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9th Circuit joins the 7th Circuit: Successor may be responsible for predecessor's ERISA MEPP withdrawal liability

The 9th Circuit Court of Appeals has adopted the 7th Circuit's judge-made rule that a successor can be liable for a predecessor business's ERISA multiemployer pension plan withdrawal liability. *Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 9th Cir., No. 12-17675, 9/11/15 ("Resilient"). Moreover, the 9th Circuit in *Resilient* may have expanded the group of persons who may be regarded as an ERISA successor, saying the doctrine can apply even if the alleged successor didn't acquire its business from the predecessor in an asset purchase transaction.

In the most recent 7th Circuit case -- and contrary to the common law rules that typically govern asset sales -- an asset purchaser was held liable for the seller's ERISA multiemployer pension plan (MEPP) withdrawal liability despite an express disclaimer of liability assumption in the asset purchase agreement. (For more background about the 7th Circuit's earlier rulings, see our August 2015 Client Alert <http://www.paulweiss.com/media/3086450/5aug15bkctcvalert.pdf>).

In the 9th Circuit's *Resilient* case, a flooring company went out of business after 50 years, terminated its lease and sold its tools and equipment at public auction. One of the salesmen decided to lease the same store and warehouse and enter that same line of business as an owner, using the same telephone numbers and similar signage as the old business and buying 30% of the defunct company's tools and inventory at the public auction (but not customer lists or goodwill). He apparently used his experience and contacts to pitch to the same customer base he'd known for years, and hired many of the old company's employees. The Circuit remanded to the District Court for further factual findings on the successorship question, to take into account the 9th Circuit's instruction that continuity of customer base can be a critical factor in identifying a successor. The 9th Circuit explicitly rejected the notion that imposing liability on a common law successor interferes with ERISA's precise statutory rules on allocating withdrawal liability. There was no indication in the opinion that the alleged successor had knowledge of the predecessor's withdrawal liability, an element critical to a finding of liability according to both the 7th and 9th Circuits; this issue of fact will presumably be addressed on remand.¹

Given the growing consensus regarding the application of the successorship doctrine to MEPP withdrawal liability, purchasers of MEPP-related assets may wish to consider pursuing their transaction in

¹ The Court noted that the "the sealing of several key documents [in the record of the district court case], including [the new owner's] business plan, has somewhat hampered our ability fully to explain our ruling in this precedential opinion" and that opinion "does not contain all the facts in the record supporting it." *Resilient* at *n1.

bankruptcy. As we have previously noted, Bankruptcy Code Section 363 sales may provide some protection against successor liability claims. However, transactions should be evaluated on a case-by-case basis, as bankruptcy sales may not be possible or advantageous in all circumstances. Notably, a seller may refuse to pursue a bankruptcy strategy to facilitate the type of transaction at issue in *Resilient* (i.e., a partial asset sale).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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