

PUBLICATION

Buyers Beware: The Importance of Reading the Fine Print

February 18, 2008

In a recent decision, *Tate v. Western Express, Inc.*, the Tennessee Court of Appeals held that a buyer of substantially all of a seller's assets could not recover for money spent paying off seller's undisclosed debts. The seller, Deaton, Inc., a trucking company, was having financial difficulties. Deaton sold substantially all of its assets to Western Express, a truck load carrier, in an Asset Purchase Agreement. Robert Tate, a shareholder of Deaton, was a party to the sale for limited purposes. Mr. Tate's interest in Deaton was strictly financial; he had no involvement in the day to day operations of Deaton. He was identified as a "Principal" in the Agreement, meaning he made certain warranties and representations.

After the sale, Western Express encountered many problems. It learned that Deaton had failed to pay several businesses, the insurance premiums for its drivers, the repair costs for a tractor, and failed to deliver certain equipment that was listed as part of the sale. Western Express was not aware of these debts and had not agreed to be responsible for them. However, in order to continue operating and maintain business relations, Western Express paid Deaton's debts. Western Express sued Mr. Tate in an attempt to recover some of these losses.

Western Express's recovery depended on provisions in the Agreement regarding Mr. Tate's obligations. The language of the Agreement and Mr. Tate's role at Deaton impacted the Court's decision. First, Mr. Tate was not responsible for withholding information about the unpaid businesses because the Agreement stated that to the best of Seller's or Principal's knowledge, there were no actions pending or threatened by or against the business. The "best of knowledge" language relieved Mr. Tate from all liability since he did not know and could not have known (due to his solely financial interest) about these claims. Second, Mr. Tate was not responsible for the unpaid insurance premiums because the Agreement required the Seller and Principal to assist the buyer in retaining the services and preserving the goodwill of the drivers. The Court held this to be an operational activity, something in which Mr. Tate was not involved. Third, the repair bill from the tractor could not be recovered from Mr. Tate because nothing in the Agreement stated that he would be responsible for such items. Finally, Mr. Tate was responsible for the undelivered equipment. The Agreement listed the assets, and Mr. Tate represented to Western Express that those assets would be transferred. However, Western Express did not do inventory at the close of the deal, and thus could not prove that the equipment was never delivered.

Therefore, Western Express was unable to recover any of its losses incurred as a result of the asset purchase from Mr. Tate.