1987 Title VII case, the court noted 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*, and most of the other cases regarding broadened successor liability do not mention this factor. Also, as noted in *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995), availability of relief from a predecessor is not dispositive in a successor liability case but, rather, is a factor to be considered along with other facts.

ISSN 0747-8607

different (except for one CFO who stayed on). The buyer did not assume liability for the multiemployer pension obligation (or the union agreement). The pension fund sued both parties for delinquent pension contributions.

The Seventh Circuit cited the Supreme Court's decision in *Golden State Bottling Co. v. NLRB*[15] for the proposition that the liability of an asset purchaser for an unfair labor practice (unlawful discharge) could be imposed on a 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 for free exercise of employees' rights with minimal economic cost because a 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. ERISA §515, which requires employers to honor their obligations under a labor contract to make contributions to a pension fund, should be imposed on a successor as well, as 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 if 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 because 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, and (vi) honored the predecessor's warranties, and because two of its officers remained with the successor. It did not matter that there was no continuity of ownership. The case was remanded to district court to determine if there was sufficient knowledge of the liability.

2. *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 if 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 or for withdrawal liability 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 these contributions should be like any other contractual obligation that is subject to the common law successor liability rules.

A similar question is raised by *Einhorn v. M.L. Ruberton Construction Company*,[16] which is one of the few cases to disagree with the *Artistic Furniture* doctrine of broadened successor liability. The district court disagreed with *Artistic Furniture* and held that ERISA obligations are different than unfair labor practice or employment discrimination laws, because unfair labor practice and nondiscrimination rules are designed to protect the employees, while successor liability to a multiemployer fund for delinquent contributions or withdrawal liability is a corporate debt to a multiemployer fund, and is not a law directly protecting employees. 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 ($54,000 a year in 2011 starting at age 65).

3. *Additional Comment — Why Should an Asset Sale Trigger Withdrawal Liability if the 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 still appear to 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.

4. *It Does Not Matter that a Collective Bargaining Agreement Imposed the Obligation to Contribute.* Note that finding successor liability in the *Artistic Furniture* case could not have been based entirely on the fact that the collective bargaining agreement required the contribution to the fund, because under la-

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

[16] 665 F. Supp.2d 463 (D.N.J. 2009).

ISSN 0747-8607

bor 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 SUCCESSOR LIABILITY FOR VARIOUS ERISA OBLIGATIONS

A. *Moriarty v. Svec (Broadened Successor Liability for Pension and Welfare Fund Delinquency).* Seventh Circuit upheld *Artistic Furniture* in *Moriarty v. Svec* [17] (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).

B. *Brend v. Sames Corp.* (Expanded Successor Liability Even for ERISA Top-Hat Plans)[18] This case applied successor liability based on standards set forth in *Artistic Furniture* to a top-hat executive retirement plan, as discussed further below, as top-hat plans are generally subject to ERISA.

EXPANDED ERISA SUCCESSOR LIABILITY UNDER SIXTH, NINTH AND SECOND CIRCUITS

A. *Sixth Circuit.* District court decisions have applied broad successor liability in ERISA contexts, as in the Seventh Circuit's *Artistic Furniture* case.[19]

B. *Ninth Circuit.* Ninth Circuit cases (some of which predate and are cited in *Artistic Furniture*) extend successor liability with regard to ERISA pension and welfare obligations under collective bargaining agreements if there is a successor with substantial continuity between the old and new operations (even without continuity of ownership).[20]

C. *Second Circuit. Stotter Division of Graduate Plastics Co., Inc. v. District 65, UAW.*[21] The court 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.[22]

D. *Other Cases that Agree with* Artistic Furniture. A district court in the D.C. Circuit agreed with *Artistic Furniture* but held that the particular facts did not support finding successor liability because there was not a substantial continuity of the business operations.[23]

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[17] 164 F.3d 323 (7th Cir. 1998).

[18] 28 EBC 2905 (N.D. Ill. 2002).

[19] *See, e.g., Schilling v. Interim Healthcare of Upper Valley, Inc.*, 44 EBC 1988 (S.D. Ohio 2008) (also quoting two other district court cases in the Sixth Circuit; court found that under *Artistic Furniture*, there would be successor liability for ERISA, and therefore, successor in *Schilling* was liable for unpaid medical claims under an ERISA health plan; court looked to *Artistic Furniture* test of whether buyer had prior knowledge of the claim and whether there was continuity of business operations).

[20] *See, e.g., Hawaii Carpenters Trust Funds (Health and Welfare Trusts) 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 was the same basic operation, same plant, same workforce, same supervisors, same machinery and same product, and as a successor employer, the successor was requested to abide by terms and conditions of predecessor's collective bargaining agreement unless it timely bargained to an impasse; successor liable for delinquent contributions to health and pension trust funds under collective bargaining agreement; also held with regard to delinquent contributions to pension plan that six-year statute of limitations under ERISA should be used); *Trustees for Alaska Laborers-Construction Industry Health & Sec. Fund v. Ferrell*, 812 F.2d 512 (9th Cir. 1987) (member of joint venture that continued to operate business with same employees and equipment after joint venture ceased operations was successor employer for purposes of multiemployer withdrawal liability; company deemed successor if it hires most of its employees from predecessor employer's workforce and if it conducts essentially same business as predecessor); *Board of Trustees of Northwest Ironworkers Health and Security Fund v. Tanksley*, 2010 WL 519733 (E.D. Wash. 2/12/10) (company taken over in bankruptcy was successor employer because it operated out of same premises, performed same type of work and used similar assets, and same officers and partners served on both entities, and was obligated to collective bargaining agreement as alter ego).

[21] 991 F.2d 997 (2d Cir. 1993).

[22] In *Stotter*, a manufacturer had obligations to a multiemployer pension plan which it had ceased to honor, 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.

Compare Board of Trustees of the Sheet, Metal Workers Local Union No. 137 Insurance, Annuity and Apprenticeship Training Funds v. Silverstein, 1995 WL 404873 (S.D.N.Y. 1995), in which 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.

[23] *Board of Trustees of UNITE HERE Local 25 v. Mr. Watergate LLC*, 677 F. Supp.2d 229 (D.D.C. 2010) (lender that took over hotel after it closed and did not reopen it was not successor employer; although quoting *Artistic Furniture*, court held that

ISSN 0747-8607

SPLIT IN THIRD CIRCUIT DISTRICT COURT CASES ON WHETHER TO FOLLOW *ARTISTIC FURNITURE*

A. *Unclear if Other Circuits Would Disagree with* Artistic Furniture. It is unclear whether some other circuits would disagree with *Artistic Furniture*'s ERISA successor liability rule.

B. *N.J. District Court Case Disagrees with* Artistic Furniture. *Einhorn v. M.L. Ruberton Construction Co.*[24] disagrees with *Artistic Furniture* and holds that broadened successor liability for unfair labor practices or employment discrimination should not be expanded to ERISA.[25] The district court decision brings support from a Third Circuit case [26] which indicated that ERISA liability would be imposed after a merger — but not necessarily after an asset sale — because *Golden State Bottling Co.* applies broadened successor liability only to unfair labor practices but not to corporate debt, such as pension obligations to a union.

C. *Pennsylvania District Court Follows* Artistic Furniture. A Pennsylvania district court case agrees with *Artistic Furniture* that, where applicable, there could be broadened successor liability for ERISA withdrawal liability.[27]

SUCCESSOR LIABILITY FOR OTHER ERISA OBLIGATIONS SUCH AS RETIREE HEALTH, ERISA NONQUALIFIED PLANS AND FIDUCIARY LIABILITY

A. *Retiree Health.* Regarding successor liability for retiree health in an asset sale (as provided in a labor agreement), 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).

B. *Some Cases Extend* Artistic Furniture *to ERISA Welfare Plans*. Many federal cases have held broadened successor liability should apply to retiree health obligations under ERISA welfare plans if there is notice of liability and continuity of operations (even if no continuity in ownership), and ERISA's broadened successor liability is not limited to pension liability.[28]

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there was no substantial continuity of business operations because lender who took over hotel in foreclosure did not reopen hotel).

[24] 665 F. Supp.2d 463 (D.N.J. 2009).

[25] In *Einhorn*, Statewide Hi-Way Safety, which employed union workers, sold its assets to M.L. Ruberton Construction Co., a nonunion company. The seller had been obligated to make contributions to three multiemployer pension plans under ERISA. The 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, in which 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 the seller or from the proceeds of sale, under a constructive trust theory. Thus, an ERISA fund does not need the same protections as an individual employee, contrary to *Artistic Furniture*; summary judgment was granted for the buyer).

[26] *Teamsters Pension Trust Fund v. Littlejohn*, 155 F.3d 206, 209 (3d Cir. 1998) (court noted that parties argue over application of cases re development of corporate successorship in federal labor law, such as *Golden State Bottling Co.*, in which Supreme Court held that successor liability is broader when obligation involved is collective bargaining agreement than when ordinary debt is involved; in other cases, Supreme Court has also stated that employer may be bound by predecessor's collective bargaining agreement as long as it had notice of obligation and continued predecessor's operations even if only assets sold and not a merger; Third Circuit states that those cases are somewhat distinguishable because they dealt with application of labor law concepts and terms of collective bargaining agreement, but in this case, only transfer of valid and ordinary debt was at issue and just happened to have its genesis in terms of collective bargaining agreement).

[27] *Central Pennsylvania Teamsters Pension Fund v. Beer Distributing Co.*, 47 EBC 1037 (E.D. Pa. 2009) (asset purchaser was liable as successor for ERISA withdrawal liability; court noted that federal courts have expanded successor liability for ERISA; successor and predecessors were 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 *Einhorn v. M.L. Ruberton Construction Co.*, although it can be distinguished in that in this case, all factors could, in any event, lead to general common law exception such as de facto merger).

[28] *See, e.g., Bish v. Aquarion Services Co.*, 289 F. Supp.2d 134 (D. Conn. 2003) (where seller promised retiree health in collective bargaining agreement, asset buyer would be subject to retiree health obligation because by continuing operations, retiree health obligation would continue, and ERISA successor liability is not limited only to ERISA withdrawal liability but applies also to ERISA fiduciary duties and to promises for retiree health; court denied motion to dismiss claims). *See also Cleveland Electric Illuminating Co. v. Utility Workers Union of America*, 440 F.3d 809 (6th Cir. 2006) (issue of retiree health presumptively arbitrable under collective bargaining agreement); *Grim v. Healthmont, Inc.*, 29 EBC 1500 (D. Or. 2002) (cites cases that, under federal common law as applied to ERISA pension claims, employer liable for previous employer's obligations under ERISA plan if buyer considered bona fide successor and had notice of potential liability; court applies to facts in this case involving retiree health); *Hawaii Carpenters Trust Funds (Health & Welfare Trust Funds) v. Waiola Carpenter Shop, Inc.* 823 F.2d 289 (9th Cir. 1987) (discussed above; successor liable for health and pension obligations under collective bargaining agreement); *Moriarty v. Svec*, 164 F.3d 323 (7th Cir. 1998) (discussed above; broadened successor liability applies to unpaid contributions to multiemployer pension and welfare funds); *Schilling v. Interim Healthcare of Upper Valley, Inc.*, 44 EBC 1988 (S.D. Ohio 2008) (court found that under *Artistic Furniture*, there would be successor liability for ERISA, and therefore, successor in *Schilling* was liable for unpaid medical claims under ERISA health plan; court looked to *Artistic Furniture* test of whether buyer had prior knowledge of the claim and whether there was continuity of business operations).

Note that case law has held that a buyer who assumes retiree

ISSN 0747-8607

C. *Successor Liability for Top-Hat Supplemental Pension Obligation*. In *Brend v. Sames Corp.*[29] the court applied the expanded ERISA successor liability under *Artistic Furniture* to obligations under a top-hat executive retirement plan, as top-hat plans are generally subject to ERISA.[30] The court noted that although top-hat employees need less protection than rank-and-file employees, ERISA protects all employees.

D. *Split Whether ERISA Fiduciary Obligations Have Expanded Successor Liability*. With regard to ERISA fiduciary liability, a district court has held that ERISA fiduciary liability would not have broadened successor liability.[31] However, another district court case stated in dictum that ERISA fiduciary duties would also have broadened ERISA successor liability.[32]

OTHER ERISA ISSUES WITH ASSET SALES

A. *Alter Ego Theory as Applied to Asset Purchases*. 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, if there is fraud, disregard by the owner of the separate character of the corporation, or shareholders undercapitalize the corporation.[33] Courts have sometimes used the alter ego theory to apply successor liability.[34]

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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. *Williams v. Wellman Thermal Systems Corp.*, 684 F. Supp. 584 (S.D. Ind. 1988) (involving cutbacks of retiree welfare benefits of former employees and whether benefits under collective bargaining agreement extend beyond term of agreement; plant's assets were sold by GE to Wellman Thermal Systems in August 1979, and collective bargaining agreement term was July 1979 through July 1982; collective bargaining agreement between GE and union was ambiguous as to whether retiree welfare plans continued; asset purchase agreement provided that although Wellman was to offer employee benefit plans to transferred employees comparable to plans GE had on sale date, Wellman reserved the right to alter, amend or terminate any particular plan in future; asset purchase agreement was only document where Wellman specifically reserved right to alter, amend or terminate benefit plans; court held that because collective bargaining agreement between GE and union was ambiguous and Wellman documents failed to clarify ambiguity, granting summary judgment on issue of whether retiree benefits extend beyond term of collective bargaining agreement was inappropriate).

[29] 28 EBC 2905 (N.D. Ill. 2002).

[30] *Brend v. Sames Corp.* 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 because as an ERISA plan, the plan was subject to the continuity of operations and notice standards under *Artistic Furniture* for successor liability, even though there was 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.

[31] *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, 47 EBC 2505 (W.D. Wash. 2009). The court stated that whether a company can be liable based upon an expanded ERISA inherited liability for breach of ERISA fiduciary duties was a question of first impression and that broad successor liability should not apply in this case (''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'').

[32] *Bish v. Aquarion Services Co.*, 289 F. Supp.2d 134 (D. Conn. 2003). As discussed above, *Bish* involved a seller that 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, because by continuing operations, the retiree health obligation would continue, and expanded ERISA successor liability was not limited only to ERISA delinquent multiemployer contributions or withdrawal liability but also applies to ERISA fiduciary duties and to promises for retiree health. The court denied a motion to dismiss claims.

[33] *See, e.g.,* the following circuit court cases piercing the corporate veil: *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987) (pierced corporate veil so as to hold shareholders jointly and severally liable with corporations for fiduciary breaches; close and intimate relationship between corporate fiduciaries and their individual shareholders justified piercing corporate veil); *Board of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164 (3d Cir. 2002) (summary judgment to dismiss piercing corporate veil claim by multiemployer pension fund against individual defendants not granted; noted that under N.J. law, to pierce corporate veil, must show that: (i) corporation is organized and operated as mere instrumentality of other corporation, and (ii) dominant corporation uses subservient corporation to perpetrate fraud, to accomplish injustice or to circumvent the law; factors to be considered included failure to observe corporate formalities and non-functioning of other officers and directors); *Flynn v. R.C. Tile*, 353 F.3d 953 (D.C. Cir. 2004) (tile installation firm formed by three brothers soon after their company ceased operations was the company's alter ego because they had same ownership, management, business purpose, operations, equipment and customers).

Compare the following circuit court cases which did not pierce the corporate veil: *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995) (refusing to impose liability for prohibited transaction on alter ego of party in interest under federal common law of ERISA); *Massachusetts Carpenters Central Collection Agency v. AA Building Erectors, Inc.*, 343 F.3d 18 (1st Cir. 2003) (where non-union company formed union subsidiary for customers that preferred union work, although the two companies may have been alter egos, alter ego doctrine was inapplicable because the two companies were not formed to avoid obligations under collective bargaining agreement); *Trustee of Resilient Floor Decorators Insurance Fund*, 395 F.3d 244 (6th Cir. 2005) (nonunionized carpet and flooring retailer is not alter ego of unionized carpet and flooring installation company in same building, and is not liable for multiemployer fringe benefit funds).

[34] *See, e.g., Plumbers, Pipefitters and Apprentices Local Union No. 112 v. Mauro's Plumbing, Heating and Fire Suppression*, 84 F. Supp.2d 344 (N.D.N.Y. 2000). The court held that where a plumbing company that signed a collective bargaining agreement ceased operations and the 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 because

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B. *Emergence from Bankruptcy Like an Asset Sale.* With regard to a stock sale or merger, the purchaser should ordinarily step into the shoes of the seller for any termination liabilities, even if they resulted from termination of the plan when it was with the seller.[35] However, if a purchaser in a stock sale or merger acquires a bankrupt corporation and its pension plan, courts have ruled 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.[36] In a case in which successor liability would apply to an asset purchaser, the purchaser from the bankruptcy could also have successor liability.[37]

C. *ERISA §§4069(b) and 4212 Successor Liability for Mere Changes in Form.* In order to avoid controlled group liability, companies sometimes attempt to remove themselves from the controlled group. ERISA §§4069(b) and 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.

D. *Asset Sale as Withdrawal and ERISA §4204 Agreement.* If a contributing employer to a multiemployer pension plan sells its assets, this asset sale can trigger a withdrawal by the entity because the original company ceases to exist.

As noted above, even though there may be successor liability on the withdrawal liability or other liability to a multiemployer fund, the asset sale itself would still appear to be treated as a withdrawal under ERISA (unless an ERISA §4204 contract is entered into). Query: If the asset sale is disregarded by having the buyer pick up liability as successor, why should a sale of assets be treated as a withdrawal under ERISA?

There is a statutory exception in ERISA §4204 under which a withdrawal will not occur in a sale of assets to an unrelated party, provided that: (i) the purchaser is obligated to contribute a similar amount, (ii) the purchaser posts a bond or escrow for a five-year period equal to at least the average annual contribution; (iii) the contract of sale provides for the seller to be secondarily liable if the buyer withdraws within a five-year period, and (iv) if the seller sells substantially all of its assets or liquidates within the five-year period, the seller must post a bond or escrow.

LABOR LAW OBLIGATION ON SUCCESSOR TO BARGAIN IN GOOD FAITH

A. *Duty on Successor to Bargain in Good Faith but Not Bound to Specific Contract Provisions if it Has Not Specifically Assumed Contract or Been Found to Be Alter Ego of Predecessor.* The National Labor Relations Act of 1935 (NLRA), which deals with the establishment of collective bargaining relationships, imposes an obligation on an employer and union to bargain in good faith.[38] 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

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there was continuity of ownership and management, 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.

[35] *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).

[36] *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 of 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 liability to corporations that made contingent purchases of stock that had no practical effect; purchase of stock during bankruptcy for $1 does not make party part of controlled group because stock is worthless; therefore, purchase from 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, because applying bankrupt's assets to PBGC's liability would have reduced assets available to their creditors and inequitably benefited group members; court noted that ERISA provides a lien on 30% of 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).

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

[38] It is an unfair labor practice for an employer to refuse to bargain in good faith with the union. NLRA §8(a)(5), 29 USCA §158(a)(5). It is also an unfair labor practice for a labor organization to refuse to bargain in good faith with the employer. NLRA §8(b)(3), 29 USCA §158(b)(3).

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with the existing union representatives.[39] 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.[40]

B. *Compelling Arbitration.* There is a split among the circuits as to whether successors who are not alter egos of predecessors can still be compelled to arbitrate as to whether the successors are bound to all or some of the terms of the existing collective bargaining agreement.[41]

C. *Successor Clauses Do Not Bind Third Parties.* A successor clause in a contract does not bind third parties who did not sign the agreement.[42] Therefore, if the collective bargaining agreement requires the successor to assume the agreement, the buyer is not presumed to have assumed the collective bargaining agreement. However, by not inducing the buyer to assume the agreement, the seller may be liable for damages.[43] Also, in some cases, the union may be able to enjoin a pending sale.[44]

CONCLUSION

Successor liability in ERISA contexts — such as delinquent contributions to multiemployer pension plans — would, according to case law in many circuits, be applicable if there is a continuity of operations and notice, even if there is not continuity of

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[39] *See, e.g., Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974), in which a family that operated a Howard Johnson franchise sold the assets back to Howard Johnson and only a small fraction of union employees of this family operation were rehired by Howard Johnson. The Supreme Court held that Howard Johnson had no duty to arbitrate as to whether it violated the collective bargaining agreement with a lockout, because unless it assumes the collective bargaining agreement or is an alter ego of the prior corporation, there is no obligation to assume the terms of the collective bargaining agreement (even though there could still be a duty to bargain in good faith). *See also Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27 (1987), in which a company that was liquidating sold its remaining assets and rehired a number of employees. Out of the 21 new employees, 18 were from the original company. The company refused to bargain with the union, claiming that it was not a successor. The Supreme Court held that if 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.

[40] *See NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 284, 291 (1972) (even if 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 terms of that agreement); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) (quoting *Burns* that a successor is not bound by the substantive provisions of the predecessor's collective bargaining agreement). Only if the successor is found to be the alter ego of the predecessor and general common law successor liability rules will the collective bargaining agreement be binding. *E.g., Southward v. South Central Ready Mix Supply Corp.*, 7 F.3d 487, 493 (6th Cir. 1993) (if a successor employer is alter ego of predecessor, it automatically assumes all predecessor's obligations, including collective bargaining agreement). *See Ameristeel* and *Meridian* cases discussed below.

[41] In *Local 348 UFCW AFL-CIO v. Meridian Management Corp.*, 583 F.3d 65 (2d Cir. 2009), the Second Circuit ruled that, if there is a substantial continuation of operations and the workforce, a successor employer could be compelled to arbitrate whether, and to what extent, it is bound by the substantive terms of the preexisting collective bargaining agreement. The arbitrators could hold the successor employer bound by some or all of the substantive terms of a preexisting agreement if there are sufficient indicia of substantial continuity of identity of the workforce.

Most circuits disagree with the *Meridian* decision. For example, in *Ameristeel Corp. v. International Brotherhood of Teamsters*, 267 F.3d 264 (3d Cir. 2001), the Third Circuit ruled that arbitration is required only if the successor could be bound to the terms of the contract, such as if it could be found to be the alter ego of the predecessor (for example, if there is a mere technical change in the structure or identity of the old employer without any substantial change in its ownership or management). Ameristeel had purchased assets of a manufacturing facility and rehired most of the union employees of the facility and, therefore, became bound to bargain with the union. The court held that an unconsenting successor employer that is not the alter ego of the predecessor cannot be bound by the terms of collective bargaining agreement negotiated by its predecessor. Therefore, there is no contract for the arbitrator to construe.

[42] Specific successorship clauses are not binding on successors, but courts may require a seller to obtain the agreement of the purchaser to assume the collective bargaining agreement because of a successorship clause. *PCR Sportswear Corp.* (8/3/79) (Rosenberg, Arb.), *aff'd*, No. 79 Civ. 5313 (HFW) (S.D.N.Y. 4/15/80). If there are general boilerplate successorship clauses, such as: ''The contract shall be binding upon the employer, successors, assigns, purchasers, lessees and/or transferees,'' some courts have refused to enforce them as meaningless boilerplate. *Gallivan's Inc.*, 79 Lab. Arb. (BNA) 253 (1982) (Gallagher, Arb.); *Wyatt Manufacturing Co.*, 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.).

[43] *See, e.g., Wheelabrator Envirotech Operating Services v. Massachusetts Laborers District Council Local 1144*, 88 F.3d 40 (1st Cir. 1996) (by agreeing to include successor clause in union agreement, Wheelabrator accepted and bargained for risk that if it lost contract, if would guarantee that successor would honor wages, benefits and other terms and conditions of employment; Wheelabrator breached its collective bargaining agreement with union by failing to compel its successor to assume agreement).

[44] *Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (preliminary injunction properly issued restraining employer from completing sale of assets that would result in permanent loss of employment pending decision by arbitrator on union's claim that sale violated collective bargaining agreement).

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ownership. Some cases have extended this to other ERISA liabilities, such as obligations for promised retiree health for unions, liabilities of ERISA top-hat plans and fiduciary liability. This area of law is not entirely clear, and there is some divergence of opinion in case law. Care must be taken, however, in an asset acquisition to account for possible successor liability both in conducting due diligence and in assessing risk.

ADDENDUM – 1-26-2011:

Jan. 26, 2011

Does Anyone Argue on Artistic Furniture? Not Anymore

Charles C. Shulman

In Successor Liability Under ERISA, 39 BNA Tax Management Compensation Planning Journal 3 (Jan. 7, 2011), I noted that, to my knowledge, only one case has disagreed with the expanded successor liability under ERISA set forth in Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323 (7th Cir. 1990). Artistic Furniture held that under ERISA a purchaser of assets could be liable for delinquent pension contributions even when the common-law successor liability exceptions do not apply because there was no continuity of ownership, provided, that there is sufficient evidence of continuity of operations and the purchaser had knowledge of the liability of the seller.

The lone case that specifically argued on Artistic Furniture was Einhorn v. M.L. Ruberton Construction Co., 665 F. Supp.2d 463 (D.N.J. 2009). In that case a purchaser bought assets of a company that had been obligated to make contributions to three multiemployer pension plans. It held that the broadened successor liability for unfair labor practices or employment discrimination should not be expanded to ERISA. The district court brought support from a Third Circuit case, Teamsters Pension Trust Fund v. Littlejohn, 155 F.3d 206, 209 (3d Cir. 1998), which 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., 414 U.S. 168 (1973), applies broadened successor liability only to labor law obligations but not to a corporate debt such as a pension obligation to a union.

However, the Third Circuit in Einhorn v. M.L. Ruberton Construction Co., --- F.3d ----, 2011 WL 182131 (3d Cir. Jan. 21 2011), overturned the district court and held that expanded successor liability applies under ERISA. The court agreed with the Seventh Circuit Artistic Furniture case that ERISA, like NLRA labor law and Title VII employment law, should have expanded successor liability even without continuity of ownership, as long as there is continuity of operations and notice. The court cited the Golden State Supreme Court case that emphasized the importance of providing protection for the victimized employee without a remedy against a defunct predecessor entity. A central policy goal of ERISA is to protect plan participants and beneficiaries. Failure to pay contributions harms plan beneficiaries, and other employers would be forced to make up the difference to ensure that workers receive their entitled benefits. The Littlejohn case should not be relied upon to limit expanded successor liability to merger since there is more than a contractual arrangement at stake under ERISA. Also, in Littlejohn the successor did not have advance notice, while asset purchase expanded successor liability would apply when the buyer does have advance notice. The Third Circuit cited cases in the First, Second, Ninth, Tenth and D.C. circuits that, like the Seventh Circuit, have extended Golden State expanded successor liability to delinquent pension contributions under ERISA. The court stated that no court of appeals, to its knowledge, has rejected the holding in Artistic Furniture. Therefore, the Third Circuit overturned the lower court ruling, stating: "In sum, we hold that a purchaser of assets may be liable for a seller's delinquent ERISA fund contributions to vindicate important federal statutory policy where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and seller." The case was vacated and remanded for further proceedings in accordance with the Third Circuit opinion.

Successor liability in ERISA contexts – such as delinquent contributions to multiemployer pension plans –would, according to existing case-law, be applicable if there is a continuity of operations and notice even if there is not continuity of ownership. Some cases have extended this to other ERISA liabilities such as obligations under union contract with respect to retiree health and fiduciary liability. Care must be taken in an asset acquisition to account for possible successor liability.

ISSN 0747-8607