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MULTIEMPLOYER PLANS:

Understand the Liability Before You Do the Deal

BY GABRIEL S. MARINARO, ATTORNEY

With unfunded liabilities continuing to grow, multiemployer pension plan liability continues to be a real concern in corporate transactions. Depending on the transaction, a withdrawal from the multiemployer pension plan may be triggered, creating a liability for the seller or, in some cases, the buyer as a successor to the seller's business. Buyers need to take precautions to either limit their liability or understand the extent of these liabilities before agreeing on a deal structure.

If a buyer decides to buy the stock of a seller that is a contributing employer to a multiemployer pension plan, and the obligation to contribute to the multiemployer pension plan and the level of contributions continue without any interruption after the sale, no withdrawal from the multiemployer plan will be triggered. If, instead, the buyer only wants to purchase the assets of a seller that is a contributing employer, this often triggers a withdrawal when the seller either completely or partially ceases to contribute to the multiemployer pension plan. However, if the parties structure the asset sale in accordance with the requirements under ERISA Section 4204, a withdrawal will not be deemed to have occurred on the date of the transaction.

The requirements under ERISA Section 4204 are detailed and include requirements that:

- the buyer assume the obligation to contribute to the multiemployer plan at substantially the same level as the seller was contributing prior to the sale;
- the buyer post a bond or escrow for five plan years equal to the greater of the average annual contribution of the seller for the past three years or the prior year's contribution amount;
- the asset purchase agreement state that, if the buyer withdraws within five plan years, the seller is secondarily liable for the amount of the withdrawal liability it would have incurred on the date of the asset sale but for this exemption.

If the seller distributes all or substantially all of its assets or liquidates prior to the end of the five plan years, the seller is required to post a bond or escrow equal to the present value of the withdrawal liability the seller would have had on the date of the asset purchase. There are additional requirements and exceptions under Section 4204 that the parties will need to review in structuring a transaction to comply with Section 4204. Buyers that are considering the purchase of assets of a seller where a partial or complete cessation of contributions to a multiemployer plan will occur should consider whether this exemption under ERISA Section 4204 makes sense for their transaction.

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In some cases, the seller's liquidation or dissolution value may dictate the amount of withdrawal liability in an asset sale. Under ERISA Section 4225, withdrawal liability triggered in an asset sale is limited to the greater of (1) a portion of the liquidation or dissolution value of the selling contributing employer (determined after the sale or exchange of such assets) or (2) if the multiemployer pension plan uses the "attributable method" of allocating withdrawal liability, the unfunded vested benefits attributable to the seller. The limits on the amount of withdrawal liability based on the liquidation or dissolution value of the company are set forth in the statute and increase from 30% of the liquidation or distribution value of the seller after the sale (if the value does not exceed $5 million) to 80% of the liquidation or distribution value if it exceeds $25 million. For purposes of determining whether the multiemployer plan uses the "attributable method" for allocating withdrawal liability, buyers should look at the multiemployer pension plan documents and withdrawal liability estimate. Similar to the discussion of ERISA Section 4204 above, there are other details under ERISA Section 4225 that will need to be reviewed in connection with an asset deal.

Buyers need to be proactive and make sure

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Action to Quiet Title for Property Purchased at Tax Foreclosure Auction

BY SCOTT M. BROOKENS, ATTORNEY

In Michigan, if property taxes and assessments go unpaid, officials in the county in which the property is located have authority to place a tax lien on the offending property. In the event interested parties fail to extinguish the tax lien in a timely manner, the county may recover all unpaid taxes and costs by foreclosing on the lien and subsequently selling the delinquent property.

The Michigan legislature has detailed the tax foreclosure process and the county's corresponding authority in the General Property Tax Act (GPTA). The GPTA outlines the requirements that county officials must follow in order to properly foreclose on a delinquent property. Failure on the part of the county to strictly adhere to these statutory guidelines may open the door for prior interest holders to attack the validity of the tax foreclosure sale. In some cases, Michigan courts have invalidated auction sales on tax foreclosure properties where the county failed to provide proper notice of the impending foreclosure. *See In re Treasurer of Wayne Cnty. for Foreclosure*, 478 Mich. 1, 732 N.W.2d 458 (2007).

Because of the risks associated with tax foreclosure properties, title companies are often unwilling to provide title insurance policies for subsequent transfers. However, a title company will provide title insurance for subsequent transfers if the purchaser of a property at a tax sale auction clears title to the respective parcel. One way to clear title is through a quiet title action.

In order to clear title to property purchased at a tax sale auction, the purchaser must bring an action to quiet title in the circuit court situated in the county in which the property is located. The goal of such an action is to vest title to the property in the purchaser forever as against all of the parties that held an interest in the property immediately prior to the tax foreclosure. The first step in the quiet title process is to conduct a title search on the property and identify all of the parties that held an interest in the property prior to the foreclosure. Each of these parties should be named in the quiet title action.

Second, a complaint must be filed with the appropriate court, setting forth the basis for the plaintiff's claim to the property, requesting that the court quiet title to the property in the plaintiff/purchaser forever as against all named parties. The complaint must establish that (a) the plaintiff purchased the property from the county at a tax foreclosure auction and (b) the county properly foreclosed on the property.

Third, once the complaint is filed and served, the named parties have an opportunity to answer the complaint and articulate why their interest in the property should not be extinguished. If a defendant attempts to argue that the county did not properly foreclose on the property, the plaintiff may be in for a protracted legal battle. However, at this point in a quiet title action, many parties do not contest the matter and some fail to respond or otherwise answer in any manner. If a party fails to respond, default will be entered and the plaintiff will be able to seek a default judgement from the court, granting the requested relief. In Michigan, in order to obtain a default judgement quieting title to real property, the plaintiff must serve all defendants in default with notice of the plaintiff's intent to obtain a default judgement. The court generally holds a hearing in which defaulted parties have one final opportunity to appear and present defenses to their default. Barring any unusual or extraordinary circumstances, at such hearings the court generally grants the requested relief.

Finally, upon obtaining a favorable ruling and receiving a sealed and certified judgment quieting title from the court, the plaintiff must record the judgment with the register of deeds in the county in which the property is located. Once the judgment has been recorded, title to the property is vested in the purchaser forever as to the parties named in the quiet title action. At this point, title companies will be willing and able to provide title insurance policies for

subsequent transfers of the parcel.

Although it may seem like an extensive process, uncontested quiet title actions can be relatively painless. Furthermore, there are fewer contested actions now that county governments have streamlined the foreclosure process. Thus, if you have purchased or plan to purchase a property at a tax foreclosure auction, do not let apprehension about the process hold you back from properly clearing title to the property.

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Legal Entities and Formalities: Making Sure Your Business Protects You

BY NICHOLAS H. VANDER VEEN, ATTORNEY

A primary reason to form a corporation or limited liability company is to obtain limited liability protection: the owner's personal assets are protected from the claims of the company's creditors. One of the most common issues I observe among many small business owners is the propensity to take actions that put their limited liability protection at risk. Losing limited liability protection can result from a failure to follow or observe the generally simple, but numerous, rules and formalities. Whether it is because of a lack of funds, time-constraint issues, or a misplaced I-can-do-it-myself attitude, some small business owners fail to seek the advice and answers they need, thus opening themselves up to potential personal liability for company debt. With that in mind, the following are some simple rules to remember.

I. A Separate Legal Entity

Sole proprietors fail to understand that there is no legal distinction between the individual and the business (and all of the liabilities running a business entails) unless they form a legal business entity under the laws of the state in which they reside. Therefore, if you do not operate your business as a limited liability company or corporation, your personal assets are exposed.

II. Identifying the Correct Contracting Party

A mistake commonly made when entering into business contracts is failing to identify the business entity as the contracting party. If not done clearly and correctly , contracts (such as leases and supply agreements), debts, and other liabilities intended to be on behalf of the company may be interpreted, instead, as personal liabilities. For this reason, the company, not the owner, should be the contracting party.

III. Signing in the Correct Capacity

Even when correctly naming the company as the party to the contract, many business owners sign only their name with no designation of their title or capacity for the entity at the end of the contract. When signing on behalf of the company, the signature block should contain the name and title of the person signing.

IV. True Ownership of the Assets

I sometimes encounter clients who have properly formed an LLC or a corporation, but have forgotten to transfer to that company the assets used in the business. This results in an undercapitalized company that could fail to provide the limited liability protection for which it was designed.

V. Comingling of Funds

Company funds should be kept in a company account and used for company debts and liabilities. Personal funds should be kept in a personal account and used for personal debts and liabilities. Comingling funds (mixing personal and company funds in a single account or using the funds of one to pay the debts of the other) is dangerous and jeopardizes the company's limited liability protection.

VI. Maintaining Appropriate Formalities

Corporations act through officers, directors and other authorized agents. Limited liability companies act through members, managers, or other authorized agents. Make sure that you properly identify who has the authority to make certain decisions on behalf of your entity. Otherwise, you jeopardize the limited liability protection your company is designed to provide.

VII. Filing the Annual Report

One of the easiest and often overlooked or forgotten formalities to maintain is the need to file annual reports on behalf of the entity. Failure to timely file an annual report can lead financial penalties against the business entity

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Recent Additions to Smith Haughey

Welcome Gabriel S. Marinaro! Attorney Gabe Marinaro joins our Traverse City and Ann Arbor office in the Labor & Employment Law Practice Group. Gabe's practice focuses on all aspects of employee benefits and executive compensation. He regularly counsels publicly traded and privately held companies, tax-exempt organizations and governmental entities on a variety of employee benefits and executive compensation matters. Gabe can be reached at gmarinaro@shrr.com or 231.486.4540.

Welcome Scott M. Brookens! Scott Brookens is an attorney in West Michigan who practices in the areas of business transactions, mergers and acquisitions, and real estate law. In addition to his successful track record in the film and media production industry, Scott has experience working with small businesses and start-ups on growth and development strategies for their businesses. Scott can be reached at sbrookens@shrr.com or 616.458.4394.

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that they gather as much information about any potential seller liability under a multiemployer pension plan. The buyer should be provided with an estimate of the withdrawal liability prepared by the multiemployer pension plan. Although this estimate will not provide the current liability, it at least gives the buyer an idea of the potential size of the liability if a withdrawal occurs. Additionally, due diligence of the seller's contribution history (including any other members of the seller's controlled group) is important to understanding what potential multiemployer plan liabilities might be lurking. In certain situations, courts have imposed the seller's withdrawal liability and/or liability for missed contributions on a buyer of assets under a successor employer theory.

Thus, it is incumbent upon the parties to make sure they understand the seller's multiemployer plan obligations (both past and present) to get a sense of any withdrawal liability and develop a structure to mitigate or avoid such liability.

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or even suspension or dissolution by the state.

VIII. Planning for Succession

Entities without bylaws, operating agreements, or separate shareholder agreements probably do not have a structure in place for dealing with unplanned or unexpected succession and change of ownership.

This list is not a complete or exhaustive list of all potential missteps and mistakes that can jeopardize the protections afforded by forming a limited liability entity. The adage " an ounce of prevention is worth a pound of cure" is very true when it comes to maintaining your company's limited liability status. It takes the specialized knowledge and experience of an attorney to properly navigate and ensure you succeed in using a legal entity to protect yourself from personal liability associated with the operation of your business.

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