

PUBLICATION

Seventh Circuit Extends FLSA Successor Liability to Asset Purchaser

March 27, 2013

The U.S. Court of Appeals for the Seventh Circuit became the second federal appellate court to extend successor liability under the FLSA to an asset purchaser. In *Teed et al, v. Thomas & Betts Power Solutions, LLC*, the Seventh Circuit applied "federal common law" of successor liability to find that an electrical contractor who purchased assets in a foreclosure sale was liable for its predecessor's FLSA liability. The Court broadly held that "successor liability is appropriate in suits to enforce federal labor or employment laws...unless there are good reasons to withhold such liability."

The Court rationalized the imposition of successor liability based on the asset purchaser's notice of the FLSA claims at the time that it purchased the assets, and its continued operation of the predecessor's business as a going concern. Therefore, the Court reasoned, the purchaser could have discounted its offer price for the assets to account for successor liability for the predecessor's FLSA violations.

In reaching its conclusion, the Court summarily rejected the arguments that FLSA, itself, makes no mention of successor liability. The Court further rejected the argument that the imposition of successor liability would deter the purchase and continued operation of insolvent businesses, which could result in the loss of jobs to the very Plaintiffs that successor liability benefits.

The Court noted that successor liability would not apply in the absence of a substantial continuity of operations. In other words, if the asset purchaser divides up and sells off the predecessor's assets, then it would not be liable.

The problem with the Court's decision is that it creates uncertainty for asset purchasers. The Court's decision is premised on the concept that if an asset purchaser has notice of FLSA claims, it can adjust its offer accordingly. However, it is unclear what constitutes "notice" of the claims. If the asset purchaser learns in due diligence that the predecessor has received a demand letter from an attorney representing a single plaintiff, and that plaintiff subsequently files a collective action on behalf of thousands of employees, does the asset purchaser have "notice" of the potential liability? The decision also creates uncertainty as to what constitutes continued operations in determining successor liability.

The lesson for potential asset purchasers is to thoroughly investigate potential FLSA claims in due diligence, and incorporate potential successor liability in valuing its purchase offers.