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ARTICLE

Successor Liability Under ERISA

by Charles C. Shulman, Esq.¹

INTRODUCTION

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 a business. This article explores the current state of the law regarding successor liability under ERISA.

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.² There are four exceptions under which successor liability will apply to an asset purchaser.

A. *Express or Implied Assumption of Liabilities.* The first exception is if the purchasing company ex-

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² See, e.g., *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 692 (1st Cir. 1984) (successor not liable in product liability action as 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 (3d Cir. 2006) (buyer of manufacturer's assets had no successor liability); *Murray v. Miner*, 74 F.3d 402 (2d 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* §7122, et seq.

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 exceptions are generally applied regardless of whether predecessor or successor organization was corporation or some other form of business organization, citing 63 Am. Jur.2d *Products Liability* §117 (1984)).

pressly³ or impliedly⁴ agrees to assume the selling company's liabilities.

B. *De Facto Merger.* The second exception is if the transaction amounts to a “de facto merger” (buyer's existing business and target business are deemed like a merger), looking to four factors that favor such a finding:

1. continuity of ownership (e.g., purchaser company pays for assets with stock of purchaser);
2. continuity of the enterprise, evidenced by continuity of management, personnel, physical location, assets and general business operations;
3. dissolution of seller; and
4. purchaser assuming obligations necessary for uninterrupted continuation of normal business operations of seller.⁵

Many cases require the continuity of shareholders prong to find a de facto merger.⁶

C. *Mere Continuation of Seller Entity.* The third exception is if the purchaser corporation is a “mere con-

³ 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).

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

⁵ See, e.g., *U.S. v. General Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005) (acquisition of privately-held battery manufacturer part for cash and part for stock constituted de facto merger so that purchaser and its successor would be responsible under Comprehensive Environmental Response, Compensation and Liability Act — Superfund law — 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 (1985) (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). Compare *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 de facto merger).

⁶ 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 de facto merger); *Arnold Graphics Indus. v. Independent Agent Center, Inc.*, 775 F.2d 38, 42 (2d Cir. 1985) (to find that de facto merger has occurred, there must be continuity of shareholders); *Louisiana-Pacific Corp. v. Asarco*,

tinuation” 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:

1. common identity of officers, directors and shareholders in the selling and purchasing corporations (continuity of ownership or corporate structure);
2. continuity of business operations;
3. cessation of ordinary business by seller; and
4. inadequate consideration paid for assets.⁷

Common identity of officers, directors and shareholders is the key element to finding mere continuation.⁸

The “mere continuation” theory is very similar to the “de facto merger” theory and they are sometimes

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; court did not find de facto merger based on totality of circumstances).

⁷ See, e.g., *Medicine Shoppe International v. S.B.S. Pill Dr.*, 336 F.3d 801 (8th Cir. 2003) (pharmacy was successor of franchisee; for “mere continuation,” factors include: (i) common identity of officers, directors and stockholders; (ii) incorporators of successor also incorporated predecessor; (iii) business operations are identical; (iv) transferee uses same trucks, equipment, labor force, supervisors and name of transferor; and (v) notice has been given of transfer to employees or customers). Other cases formulate the factors as stated in the text.

Compare Mickowski v. Visi-Trak Worldwide, LLC, 415 F.3d 501 (6th Cir. 2005) (corporation is not “mere continuation” of corporation whose assets it has purchased for purposes of successor liability just because it continues to provide same services (continuation of business operation), but rather, key element in mere continuation theory is continuation of corporate entity, such as when one corporation sells its assets to another corporation with 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, test is whether there is continuation of corporate entity of transferor, not whether there is continuation of transferor’s business operation).

⁸ See, e.g., *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 “de facto merger” or “mere continuation”; key element of continuation is common identity of officers, directors and stockholders in selling and purchasing corporations).

treated together in caselaw.⁹ Note that the “de facto merger” and “mere continuation” tests are 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 if the transfer of assets is for the fraudulent purpose of escaping liability for the seller’s debts.¹⁰

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.¹¹

Tax Liability on Successor. Section 6901 of the Internal Revenue Code 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.¹²

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

¹⁰ See, e.g., *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).

¹¹ *Ray v. Alad Corp.*, 560 P.2d 3, 7 (Cal. 1977) (non-bankruptcy asset sale; successor that continues to market 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 substantial part of manufacturer’s assets and continuing to market good in same product line exposes purchaser to successor liability).

¹² 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 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. *Comr. v. Stern*, 357 U.S. 39, 45 (1958). In general, the elements of transferee liability in equity in a given state are those found in that state’s fraudulent conveyance provisions.

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 so 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 if 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 *Artistic Furniture* Case re Contributions to Multiemployer Pension Plan — Continuity of Business Operations and Notice Are Sufficient

1. *Upholsterers' International Union Pension Fund v. Artistic Furniture of Pontiac*.¹³ 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:

- a. there is sufficient evidence of continuity of operations, and
- b. the purchaser had knowledge of liability of the seller.¹⁴

¹³ 920 F.2d 1323 (7th Cir. 1990).

¹⁴ Citing a 1987 Title VII case, the court noted as a factor “whether the predecessor is able, or was able prior to the pur-

There would be no requirement for continuity of ownership, as there is under common law exceptions.

In *Artistic Furniture*, the old employer, Pontiac Furniture, ceased making contributions to a multiemployer pension fund. The main creditor of the company sold the assets to Artistic Furniture, an unrelated company. The owners, officers and directors were all different (except for one CFO who stayed on). The buyer did not assume liability for the multiemployer pension obligation (or the union agreement). The pension fund sued both parties for delinquent pension contributions.

The Seventh Circuit cited the Supreme Court's decision in *Golden State Bottling Co. v. NLRB*¹⁵ for the proposition that the liability of an asset purchaser for an unfair labor practice (unlawful discharge) could be imposed on a successor who continued the predecessor's operations and who had notice of the pending unfair labor practice charge at the time of the transaction, even though there was no continuity of ownership (and, therefore, no de facto merger or mere continuation). This protects congressional intent for free exercise of employees' rights with minimal economic cost because a buyer is aware of the obligation. Similar conclusions have been reached for other labor law obligations and employment discrimination laws.

Artistic Furniture applied the rationale of *Golden State Bottling Co.* to multiemployer pension liability under ERISA. ERISA §515, which requires employers to honor their obligations under a labor contract to make contributions to a pension fund, should be imposed on a successor as well, as ERISA's purpose is to protect other employers in the fund and the PBGC (and presumably employees if their benefits are affected), which applies when delinquent contributions are made. However, this successor liability will only apply if there was sufficient evidence of (i) continuity of operations, and (ii) prior knowledge by the buyer of this liability.

The Seventh Circuit held that there was sufficient evidence of continuity of operations because Artistic Furniture: (i) employed substantially all the workforce, (ii) operated from the same location, (iii) used predecessor's machines, (iv) produced the same products, (v) completed open work orders, and (vi) honored the predecessor's warranties, and because two of

chase, to provide the relief requested.” However, it does not consider this factor in discussing the successor liability for *Artistic Furniture*, and most of the other cases regarding broadened successor liability do not mention this factor. Also, as noted in *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995), availability of relief from a predecessor is not dispositive in a successor liability case but, rather, is a factor to be considered along with other facts.

¹⁵ 414 U.S. 168 (1973).

its officers remained with the successor. It did not matter that there was no continuity of ownership. The case was remanded to district court to determine if there was sufficient knowledge of the liability.

2. *Comment on Artistic Furniture Case — Are ERISA Laws Like Unfair Labor Practices and Employment Discrimination Laws?*

The rationale for broadened successor liability for labor law obligations and employment discrimination is that these statutes were enacted to protect employees, and if there is continuity of operations, employees should be able to expect to retain these protections from their current employer. *Artistic Furniture* expands this rationale to ERISA liability for delinquent contributions to multiemployer plans or for withdrawal liability because ERISA is intended, among other purposes, to protect other employers and the PBGC.

Query whether this is a good analogy. Unfair labor practice rules 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 these contributions should be like any other contractual obligation that is subject to the common law successor liability rules.

A similar question is raised by *Einhorn v. M.L. Ruberton Construction Company*,¹⁶ which is one of the few cases to disagree with the *Artistic Furniture* doctrine of broadened successor liability. The district court disagreed with *Artistic Furniture* and held that ERISA obligations are different than unfair labor practice or employment discrimination laws, because unfair labor practice and nondiscrimination rules are designed to protect the employees, while successor liability to a multiemployer fund for delinquent contributions or withdrawal liability is a corporate debt to a multiemployer fund, and is not a law directly protecting employees. A counter-argument to *Einhorn* is that ERISA rules, while enforcing the union's pension fund, indirectly protect employees from losing benefits if the multiemployer plan does not have enough assets to meet its obligations and the PBGC guarantees are not sufficient (\$54,000 a year in 2011 starting at age 65).

3. *Additional Comment — Why Should an Asset Sale Trigger Withdrawal Liability if the 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 still appear to be treated as a withdrawal under ERISA (unless an ERISA §4204 contract is entered into). This result is puzzling: if the asset sale is disregarded

by having the buyer pick up liability as a successor, why should a sale of assets be treated as a withdrawal under ERISA? It would appear that by operation of law, there is a withdrawal (and the parties may be bound to the form they have chosen), and although equity dictates that there should be recourse against successors, this does not change the basic nature of the asset sale.

4. *It Does Not Matter that a Collective Bargaining Agreement Imposed the Obligation to Contribute.* Note that finding successor liability in the *Artistic Furniture* case could not have been based entirely on the fact that the collective bargaining agreement required the contribution to the fund, because under labor law, successors are generally not bound to the specific provision of the collective bargaining agreement — although they do have a duty to bargain in good faith — unless the contract was specifically assumed or the successor is found to be the alter ego of the predecessor (see below).

OTHER SEVENTH CIRCUIT CASES FINDING SUCCESSOR LIABILITY FOR VARIOUS ERISA OBLIGATIONS

A. *Moriarty v. Svec* (*Broadened Successor Liability for Pension and Welfare Fund Delinquency*). Seventh Circuit upheld *Artistic Furniture* in *Moriarty v. Svec*¹⁷ (son who took over funeral home business from father was liable for unpaid contributions to multiemployer pension and welfare fund because there was continuity of operations and knowledge of liability).

B. *Brend v. Sames Corp.* (*Expanded Successor Liability Even for ERISA Top-Hat Plans*)¹⁸ This case applied successor liability based on standards set forth in *Artistic Furniture* to a top-hat executive retirement plan, as discussed further below, as top-hat plans are generally subject to ERISA.

EXPANDED ERISA SUCCESSOR LIABILITY UNDER SIXTH, NINTH AND SECOND CIRCUITS

A. *Sixth Circuit.* District court decisions have applied broad successor liability in ERISA contexts, as in the Seventh Circuit's *Artistic Furniture* case.¹⁹

B. *Ninth Circuit.* Ninth Circuit cases (some of which predate and are cited in *Artistic Furniture*) ex-

¹⁷ 164 F.3d 323 (7th Cir. 1998).

¹⁸ 28 EBC 2905 (N.D. Ill. 2002).

¹⁹ See, e.g., *Schilling v. Interim Healthcare of Upper Valley, Inc.*, 44 EBC 1988 (S.D. Ohio 2008) (also quoting two other district court cases in the Sixth Circuit; court found that under *Artistic Furniture*, there would be successor liability for ERISA, and

¹⁶ 665 F. Supp.2d 463 (D.N.J. 2009).

tend successor liability with regard to ERISA pension and welfare obligations under collective bargaining agreements if there is a successor with substantial continuity between the old and new operations (even without continuity of ownership).²⁰

C. *Second Circuit. Stotter Division of Graduate Plastics Co., Inc. v. District 65, UAW.*²¹ The court 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.²²

therefore, successor in *Schilling* was liable for unpaid medical claims under an ERISA health plan; court looked to *Artistic Furniture* test of whether buyer had prior knowledge of the claim and whether there was continuity of business operations).

²⁰ See, e.g., *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 was the same basic operation, same plant, same workforce, same supervisors, same machinery and same product, and as a successor employer, the successor was requested to abide by terms and conditions of predecessor's collective bargaining agreement unless it timely bargained to an impasse; successor liable for delinquent contributions to health and pension trust funds under collective bargaining agreement; also held with regard to delinquent contributions to pension plan that 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 joint venture that continued to operate business with same employees and equipment after joint venture ceased operations was successor employer for purposes of multiemployer withdrawal liability; company deemed successor if it hires most of its employees from predecessor employer's workforce and if it conducts essentially same business as predecessor); *Board of Trustees of Northwest Ironworkers Health and Security Fund v. Tanksley*, 2010 WL 519733 (E.D. Wash. 2/12/10) (company taken over in bankruptcy was successor employer because it operated out of same premises, performed same type of work and used similar assets, and same officers and partners served on both entities, and was obligated to collective bargaining agreement as alter ego).

²¹ 991 F.2d 997 (2d Cir. 1993).

²² In *Stotter*, a manufacturer had obligations to a multiemployer pension plan which it had ceased to honor, 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.

Compare *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), in which the court held that liability for unpaid contributions to the Insurance, Welfare, Annuity and Apprenticeship Funds could not be

D. *Other Cases that Agree with Artistic Furniture.* A district court in the D.C. Circuit agreed with *Artistic Furniture* but held that the particular facts did not support finding successor liability because there was not a substantial continuity of the business operations.²³

SPLIT IN THIRD CIRCUIT DISTRICT COURT CASES ON WHETHER TO FOLLOW ARTISTIC FURNITURE

A. *Unclear if Other Circuits Would Disagree with Artistic Furniture.* It is unclear whether some other circuits would disagree with *Artistic Furniture's* ERISA successor liability rule.

B. *N.J. District Court Case Disagrees with Artistic Furniture.* *Einhorn v. M.L. Ruberton Construction Co.*²⁴ disagrees with *Artistic Furniture* and holds that broadened successor liability for unfair labor practices or employment discrimination should not be expanded to ERISA.²⁵ The district court decision brings support from a Third Circuit case²⁶ which indicated that ERISA liability would be imposed after a merger

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.

²³ *Board of Trustees of UNITE HERE Local 25 v. Mr. Watergate LLC*, 677 F. Supp.2d 229 (D.D.C. 2010) (lender that took over hotel after it closed and did not reopen it was not successor employer; although quoting *Artistic Furniture*, court held that there was no substantial continuity of business operations because lender who took over hotel in foreclosure did not reopen hotel).

²⁴ 665 F. Supp.2d 463 (D.N.J. 2009).

²⁵ In *Einhorn*, Statewide Hi-Way Safety, which employed union workers, sold its assets to M.L. Ruberton Construction Co., a non-union company. The seller had been obligated to make contributions to three multiemployer pension plans under ERISA. The court found that absent a general common law finding of successor liability under the four exceptions above, there is no special ERISA successor liability. This is in contrast to unfair labor practices and employment discrimination, in which unfairly treated workers or victims of discrimination may have no other practical recourse than to their current employer, but ERISA plans can collect delinquent contributions from the seller or from the proceeds of sale, under a constructive trust theory. Thus, an ERISA fund does not need the same protections as an individual employee, contrary to *Artistic Furniture*; summary judgment was granted for the buyer).

²⁶ *Teamsters Pension Trust Fund v. Littlejohn*, 155 F.3d 206, 209 (3d Cir. 1998) (court noted that parties argue over application of cases re development of corporate successorship in federal labor law, such as *Golden State Bottling Co.*, in which Supreme Court held that successor liability is broader when obligation involved is collective bargaining agreement than when ordinary debt is involved; in other cases, Supreme Court has also stated that employer may be bound by predecessor's collective bargaining agreement as long as it had notice of obligation and continued predecessor's operations even if only assets sold and not a merger; Third Circuit states that those cases are somewhat distinguishable

— but not necessarily after an asset sale — because *Golden State Bottling Co.* applies broadened successor liability only to unfair labor practices but not to corporate debt, such as pension obligations to a union.

C. *Pennsylvania District Court Follows Artistic Furniture.* A Pennsylvania district court case agrees with *Artistic Furniture* that, where applicable, there could be broadened successor liability for ERISA withdrawal liability.²⁷

SUCCESSOR LIABILITY FOR OTHER ERISA OBLIGATIONS SUCH AS RETIREE HEALTH, ERISA NONQUALIFIED PLANS AND FIDUCIARY LIABILITY

A. *Retiree Health.* Regarding successor liability for retiree health in an asset sale (as provided in a labor agreement), common law successor liability exceptions would apply (i.e., express or implied assumption, de facto merger, mere continuation of seller or transfer for fraudulent purposes).

B. *Some Cases Extend Artistic Furniture to ERISA Welfare Plans.* Many federal cases have held broadened successor liability should apply to retiree health obligations under ERISA welfare plans if there is notice of liability and continuity of operations (even if no continuity in ownership), and ERISA's broadened successor liability is not limited to pension liability.²⁸

because they dealt with application of labor law concepts and terms of collective bargaining agreement, but in this case, only transfer of valid and ordinary debt was at issue and just happened to have its genesis in terms of collective bargaining agreement).

²⁷ *Central Pennsylvania Teamsters Pension Fund v. Beer Distributing Co.*, 47 EBC 1037 (E.D. Pa. 2009) (asset purchaser was liable as successor for ERISA withdrawal liability; court noted that federal courts have expanded successor liability for ERISA; successor and predecessors were related entities through family ownership, successor assumed customers, took over facility, rehired nearly all employees, and there may have been an implied assumption of liability; case on its face supports *Artistic Furniture* and contradicts *Einhorn v. M.L. Ruberton Construction Co.*, although it can be distinguished in that in this case, all factors could, in any event, lead to general common law exception such as de facto merger).

²⁸ See, e.g., *Bish v. Aquarion Services Co.*, 289 F. Supp.2d 134 (D. Conn. 2003) (where seller promised retiree health in collective bargaining agreement, asset buyer would be subject to retiree health obligation because by continuing operations, 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) (issue of retiree health presumptively arbitrable under collective bargaining agreement); *Grim v. Healthmont, Inc.*, 29 EBC 1500 (D. Or. 2002) (cites cases that, under federal com-

C. *Successor Liability for Top-Hat Supplemental Pension Obligation.* In *Brend v. Sames Corp.*²⁹ the court applied the expanded ERISA successor liability under *Artistic Furniture* to obligations under a top-hat executive retirement plan, as top-hat plans are generally subject to ERISA.³⁰ The court noted that although top-hat employees need less protection than rank-and-file employees, ERISA protects all employees.

D. *Split Whether ERISA Fiduciary Obligations Have Expanded Successor Liability.* With regard to ERISA fiduciary liability, a district court has held that ERISA fiduciary liability would not have broadened

mon law as applied to ERISA pension claims, employer liable for previous employer's obligations under ERISA plan if buyer considered bona fide successor and had notice of potential liability; court applies to facts in this case involving retiree health); *Hawaii Carpenters Trust Funds (Health & Welfare Trust Funds) v. Waiola Carpenter Shop, Inc.* 823 F.2d 289 (9th Cir. 1987) (discussed above; successor liable for health and pension obligations under collective bargaining agreement); *Moriarty v. Svec*, 164 F.3d 323 (7th Cir. 1998) (discussed above; broadened successor liability applies to unpaid contributions to multiemployer pension and welfare funds); *Schilling v. Interim Healthcare of Upper Valley, Inc.*, 44 EBC 1988 (S.D. Ohio 2008) (court found that under *Artistic Furniture*, there would be successor liability for ERISA, and therefore, successor in *Schilling* was liable for unpaid medical claims under ERISA health plan; court looked to *Artistic Furniture* test of whether buyer had prior knowledge of the claim and whether there was continuity of 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 benefits under collective bargaining agreement extend beyond term of agreement; plant's assets were sold by GE to Wellman Thermal Systems in August 1979, and collective bargaining agreement term was July 1979 through July 1982; collective bargaining agreement between GE and union was ambiguous as to whether retiree welfare plans continued; asset purchase agreement provided that although Wellman was to offer employee benefit plans to transferred employees comparable to plans GE had on sale date, Wellman reserved the right to alter, amend or terminate any particular plan in future; asset purchase agreement was only document where Wellman specifically reserved right to alter, amend or terminate benefit plans; court held that because collective bargaining agreement between GE and union was ambiguous and Wellman documents failed to clarify ambiguity, granting summary judgment on issue of whether retiree benefits extend beyond term of collective bargaining agreement was inappropriate).

²⁹ 28 EBC 2905 (N.D. Ill. 2002).

³⁰ *Brend v. Sames Corp.* found that an asset buyer may have successor liability for a top-hat executive retirement contract even though specifically excluded in the asset purchase agreement because as an ERISA plan, the plan was subject to the continuity of operations and notice standards under *Artistic Furniture* for successor liability, even though there was no continuity of ownership. In this case, there was notice of the liability and a genuine issue of material fact whether there was substantial continuity.

successor liability.³¹ However, another district court case stated in dictum that ERISA fiduciary duties would also have broadened ERISA successor liability.³²

OTHER ERISA ISSUES WITH ASSET SALES

A. Alter Ego Theory as Applied to Asset Purchases. On occasion, courts have found a shareholder liable for ERISA and other liabilities of the corporation under the doctrine of piercing the corporate veil (alter ego), for example, if there is fraud, disregard by the owner of the separate character of the corporation, or shareholders undercapitalize the corporation.³³ Courts

³¹ *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, 47 EBC 2505 (W.D. Wash. 2009). The court stated that whether a company can be liable based upon an expanded ERISA inherited liability for breach of ERISA fiduciary duties was a question of first impression and that 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”).

³² *Bish v. Aquarion Services Co.*, 289 F. Supp.2d 134 (D. Conn. 2003). As discussed above, *Bish* involved a seller that had promised retiree health in a collective bargaining agreement and an asset buyer. The court held that the buyer would be subject to the retiree health obligation, because by continuing operations, the retiree health obligation would continue, and expanded ERISA successor liability was not limited only to ERISA delinquent multi-employer contributions or withdrawal liability but also applies to ERISA fiduciary duties and to promises for retiree health. The court denied a motion to dismiss claims.

³³ *See, e.g.*, the following circuit court cases piercing the corporate veil: *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987) (pierced corporate veil so as to hold shareholders jointly and severally liable with corporations for fiduciary breaches; close and intimate relationship between corporate fiduciaries and their individual shareholders justified piercing corporate veil); *Board of Trustees of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164 (3d Cir. 2002) (summary judgment to dismiss piercing corporate veil claim by multiemployer pension fund against individual defendants not granted; noted that under N.J. law, to pierce corporate veil, must show that: (i) corporation is organized and operated as mere instrumentality of other corporation, and (ii) dominant corporation uses subservient corporation to perpetrate fraud, to accomplish injustice or to circumvent the law; factors to be considered included failure to observe corporate formalities and non-functioning of other officers and directors); *Flynn v. R.C. Tile*, 353 F.3d 953 (D.C. Cir. 2004) (tile installation firm formed by three brothers soon after their company ceased operations was the company’s alter ego because they had same ownership, management, business purpose, operations, equipment and customers).

Compare the following circuit court cases which did not pierce the corporate veil: *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995) (refusing to impose liability for prohibited transaction on alter ego of party in interest under federal common law of ERISA); *Massachusetts Carpenters Central Collection Agency v. AA Building Erectors, Inc.*, 343 F.3d 18 (1st Cir. 2003) (where non-union com-

pany sometimes used the alter ego theory to apply successor liability.³⁴

B. Emergence from Bankruptcy Like an Asset Sale. With regard to a stock sale or merger, the purchaser should ordinarily step into the shoes of the seller for any termination liabilities, even if they resulted from termination of the plan when it was with the seller.³⁵ However, if a purchaser in a stock sale or merger acquires a bankrupt corporation and 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.³⁶ In a case in which successor liability would apply to an asset pur-

pany formed union subsidiary for customers that preferred union work, although the two companies may have been alter egos, alter ego doctrine was inapplicable because the two companies were not formed to avoid obligations under collective bargaining agreement); *Trustee of Resilient Floor Decorators Insurance Fund*, 395 F.3d 244 (6th Cir. 2005) (nonunionized carpet and flooring retailer is not alter ego of unionized carpet and flooring installation company in same building, and is not liable for multiemployer fringe benefit funds).

³⁴ *See, e.g., Plumbers, Pipefitters and Apprentices Local Union No. 112 v. Mauro’s Plumbing, Heating and Fire Suppression*, 84 F. Supp.2d 344 (N.D.N.Y. 2000). The court held that where a plumbing company that signed a collective bargaining agreement ceased operations and the owners established a non-union company (Northeast Mechanical) three months later at the same location, the successor was liable for the predecessor’s multiemployer welfare contributions as the alter ego of the first company because there was continuity of ownership and management, employment of many of the same employees, similarity of business purposes, overlapping operations, use of office and plumbing equipment and sharing of customers. Because it found alter ego status, court found it unnecessary to also examine successor liability status.

³⁵ *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).

³⁶ *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 of 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 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 because stock is worthless; therefore, purchase from 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 (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, because applying 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 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).

chaser, the purchaser from the bankruptcy could also have successor liability.³⁷

C. *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) and 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.

D. *Asset Sale as Withdrawal and ERISA §4204 Agreement.* If a contributing employer to a multiemployer pension plan sells its assets, this asset sale can trigger a withdrawal by the entity because 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 still appear to be treated as a withdrawal under ERISA (unless an ERISA §4204 contract is entered into). Query: If the asset sale is disregarded by having the buyer pick up liability as successor, why should a sale of assets be treated as a withdrawal under ERISA?

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 is obligated to contribute a similar amount, (ii) the purchaser posts a bond or escrow for a five-year period 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.

LABOR LAW OBLIGATION ON SUCCESSOR TO BARGAIN IN GOOD FAITH

A. *Duty on Successor to Bargain in Good Faith but Not Bound to Specific Contract Provisions if It Has*

³⁷ *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995) (claim by multiemployer pension fund against successor entity for ERISA withdrawal liability and delinquent pension contributions to union's pension should not have been dismissed; court noted that it was not absolutely precluded from finding successor liability against successor where there was substantial continuity of operations and notice, despite fact that company had just emerged from bankruptcy; successor liability after bankruptcy does not subvert bankruptcy rules because the property has already emerged from bankruptcy).

Not Specifically Assumed Contract or Been 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.³⁸ 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.³⁹ 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 specific terms of the existing collective bargaining agreement.⁴⁰

³⁸ It is an unfair labor practice for an employer to refuse to bargain in good faith with the union. NLRA §8(a)(5), 29 USCA §158(a)(5). It is also an unfair labor practice for a labor organization to refuse to bargain in good faith with the employer. NLRA §8(b)(3), 29 USCA §158(b)(3).

³⁹ See, e.g., *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974), in which 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 (1987), in which 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 if 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.

⁴⁰ See *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 284, 291 (1972) (even if 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 (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 terms of that agreement); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) (quoting *Burns* that a successor is not bound by the substantive provisions of the predecessor's collective bargaining agreement). Only if 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) (if a successor employer is alter ego of predecessor, it automatically assumes all predecessor's obligations, includ-

B. *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.⁴¹

C. *Successor Clauses Do Not Bind Third Parties.* A successor clause in a contract does not bind third parties who did not sign the agreement.⁴² Therefore, if

ing collective bargaining agreement). See *Ameristeel* and *Meridian* cases discussed below.

⁴¹ In *Local 348 UFCW AFL-CIO v. Meridian Management Corp.*, 583 F.3d 65 (2d Cir. 2009), the Second Circuit ruled that, if there is a substantial continuation of operations and the workforce, a successor employer could be compelled to arbitrate whether, and to what extent, it is bound by the substantive terms of the preexisting collective bargaining agreement. The arbitrators could hold the successor employer bound by some or all of the substantive terms of a preexisting agreement if 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 required only if the successor could be bound to the terms of the contract, such as if it could be found to be the alter ego of the predecessor (for example, if 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.

⁴² 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.* (8/3/79) (Rosenberg, Arb.), *aff'd*, No. 79 Civ. 5313 (HFW) (S.D.N.Y. 4/15/80). If there are general boilerplate successorship clauses, such as: "The contract shall be binding upon the employer, successors, assigns, purchasers, lessees and/or transferees," some courts have refused

the collective bargaining agreement requires the successor to assume the agreement, the buyer is not presumed to have assumed the collective bargaining agreement. However, by not inducing the buyer to assume the agreement, the seller may be liable for damages.⁴³ Also, in some cases, the union may be able to enjoin a pending sale.⁴⁴

CONCLUSION

Successor liability in ERISA contexts — such as delinquent contributions to multiemployer pension plans — would, according to case law in many circuits, 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 for promised retiree health for unions, liabilities of ERISA top-hat plans and fiduciary liability. This area of law is not entirely clear, and there is some divergence of opinion in case law. Care must be taken, however, in an asset acquisition to account for possible successor liability both in conducting due diligence and in assessing risk.

to enforce them as meaningless boilerplate. *Gallivan's Inc.*, 79 Lab. Arb. (BNA) 253 (1982) (Gallagher, Arb.); *Wyatt Manufacturing Co.*, 82 Lab. Arb. (BNA) 153 (1983) (Goodman, Arb.).

⁴³ See, e.g., *Wheelabrator Envirotech Operating Services v. Massachusetts Laborers District Council Local 1144*, 88 F.3d 40 (1st Cir. 1996) (by agreeing to include successor clause in union agreement, Wheelabrator accepted and bargained for risk that if it lost contract, it would guarantee that successor would honor wages, benefits and other terms and conditions of employment; Wheelabrator breached its collective bargaining agreement with union by failing to compel its successor to assume agreement).

⁴⁴ *Local Lodge No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (preliminary injunction properly issued restraining employer from completing sale of assets that would result in permanent loss of employment pending decision by arbitrator on union's claim that sale violated collective bargaining agreement).

INSIDE WASHINGTON

New Developments in Legislation, Regulations and Informal Agency Positions

PLEASE NOTE

These “Items” contain information derived from informal discussions with active tax practitioners. Subscribers are cautioned that any of these items is subject to change without notice and are advised not to take any action solely on the basis of information supplied in an Item.

IRS to Issue Guidance on Readily Tradable Securities

In May 2010, the IRS issued final regulations under Code §401(a)(35) relating to diversification requirements for certain defined contribution plans holding publicly traded employer securities. Those final regulations are effective for plan years beginning on or after January 1, 2011.

The *JOURNAL* has learned that the IRS will soon issue guidance regarding the diversification requirements under §401(a)(35). It is expected that the guidance will define what it means to be a readily tradable security and that this definition will not only apply for purposes of the diversification requirement under §401(a)(35), but will also apply for all purposes under the Internal Revenue Code.

Personnel Changes at IRS Employee Plans

The *JOURNAL* has learned that Michael Julianelle has left his position as Director of Employee Plans and that Rob Choi will be replacing him on a permanent basis. Previously, Rob Choi was Director, Exempt Organizations Rulings and Agreements. Directors operating under Rob Choi are: (1) Andy Zuckerman, Director, EP Rulings and Agreements; (2) Mark O'Donnell, Director, EP Customer Education and Outreach; and (3) Monika Templeman, Director, EP Exams.

Background on IRS Guidance Regarding Group Trust Arrangements

The IRS recently issued Rev. Rul. 2011-1, expanding group trust arrangements to certain §403(b) plans

and §401(a)(24) governmental retiree benefit plans, but not necessarily to dual-qualified U.S. and Puerto Rican plans (except on an interim basis). It is the *JOURNAL*'s understanding that the IRS initially did not intend to include Puerto Rican plans in group trusts, but as a result of an inquiry from a Congressional member, the IRS ultimately decided to include in Rev. Rul. 2011-1 interim guidance relating to Puerto Rican plans.

The *JOURNAL* has also learned that the IRS is examining ways to assist U.S. sponsors in getting their plans in compliance with Puerto Rican laws.

IRS Guidance on Church Plans Expected Soon

The *JOURNAL* understands that guidance regarding church plans is expected soon. The IRS is anxious for this guidance to be released because there are a significant number of ruling requests pending for church plans. The *JOURNAL* has learned that the upcoming guidance will include a model notice to be furnished to participants in a church plan with respect to which a determination letter has been requested.

Governmental Plan Determination Letter Requests Raise Issues for IRS

The *JOURNAL* understands that the IRS currently is working through the 1,700 determination letter requests it has received regarding governmental plans. In order to expedite the resolution of issues raised while reviewing these determination letter requests, the IRS has developed a technical group that includes personnel from the IRS Chief Counsel's Office so as to ensure that the issues are worked through uniformly and expeditiously.

Another issue of significance relating to governmental plans for the IRS concerns pick-up arrangements. Because of economic conditions, many states are investigating whether they can provide employee-participants with choices with respect to pick-up contributions. However, a concern exists that providing choices would transform these arrangements into §401(k) arrangements, which are not permitted for governmental plans. Although the IRS is working through these issues, it is not clear when guidance will be issued.

IRS Views on In-Plan Roth Rollovers

The IRS recently issued Notice 2010-84, which provides guidance relating to in-plan Roth rollovers, which were authorized under the Small Business Jobs Act of 2010, enacted on September 27, 2010. The *JOURNAL* understands that the IRS takes the position

that because the in-plan Roth rollover is optional, employers have a large amount of flexibility in implementing in-plan Roth rollovers, so long as the nondiscrimination rules and the conditions of Notice 2010-84 are satisfied. Thus, employers can pick and choose among the distributable events and the distribution options that can be subject to an in-plan Roth rollover.

Status of LRMs for Pre-approved Defined Contribution Plans

The EGTRRA remedial amendment cycle for pre-approved defined contribution plans expires on January 31, 2011, with a new six-year cycle opening on February 1, 2011. Under current procedures, sponsors and practitioners maintaining mass submitter and national sponsor plans will have until October 31 of the calendar year in which a six-year remedial amendment cycle opens to submit opinion and advisory letter applications, while other types of applications for pre-approved plans (non-mass submitters, mass submitters on behalf of word-for-word identical adopters, and mass submitters on behalf of minor modifier M&P plans (placeholder applications)) have until January 31 of the year after the cycle opens.

The *JOURNAL* has learned that the IRS is currently working on the List of Required Modifications (LRMs) for defined contribution plans and hopes to have the LRMs completed by January. Additionally, it is expected that an update of Rev. Proc. 2005-16 (setting forth the procedure for issuing opinion letters to pre-approved plans) will be released. However, the *JOURNAL* has learned that the guidance may not be ready by February 1, 2011.

IRS Considering Lifetime Annuitization Issues

The IRS continues to seek comments relating to the expansion of annuity options available under defined contribution plans. Specifically, the IRS is seeking comments so that it can educate itself about the various types of annuity products currently available on the market. The *JOURNAL* has learned that regular meetings are being held regarding life annuity options but that some of the technical issues are difficult to resolve. As part of its examination of the issues, the group is looking at the new partial annuitization products coming onto the market as now permitted under the Small Business Jobs Act of 2010.

IRS to Issue §403(b) Plan Termination Guidance

Final regulations issued in 2007 required §403(b) plan sponsors to comply, both in form and operation, with §403(b) and the regulations by January 1, 2009. The deadline for the written plan requirement was subsequently extended by Notice 2009-3 until December 31, 2009, if certain requirements were satisfied. One of the issues that arose as plan sponsors were reviewing their plan operations to comply with the final regulations was how certain §403(b) plans could be terminated. The *JOURNAL* understands that the IRS is close to issuing guidance on this issue. The guidance is expected to be in the form of a revenue ruling and will address several different scenarios.

DOL Issues Proposed Regulation Expanding Definition of "Fiduciary"

The Department of Labor (DOL) issued DOL Prop. Regs. §2510.3-21, which would significantly expand the definition of "fiduciary" under Title I of ERISA, in the context of individuals and entities which provide investment advice to a plan or plan participants. RIN 1210-AB32, 75 Fed. Reg. 65263 (10/22/10). Public comments may be provided to the DOL until January 20, 2011. The regulation will become effective 180 days after publication in final form.

Background

Section 3(21) of ERISA defines a "fiduciary" as a person who: (1) exercises discretionary authority or control regarding the management of an employee benefit plan or its assets, (2) renders (or has authority to render) investment advice for a fee or other direct or indirect compensation with respect to plan assets, or (3) has discretionary authority or responsibility relating to the administration of a plan. The proposed regulation addresses the second type of fiduciary and would significantly modify regulations issued by the DOL in 1975. Those regulations provide in relevant part that a person who provides investment advice to a plan for a fee does not thereby become a plan fiduciary pursuant to the second element of the statutory definition unless the following five conditions are all satisfied: (1) the person renders advice regarding the value of securities or other property or makes recommendations regarding the advisability of investing in purchasing securities or other property, (2) such advice or recommendations are provided on a regular basis, (3) such advice or recommendations are provided based on an understanding with the plan that such advice will be provided, (4) the advice will serve as a primary basis for the plan's investment decisions, and (5) the advice will be individualized based on the specific needs of the plan.

Additional guidance provided by the DOL in 1996 (DOL Interpretive Bulletin 96-1) drew a distinction between providing "investment education" (which under the 1996 guidance would not by itself cause a person to become a "fiduciary") and "investment advice" (which may cause a person to become a fiduciary). In addition, the DOL over the years has held that (1) a person who provides valuation services relating to closely-held employer securities in an ESOP does not thereby become a fiduciary (DOL Adv. Op. 76-65A), and (2) a person who provides advice to a

plan participant regarding the advisability of taking a plan distribution and how such distribution should be invested does not thereby become a fiduciary (DOL Adv. Op. 2005-23A).

The Proposed Regulation

According to the DOL, the proposed regulation is intended to reflect significant changes since the current regulations were published in 1975 in both the financial industry and the expectations of plan officials and plan participants who receive investment advice, and is designed to protect plan participants from self-dealing and conflicts of interest on the part of service providers by expanding and clarifying the circumstances in which persons providing investment advice to a plan or plan participants are "fiduciaries" and thereby subject to the fiduciary standards set forth in ERISA. The proposed regulation would substantially revise the five-part test set forth in the 1975 regulations and eliminate the requirement that in order for a person who provides investment advice for a fee to thereby be a fiduciary, such advice must be provided on a "regular basis" and must serve as a "primary basis" for the plan's investment decisions.

More specifically, the proposed regulation would provide that a person who renders investment advice for a fee, either direct or indirect, and in whatever form (e.g., brokerage fees, sales commissions), to a plan, a plan fiduciary or a plan participant will become a plan fiduciary if the person: (1) provides advice or an appraisal or fairness opinion regarding the value of securities or other property, recommends the advisability of investing in or purchasing securities or other property, or provides advice or recommendations regarding the management of securities or property; *and* (2) acknowledges or represents that the person is a fiduciary, has discretionary authority regarding the plan assets or plan administrative matters, is an "investment adviser" within the meaning of the Investment Advisers Act of 1940, or provides advice or recommendations pursuant to an arrangement or understanding that such advice may be considered in connection with investment or management decisions involving plan assets and will be individualized to the needs of the plan, a plan fiduciary or plan participant.

Notwithstanding the generally broad scope of the proposed regulation's description of activities which may result in an investment adviser being a plan fiduciary, the proposed regulation would explicitly provide that an investment adviser does *not* become a plan fiduciary in the following circumstances:

- (1) the adviser can demonstrate that the recipient of the investment advice knows or reasonably should know that the adviser is providing the advice as a purchaser or seller (or agent of a purchaser or seller) whose interests are adverse to the interests

of the plan and its participants, and that the adviser is not purporting to provide investment advice;

- (2) the plan is a defined contribution plan, and the adviser is providing an investment evaluation or making a menu of investments available to the plan, without regard to any individualized needs of the plan or plan participants, and with a written disclosure to the plan fiduciary that the adviser is not purporting to provide impartial advice, or is providing general financial data necessary for the plan fiduciary to monitor the investment options offered under the plan, with a written disclosure to the plan fiduciary that the adviser is not purporting to provide impartial advice; or
- (3) the adviser provides a report that merely reflects the value of an investment for purposes of permitting the plan to comply with the reporting and disclosure requirements in ERISA and the Code, so long as such report does not involve assets for which there is not a generally recognized market and does not serve as a basis on which a plan may make distributions to plan participants.

The proposed regulation also would provide that it would be applicable for purposes of the prohibited transaction rule in Code §4975, as well as for purposes of Title I of ERISA.

Notwithstanding these limitations on its scope, the proposed regulation would result in a significant number of investment advisers being included for the first time in the definition of “fiduciary” and subjected to the fiduciary rules in Title I of ERISA.

For further discussion of fiduciary status under Title I of ERISA, see 365 T.M., *ERISA — Fiduciary Responsibility and Prohibited Transactions*.

Eleventh Circuit Confirms that RSUs Were Properly Valued at Retirement Date; §409A Delayed Payment Rules Do Not Control Valuation Date

In a recent decision, the U.S. Court of Appeals for the Eleventh Circuit held that a participant’s restricted stock units (RSUs), payable in cash, were to be valued on the date of the participant’s retirement, not the date of expiration of the six-month holding period under Code §409A. See *Graphic Packaging Holding Company v. Humphrey*, 50 EBC 1289 (11th Cir. 2010). The decision highlights the need to exercise care when drafting compensatory arrangements and also the negative consequences that potentially can be avoided by proactively identifying and clarifying plan ambiguities.

Under the facts of the case, Graphic Packaging Holding Company sponsored the 2004 Stock and In-

centive Compensation Plan. The participant received various RSU awards under the plan. Under the terms of the plan, the RSUs became 100% vested upon the participant’s retirement. Additionally, because the participant was a specified employee for purposes of §409A, the payout dates for certain RSUs were extended for an additional six months.

The underlying value of each RSU was based on the value of one share of Graphic Packaging’s common stock. However, the terms of the plan and the applicable award agreements were silent on whether the value of an RSU was to be determined as of the participant’s retirement date or, alternatively, the date the six-month mandatory holding period lapsed. In light of this ambiguity, the determination of the proper valuation date took on added significance, as the value of Graphic Packaging’s common stock decreased by approximately 45% during the six-month period following the participant’s retirement.

The participant retired on December 31, 2007, and at the time of his retirement, the common stock of Graphic Packaging was valued at \$3.69 per share. In January 2008, immediately following the participant’s retirement, Graphic Packaging sent two letters to the participant explaining his rights to receive payment under his vested RSUs, and both letters included a statement that the RSUs would be valued as of the participant’s retirement date. Shortly thereafter, Graphic Packaging realized that the payout of the participant’s RSUs would have to be delayed six months because the participant was a specified employee for purposes of §409A. This development was communicated to the participant via a telephone conversation and, in June 2008, a third letter was sent to the participant which, among other items, indicated that the participant’s RSUs would be valued as of his retirement date. On June 30, 2008, the participant received payment on his RSUs, valued as of his retirement date.

Subsequent to the settlement of the participant’s RSUs, Graphic Packaging’s legal department determined that the payout to the participant should have been valued based on the trading price of Graphic Packaging’s common stock on the date of distribution (\$2.02 per share), not the date of retirement. After demand for repayment and refusal by the participant to repay the alleged excess payment, the issue was submitted to the compensation committee. The compensation committee was responsible for the administration of the plan, and the plan specifically provided that all determinations by the compensation committee were final and binding on plan participants. Upon review, the compensation committee also concluded that the value of the participant’s RSUs should have been valued as of June 30, 2008, not the participant’s retirement date. The participant refused all demands

for repayment, and Graphic Packaging brought suit seeking repayment. The district court dismissed Graphic Packaging's claims against the participant on the grounds that Graphic Packaging failed to show that it made a mistake in valuing the participant's RSUs as of the participant's retirement date.

On appeal, Graphic Packaging asserted, *inter alia*, that the district court erred in not showing deference to the compensation committee's determination and by misinterpreting Graphic Packaging's past practice in valuing RSUs. Applying Delaware law, the Eleventh Circuit recognized that it is required to give deference to a committee that is granted decision-making authority. *See, e.g., JPMorgan Chase & Co. v. Pierce*, 517 F. Supp. 2d 954 (E.D. Mich. 2007). However, the court disagreed that deference must be granted in this instance, in which (1) the claim for recovery was based on the equitable principle of unjust enrichment, and (2) the compensation committee was unable to show that a mistake was, in fact, made in choosing one valuation date over the other. With respect to the latter point, the court was persuaded by several factors, including that this was the first instance in which the six-month delayed payment rule was applied. Graphic Packaging repeatedly confirmed in at least three separate letters that the RSUs would be valued as of the date of retirement (and, in fact, paid out on this basis). In all prior instances, RSUs were valued as of the date of retirement. Further, the plan and award agreements were silent on the appropriate valuation date.

Accordingly, although the Eleventh Circuit did acknowledge that the six-month holding period had never been applied before the participant's departure, the court agreed with and upheld the district court's determination that Graphic Packaging failed to submit evidence showing that valuing the participant's RSUs as of his retirement date was, in fact, a mistake. In short, although it was true that §409A mandated a six-month delay in payment, this fact, in and of itself, did not require that the valuation date for purposes of plan distributions also be delayed.

For further discussion of deferred compensation arrangements and §409A, see 385 T.M., *Deferred Compensation Arrangements*.

Third Circuit Finds No Breach of ERISA Fiduciary Duty Where Non-Employee Spouse Retires Based on Alleged Misrepresentations Relating to Employee's Pension Benefits

The Third Circuit recently held that an employer did not breach its fiduciary duty under ERISA by al-

legedly making misrepresentations about an employee's pension benefits that led the employee's spouse to retire from her job with a different employer. *Shook v. Avaya Inc.*, 50 EBC 1128 (3d Cir. 2010). In so holding, the court found that the husband and wife plaintiffs failed to establish the element of detrimental reliance needed to succeed on a claim for breach of fiduciary duty.

Through a series of corporate transactions, the husband became an employee of Avaya, Inc., and participated in Avaya's pension plan. Under the terms of the pension plan, an employee's prior service with predecessor companies was counted for eligibility purposes but was limited for purposes of benefit calculations. The husband received a series of letters from Avaya relating to the recognition of his prior service under the pension plan and, based on his understanding of the information provided, calculated his expected monthly pension amount under the plan. Without confirming the accuracy of the husband's pension benefit calculation, the plaintiffs determined that the wife could retire from her job with another employer.

When Avaya subsequently terminated the husband, the monthly amount of his pension benefit, as calculated by Avaya, was much lower than his previous calculation. After exhausting Avaya's administrative appeal procedures, the plaintiffs filed suit against Avaya claiming that Avaya breached its fiduciary duty to them by providing misleading information in the letters that were sent to the husband regarding his benefits under the pension plan. Finding that Avaya did not make a material misrepresentation with respect to its pension plan, the district court ruled in favor of Avaya.

On appeal, the Third Circuit affirmed the district court's ruling, but on slightly different grounds. Recognizing first that a claim for breach of fiduciary duty requires a plaintiff to establish detrimental reliance on a material misrepresentation or omission, the court found that the wife's decision to retire did not constitute the requisite detrimental reliance. The court acknowledged that detrimental reliance need not be based solely on an employee's decision to retire, but could also be based on decisions to decline other employment, forego an option to purchase supplemental insurance, or other important financial decisions pertaining to retirement. To that end, the plaintiffs argued that the wife's decision to retire was one such "important financial decision relating to retirement."

Although employers have been held liable under ERISA for misrepresentations about an employee's benefits, the Third Circuit rejected the plaintiffs' argument and refused to extend such liability to situations in which a decision by a participant or beneficiary of a plan, based on alleged misrepresentations, affects a non-employee's benefits or retirement — separate and

apart from the plan. Although the plaintiffs may have acted based on their understanding of the information provided in the letters received from Avaya, their decision that the wife should retire from her job did not implicate their benefits under Avaya's pension plan. Specifically, the wife's decision to retire did not affect her husband's benefits or retirement as a participant under the pension plan, nor did it affect her potential benefits under the pension plan as a beneficiary.

The Third Circuit found the plaintiffs' reliance to be "too attenuated to hold Avaya liable as a fiduciary" and the claimed injury to be unforeseeable. Accordingly, it held that the plaintiffs' actions did not implicate Avaya's fiduciary duties under its pension plan and that Avaya could not be held liable for such conduct that did not implicate its fiduciary duties and that it could not have reasonably foreseen.

For further discussion of fiduciary responsibilities under ERISA, see 365 T.M., *ERISA — Fiduciary Responsibility and Prohibited Transactions*.

Group Health Plans May Change Health Insurance Coverage Without Losing Grandfathered Plan Status

In November 2010, the IRS, DOL and HHS issued interim final and proposed regulations clarifying that a group health plan will not lose grandfathered status merely because the plan enters into a new policy, certificate, or contract of insurance after March 23, 2010. T.D. 9506, 75 Fed. Reg. 70114 (11/17/10); REG-118412-10, 75 Fed. Reg. 70159 (11/17/10). The amended rule applies to changes to group health insurance coverage that are effective on or after November 15, 2010. It should be noted that the effective date is the date the new policy takes effect, not when it is executed.

Grandfathered health plans are group health plans existing as of March 23, 2010 (the date of enactment of the Affordable Care Act), that meet certain requirements. The IRS, DOL and HHS previously issued interim final and proposed regulations intended to address some of the changes to group health plans that would terminate grandfathered status. T.D. 9489, 75 Fed. Reg. 34538 (6/17/10); REG-118412-10, 75 Fed. Reg. 34571 (6/17/10). Those regulations included rules for the cessation of grandfathered status resulting from reduction of benefits and changes in cost-sharing.

Under the earlier interim final regulations, if an employer entered into a new policy, certificate, or contract of insurance after March 23, 2010, that policy, certificate, or contract of insurance would lose grandfathered status. Several objections to this rule emerged. First, the rule treated insured group health plans differently from self-insured plans, which can

change third-party administrators without relinquishing grandfathered status. Second, the rule did not acknowledge that some group health plan changes are made involuntarily, for example, if the issuer withdraws from the market. Third, the rule unnecessarily restricted the right of issuers to reissue policies to current plan sponsors for administrative reasons unrelated to any change in the underlying terms of the health insurance coverage. Examples include to transition the policy to a subsidiary of the original issuer, or to consolidate a policy with its various riders or amendments. Lastly, the rule could be viewed as giving insurers undue and unfair leverage in negotiating the price of coverage renewals.

Under the amended the interim final regulations, a group health plan can retain its grandfathered status if it changes its policy, certificate, or contract of insurance, as long as it has not made any other changes that would revoke grandfathered status.

In addition, certain documentation requirements were added. To maintain its status as a grandfathered plan, the new health insurance issuer must be provided with, and the new health insurance issuer must require, documentation of plan terms (including benefits, cost-sharing, employer contributions, and annual limits) under the prior health coverage. It must be determined whether any change is being made that would cause the plan to lose its grandfathered health coverage status. The documentation may include a copy of the prior policy or summary plan description.

The amendment to the interim final regulations is effective prospectively, but not retroactively, to changes in group health insurance coverage that were effective before November 15, 2010. For this purpose, the date the new coverage becomes effective is the operative date, not the date of execution of the contract for a new policy, certificate, or contract of insurance.

The new regulations are helpful for employers that desire to maintain grandfathered status. The rules address the primary objections to the prior rule in a positive manner. Practitioners will want to observe the documentation rules and keep records that reflect that the requirements have been met.

For further discussion of medical benefits, see 389 T.M., *Medical Plans — COBRA, HIPAA, HRAs, HSAs and Disability*.

IRS Addresses "Unforeseeable Emergency" Distributions Under §§457(b) and 409A

In Rev. Rul. 2010-27, 2010-45 I.R.B. 620, the IRS provided guidance on what constitutes an unforeseeable emergency distribution under Code §457(b). The substance of the ruling is largely set forth in the form of examples. The revenue ruling also clarifies that the

same standards will be applied to unforeseeable emergency distributions from nonqualified deferred compensation plans that are subject to §409A.

In the ruling, the IRS first noted that §457(d)(1)(A) allows distributions to be made only in certain events, including when the participant is faced with an unforeseeable emergency. An unforeseeable emergency is a severe financial hardship resulting from one of several events. Such events include loss of a participant's property due to casualty, such as a natural disaster or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant. The imminent foreclosure of or eviction from a primary residence may constitute an unforeseeable emergency. The need to pay for medical expenses, or for the funeral expenses of a spouse or a dependent, can also constitute an unforeseeable emergency. Finally, whether a participant is faced with an unforeseeable emergency permitting a distribution under §457(d)(1)(A) is determined based on the relevant facts and circumstances of each case.

The IRS then applied these standards to three situations in which a distribution was requested. The amount of the requested distribution was the sum needed to pay certain expenses, as well as an additional amount to pay federal, state or local income taxes that would result from the distribution. It was assumed that documentation was produced showing the expense and the amount (if any) of insurance that will cover the expense. It was also assumed that the participant has no other source of funds to pay the expense. The examples, and the conclusions, are as follows:

Situation 1. Participant A requests a distribution to pay for the cost of having A's principal residence repaired after significant water damage from a water leak that was discovered in the basement. Participant A provides written estimates of the repair cost. This was ruled to be substantially similar to paying for damage due to a natural disaster and was permitted.

Situation 2. Participant B requests a distribution to pay for funeral expenses for B's adult son, who is not B's dependent (as defined in §152). B provides a bill from the funeral home that itemizes the cost of the funeral expenses. The need to pay for the funeral expenses of a non-dependent adult son was considered an extraordinary and unforeseeable circumstance that arises because of events beyond the control of the participant. The event was viewed as substantially similar to the need to pay for the funeral expenses of a dependent, which is authorized by regulations, and was thus permitted.

Situation 3. Participant C requests a distribution to pay accumulated credit card debt, which is not due to any events that are extraordinary and unforeseeable

circumstances arising as a result of events beyond the control of C. The IRS ruled that this did not present facts indicating that an unforeseeable emergency circumstance has arisen because of events beyond the control of the participant. Accordingly, the distribution was not authorized.

Finally, the IRS noted that although a plan described in §457(b) is not subject to §409A, the definition of "unforeseeable emergency" under these two sections is substantially similar. Accordingly, the principles and rulings set forth in Rev. Rul. 2010-27 also apply to an amount deferred under a nonqualified deferred compensation plan subject to §409A(a).

The IRS analysis in Rev. Rul. 2010-27 of what constitutes a "similar event" to specifically listed events is very helpful. Practitioners have some comfort that they will not have to adhere strictly to the events in the regulations, but can expand the allowable events within reason. One critical component of the analysis will be whether the emergency was not foreseeable and beyond the control of the participant. The application of the principles to §409A is also helpful. Terms used in §409A can have different meanings than similar terms in other Code sections (such as "substantial risk of forfeiture" and §83), so the clarification that the principles will be consistently applied in this circumstance was most welcome.

For further discussion of §§457 and 409A, see 373 T.M., *Employee Benefits for Tax-Exempt Organizations*, and 385 T.M., *Deferred Compensation Arrangements*.

District Court Holds that Voluntary Appeals Do Not Require Full and Fair Review

In *DaCosta v. Prudential Insurance Co. of America*, 50 EBC 1338 (E.D.N.Y. 2010), the U.S. District Court for the Eastern District of New York determined that voluntary appeals of denials of benefits need not fully comply with ERISA's rules and regulations.

DaCosta, an ERISA class action case was before the district court on a motion to dismiss, concerning what impact, if any, ERISA has on "voluntary appeals" that an insurer conducts after denying an insured's initial ERISA-mandated appeal. The parties agreed that ERISA does not require insurers to provide or conduct voluntary appeals. However, the plaintiffs contended that if an insurer opts to provide voluntary appeals, those appeals must comply with ERISA.

Prudential argued that such claims fail on the merits because it complied with the applicable requirements of ERISA with regard to voluntary appeals. The plaintiffs claimed that: (1) Prudential failed to provide

sufficient information concerning the voluntary appeals process, and (2) ERISA requires a “full and fair review” on any appeal the insurer undertakes, regardless of whether ERISA mandated the appeal. The court held that the plaintiffs did state a claim for lack of sufficient information based on ERISA, but that the voluntary appeal did not require a full and fair review.

First, regarding the so-called “sufficient information” claims, the court determined that because the plaintiffs sought only injunctive relief, not disgorgement or restitution, in connection with Prudential’s alleged failure to provide sufficient information concerning the voluntary appeal process, the plaintiffs had standing to pursue the claims. In determining the merits of the sufficient information claim, the court cited DOL Regs. §2560.503-1(c)(3)(iv), which requires an insurer that offers voluntary appeals to provide “sufficient information relating to the voluntary level of appeal to enable the claimant to make an informed judgment about whether to submit a benefit dispute to the voluntary level of appeal.” In this case, Prudential did sufficiently inform the plaintiffs that pursuing a voluntary appeal would not affect their rights to any other benefits under the plan. However, it did not provide any information concerning, among other things, “the applicable rules, the claimant’s right to representation, the process for selecting the decision-maker, and the circumstances, if any, that may affect the impartiality of the decisionmaker,” as required by the regulation.

Specifically, the plaintiffs alleged that Prudential’s letters and supplemental information packet did not tell the plaintiffs that, in processing voluntary appeals, Prudential: (1) typically selected the same decision-maker who handled the original appeal; (2) typically assigned the same physicians who handled the original appeal; and (3) applied no “hard and fast” “applicable rules,” except that the review was not de novo. Thus, the court found that the plaintiffs had sufficiently stated a claim that Prudential failed to provide “sufficient information” concerning the voluntary appeals process.

The plaintiffs’ claims concerning the substance of Prudential’s voluntary appeal procedures did not fare as well with the court. The court agreed with Prudential’s argument that ERISA’s regulations cover only mandated appeals, not voluntary appeals that an insurer chooses to offer. Citing ERISA §503(2), the court stated that an ERISA-covered plan must “afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the de-

cision denying the claim.” Highlighting the basic language in the statute, the court focused on the word “a,” as in “a reasonable opportunity” and “a full and fair review.” Looking to the plain reading of the language, the court found that in these circumstances, “a” means “one” when used in this manner, rather than “every.” Thus, the court concluded that under a plain reading of ERISA §503(2) and the applicable regulations, ERISA requires only a single mandatory review. The court held that nothing in the statute requires that “every” opportunity an insurer affords must be “reasonable,” or that “every” review an insurer offers must be “full and fair.”

Finally, the court looked to public policy which, it held, also supports Prudential’s position. The court noted that, generally, courts are hesitant to impose additional burdens on a party by virtue of that party voluntarily doing more than the law requires. The court emphasized the goal of encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. Applying this principle to ERISA, the court held that it makes no sense to discourage ERISA plan providers from offering voluntary appeals, even if those appeals lack ERISA safeguards. According to the court, voluntary appeals provide an additional avenue for insureds to seek relief, before turning to slow and expensive litigation, and because voluntary appeals toll the statute of limitations, they limit the harm that unsuccessful appellants might incur in undertaking them.

Accordingly, the court granted Prudential’s motion to dismiss to the extent that it challenges the plaintiffs’ claims concerning how it substantively conducts voluntary reviews.

The court’s decision in *DaCosta* that voluntary appeals do not require a full and fair review severely limits any potential of a sustainable claim based upon failure to follow appropriate voluntary appeal procedures, and highlights the fact that a claim based upon failure to provide sufficient information can be made only to seek injunctive relief. Although this is a district court case, the principles relied upon by the court in making its determination — to encourage resolution of benefits disputes through internal administrative proceedings rather than costly litigation — are derived from Supreme Court jurisprudence (*see Konkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010)) and, thus, other federal district courts are likely to follow its analysis.

For further discussion of voluntary appeals under an ERISA plan, see 374 T.M., *ERISA — Litigation, Procedure, Preemption and Other Title I Issues*.

***You Are Invited to Attend the January
Tax Management Advisory Board Meeting***

AGENDA:

Corporate Taxation

MEMORANDA:

- 1. Recent Developments in §355**, by *Candace A. Ridgway, Esq., Jones Day, Washington, D.C.*
- 2. Update on Liquidation Reincorporation Doctrine**, by *Joshua T. Brady, Esq. Ivins, Phillips & Barker, Washington, D.C.*
- 3. FDIC Assisted Acquisitions: Section 597 Redux**, by *Michael Kliegman, Esq. and Ty Patel, Esq., PricewaterhouseCoopers LLP, New York, New York*

**TO BE HELD
THURSDAY, JANUARY 18, 2011
WALDORF-ASTORIA HOTEL
BEEKMAN SUITE
NEW YORK, NY
MEETING: 5:30 PM
RECEPTION: 7:00 PM**

RSVP

Reception follows

Requests to attend will be honored and accommodations made within the limited capacity available and in the order in which they are received. Requests should specify the JANUARY CORPORATE TAXATION MEETING and be addressed to BNA Tax & Accounting, 1801 S. Bell Street, Arlington, VA. 22202. For information about CPE or CLE credit hour awards, or to register, call Sandy Mackall at: (703) 341-5906.