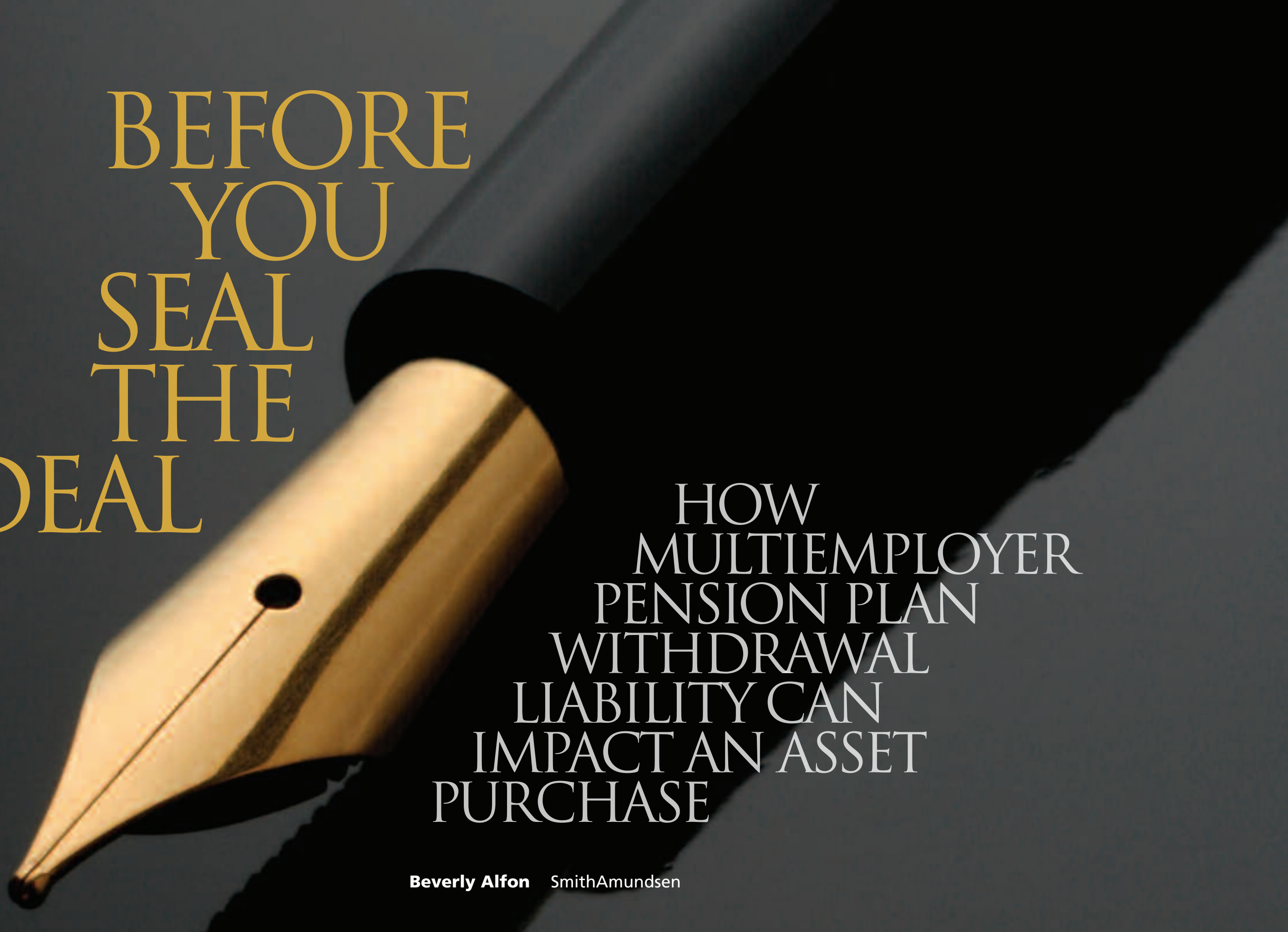

BEFORE YOU SEAL THE DEAL

HOW MULTIEMPLOYER PENSION PLAN WITHDRAWAL LIABILITY CAN IMPACT AN ASSET PURCHASE

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Caveat emptor ("Let the Buyer Beware"). Consider yourself warned. The general rule that a purchaser of assets does not assume the debt and liabilities of the seller – does not apply when the seller has been obligated to contribute to a multiemployer defined benefit pension fund. Asset purchasers are being hit with successor liability for withdrawal liability.

LET'S BREAK THIS DOWN

The potential for withdrawal liability only exists as to a multiemployer defined benefit (pension) plan.

What is a multi-employer fund? It is an employee benefit plan to which an employer becomes obligated to submit contributions based on a collective bargaining agreement with a union. A fund is referred to as "multiemployer" because the plan is funded entirely by contributions from numerous employers and investment returns on those amounts. It offers the same types of employee benefits that individual employers provide for their employees, such as retirement, medical and training benefits.

What is a defined benefit pension plan? Defined benefit pension plans define the monthly benefit that an employee will receive in retirement, based on a formula that typically considers years of service for employers who participate in the plan.

What is withdrawal liability? By federal statute, multiemployer pension plans pool risk so that the withdrawal of a few employers from the plan will not jeopardize the financial health of the trust. The Multiemployer Pension Plan Amendment Act of 1980 (MPPAA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to impose liability on an employer who withdraws from a multiemployer defined benefit pension plan that has unfunded vested benefits. The liability is for the employer's "share" of the unfunded vested benefits of the plan. The manner in which the liability is calculated, communicated, disputed and collected is all set forth under the MPPAA. Since the U.S. financial market bubble burst back in 2008, these multiemployer pension plans have faced significant decrease in the value of plan assets and employer withdrawal from plans.

What triggers withdrawal liability? An employer can trigger *complete* withdrawal (ERISA §4203(a)) when it stops making benefit contributions to the plan, either because it no longer has the contractual obligation to do so (i.e., it terminated its CBA with the union or stopped all or part of its operations that was covered by the CBA) or because it stopped making the contributions (because it shut down the business, negotiated out the portion of the CBA that required the contributions to the fund, or the company sold its assets to an employer that did not assume the existing CBA). A *partial* withdrawal (ERISA §4205) occurs when there is either (a) a 70% decline in contribution units; or (b) a cessation of the employer's contribution obligations under one, but not all, of the employer's CBAs or one, but not all, of the employer's facilities, and the employer continues to perform the work that it previously made contributions for to the fund.

HOW IS THIS RELEVANT TO MERGERS & ACQUSITIONS?

The general rule is that withdrawal liability will be imposed upon the employer who had the obligation to contribute to the pension fund (in this scenario, the seller).

However, over the past few years, federal courts have significantly expanded a seller's withdrawal liability to reach the asset purchaser.

In 2016, the Seventh Circuit found an asset purchaser potentially liable for the seller's withdrawal liability in *Board of Trustees of the Automobile Mechanics' Local 701 Union and Industry Pension Fund v. Full Circle Group, Inc.*, 826 F.3d 994 (7th Cir. 2016). To impose successor withdrawal liability on the buyer, the Seventh Circuit enumerated only two elements: (1) notice of the potential liability prior to the purchase; and (2) substantial continuity in the operation of the business before and after the sale. The court rejected the purchaser's claim of ignorance:

> *[The purchaser] may never have heard of withdrawal liability or known that the union pension fund was underfunded…but knowing that he was dealing with a union pension fund he was on notice that there was a possibility of such liability. A lack of familiarity with the concept of withdrawal liability cannot be an excuse; he had lawyers to advise him on [his company's] legal obligations. Further evidence of notices is the fact known if not to him then (again) to his advisers that most union pension funds are underfunded [.]*

The Seventh Circuit determined that the purchaser had notice of the potential liability based on its knowledge that the workforce was unionized. It remanded the case to the district court for trial on the second element of substantial continuity of the operation.

That case was clearly in line with the Seventh Circuit's 2015 ruling that notice of potential withdrawal liability is sufficient to impose the liability upon a successor, in this case the asset purchaser. *Tsareff v. ManWeb Services, Inc.*, 794 F.3d 841 (7th Cir. 2015) (*Man Web I*). To find otherwise, the court explained, would create a "liability loophole" whereby multiemployer plans "would be foreclosed in some situations [where an employer withdraws as a result of the asset sale and the demand for withdrawal liability post-dates the closing of the asset sale] but not others [where an employer ceases operations due to bankruptcy] from seeking withdrawal liability from asset purchasers who would otherwise qualify as successors, and the plans would be left 'holding the bag.'" The Seventh Circuit remanded the case to the district court to determine the issue of sufficient continuity of operations.

The district court issued its decision against the pension fund, finding no substantial continuity of business operations. However, in March 2018 the Seventh Circuit reversed the district court, holding that it erred by focusing "more on the continuity of the pre-purchase ManWeb business at the expense of examining the more critical degree of continuity of [the purchaser's business]." *Indiana Electrical Workers Pension Benefit Fund, et al. v. ManWeb Services, Inc.*, 884 F.3d 770 (7th Cir. 2018) (*ManWeb II*). The court referred to it as a "Big Buyer" loophole, which would destroy "a finding of continuity even where a large buyer in essence swallows a smaller seller whole and continues its business as part of the buyer's business." The court even referred to a press release "describing the transaction not as an asset purchase but as an acquisition and merger," which the court described as "the language of continuity." The Seventh Circuit directed the district court to reevaluate the continuity factors by focusing on the extent to which the business of the seller was continued by the purchaser after the asset purchase, considering the following factors: ownership, physical assets, intangible assets, management and workforce, business services, and customers.

On June 1, 2018, the Ninth Circuit held in *Heavenly Hana LLC v. Hotel Union & Hotel Industry of Hawaii Pension Plan,* that a private equity company that acquired a hotel was liable for the seller's unpaid withdrawal liability of $750,000. The Ninth Circuit rejected the district court's requirement of "actual notice" of the liability to the buyer and determined that "constructive notice" was sufficient to impose successor withdrawal liability "because a reasonable purchaser would have discovered their predecessor's withdrawal liability." The court found constructive notice on the following facts: (1) the private equity company was experienced in other acquisitions that involved multiemployer pension plans; (2) the private equity company had notice that the hotel employees were unionized and the seller contributed to a multiemployer plan; and (3) the pension plan's funding notices, which clearly indicated that it was underfunded, were available to the public. The seller's representation of no withdrawal liability to the buyer, and the buyer's reliance on incorrect advice of its counsel, did not sway the court.

These recent decisions make clear that an investigation regarding potential successor withdrawal liability must be a part of an asset purchaser's due diligence.

BEST PRACTICES

- If any of the seller's employees are unionized, determine the seller's defined benefit pension plan obligations and potential withdrawal liability.
- Investigate into all publicly available plan documents, request and review all formal plan notices issued to the seller over the past several years, and requiring the seller to request a withdrawal liability estimate from the pension plan.[1]
- Determine whether there are applicable industry exemptions to the assessment of withdrawal liability, such as the construction industry exemption.
- If there is potential withdrawal liability, negotiate the price down and negotiate some protection through an ERISA 4204 agreement.[2]

Keep in mind that there are also legal obligations that may attach to the purchaser under the National Labor Relations Act, with respect to notice and bargaining obligations (which are beyond the scope of this article).

Long before sealing the deal, traditional labor and benefits counsel should be called upon in any asset purchase transaction involving unionized employees.

1 It should be noted that a plan has up to 6 months to respond to a request for a withdrawal liability estimate (although most respond much sooner) and the plan may pass on the cost of actuarial services to calculate the estimate.

2 If a potential purchaser is willing to continue contributions to the pension fund, it may avoid potential withdrawal liability through the use of ERISA Section 4204 asset sale language. Under this type of agreement, the purchaser agrees to maintain the same level of pension contributions as required under the seller's CBA with the union, plus satisfy a number of other requirements set forth in the statute. If agreed upon, withdrawal does not immediately occur as a result of the sale. However, the statutory requirements can be onerous and it does not completely relieve the purchaser from potential withdrawal liability. The purchaser takes the place of the contributing employer and becomes susceptible to all of the events that may trigger withdrawal liability.

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