

Multiemployer Pension Plans: Potential Successor Liability from Buyer's Attempts to Continue Seller's Business

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The district court erred in finding a multiemployer pension plan did not show sufficient continuity of business operations to support imposing successor liability on an asset purchaser, the federal appeals court in Chicago has ruled in a case under the Multiemployer Pension Plan Amendments Act (MPPAA) involving withdrawal liability of \$661,978. *Indiana Electrical Workers Pension Benefit Fund v. ManWeb Services, Inc.*, No. 16-2840 (7th Cir. Mar. 12, 2018).

The Court said that “the totality of relevant circumstances ... weigh more heavily in favor of successor liability than the district court recognized.” It vacated summary judgment and remanded the case to the district court with instructions to reweigh the successor liability factors, particularly that relating to customers.

This is the case's second trip to the Seventh Circuit.

Background

ManWeb is a non-unionized Indianapolis company that provides industrial construction services. In August 2009, ManWeb paid \$259,360 for the assets of Tiernan & Hoover d/b/a The Freije Company (named after the founding Freije family), a much smaller, unionized Indianapolis construction company specializing in cold-storage facilities.

Freije had a collective bargaining agreement with the International Brotherhood of Electrical Workers Local 481. Freije withdrew from the union's pension fund when it ceased operations following the asset sale, and the Fund assessed withdrawal liability of \$661,978 against Freije. Freije did not contest this assessment, which therefore became due and owing. The Fund sued Freije to collect the withdrawal liability and added ManWeb as a defendant on a theory of successor liability.

Successor Liability

Generally, an asset purchaser does not assume the seller's liabilities, including its ERISA obligations. Courts, however, have formulated an exception to the doctrine of successor liability for certain labor and employment obligations. Successor liability has been applied to withdrawal liability under MPPAA.

To hold a successor liable, a court must find “sufficient indicia of continuity between the two companies” (the *substantial continuity* test), and that the successor firm had *notice* of its predecessor's liability.

Further, as successor liability is an equitable doctrine, a court's analysis requires balancing competing policy interests: the facilitation of the transfer of corporate assets (the rationale for the general rule) and the protection of the financial stability of multiemployer pension plans and benefits earned by their participants (the policy goals of MPPAA).

Lower Court Decision No. 1

The district court in 2013 granted summary judgment to ManWeb, holding the requisite notice was lacking and therefore ManWeb was not liable as a successor. Because the Fund's withdrawal liability assessment took place months after the asset sale, the court concluded that "it was impossible for ManWeb to have notice of any existing withdrawal liability." Therefore, the court found that it need not, and therefore did not, evaluate whether there was substantial continuity of business operations.

Seventh Circuit: Notice Requirement Satisfied

On appeal, the Seventh Circuit ruled that notice of contingent withdrawal liability is sufficient for the successor liability doctrine. *Tsareff v. ManWeb Services, Inc.*, 794 F.3d 841 (7th Cir. 2015). To find otherwise, the Court explained, would create a "liability loophole" whereby multiemployer plans "would be foreclosed in some situations [where an employer withdraws as a result of the asset sale and the demand for withdrawal liability post-dates the closing of the asset sale] but not others [where an employer ceases operations due to bankruptcy] from seeking withdrawal liability from asset purchasers who would otherwise qualify as successors, and the plans would be left 'holding the bag.'"

The case was remanded to the district court for consideration of the successor liability business continuity requirement.

Lower Court Decision No. 2

On remand, the district court again found ManWeb was not liable as Freije's successor, concluding there was no substantial continuity of business operations from Freije to ManWeb. After evaluating five clusters of continuity factors (business processes and services, facilities and equipment, workforce, management and ownership, and customers), it ruled that "ManWeb did not and has not continued [Freije's] business without interruption or substantial change." On the balance of equities, it found the factors and policies weighed against successor liability.

The Fund again appealed.

Seventh Circuit: Six Business Continuity Factors

The Seventh Circuit again reversed the district court, largely disagreeing with the lower court's focus on ManWeb's business before and after acquisition of Freije. No. 16-2840 (7th Cir. Mar. 12, 2018).

The Seventh Circuit said the lower court incorrectly focused "more on the continuity of the pre-purchase ManWeb business at the expense of examining the more critical degree of continuity of Freije's business" and improperly created a "Big Buyer" loophole. This loophole, the Court explained, would destroy "a finding of continuity even where a large buyer in essence swallows a smaller seller whole and continues its business as part of the buyer's business." To avoid this result, the Court instructed the district court to reevaluate the continuity factors by properly focusing on the extent to which the business of the predecessor company (Freije) was continued by the putative successor (ManWeb) after the asset purchase.

The Court discussed at length the following six business continuity factors:

1. Ownership
2. Physical assets

3. Intangible assets
4. Management and workforce
5. Business services
6. Customers

The Court found it particularly compelling that “ManWeb issued a press release describing the transaction not as an asset purchase but as an acquisition and merger,” which the Court described as “the language of continuity.” It found ManWeb bought Freije’s assets “in large part because it wanted to convince customers that it was, in fact, a continuation of the old Freije company” and this “continuity of the tradename and related intangible assets, together with the intention behind it, weighed strongly in favor of continuity of business operations.”

The Court also found it significant that three of Freije’s senior managers (including the key founder’s son) came directly to ManWeb following the transaction and that “ManWeb publicized these men’s employment with it to keep old Freije customers and attract new ones.” In addition, the Court noted, 13 of Freije’s 40 pre-transaction employees were hired by ManWeb, a continuity of workforce that it deemed “not insignificant.”

Moreover, the Court found continuity of business services when focusing on the services previously offered by Freije (industrial refrigeration) that were offered by ManWeb after the purchase.

The Court also disagreed with the lower court’s ruling on continuity of customers. The district court ruled that “ManWeb had hoped to keep Freije customers and to draw in new customers with the Freije name,” but there was no evidence ManWeb had received any new work from former Freije customers. The court interpreted this failure to mean there was no continuity of customers. The appellate court, however, found it “more important” whether ManWeb attempted to convert Freije’s customers to ManWeb customers. It was “skeptical” that “disappointed hopes should save ManWeb from successor liability.”

In a concurring opinion, Circuit Judge Daniel Manion noted his “disagreement” with the Court’s conclusion that ManWeb’s *attempts* to treat Freije’s customers as its own, “regardless of whether those efforts resulted in any actual continuity of customers,” weighs in favor of imposing \$661,978 in successor liability on ManWeb. He stated, “[W]e should judge based on results, not the parties’ ambitions.”

Finally, the Court explained that “equitable balancing remains an issue within the sound discretion of the district court,” and that its “disagreement with the district court’s legal analysis does not mandate that we substitute our own judgment on the weighing of these factors for the district court’s revised judgment.” The Court remanded the case for the district court to “reweigh the successor liability factors in light of the considerations we have identified.”

The Court’s emphasis on the *attempt* by an asset purchaser (ManWeb) to secure the customers of the entity whose assets it purchased (Freije) as a *strong factor* in demonstrating whether there is substantial continuity between buyer and seller is troubling. This factor is present in nearly all asset purchases. Indeed, what buyer does not want to secure the seller’s customers? The Court’s emphasis may result in an unwarranted

expansion of the successor liability doctrine.

We will continue to monitor this case as it winds its way back to the district court (and, perhaps, again to the Seventh Circuit). Please contact a Jackson Lewis attorney if you have questions about the MPPAA and related issues.

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