



NJ Office & Mailing Address  
632 Norfolk St., Teaneck, NJ 07666  
NJ Tel - 201-357-0577  
(rings in office & on cell)  
Fax - 201-836-4847

NY Office:  
345 Seventh Ave., 21 Fl., New York, NY  
NY Tel – 212-380-3834  
E-mail - cshulman@ebeclaw.com  
Admitted in NY & NJ

Updated 1/26/2011

Printed in 39 Tax Mgmt. Comp. Plan. J. 3 (1/7/2011) with later edits

## **Successor Liability Under ERISA**

**Charles C. Shulman<sup>1</sup>**

One of the murky but interesting aspects of ERISA law – which has been revisited from time to time by the Federal courts – has been the extent to which liability under ERISA will carry over to successors who purchase the assets rather than the stock of the business. This article explores the current state of the law regarding successor liability under ERISA.

### 1. General Successor Liability Rules

*General Common-Law Rule of Successor Liability.* The general common law rule is that a company that purchases assets of another company is not automatically responsible for the seller's liabilities.<sup>2</sup> There are four exceptions – where successor liability will apply to an asset purchaser:

---

<sup>1</sup> Charles C. Shulman, Esq. practices employee benefits and executive compensation law in New York and New Jersey at the Law Offices of Charles C. Shulman, Esq. – www.EBEClaw.com, email - cshulman@ebeclaw.com, tel. 201-357-0577, 212-380-3834. He has almost 20 years experience in ERISA, employee benefits and executive compensation. Before starting his own firm, Charlie practiced employee benefits and executive compensation at Paul Weiss, Cahill Gordon and Skadden Arps. He has handled significant employee benefits compliance and M&A work, negotiating and advising regarding various issues relating to qualified and non-qualified plans, ERISA liability, fiduciary issues, executive compensation, welfare plans, employment issues, etc.

<sup>2</sup> See, e.g., *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 692 (1st Cir. 1984) (successor not liable in product liability action since purchase of assets did not meet any of the four exceptions to the general rule); *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3rd Cir. 2006) (buyer of manufacturer's assets had no successor liability); *Murray v. Miner*, 74 F.3d 402 (2nd Cir. 1996) (based on New York law shareholders of successor corporation not liable for breach of employment contracts, where there was no employer-employee relationship between employees and successor at time of alleged wrong).

See generally, 15 Fletcher, *Cyclopedia of the Law of Private Corporations*, Westlaw (FLTR-CYC), updated Aug. 2010, §§ 7122, 7114, 7124.10, 7124.20 & 7125.

The successor liability rules are generally applicable whether the successor is a corporation or another entity. *Graham v. James*, 144 F.3d 229, 240 (2d Cir. 1998) (traditional rule of corporate successor liability and the exceptions to the rule are generally applied regardless of whether the predecessor or successor organization was a corporation or some other form of business organization; citing 63 Am.Jur.2d *Products Liability* § 117 (1984)).

a. *Express or Implied Assumption of Liabilities.* The first exception is where the purchasing company expressly<sup>3</sup> or impliedly<sup>4</sup> agrees to assume the selling company's liabilities.

b. *De Facto Merger.* The second exception is where the transaction amounts to a "de facto merger," looking to four factors which favor such a finding: (i) continuation of the enterprise evidenced by continuity of management, personnel, physical location, assets and general business operations, (ii) *continuity of shareholders* (continuity of ownership, e.g., the purchasing company pays for the acquired assets with its stock), (iii) the seller ceasing its ordinary business operation and liquidating as soon as possible, and (iv) the purchaser assuming those obligations ordinarily necessary for the uninterrupted continuation of normal business operations of the seller.<sup>5</sup> Many cases require the continuity of shareholders prong to find a de facto merger.<sup>6</sup>

c. *Mere Continuation of Seller Entity.* The third exception is where the purchaser corporation is a "mere continuation" of the seller, i.e., merely a *restructured or reorganized form of seller's corporate entity* and not simply a continuation of the business operation. This exception is aimed at owners and directors who may dissolve one company and begin another to avoid debts and liabilities. Factors include: (i) *common identity of the officers, directors and shareholders* in the selling and purchasing corporations (continuity of ownership or corporate structure), (ii) continuity of business operations, (iii) cessation of ordinary business by seller and (iv) inadequate consideration paid for assets.<sup>7</sup>

---

<sup>3</sup> See, e.g., *Florum v. Elliott Mfg.*, 867 F.2d 570 (10th Cir. 1989) (conduct of successor corporation shows that it specifically assumed the liability); *Hudson Riverkeeper Fund v. Atlantic Richfield Co.*, 138 F.Supp.2d 482 (S.D.N.Y. 2001) (corporation which expressly assumed alleged polluter's liabilities could be liable under Resource Conservation and Recovery Act even though its subsidiary was current site owner).

<sup>4</sup> See, e.g., *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985), cert. denied 474 U.S. 980, 106 S.Ct. 384 (implied assumption of liability where language of assumption agreement is broad).

<sup>5</sup> See, e.g., *United States v. General Battery Corp., Inc.*, 423 F.3d 294 (3rd Cir. 2005) (acquisition of privately-held battery manufacturer part for cash and part for stock constituted a de facto merger so that purchaser and its successor would be responsible under the Comprehensive Environmental Response, Compensation and Liability Act for liability of battery manufacturer); *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 310 (3d Cir. 1985), cert. denied 474 U.S. 980, 106 S.Ct. 384 (successor liable for predecessor's negligence as express assumption of liability as well as de facto merger, where : (i) successor acquired all assets of predecessor in exchange for stock in successor corporation (ii) predecessor's management and personnel became part of successor, (iii) predecessor was required to transfer right to use its corporate name, and (iv) successor continued to operate predecessor's plants and produced same products as predecessor).

See in contrast, *New York v. National Service Industries, Inc.*, 460 F.3d 201 (2d Cir. 2006) (company that bought assets of dry cleaning business was not liable for actions of seller under de facto merger theory because there was no continuity of ownership; some evidence of continuity of ownership is necessary to find a de facto merger).

<sup>6</sup> E.g., *New York v. National Service Industries, Inc.*, 460 F.3d 201 (2d Cir. 2006) (cited above; some evidence of continuity of ownership is necessary to find a de facto merger); *Arnold Graphics Indus. v. Independent Agent Center, Inc.*, 775 F.2d 38, 42 (2d Cir.1985) (to find that a de facto merger has occurred there must be continuity of shareholders); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990) (there was no continuity of shareholders, which is a prerequisite for finding de facto merger). Some cases, however, hold that no one of these factors is either necessary or sufficient to establish a de facto merger. *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1457-8 (11th Cir. 1985), reh'g denied 765 F.2d 154 (11th Cir. 1985) (successor not liable; based on totality of circumstances the court did not find a de facto merger).

<sup>7</sup> See, e.g., *Medicine Shoppe International, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801 (8th Cir. 2003) (pharmacy was corporate successor of franchisee as a mere continuation of predecessor; in determining whether there is "merely a continuation," several factors should be considered, none of which is determinative, namely whether: (i) there is common identity of officers, directors and stockholders; (ii) the incorporators of the successor also incorporated the predecessor; (iii) the business operations are identical; (iv) the transferee uses the same trucks, equipment, labor force, supervisors and name of the transferor; and (v) notice has been given of the transfer to employees or customers; applying Missouri law).

See in contrast, *Mickowski v. Visi-Trak Worldwide, LLC*, 415 F.3d 501 (6th Cir. 2005) (a corporation is not a "mere continuation" of the corporation whose assets it has purchased for purposes of successor liability just because it continues to provide the same services (continuation of business operation), but rather the key element in the mere continuation theory is

The common identity of officers, directors and shareholders is the key element of the mere continuation exception.<sup>8</sup>

This “mere continuation” theory is very similar to the “de facto merger” theory and they are sometimes treated as one test in case-law.<sup>9</sup>

Note that this “de facto merger” test and the “mere continuation” test above are much narrower than the continuity of operations condition for pension successor liability under the Artistic Furniture line of cases discussed below, in that de facto merger and mere continuation generally require continuity of ownership, which is not the case in the pension successor liability cases.

d. *Fraudulent Transfer*. The fourth exception is where the transfer of assets is for the fraudulent purpose of escaping liability for the seller’s debts.<sup>10</sup>

*Product-Line Exception*. A small number of jurisdictions, including California and New Jersey, recognize an additional, more expansive exception under which successor liability might attach to an asset purchaser - the so-called “product line” doctrine.<sup>11</sup>

*Tax Liability on Successor*. IRC § 6901 allows the IRS to assess and collect taxes from the transferee of property in the same manner as it does in the case of the transferor entity that originally incurred the tax liability.<sup>12</sup>

---

the continuation of the corporate entity such as when one corporation sells its assets to another corporation with the same people owning both corporations – common identity of stockholders, directors, and stock); *Grand Laboratories, Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277 (8th Cir. 1994) (successor corporation that purchased predecessor's assets was not “mere continuation” of predecessor under Iowa law where companies had no common shareholders or directors; in determining whether one corporation is a continuation of another, the test is whether there is a continuation of the corporate entity of the transferor, not whether there is a continuation of the transferor’s business operation); *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451 (1st Cir. 1985) (mere continuation exception applies when transferee corporation is merely a continuation or reincarnation of transferor corporation; no continuation of management or ownership was found where no stock transfer took place); *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690 (1st Cir. 1984) (purchase of manufacturing company's assets for cash did not constitute a “merger” or a “mere continuation” of the manufacturing company).

<sup>8</sup> *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 693 (1st Cir. 1984) (purchase of manufacturing company's assets for cash did not constitute a “merger” or a “mere continuation” of the manufacturing company; key element of continuation is a common identity of the officers, directors and stockholders in the selling and purchasing corporations).

<sup>9</sup> See, e.g., *Berg Chilling Systems, Inc. v. Hull Corp.*, 435 F.3d 455 (3rd Cir. 2006) (where one company sells all of its assets to another company, the buyer is not normally liable for the liabilities of the seller, though if circumstances indicate that there was a “de facto merger” of the corporations or that the purchasing company was a “mere continuation” of the selling company, liability would attach to buyer; the de facto merger test is similar to the mere continuation test, except that the mere continuation test focuses on situations in which the buyer is merely a restructured or reorganized form of the seller).

<sup>10</sup> See, e.g., *Allied Industries International, Inc. v. AGFA-Gevaert, Inc.*, 688 F.Supp.1516 (S.D. Fla 1988), affirmed without opinion, 900 F.2d 264 (11th Cir. 1990) (sales commissions paid by corporation that was continuation of judgment debtor were transfer of property to delay, hinder, or defraud creditors under Florida law and could be reached by judgment creditor); *Lumbard v. Maglia, Inc.*, 621 F.Supp. 1529 (S.D.N.Y.1985) (creditor of liquidated manufacturer adequately alleged successor liability charging that various defendants had fraudulently created new entity to carry on manufacturer’s business while avoiding its debts); *Raytech Corp. v. White*, 54 F.3d 187, 192 (3d Cir. 1995) (transferee corporation could be liable for transferor corporation's liabilities for asbestos exposure even though transferor's asbestos related assets were not part of transaction; issue was whether transfer was fraudulent attempt to avoid liability).

<sup>11</sup> *Ray v. Alad Corp.*, 560 P.2d 3, 7 (Cal. 1977) (non-bankruptcy asset sale; successor that continues to market a product line purchased from predecessor assumes predecessor’s liability for defective products); *Lefever v. K.P. Hovnanian Enterprises, Inc.*, 734 A.2d 290, 292 (N.J. 1999) (asset sale in bankruptcy case; acquiring a substantial part of manufacturer’s assets and continuing to market good in same product line exposes purchaser to successor liability).

<sup>12</sup> The liability of a transferee that may be enforced under § 6901 may be either at law or in equity. Regardless of whether enforcement is sought at law or in equity, there are two fundamental elements to transferee liability: (1) there must be a

## 2. Seventh Circuit Artistic Furniture Case Applying Broadened Application of Successor Liability for ERISA Obligations

*Broadened Application of Successor Liability in ERISA Context.* Minimum funding pension obligations, Title IV termination liability, multiemployer withdrawal liability and other pension liabilities would seem to be treated like any other preexisting obligation that unless assumed by the buyer – or unless the common law exceptions for successor liability apply – the buyer of assets would not be liable for the seller’s obligations. However, case-law has expanded successor liability with respect to certain obligations under ERISA in certain circumstances.

Several cases – including circuit and district court decisions in the Seventh, Sixth, Ninth and Second Circuits – have found successors in asset purchases to be liable for the predecessors’ pension obligations under ERISA even where the general common law exceptions for successor liability would not ordinarily apply. Most of these cases are in the multiemployer pension plan liability context but some cases apply to retiree health and top-hat retirement plans (and there is a split regarding ERISA fiduciary liability).

*ERISA Successor Liability – Seventh Circuit 1990 Artistic Furniture Case re Contributions to Multiemployer Pension Plan – Continuity of Business Operations and Notice are Sufficient.* In *Upholsterers’ International Union Pension Fund v. Artistic Furniture of Pontiac*, 920 F.2d 1323 (7th Cir. 1990), the Seventh Circuit held that under ERISA a purchaser of assets could be liable for delinquent pension contributions owed by the seller to a multiemployer pension fund maintained by the union even when the common-law successor liability exceptions do not apply; provided, that (i) there is sufficient evidence of continuity of operations, (ii) the predecessor was or is able to provide the relief and (iii) the purchaser had knowledge of the liability of the seller. There would be no requirement for continuity of ownership, as there is under the general common law exceptions for successor liability.

Artistic Furniture involved a company, Pontiac Furniture, which contributed to a multiemployer pension fund of the Upholsterers’ International Union. The company was in financial difficulty and ceased making pension contributions. In 1985, the creditor foreclosed on the loan and sold the assets to Artistic Furniture. Artistic Furniture was unrelated to the seller and the officers and directors were completely different (except for the CFO who stayed on). The buyer negotiated a new collective bargaining agreement and did not assume liability for the multiemployer pension plan. The pension fund sued the seller and the buyer for delinquent pension contributions and the district court granted summary judgment finding there was no commonality of ownership between the buyer and the seller that would cause liability under the general successor liability exceptions. The Seventh Circuit reversed the summary judgment motion.

The decision noted that the Supreme Court in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S. Ct. 414 (1973), has held in the unfair labor practice context that liability for unlawful discharge by a predecessor could be imposed on the successor. The Supreme Court in *Golden State Bottling Co.* stated that NLRA liability could be imposed on a successor who continues predecessor’s operations and who had notice of the pending unfair labor practice charge at the time of the acquisition; this protects NLRA free exercise of employees’ rights and has minimal economic cost because buyer is aware of obligation. Similar conclusions have been reached in Federal cases with respect to other labor law obligations and to employment discrimination if there is continuity of the business operations and the successor had prior knowledge of the obligation.

The court in *Artistic Furniture* held that the same rationale of *Golden State Bottling Co.* could be applied with respect to multiemployer pension liability under ERISA, and ERISA § 515 – which requires the employer to make contributions to a multiemployer plan that it has obligated itself to make – may be interpreted to include successors since this advances the purposes of ERISA. Thus, the Seventh Circuit held that an imposition of successor liability is appropriate for delinquent pension contributions since the vindication of an important Federal ERISA statutory policy of protecting other employers and the PBGC [and presumably employees if their benefits

---

transfer of the taxpayer’s property to a third-party transferee, and (2) the taxpayer must be liable for the tax at the time of transfer and at the time transferee liability is asserted. The Supreme Court has ruled that transferee liability is predicated on state, not Federal, law. *Commissioner v. Stern*, 357 U.S. 39, 45, 78 S. Ct. 1047 (1958). In general, the elements of transferee liability in equity in a given state are those found in that state’s fraudulent conveyance provisions.

are affected], necessitates creation of an exception to the common law rule. The court stated, however, that this successor liability will only apply where there was sufficient evidence (i) of continuation of operations, and (ii) of prior knowledge by the buyer of the seller's liability.

The court held that there was sufficient evidence of continuity of operations. Artistic Furniture employed substantially all the workforce, it operated from the same location, it used the predecessor's machines, it produced the same products, it completed open work orders, it honored the predecessor's warranties, and two of its officers remained with the successor. It does not matter that there is no continuity of ownership. However, it was unclear whether there was sufficient knowledge of the liability, and therefore the court remanded to district court for further proceedings.

*Comment on Artistic Furniture Case – Are ERISA Laws Like Labor or Employment Discrimination Laws?*  
The rationale for applying the broadened successor liability for labor law obligations and employment discrimination is that these statutes were enacted with the Congressional intent to protect the employees, and where there is continuity of operations the employees should be able to expect to retain these protections from their employer. Artistic Furniture is the first case to expand this rationale to ERISA liability for delinquent contributions to multiemployer plans or for withdrawal liability because ERISA is also intended to protect other employers and the PBGC..

Query whether this is a good analogy – labor laws and nondiscrimination laws are intended to protect the employee vis-à-vis the employer. But for multiemployer pension contributions the parties protected are primarily other employers in the fund and the PBGC, and they should be like any other contractual obligation that is subject to the common law successor liability rules.

Note also, that, as discussed further below, the N.J. district court case *Einhorn v. M.L. Ruberton Construction Company*, 665 F.Supp. 2d 463 (D.N.J. 2009), which is one of the few cases to specifically disagree with Artistic Furniture, held that ERISA is different than labor law unfair labor practices rules or employment discrimination laws because those laws are designed with Congressional intent to directly benefit the employees, while successor liability to a multiemployer fund for delinquent contributions or for withdrawal liability is a corporate debt to the multiemployer fund and is not a law directly protecting the employee. The counter-argument to Einhorn is that ERISA rules, while enforcing the union's pension fund, also may lead to loss of benefits by employees if the multiemployer fund does not have enough assets to meet its obligations and the PBGC guarantees are limited (\$54,000 a year in 2010). Also, the Third Circuit in overturning the district court case, at *Einhorn v. M.L. Ruberton Construction Co.*, 2011 WL 182131, 6 (3d Cir. 2011), noted that absent imposition of successor liability other employers will be forced to make up the difference to ensure that workers receive their entitled benefits.

*Additional Comment – Why Should Asset Sale Trigger Withdrawal Liability if Buyer Has Successor liability?* Note that even though there may be successor liability on the withdrawal liability or other liability to the fund, the asset sale itself would appear to still be treated as a withdrawal (unless an ERISA § 4204 contract is entered into). This result is troubling, in that if the asset sale is disregarded by having the buyer pick up the liability as a successor, why should the sale of assets be treated as a withdrawal under ERISA? (See further below.)

*Further Comment – Does it Matter That Collective Bargaining Agreement Imposed the Obligation to Contribution?* Query whether the rationale for finding successor liability in the Artistic Furniture case also turned on fact that collective bargaining agreement required the contribution to the fund?

### 3. Other Seventh Circuit Cases Finding Successor Liability Under ERISA for Pension and Welfare Fund Contribution and for Top-Hat Executive Retirement Plan.

The Seventh Circuit upheld the principles of Artistic Furniture in *Moriarty v. Svec*, 164 F.3d 323 (7th Cir. 1998), holding that a son who took over the funeral home business of his father was liable for unpaid employer

contributions to the multiemployer pension and welfare fund because there was continuity of operations and knowledge of liability.<sup>13</sup>

A district court in the Seventh Circuit also imposed successor liability based on the common law standards set forth in *Artistic Furniture* to a top-hat executive retirement plan since top-hat plans are subject to ERISA. *Brend v. Sames Corporation*, 28 E.B.C. 2905, 2002 WL 1488877, (N.D.Ill. 2002), discussed further below.

In one case, the Seventh Circuit also held that a purchaser could be liable for delinquent pension contributions and withdrawal liability under the rationale of *Artistic Furniture* even after the entity emerged from bankruptcy proceedings.<sup>14</sup> See further discussion below.

#### 4. Expanded ERISA Successor Liability Under Sixth, Ninth and Second Circuits

*ERISA Successor Liability – Sixth Circuit.* District courts in the Sixth Circuit have applied broad successor liability in ERISA contexts, following the Seventh Circuit *Artistic Furniture* case.<sup>15</sup>

*ERISA Successor Liability – Ninth Circuit.* Ninth Circuit cases (some of which predate and are cited in *Artistic Furniture*) have extended successor liability with regard to ERISA pension and welfare obligations under collective bargaining agreements where there is a successor with substantial continuity between the old and new operations (even without continued ownership).<sup>16</sup>

---

<sup>13</sup> *Moriarty v. Svec* involved a funeral home and a livery service that belonged to Elmer Svec. Elmer Svec died in 1987 and James Svec, Elmer's son, formally assumed ownership in 1993. The court found that the company was liable to the multiemployer fund for employees of the livery service. Although under Illinois State common law rules of successor liability the son would not be a successor, Federal common law as articulated in *Artistic Furniture* would hold the son liable as successor since there was sufficient continuity and notice.

<sup>14</sup> *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995) (Seventh Circuit held that claim by multiemployer pension fund against successor entity for ERISA withdrawal liability and delinquent pension contributions to the union's pension should not have been dismissed; court notes that it was not absolutely precluded from finding successor liability against the successor where there was substantial continuity of operations and notice, despite the fact that company had just emerged from bankruptcy; successor liability after bankruptcy does not subvert bankruptcy rules since the property has already emerged from bankruptcy).

<sup>15</sup> See, e.g., *Schilling v. Interim Healthcare of Upper Valley, Inc.*, 44 E.B.C. 1988, 2008 WL 2355831 (unpublished) (S.D. Ohio 2008; which is in the 6th Circuit) (also quoting two other district cases in the Sixth Circuit; court found that under standards of the Seventh Circuit case of *Upholsterer's Int'l Union v. Artistic Furniture* there would be successor liability for ERISA and therefore the successor in *Schilling* was liable for the *unpaid medical claims* under the ERISA health plan; court looked to *Artistic Furniture* test whether buyer had no prior knowledge of the claim, and whether there is continuity at the business operations).

<sup>16</sup> *Hawaii Carpenters Trust Funds (Health and Welfare Trusts) v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289 (9th Cir. 1987) (in employee buyout of company there was substantial continuity between the enterprises (looking at factors such as whether there is the the same basic operation, the same plant, the same workforce, the same supervisors, the same machinery and the same product), and as a successor employer the successor was requested to abide by the terms and conditions of the predecessor's collective bargaining agreement unless it has timely bargained to an impasse; successor is liable for delinquent contributions to health and pension trust funds under collective bargaining agreement; also held with regard to delinquent contributions to a pension plan that the six year statute of limitations under ERISA should be used); *Trustees for Alaska Laborers-Construction Industry Health & Sec. Fund v. Ferrell*, 812 F.2d 512 (9th Cir.1987) (member of a joint venture who continued to operate business with same employees and equipment after joint venture ceased operations was a successor employer for purposes of multiemployer withdrawal liability; company is deemed a successor if it hires most of its employees from the predecessor employer's workforce and if it conducts essentially the same business as the predecessor); *Board of Trustees of Northwest Ironworkers Health and Security Fund v. Tanksley*, 159 Lab.Cas. ¶ 10,188, 2010 WL 519733 (E.D. Washington Feb 12, 2010) (company taken over in bankruptcy was successor employer since operated out of same premises, performed same type of work and used similar assets, and the same officers and partners served on both entities, and is obligated to collective bargaining agreement as alter ego).

*Successor Pension Liability – Second Circuit.* The Second Circuit in *Stotter Division of Graduate Plastics Co. Inc. v. District 65, United Auto Workers*, 991 F.2d 997 (2d Cir. 1993), ruled that an asset purchaser could be liable for the predecessor’s unpaid contributions to a multiemployer plan, in accordance with the bargaining unit contract, and it upheld an arbitrator’s decision to that effect.<sup>17</sup>

*Other Cases that Agree With Artistic Furniture.* A First Circuit alter-ego case notes that successor liability analysis has been applied to claims involving employee benefit funds under ERISA.<sup>18</sup>

A district court case in the D.C. Circuit also seems to agree with *Artistic Furniture* but held that in its particular facts did not support finding successor liability because there was not a substantial continuity of the business operations.<sup>19</sup>

##### 5. Split in Third Circuit District Court Cases Whether to Follow Artistic Furniture; Third Circuit Overturns District Court and Applies Expanded Successor Liability Under ERISA

There are apparently no court of appeals that disagree with the *Artistic Furniture*'s ERISA successor liability rule.<sup>20</sup>

A 2009 N.J. district court case, *Einhorn v. M.L. Ruberton*, 665 F. Supp.2d 463 (D.N.J. 2009), disagreed with *Artistic Furniture* and held that the broadened successor liability for unfair labor practices or employment discrimination should not be expanded to ERISA.<sup>21</sup> The district court decision brought support from a Third Circuit

---

<sup>17</sup> In *Stotter* a manufacturer had obligations to a multiemployer pension plan which it had ceased to make and the union commenced arbitration pursuant to the collective bargaining agreement. In the meantime, the company had defaulted on loans, and the bank foreclosed on the assets. The successor continued with the same employees at the same location. The arbitrator ruled that because the buyer was a successor employer to the seller, it had a duty to participate in the arbitration and it was jointly and severally liable for any delinquent contributions. (An arbitrator’s award is generally upheld if arguably construing the contract and acting within the scope of its authority.) There was an adequate basis for its decision to hold the purchaser liable for the delinquent contributions in light of *Artistic Furniture* and other cases.

See, however, *Board of Trustees of the Sheet, Metal Workers Local Union No. 137 Insurance, Annuity and Apprenticeship Training Funds v. Silverstein*, 1995 WL 404873 (S.D.N.Y. 1995), where the court held that liability for unpaid contributions to the Insurance, Welfare, Annuity and Apprenticeship Funds could not be imposed on an asset purchaser even under the *Stotter* and *Artistic Furniture* rationale, because there was not a sufficient continuity of identity where there was no real continuity of workforce and the businesses were not identical.

<sup>18</sup> *Mass. Carpenters Cent. Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 308 (1st Cir. 1998) (nonsignatory to collective bargaining agreement which required payments into multiemployer pension fund was signatory’s alter ego and liable under ERISA for signatory’s delinquent contributions; cited by Third Circuit *Einhorn* case discussed below as supporting expanded successor liability under ERISA).

<sup>19</sup> *Board of Trustees of UNITE HERE Local 25 and Hotel Association of Washington, D.C. Pension Fund v. Mr. Watergate LLC*, 677 F. Supp. 2d 229 (Jan. 6, 2010) (where lender took over Watergate Hotel after it closed and did not reopen the hotel, the lender was not a successor employer; although quoting the *Artistic Furniture* case, court held that in its case there was no substantial continuity of business operations; which would look at use of same employees, equipment, products and customers to determine if there was continuity, and in case of Watergate Hotel lender who took over hotel in foreclosure did not reopen hotel).

<sup>20</sup> *Einhorn v. M.L. Ruberton Construction Co.*, 2011 WL 182131, 8 (3d Cir. 2011), states that “No court of appeals, to our knowledge, has rejected the holding in *Artistic Furniture*.”

<sup>21</sup> *Einhorn v. M.L. Ruberton Construction Co.* involved Statewide Hi-Way Safety which employed union workers and sold its assets to M.L. Ruberton Construction Company, a non-union company, and Statewide had been obligated under ERISA to make contributions to three multiemployer pension plans, absent a general common-law finding of successor liability under the four exceptions above there would be no special ERISA successor liability on the asset purchaser; in contrast to labor law and employment discrimination where unfairly treated labor workers or victims of discrimination have no one other than the buyer to turn to, ERISA plans can collect delinquent contributions from the seller or from the proceeds of the sale

case of *Teamsters Pension Trust Fund v. Littlejohn* that indicated that ERISA liability would be imposed after a merger (but not necessarily after an asset sale) because the Supreme Court Case of *Golden State Bottling Co.* applies broadened successor liability only to labor law obligations but not to a corporate debt such as a pension obligation to a union.<sup>22</sup>

However, the Third Circuit in *Einhorn v. M.L. Ruberton Construction Co.*, 2011 WL 182131 (3d Cir. 2011), overturned the district court and held that expanded successor liability applies under ERISA. The court agreed with the Seventh Circuit *Artistic Furniture* case that ERISA, like NLRA labor law and Title VII employment law, should have expanded successor liability even without continuity of ownership, as long as there is continuity of operations and notice. The court cited the *Golden State* Supreme Court case that emphasized the importance of providing protection for the victimized employee without a remedy against a defunct predecessor entity. A central policy goal of ERISA is to protect plan participants and beneficiaries. Failure to pay contributions harms plan beneficiaries, and other employers would be forced to make up the difference to ensure that workers receive their entitled benefits. The *Littlejohn* case should not be relied upon to limit expanded successor liability to merger since there is more than a contractual arrangement at stake under ERISA. Also, in *Littlejohn* the successor did not have advance notice, while in asset purchase expanded successor liability applies when the buyer did have advance notice. The Third Circuit cited cases in the First, Second, Ninth, Tenth and D.C. circuits that have extended *Golden State* expanded successor liability to delinquent pension contributions under ERISA. The court stated that no court of appeals, to its knowledge, has rejected the holding in *Artistic Furniture*. Therefore, the Third Circuit overturned the lower court ruling, stating: “In sum, we hold that a purchaser of assets may be liable for a seller’s delinquent ERISA fund contributions to vindicate important federal statutory policy where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and seller.” The case was vacated and remanded for further proceedings in accordance with the Third Circuit opinion. A 2009 Pennsylvania district court case, (which like the N.J. Dist. Court case is in the Third Circuit), agrees with *Artistic Furniture* that where applicable there could be broadened successor liability for ERISA withdrawal liability. *Central Pennsylvania Teamsters Pension Fund v. Beer Distributing Company, Inc.*, 47 E.B.C. 1037, 2009 WL 812224 (E.D. Pa. 2009).<sup>23</sup>

#### 6. Successor Liability for Other ERISA Obligations Such as Retiree Health, Top-Hat Plan and Fiduciary Liability

Regarding successor liability for retiree health obligations in an asset sale, e.g., as provided in a collective bargaining agreement, the general common-law successor liability exceptions would certainly apply (namely express or implied assumption, de facto merger, mere continuation of seller or transfer for fraudulent purposes).

---

under a constructive trust theory discussed below; thus an ERISA fund does not need the same protections as an individual employee, contrary to *Artistic Furniture*; summary judgment for the buyer was granted).

<sup>22</sup> *Teamsters Pension Trust Fund v. Littlejohn*, 155 F.3d 206, 209 (3d Cir. 1998) (court notes that parties argue over application of cases re development of corporate successorship in federal labor law, such as *Golden State Bottling Co.* where the Supreme Court held that successor liability is broader when the obligation involved is a collective bargaining agreement than when an ordinary debt is involved; in other cases Supreme Court has also stated that employer may be bound by collective bargaining agreement of predecessor as long as it had notice of obligation and continued operations of predecessor even if only assets sold and not a merger; Third Circuit states that those cases are somewhat distinguishable because they dealt with the application of labor law concepts and the terms of a collective bargaining agreement, but in this case only the transfer of a valid and ordinary debt is at issue which just happens to have its genesis in the terms of a collective bargaining agreement).

<sup>23</sup> In *Central Pennsylvania Teamsters Pension Fund v. Beer Distributing Company* the successor company was liable for ERISA withdrawal notice. The court noted that Federal courts such as *Artistic Furniture* have expanded successor liability for ERISA; court does not mention any split in the circuits; court does state that the successor and predecessors are related entities through family ownership, the successor assumed customers, took over facility, and hired nearly all employees to continue, and there may have been an implied assumption of liability; the case on its face supports *Artistic Furniture*, and contradicts *M.L. Ruberton*; it can be distinguished however, from *Ruberton* since in this case all the factors could lead to a general common law exception such as a de facto merger).

A number of cases have held that the broadened successor liability would apply to retiree health obligations where there is continuity of operations (even if no continuity in ownership) and notice of the liability, and ERISA successor liability is not limited to pension liability.<sup>24</sup>

With regard to top-hat plan liability, as stated above, in *Brend v. Sames Corp.*, 28 E.B.C. 2905 (N.D.Ill. 2002), the court applied the expanded ERISA successor liability of *Artistic Furniture* to obligations under a top-hat executive retirement plan since top-hat plans are generally subject to ERISA.<sup>25</sup>

With regard to ERISA fiduciary liability, a 2009 district court has held that ERISA fiduciary liability would not have broadened successor liability. In *re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, 47 E.B.C. 2505, 2009 WL 3246994 (W.D. Wash. 2009).<sup>26</sup> However, a 2003 district court stated in dictum that ERISA fiduciary

---

<sup>24</sup> See, e.g., *Bish v. Aquarion Services Co.*, 289 F.Supp.2d 134 (D. Conn. 2003) (where seller promised retiree health in a collective bargaining agreement, an asset buyer would be subject to the retiree health obligation, since by continuing the operations the retiree health obligation would continue, and *ERISA successor liability is not limited only to ERISA withdrawal liability* but applies also to ERISA fiduciary duties and to promises for retiree health; court denied motion to dismiss claims). See also, *Cleveland Electric Illuminating Co. v. Utility Workers Union of America*, 440 F.3d 809 (6th Cir. 2006), rehearing denied (issue of retiree health is presumptively arbitrable under the collective bargaining agreement); *Grim v. Healthmont, Inc.*, 29 E.B.C. 1500, 2002 WL 31549095 (D. Oregon 2002) (cites cases that under Federal common law as applied to ERISA pension claims, employer liable for previous employer's obligations under an ERISA plan if the buyer is considered bona fide successor and had notice of potential liability; court applies this to facts in this case, which involve retiree health); *Hawaii Carpenters Trust Funds (Health & Welfare Trust Funds), v. Waiola Carpenter Shop, Inc.*, 823 F.2d 289 (9th Cir. 1987) (discussed above, that successor is liable for health and pension obligations under collective bargaining agreement); *Moriarty v. Svec*, 164 F.3d 323 (7th Cir 1998) (discussed above, that broadened successor liability applies to appeal contributions to Multiemployer pension and Welfare funds); *Schilling v. Interim Healthcare of Upper Valley, Inc.*, 44 E.B.C. 1988, 2008 WL 2355831 (unpublished) (S.D. Ohio 2008) (court found that under standards of the Seventh Circuit case of *Upholsterer's Int'l Union v. Artistic Furniture* there would be successor liability for ERISA and therefore the successor in *Schilling* was liable for the unpaid medical claims under the ERISA health plan; court looked to *Artistic Furniture* test whether buyer had no prior knowledge of the claim, and whether there is continuity at the business operations).

(Note that case-law has held that a buyer who assumes retiree health liability cannot create in the purchase agreement a right to amend or terminate the plan that did not otherwise exist under the plan itself. *Williams v. Wellman Thermal Systems Corp.*, 684 F.Supp. 584 (S.D.Ind.1988) (involving cutbacks of retiree welfare benefits of former employees and whether the benefits under collective bargaining agreement extend beyond the term of the agreement; plant's assets were sold by GE to Wellman Thermal Systems in August of 1979 and collective bargaining agreement term was July, 1979 through July, 1982; collective bargaining agreement between GE and the union was ambiguous as to whether the retiree welfare plans continue; asset purchase agreement provided that although Wellman was to offer employee benefit plans to transferred employees that are comparable to those that GE had on the sale date, Wellman reserves the right to alter, amend or terminate any particular plan in the future; the asset purchase agreement is the only document where Wellman specifically reserved the right to alter, amend or terminate benefit plans; court held that because the collective bargaining agreement between GE and the union is ambiguous and Wellman documents do nothing to clarify the ambiguity, granting summary judgment on the issue of whether retiree benefits extend beyond the term of collective bargaining agreement is inappropriate.)

<sup>25</sup> In *Brend v. Sames Corp.* the Northern District of Illinois found that a buyer of assets of a business may have successor liability for a top-hat executive retirement contract even though the contract was specifically excluded in the asset purchase agreement, since as an ERISA plan it was subject to the continuity of operations and notice standards under *Artistic Furniture* for successor liability, even if there is no continuity of ownership. In this case there was notice as evidenced by the fact that the buyer even tried to exclude the liability, and there is was a genuine issue of material fact as to whether there was substantial continuity.

<sup>26</sup> The district court in *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, discussed below, stated whether a company can be liable based upon an expanded ERISA successor liability for breach of ERISA fiduciary duties is a question of first impression, and the court believes the broad successor liability should not apply in this case ("while compelling in the context of issues like plan contributions, there is no reason to think the test encompasses the myriad of concerns present in the context of liability based on the duties of prudence and loyalty").

duties would also have broadened ERISA successor liability. *Bish v. Aquarion Services Co.*, 289 F.Supp.2d 134 (D. Conn. 2003).<sup>27</sup>

## 7. Other ERISA Issues With Asset Sales

Emergence from Bankruptcy Like an Asset Sale. With regard to a stock sale or merger, the purchaser should in the ordinary course step into the shoes of the seller for any termination liability even if they resulted from termination of the plan when it was with the seller.<sup>28</sup> However, where a purchaser in a stock sale or merger acquires a bankrupt corporation with its pension plan, courts have ruled that the purchaser would not have controlled group liability because the ownership interests have been extinguished in the bankruptcy, and there would not be successor liability.<sup>29</sup> In a case where successor liability would apply to an asset purchaser, the purchaser from the bankruptcy could also have successor liability.<sup>30</sup>

ERISA §§ 4069(b) and 4212 Successor Liability for Mere Changes in Form. In order to avoid controlled group liability, companies sometimes attempt to remove themselves from the controlled group. ERISA §§ 4069(b) & 4218 provide that for purposes of termination liability and withdrawal liability, respectively, if an entity ceases to exist merely because of a change in identity or form, a liquidation into the parent corporation or a merger, consolidation or division, the successor will remain liable for the liability. This provision would not, however, cover ordinary asset sales. Successor liability in asset sales would be subject to the case-law discussed above.

Asset Sale as Withdrawal and § 4204 Agreement. Where a contributing employer to a multiemployer pension plan sells its assets, this asset sale can trigger a withdrawal by the entity since the original company ceases to exist.

As noted above, even though there may be successor liability on the withdrawal liability or other liability to a multiemployer fund, the asset sale itself would appear to still be treated as a withdrawal under ERISA (unless an ERISA § 4204 contract is entered into). Query: If the asset sale is disregarded by having buyer pick up liability as successor, why should sale of assets be treated as withdrawal under ERISA?

---

<sup>27</sup> As discussed in a footnote above, *Bish* involved a case where a seller had promised retiree health in a collective bargaining agreement, and an asset buyer would be subject to the retiree health obligation, since by continuing the operations the retiree health obligation would continue, and ERISA successor liability is not limited only to ERISA withdrawal liability but *applies also to ERISA fiduciary duties* and to promises for retiree health. The court denied the motion to dismiss claims.

<sup>28</sup> See, e.g., *Teamsters Pension Trust Fund of Phila. v. Littlejohn*, 155 F.3d 206 (3d Cir. 1998) (discussed above; liability for delinquent pension contribution after a merger).

<sup>29</sup> See, e.g., *In re Challenge Stamping and Porcelain*, 719 F.2d 146 (6th Cir. 1983) (corporation that acquired 100% of stock of sponsoring corporation one month after it filed for bankruptcy was not considered part controlled group for pension plan's underfunding because purpose of ERISA termination liability is to avoid employer abuse of plan termination insurance and Congress did not intend to extend the liability to corporations that made contingent purchases of stock that had no practical effect; purchase of stock during bankruptcy for \$1 does not make party part of controlled group since stock is worthless; therefore, a purchase from the bankruptcy estate does not by itself bring successor liability); *PBGC v. Ouimet Corp.*, 711 F.2d 1085 (1st Cir. 1983), cert. denied 464 U.S. 961, 104 S. Ct. 393 (1983) (where subsidiary went bankrupt and terminated underfunded plan after acquisition by controlled group that included another bankrupt subsidiary, termination liability was allocated only to the solvent group members, and not bankrupt corporations' estates, since applying the bankrupt's assets to PBGC's liability would have reduced assets available to their creditors and inequitably benefited group members; court noted that ERISA provides a lien on 30% of the net worth, not asset value and a bankrupt corporation has negative net worth). See also Brighton, "How Free is Free and Clear," 21 SEP Am. Bankr. Inst. J. 1 (Sept. 2002).

<sup>30</sup> *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995) (Seventh Circuit held that claim by multiemployer pension fund against successor entity for ERISA withdrawal liability and delinquent pension contributions to the union's pension should not have been dismissed; court notes that it was not absolutely precluded from finding successor liability against the successor where there was substantial continuity of operations and notice, despite the fact that company had just emerged from bankruptcy; successor liability after bankruptcy does not subvert bankruptcy rules since the property has already emerged from bankruptcy).

There is a statutory exception in ERISA § 4204 under which a withdrawal will not occur in a sale of assets to an unrelated party, provided that, (i) the purchaser obligates to contribute a similar amount; (ii) for a five-year period the purchaser posts a bond or escrow equal to at least the average annual contribution; (iii) the contract of sale provides for the seller to be secondarily liable if the buyer withdraws within a five-year period and, (iv) if the seller sells substantially all of its assets or liquidates within the five-year period, the seller must post a bond or escrow.

#### 8. Labor Law Successor Liability Issues

*Duty on Successor to Bargain in Good Faith But Not Bound to Specific Provisions of Contract if Have Not Specifically Assumed Contract or Found to be Alter-Ego of Predecessor.* The National Labor Relations Act of 1935 (NLRA), which deals with the establishment of collective bargaining relationships, imposes an obligation on an employer and union to bargain in good faith.<sup>31</sup> When a corporation is taken over by a new employer in an asset sale with substantial continuity of operations and workforce, there is an obligation on the new employer to bargain in good faith with the existing union representatives.<sup>32</sup> However, unless the buyer specifically assumes the contract or is found to be the alter-ego of the predecessor, the new employer is not bound by the terms of the existing collective bargaining agreement.<sup>33</sup>

---

<sup>31</sup> It is an unfair labor practice for an employer to refuse to bargain in good faith with the union. NLRA § 8(a)(5), 29 U.S.C.A. § 158(a)(5). It is an unfair labor practice for a labor organization to refuse to bargain in good faith with the employer. NLRA § 8(b)(3), 29 U.S.C.A. § 158(b)(3).

<sup>32</sup> See, e.g., *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct. 2236 (1974), where a family that operated a Howard Johnson franchise sold the assets back to Howard Johnson and only a small fraction of union employees of this family operation were rehired by Howard Johnson. The Supreme Court held that Howard Johnson had no duty to arbitrate as to whether it violated the collective bargaining agreement with a lockout, because unless it assumes the collective bargaining agreement or is an alter ego of the prior corporation, there is no obligation to assume the terms of the collective bargaining agreement (even though there could still be a duty to bargain in good faith).

See also, *Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 107 S.Ct. 2225 (1987), where a company that was liquidating sold its remaining assets and rehired a number of employees. Out of the 21 new employees, 18 were from the original company. The company refused to bargain with the union, claiming that it was not a successor. The Supreme Court held that where a majority of the company's employees have worked for the predecessor, and there was a substantial continuity – which depends on whether the business is substantially the same, the employees were doing the same jobs, and the business was producing the same products – the new employer has a duty to bargain in good faith with the union but is not bound to the specific provisions of the existing union agreement.

<sup>33</sup> See, *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 284, 291, 92 S.Ct. 1571, 1580, 1584 (1972) (even where successors held to be legal successor for purposes of bargaining, this alone is insufficient to bind the successor to the substantive provisions of the predecessor employer's collective bargaining agreement with the union); *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 258 n. 3, 94 S.Ct. 2236, 2241 n. 3 (1974) (not bound to substantive provisions even if it is a legal successor for purposes of bargaining, even in the presence of a clause binding successor and assigns to the terms of that agreement); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40, 107 S.Ct. 2225, 2234 (1987) (quoting Burns that a successor is not bound by the substantive provisions of the predecessor's collective bargaining agreement). Only where the successor is found to be the alter ego of the predecessor and general common law successor liability rules will the collective bargaining agreement be binding. E.g., *Southward v. South Central Ready Mix Supply Corp.*, 7 F.3d 487, 493 (6th Cir. 1993) (where a successor employer is the alter ego of the predecessor, it automatically assumes all the predecessor's obligations, including the collective bargaining agreement). See *Ameristeel* and *Meridian* cases in text below.

*Compelling Arbitration.* There is a split among the circuits as to whether successors who are not alter-egos of predecessors can still be compelled to arbitrate as to whether the successors are bound to all or some of the terms of the existing collective bargaining agreement.<sup>34</sup>

*Successor Clauses.* A successor clause in a contract does not bind third parties who did not sign the agreement.<sup>35</sup> Therefore, where the collective bargaining agreement requires the successor to assume the agreement, the buyer is not presumed to have assumed the collective bargaining agreement. However, the seller by not inducing the buyer to assume the agreement may be liable for damages.<sup>36</sup> Also, in some cases the union may be able to enjoin a pending sale.<sup>37</sup>

## 9. Conclusion

Successor liability in ERISA contexts – such as delinquent contributions to multiemployer pension plans – would, according to case-law, be applicable if there is a continuity of operations and notice even if there is not continuity of ownership. Some cases have extended this to other ERISA liabilities such as obligations under union contract with respect to retiree health and fiduciary liability. Care must be taken in an asset acquisition to account for possible successor liability.

---

<sup>34</sup> In *Local 348 UFCW AFL-CIO v. Meridian Management Corp.*, 583 F.3d 65 (2d Cir. 2009), the Second Circuit ruled that a successor employer, where there is a substantial continuation of operations and the workforce, could be compelled to arbitrate whether, and to what extent, it is bound by the substantive terms of the pre-existing collective bargaining agreement. The arbitrators could hold the successor employer bound by some or all of the substantive terms of a pre-existing agreement where there are sufficient indicia of substantial continuity of identity of the workforce.

Most circuits disagree with the Meridian decision. For example in *Ameristeel Corp. v. International Brotherhood of Teamsters*, 267 F.3d 264 (3d Cir. 2001), the Third Circuit ruled that arbitration is only required where the successor could be bound to the terms of the contract such as where it could be found to be the alter-ego of the predecessor (such as where there is a mere technical change in the structure or identity of the old employer without any substantial change in its ownership or management). Ameristeel had purchased assets of a manufacturing facility and rehired most of the union employees of the facility and therefore became bound to bargain with the union. The court held that an unconsenting successor employer that is not the alter ego of the predecessor cannot be bound by the terms of collective bargaining agreement negotiated by its predecessor. Therefore there is no contract for the arbitrator to construe

<sup>35</sup> Specific successorship clauses are not binding on successors, but courts may require a seller to obtain the agreement of the purchaser to assume the collective bargaining agreement because of a successorship clause. *PCR Sportswear Corp.* (Aug. 3, 1979)(Rosenberg Arb.), *aff'd* No. 79 Civ. 5313 (HFW) (S.D.N.Y. April 15, 1980). Where there are general boilerplates successorship clauses such as: “The contract shall be binding upon the employer, successors, assigns, purchasers, lessees and/or transferees,” some courts have refused to enforce such general successorship clauses since they are meaningless boilerplate. *Gallivan’s Inc.*, 79 Lab.Arb. (BNA) 253 (1982) (Gallagher, Arb.); *Wyatt Manufacturing Co.*, 82 Lab.Arb. (BNA) 153 (1983) (Goodman, Arb.).

<sup>36</sup> *Wheelabrator Envirotech Operating Services v. Massachusetts Laborers District Council Local 1144*, 88 F.3d 40 (1st Cir. 1996); *Catelli Foods, Inc.*, AAA Case No. 1130-0940-89 (Feb. 22, 1990) (Bornstein, Arb.); *Emge Packaging Co.*, FMCS 91/03225 (Oct. 31, 1991) (Render, Arb.); *Formflex Foundations, Inc.* (Mar. 31, 1993) (Mark Rosenberg, Arb.).

<sup>37</sup> *Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981).