

Publications

Successor Liability Applied to Top Hat Plan

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A federal district court held that, under the doctrine of “successor liability,” a company purchasing the assets of a business could become responsible for “top hat” plan liabilities of the selling company. *Brend v. Sames Corp.*, 2002 WL 1488877 (N.D. Ill. 2002). If the rationale of the court in *Sames* is followed by other courts, a buyer of assets could be held responsible for any liabilities related to ERISA plans maintained by the seller. This would constitute a major expansion of ERISA successor liability principles.

Successor Liability

In a typical asset acquisition, the buyer purchases specified assets from the seller and assumes specified liabilities of the seller. Buyers typically refuse to assume certain types of liabilities, often including those related to the seller’s benefit plans. These “excluded liabilities” are described in the purchase agreement between the buyer and the seller, and under common law generally remain liabilities of the seller. The purchase price negotiated between the parties can be dramatically affected by which liabilities are assumed by the buyer and which remain with the seller.

Despite the clear terms of a purchase agreement specifying that a liability remains with a seller, the Supreme Court and other federal courts have found that certain types of liabilities may nonetheless become liabilities of a buyer under the successor liability doctrine. Drawing from Supreme Court precedents in the labor law area, courts have imposed successor liability on buyers for an ERISA plan obligation where:

- imposing such liability will vindicate an important public policy, as expressed in a federal statute;
- the buyer had notice of the liability before the acquisition; and
- there was substantial continuity in the operation of the business before and after the sale.

The cases finding successor liability under ERISA have generally been limited to obligations for employer contributions to multiemployer plans, based on judicial

findings that the multiemployer plan funding provisions of ERISA reflect a strong public interest in having these contributions collected from employers.

The Sames Case

The purchase agreement in *Sames* explicitly provided that liabilities under a top hat plan (which provided for retirement, death, and certain other benefits) would not be assumed by the buyer and would remain with the seller. When the seller did not pay the benefits due under the plans, the plan participants sued, asking the court to find the buyer responsible for these benefit obligations under the successor liability doctrine.

The buy in *Sames* argued that since top hat plans were exempt from almost all of the employee protective provisions of ERISA, there was no important public policy of protecting benefits under these plans, and thus the doctrine should not apply. The court, however, refused to distinguish top hat plans from other benefit plans governed by ERISA, and held that successor liability would apply if the notice and substantial continuity factors (described above) were present. These factors are very often found in an asset acquisition where an entire business is purchased and all the employees of the seller become employees of the buyer after the deal. However, in *Sames*, the seller only sold a portion of its business and the court could not determine whether the substantial continuity factor was present.

While it is only a district court case, the *Sames* decision is potentially important because it is the only one on this important topic. Further, the court's reasoning would call for application of the successor liability theory to any ERISA benefit plan liabilities. Buyers should be aware of the possible impact of this case when addressing responsibilities for benefit plan liabilities in an asset acquisition.