

Successor Liability in Asset Acquisitions: Labor and Employment Matters

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By George M. Taylor, III, gtaylor@burr.com

and

Arthur H. Miller, Blank, Rome, Comisky & Macauley

I. INTRODUCTION

Unlike other areas, labor and employment cases tend to focus almost exclusively on the “substantial continuity” doctrine (sometimes referred to as the “continuity of enterprise” doctrine) to impose liability on a successor. The cases discussed herein are significant from the purchaser’s perspective, because they involve an attempt by a third party to impose liability where the successor believed it had no such liability, or where the successor consciously attempted to avoid such liability. There are situations where it is clear either that the successor has assumed such liability, such as an explicit assumption (by words, deeds or both) by the successor, where the successor is nothing more than the predecessor’s alter ego, or where the transaction is a fraud, or that the successor will not assume such liabilities. Thorough due diligence, proper drafting and sound legal advice given early enough in the process can help assure that the purchaser assumes only those liabilities it intends to assume. These occurrences, which intuitively account for a significant percentage of acquisitions, are not dealt with here.

II. LABOR CASES

A. Overview

The issue of successor liability in the context of labor dispute typically arises under three factual situations. First is the question of whether the successor has a duty to recognize and bargain with the existing union as the bargaining representative of the employees. The second is whether the successor has an obligation to assume, and be bound by, the terms of an existing collective bargaining agreement (“CBA”). The third issue is whether the successor can be ordered to remedy its predecessor’s unfair labor practices committed before the successor acquired the relevant assets.

The judicial determination of whether, and under what conditions, a successor can be liable for one or more of these obligations has been evolving over the last fifty years. The Supreme Court has taken up the issue of successor liability five times, with numerous appellate court decisions and decisions of the National Labor Relation Board (“NLRB”) reflecting and expanding

upon the Court's then-most recent pronouncement. Over the course of this evolution, the obligations imposed on a successor have narrowed and widened to the point where there is precedent for almost any position taken today. These materials will attempt to examine the historical evolution and give the reader some sense of the current state of the law,

In attempting to wrestle with the issues of successor liability, the NLRB and the courts have tried to give effect to the provisions of the National Labor Relations Act (the "Act"), 29 U.S.C. § § 151 et seq. Shortly after the Act was enacted into law, the Supreme Court identified that the overriding policy of the Act is "to promote industrial peace" which it later said is further supported by "promot[ing] stability in collective bargaining relationships...". As we will see, in attempting to implement these policies, the courts have imposed upon unsuspecting successors certain obligations and liabilities of which they were unaware.

B. The Supreme Court Decisions

As previously mentioned, the Supreme Court has reviewed the doctrine of successor liability in a labor context on five separate occasions. In this section, we will examine these five cases.

Wiley involved a corporate merger, pursuant to which the corporate predecessor employer which had entered into a collective bargaining agreement with a union disappeared from existence. The union sued the successor employer pursuant to § 301 of the Labor Management Relations Act to compel arbitration under the existing CBA. Recognizing the central role that arbitration plays in effectuating a national labor policy of settling labor disputes peacefully, the court noted that the usefulness of arbitration would decline "if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established. The Court also recognized, however, a competing objective of national labor policy to allow owners of businesses to independently rearrange their businesses as they deem appropriate, even though employees and their unions do not participate in negotiations which lead to changes in corporate ownership. Balancing these two competing goals, the Court determined that the owner's right to effect changes in corporate ownership would not be inhibited if the employees' rights were protected.

Before coming to its conclusion, the Court also considered whether protecting the employees' rights violated the principles of basic contract law. Acknowledging that those rules would not ordinarily bind a nonconsenting successor to a contract entered into by its predecessor, the Court noted that a collective bargaining agreement is not an ordinary contract, but rather one which is a generalized code of conduct covering the entire employment relationship, which "calls into being a new common law--the common law of a particular industry or of a particular plant."

Finding that the objectives of the national labor policy outweighed the contractual principles, the Court conclude that a merger "does not automatically terminate all rights of the employees covered by the [pre-existing collective bargaining] agreement," but rather "in appropriate circumstances...the successor employer may be required to arbitrate with the union under the agreement. The Court then found that the circumstances would be "appropriate" for imposing a duty to arbitrate on the successor employer if there was a substantial continuity of identity in the business enterprise before and after a change in ownership or corporate structure.

The Supreme Court next took up the issue of successor liability eight years later in *Burns*. Unlike *Wiley*, which involved the merger of business into another and the immediate dissolution of the predecessor, *Burns* concerned the replacement by one contractor (Burns) of

another contractor (Wackenhut) under a contract to provide plant security services. Before being replaced by Burns, Wackenhut had entered into a CBA with the union representing the guards it employed to provide those services. After Wackenhut's contract with Lockheed expired, Lockheed awarded a new contract to Burns which retained twenty-seven of the Wackenhut guards and brought in fifteen of its own guards from other locations. When Burns refused to bargain with the union and honor the preexisting CBA, the union which had represented Wackenhut's guards filed an unfair labor practice charge against Burns.

The Supreme Court held that Burns did have a duty to bargain with the union, because the union represented a majority of the employees within the bargaining unit, but the Court also determined that Burns was not bound by the substantive terms of the CBA. The Court's analysis was two fold. First, it determined that *Wiley* was not controlling because it was brought under § 301 of the LMRA, while *Burns* was an unfair labor practice charge brought under § 8(d) of the Act. That distinction, while somewhat artificial, is important, because a § 301 suit is a suit to compel arbitration subject to judicial review, whereas a § 8(d) unfair labor practice proceeding seeks to impose substantive resolution of contractual issues where the party was never a party to the contract. In addition, Burns, through its actions and pronouncements, had made it "perfectly clear" (an important exception which will be discussed below) that it had no intention of assuming that contract. For these reasons, the Court recognized that imposing the substantive terms of the predecessor's CBA on a successor employer may result in inequities."

From that analysis, the Court turned to a determination of whether or not Burns was in fact a "successor" of Wackenhut. The Court determined that even though Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors, and that both companies performed identical services at the same facility. It also found very significant that Burns commenced performance of the contract with the former Wackenhut employees comprising approximately two-thirds of its employees. The Court paid little attention to Burns' argument that under its organization, the Lockheed facility was part of a larger bargaining unit, such that the Wackenhut employees did not make up such a large percentage.

The Court did recognize that a potential employer is often willing to take over a failing business only if it can make significant changes in corporate structure, labor force composition, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in an old CBA may make these changes impossible and may thus discourage and inhibit the transfer of capital. It also recognized that a union may have made concessions to the failing predecessor employer that it would be unwilling to make to a larger economically viable firm, so that the balancing of each party's objectives would be to enable them to negotiate for any protection they deem appropriate.

Golden State, decided eighteen months after *Burns*, also arose in the context of a predecessor's alleged unfair labor practice in the discharge of an employee. The Court's statement of the facts suggest that the successor continued, after the acquisition of the predecessor's soft drink bottling and distribution business, to carry on that business without interruption or without substantial change in the methods of operation, the make up of the work force, or supervisory personnel. In upholding the Board's order to have the successor reinstate the discharged employee with back pay, the Court attempted to balance the competing interests of the purchaser (who was not a party to the unfair labor practices and had no connection with the predecessor) with those of the employees (who, the Court said, perceived that there had been no real change in the employer and who were seeking to have the effects of the unfair labor practices erased). The Court determined that "it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively." The Court also found to be

significant that the successor purchased the business with knowledge of the pendency of the unfair labor practice litigation, thus suggesting that, armed with that knowledge, the successor can protect itself through the purchase agreement of any long-term liability associated with being ordered to remedy the unfair labor practices of its predecessor.

The *Howard Johnson* case was decided by the Supreme Court just six months later, and in that case, the Court reaffirmed its holding in *Burns* and further limited *Wiley*. In *Howard Johnson*, the successor had purchased a restaurant and motel complex from its franchisee, while expressly not assuming any of the seller's obligations, including those under its CBA. The successor decided to hire its own workforce to operate the enterprises, and ended up employing only nine of the predecessor's employees in its workforce of forty-five. The union which had represented the predecessor's employees brought a § 301 suit to compel arbitration. The Court held that its prior distinction in *Wiley* between a § 301 suit and an unfair labor practice charge under § 8(d) was irrelevant, and further held that the successor would not be compelled to arbitrate even under *Wiley*.

While the decisions in *Howard Johnson* and *Wiley* appear to be contradictory, a significant difference between their respective facts was that *Wiley* involved a merger where the predecessor ceased to exist, whereas *Howard Johnson* involved the sale of assets where the predecessor's existence continued as a viable entity. The Court found that this distinction made a difference for two reasons. First, in the case of the merger, there is a background of state law that imposes liability on a successor for the obligations of the predecessor (see discussion in Tab 1 above). Thus, binding the successor in *Wiley* to the CBA "may have been fairly within the reasonable expectations of the parties." Second, the disappearance of the predecessor in *Wiley* meant that, unless the union were afforded some remedy against the successor, it would have no means to enforce the obligation voluntarily undertaken by the merged corporation. Contrast that to the facts in *Howard Johnson*, where the predecessor remained a viable entity, so that the union continued to have a realistic remedy against the predecessor.

Turning to whether or not there was substantial continuity of identity in the business enterprise, the Court found there was none because there was no "substantial continuity in the identity of the workforce across the change of ownership."

In *Fall River*, the last of the five Supreme Court cases, the union filed an unfair labor practice charge alleging that the purchaser of assets from a business which had closed was a successor to the closed business and had failed to bargain with the union concerning the terms and conditions of employment. The Court was asked to interpret its ruling in *Burns*. In the earlier case, the union had recently been certified as the employees' bargaining representative a few months before a Wackenhut lost the contract to Burns, thus raising the irrebuttable presumption that the union continued to be the bargaining representative for one year after being certified. In *Fall River*, the union had represented the employees for approximately twenty years, with the most recent CBA having been negotiated some four years before the business closed and the assets were sold to the successor. The Court expanded its ruling in *Burns* that "a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified. Where, as here, the union has a rebuttable presumption of majority status, this status continues despite the change in employers." The Court then determined that the purchaser was a successor because there was "substantial continuity" between the enterprises, with particular emphasis on the retained employees' perspective as to whether their job situations had been essentially altered. The Board had determined, and the Court affirmed, that substantial continuity existed, notwithstanding a seven month hiatus between the closing of the predecessor and startup of the purchase, or that the

employees were hired through newspaper advertisements rather than through the predecessor's employment records.

C. NLRB Decisions

Independently of the changing pronouncements of the Supreme Court, the NLRB has taken an inconsistent course in its analysis of whether a successor has liability, and if so what kind, to remedy its predecessor's unfair labor practices.

In 1944, the NLRB determined that liability would not be imposed on a "bonafide" successor. A few years later, however, the NLRB abandoned that view and determined that liability for remedial responsibility would be imposed upon a successor who had knowledge of its predecessor's unfair labor practices at the time of purchase. the Board's decision was based upon the need for mitigating the coercive effects of the predecessor's unfair labor practices on the employees, who were performing the same work after the transfer as before, at the same place and under the same terms and conditions of employment.

In the mid-1950's, however, the Tenth and the First Circuit Courts of Appeals refused to enforce remedial orders against bonafide successors. In the *Birdsall-Stockdale* case, the court analogized the NLRB's order with the scope of injunctive orders under Rule 65 (d) of the Federal Rules of Civil Procedure. That Rule states, in relevant part, that injunctions and restraining orders shall be "binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." Holding that there was not sufficient connection between the predecessor and the successor through concerted action or participation to evade to original order of the Board, the Tenth Circuit held that the successor absorbed no liability to remedy the predecessor's unfair labor practices, despite having notice of the pending proceeding prior to its purchase. Based on the court's unwillingness to follow its principle, the Board reexamined and overruled its prior position in *Symms Grocer Co.*, declaring that no provision of the [National Labor Relations] Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein."

In 1967, after the Supreme Court had issued its decision in the *Wiley* (where it imposed liability on a successor to arbitrate with a union based on national labor policy), the Board reversed itself yet again. In the *Perma Vinyl* case, the Board announced that in certain circumstances, remedial orders would be imposed upon successors for the unfair labor practices of their predecessors. The principles and rationale for that decision were as follows:

To further the public interest involved in effectuating the policies of the Act and achieve the "objectives of national labor policy, reflected and established principles of federal law," we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practices charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

The Board attempted to balance the equities involved. On the one hand, it recognized that the successor is generally not a party to the unfair labor practices of its predecessor. On the other side, the Board determined that when the new employer does not significantly change the operations and employment conditions, no real change has occurred from the perspective of the

victims of the past unfair labor practices who are looking for appropriate steps to be taken to erase the effects of those practices and to be reassured of their statutory rights.

The Board concluded because the successor has taken over control of the business, it is generally in the best position to remedy such unfair labor practices most effectively. At the same time, the Board determined that imposing this liability on the successor did not work an unfair hardship upon it, because he was the “beneficiary” of the unremedied unfair labor practices, and because he could pass the remedial costs back through to its predecessor through the purchase price paid for the business, or by obtaining appropriate indemnities in the asset purchase agreement. Interestingly enough, however, the only relief sought in the *Perma Vinyl* case was reinstatement of employment, not back pay. Thus, the Board’s rationale, which was also adopted by the Fifth Circuit, that the successor is in the best position to provide the relief from past unfair labor practices, makes somewhat more sense than if monetary relief, in the form of back pay, were sought.

In the years since its decision in the *Perma Vinyl* case, the Board has largely maintained its position that a successor should be liable either for remedying its predecessor’s unfair labor practices or recognizing and bargaining with an existing union, as appropriate. For example, in *NLRB v. Jeffries Lithograph Co.*, the Board determined, and the Court affirmed, that the purchaser of a printing company’s assets was a successor which had an obligation to recognize and bargain with the existing union under the existing CBA. That determination was made despite the presence of the following facts: first, the plant closed for three weeks during the time the assets were being purchased in order to change the name of the company; second, although when the plant reopened, its work force was the same 19 people who had worked for the predecessor, within three months the work force had been increased by 53%, and within ten months the work force had experienced a 240% growth; third, the predecessor’s 1980 sales totaled \$2 million, whereas the purchaser’s projected sales for 1981 and 1982 were \$8.9 million and \$17 million, respectively; and fourth, although the purchaser used the seller’s plant for a short period of time, it immediately after the purchase leased a newer, larger facility for ten years and began making various leasehold improvements which ultimately totaled approximately \$1.5 million. The Court stated that “standing alone, the magnitude of change is irrelevant. Unless the changes affect employees’ attitudes toward representation, they do not undermine the presumption that the old union should bargain with the new employer.” That same sentiment was articulated eleven years later by the District of Columbia Circuit Court of Appeals in *CitiSteel USA, Inc. v. NLRG*, when the Court stated that “the essential inquiry is whether operations, as they impinge on union members, remain essentially the same after the transfer of ownership. The analysis is undertaken with an emphasis on the employees’ perspective.”

D. Summary

From the review of these cases, the elements which are most often cited in determining whether a successor has assumed liability either with respect to its predecessor’s unfair labor practices or with respect to being required to recognize and bargain with the union under the existing CBA can be summarized as follows:

- Whether the purchaser has notice of the pending charges or the existence of the union contract prior to completing its purchase of the assets.
- The type of remedy sought (e.g., back pay versus reinstatement of employment, or a duty to bargain with the union versus compliance with the substantive terms of the existing CBA).

- Whether the predecessor exists as a viable entity and is in a position to provide the remedy being sought after the transaction is complete.
- Whether the successor continues to provide substantially the same services or products, and whether it uses the same equipment, plants or other facilities.
- Whether the predecessor's employees make up a majority of the successor's work force.
- The time span (if any) between the termination of the employees by the predecessor/plant shutdown and their being rehired by the successor.

The last three points are usually combined to determine whether the purchaser's operations have "substantial continuity" with those of the seller. If so, the NLRB or the court, as appropriate, will have sufficient factual basis to find the successor liable under one or more of the conflicting precedents detailed above.

It is the first three points which may be of greater significance. This group provides the decision maker with the equitable undertones to the case at hand, and help point out which party is more deserving, or in need, of winning the case.

Finally, a practical point. Notwithstanding this large body of law, the economic realities will largely govern the parties' negotiating stances, their leverage against each other, and ultimately, the outcome. Whether or not the purchaser is legally liable to negotiate, to accept the CBA, or to recognize the union, the union's ability to force the purchaser to accept the contract will control. This will be based on how important this particular facility (or group of facilities) is to the purchaser, whether the purchaser has manufacturing alternatives, the availability of replacement workers, how much the purchaser has invested, and even such tangential issues as the current state of the union's membership. As always, it should not be forgotten that legal issues are made, not in a vacuum, but in the pressurized crucible of a real business.

III. EMPLOYMENT CASES

A. Discrimination Cases

Inasmuch as discrimination cases are a relatively recent development in litigation, the issue of whether a successor could be liable for its predecessor's discriminatory practices is similarly a relatively new one. Most of these cases are brought under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of gender, religion, age, national origin or minority status.

The first case to decide this issued was *EEOC v. MacMillan Bloedel Containers, Inc.*, which concerned alleged race and sex discrimination at a Cleveland facility. After completing its investigation, the EEOC sent a letter to the operator of the facility, notifying it that the EEOC had reasonable cause to believe that unlawful employment practices had occurred. MacMillan subsequently assumed operation of the facility, after which the EEOC brought this action.

The Ninth Circuit commenced its discussion by holding that the *Wiley/Burns/Golden State* analysis, justifying a successor liability doctrine, was equally applicable to unlawful employment practices under Title VII, since "Title VII was molded, to a large degree after the [National Labor Relations] Act." Like the NLRA, Title VII was designed to give the relevant agency (here, the EEOC, rather than the NLRB) and the courts broad equitable power,

although in this situation, these powers are to be used to eradicate the present and future effects of past discrimination. Therefore, the application of the successor liability doctrine was implicitly mandated.

The Court's concern was that the failure to hold a successor employer liable for the discrimination acts of its predecessor could leave the victim of those actions without a remedy or with an incomplete remedy, and could also encourage evasion of responsibility through ownership transfers. The Court also noted that only the successor could provide certain types of remedies, such as reinstatement, hiring or replenishment of seniority. Thus, while "what is required is a balancing of the purposes of Title VII with the legitimate and often conflicting interests of the employer and discriminatee," the primary concern is "to provide the discriminatee with full relief."

Citing the factors developed from the NLRA cases, the Ninth Circuit reversed the District Court's grant of summary judgment in favor of the successor and against the EEOC, and remanded the case for development of a more complete factual record with respect to the successor's operations.

Subsequent cases have not added greatly to the *MacMillan* Court's legal analysis. They do, however, offer several interesting factual variations.

In *Trujillo v. Longhorn Mfg. Co., Inc.*, a Caucasian, who was initially turned down for a job until she re-applied using a Hispanic name, filed an employment discrimination action after being fired only eight days on the job. Between the filing of the complaint and the issuance of the EEOC's "right to sue" letter, the facility was sold in an asset sale.

While the Court's analysis is rather brief, there is one interesting issue. The plaintiff sought back pay, interest and punitive damages, which would generally militate against imposing successor liability so long as the predecessor was viable. The successor/purchaser argued that since the purchase price was being paid over a ten year schedule, the predecessor as viable and, therefore, liable. The Court rejected that argument, focusing instead on the fact that the asset sale included all of the predecessor's assets to support its determination that the predecessor was not viable and therefore holding the successor liable.

Bates v. Pacific Maritime Assoc. concerned the implementation and enforcement of a consent decree entered into between longshoremen, on the one hand, and their union and the employers' bargaining representative association, on the other, to settle an earlier Title VII action. After the consent decree was entered into, one of the employers formed a new subsidiary to provide the same services at the same harbor berths using the same equipment. The Court found that even though the predecessor was still viable and still employing longshoremen in the same location, the successor was still liable because the plaintiffs were seeking classwide relief which the individual predecessor could not provide.

Criswell v. Belta Air Lines, Inc. arose under a different statutory regime altogether. After several airline pilots successfully challenged their employer's policies on "bidding down" to second officer positions and mandatory retirement under the Age Discrimination in Employment Act (the "ADEA"), they found themselves no better off when the successor which acquired their airline in a merger reinstated its own similar policy. In a very short opinion, the Court cited its prior decision in *Bates* (which was issued five years earlier) and without much analysis, focused on the same principal factors for successor liability as would be applicable in a Title VII case, without addressing the similarities and/or differences between Title VII and the ADEA.

Finally, in *Rojas v. TK Communications, Inc.*, a female former employee of a radio station brought a sexual harassment action against her former employer and the successor which purchased the station under an asset purchase agreement eighteen months after she resigned. In that agreement, the successor had explicitly expected the plaintiff's claim when it agreed to assume certain pre-closing obligations. Even though the successor had notice of the claim and continued operations at the station in much the same way as its predecessor (two of the primary factors used to determine successor liability), the Court refused to apply the doctrine. That decision was based on the fact that the predecessor was still viable (it continued to own five other stations), and on the plaintiff's demand for monetary damages instead of reinstatement. The Court determined that the policy underlying the successor liability doctrine--protecting the employee from sudden ownership changes--did not warrant the relief requested, and holding that it would be unjust to impose liability on the successor solely to enhance the plaintiff's ability to collect monetary damages.

What these cases point out is that, in the context of discrimination cases, there is no overriding national labor policy for the courts to use in guiding their decisions. Instead, the issue is one of balancing personal equities, and therefore, the primary factors appear to be whether the successor had notice of the claim before requiring the facility, and whether the successor can adequately provide the relief sought.

B. ERISA/Employee Benefits Cases

The final area where an unsuspecting purchaser may find itself assuming unexpected employment liability is that of employee benefits, including but not limited to, ERISA.

ERISA was passed in 1974 as a comprehensive remedial statute designed to protect workers from widespread weaknesses and abuse in the private pension system. The statute not only established minimum vesting, funding, fiduciary, reporting and disclosure requirements which every pension plan must meet, it also delineated a uniform standard of conduct for fiduciaries and plan administrators. Although primarily designed to address pension plans, the statute applies to any "employee benefit plan," which is broadly defined to include unemployment, severance, vacation or medical insurance benefit plans. In 1980, Title IV of ERISA was amended by the passage of the multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA"), which pertained to an employer's cessation of contributions to a multiemployer pension plan.

Given the relatively short period of time since the passage of ERISA and MPPAA, there are not many cases dealing with successor liability on an employer's obligations thereunder; however, those few cases where the issue has arisen should give the unsuspecting purchaser cause for alarm.

For example, in *Upholsterers' Int'l. Union Pension Fund v. Artistic Furniture of Pontiac*, the Seventh Circuit imposed liability on a successor in an asset sale for its predecessor's delinquent contributions to a multiemployer pension plan. In that case, the predecessor company obligated itself to make contributions to the union's pension plan under a collective bargaining agreement. When the company began to experience financial problems, those contributions were stopped. The assets were then sold to individuals with no previous ownership interest in the predecessor, who did not represent to the union or to the predecessor that they would assume liability for the contribution shortfall. The Court used the "continuity of enterprise" analysis followed by the courts in the labor cases, focusing upon the various elements discussed in those cases. Specifically, the Court found continuity of operations was established through (a) the successor's employment of all of the predecessor's work force (including supervisory personnel), (b) the successor's use of the same plant, machinery and equipment, (c) the successor continuing to

manufacture the same products, (d) the successor completing work orders not finished by the predecessor, (e) the successor agreeing to honor warranty claims for goods sold by the predecessor, and (f) the successor retaining, after the asset sale, the predecessor's vice presidents of finance and manufacturing in the same positions. For those reasons, the Court determined that the buyer was a "successor" and that a successor could be liable for its predecessor's unpaid contribution. The case was ultimately remanded to the lower court, however, because there was an insufficient record as to whether or not the successor had prior notice of the predecessor's delinquent payments.

A slightly different issue which has arisen in other cases concerns the successor's obligation to make contributions to a benefit or pension plan under a previously - entered into collective bargaining agreement. In these cases, the courts go through a successorship analysis using the continuity of enterprise factors; however, the cases all seem to be based upon the successor continuing to make payments into the plan after sale has been consummated. As noted above, the successor can explicitly assume the predecessor's obligations, whether by words or by actions, and where it continues the predecessor's actions, whether consciously or under a mistaken belief that it is obligated to do so, the courts will impose on the successor a mandatory obligation to continue to make the contributions.

Finally, a short discussion of the nature and the sources of the liabilities which can be, either intentionally or accidentally, assumed is in order, because these liabilities can be both quite large and quite well hidden. These obligations can include:

- (a) unfunded (or underfunded) health and life insurance for retirees;
- (b) express or implied commitments not to amend or terminate the plan;
- (c) undisclosed liabilities;
- (d) hidden landmines in "disclosed" liabilities;
- (e) unpublished policies, plans and procedures;
- (f) exaggerated claims in distributed plan documents; and
- (g) imprecise claims in policy and procedure handbooks.

The way to avoid these kinds of liabilities is to do a thorough job of due diligence and to carefully consider, in advance, the statements made and the actions taken (or promised to be taken) by your employees. The due diligence effort should include getting a list of all plans, getting all documents pertaining to those plans (including the actual plan, the summary plan description, employee handouts and summaries, annual reports (Form 5500) filed with the Department of Labor, and auditors' reports), and getting a list of all of the key people associated with the plan (administrator, trustee, investment managers, accountants, attorneys, record keeper and actuary). As we have seen, your employees should be cautioned against making broad statements about the successor's ability or intent to continue these plans or the current level of benefits, since such statements may be used to bind the successor.

In summary, the prospective purchaser should not be lulled into a false sense of security as to the nature of its obligations when it comes to discrimination and employee benefits matters. As the courts have shown over the last two decades, these areas provide ground just as

fertile for successor liability as do labor issues. It is the wise and prudent purchaser who will proceed carefully, and only after obtaining knowledgeable legal advice.