

DEFENDER

THE NADC NEWSLETTER

Watch Out for Labor/Employment Issues in Acquisitions

D. Gerald Coker
Chair, Labor Law Section



D. Gerald Coker
Chair, Labor Law Section

While labor and employment issues seldom drive a dealership buy/sell, they can become the deal-breakers. If not examined early and addressed properly during negotiations, these issues could leave a buyer or seller with enormous legal liability. The issues arise under many federal and state labor and employment laws, including the National Labor Relations Act (NLRA), federal anti-discrimination laws, federal and state plant-closing laws, statutes regulating employee benefits, federal immigration laws and common law.

One issue commonly arising in a merger or acquisition is the purchaser's duty to assume the seller's contracts or bargaining relationship with the seller's unions. Often, parties to the sale assume that a union contract simply must come along as part of the purchased business. An early, thorough examination of any existing collective bargaining agreements or bargaining duties, as well as exploration of alternative means of structuring the sale, may reveal that this is not necessarily the case. In an asset purchase, although the purchaser *may* assume certain bargaining obligations with a pre-existing union, it generally is not bound by the substantive provisions of the seller's collective bargaining agreement.

In the asset purchase context, the National Labor Relations Board (NLRB) will apply a "successorship" analysis to determine whether the purchaser has an obligation under the NLRA to recognize and bargain with existing unions

and whether the purchaser has assumed the seller's collective bargaining agreement. To determine successorship status, the NLRB and the courts will examine the continuity of the work force, the continuity of the employing industry and, to a lesser extent, the impact of a hiatus in operations. The key determinant of successorship status is whether a majority of the purchaser's new workforce in an appropriate bargaining unit is composed of the seller's employees who were represented by a union. A purchaser must ensure that the method utilized to staff its operation does not violate the NLRA; hiring decisions cannot be made in a discriminatory fashion to exclude any of the seller's union-represented employees.

If the purchaser is deemed a successor, it retains certain rights but also assumes certain duties. An assets purchaser generally has the right to set initial terms and conditions of employment and to hire its own workforce, provided that hiring decisions are not based on the status of the seller's employees as members of a bargaining unit. A purchaser also may disregard the seller's collective bargaining agreement as long as the purchaser has not impliedly or in fact assumed the agreement.

A successor also takes on a number of duties after the sale. The most substantial of these may be a duty to bargain with a union. This obligation, however, typically attaches only after the seller's former union-represented employees

continued on page 3

Sidebar

Contents:

President's Letter2
NADC Leadership	...2, 4
Forum Topics2
Executive Director	...4

President's Letter



*Jonathan P. Harvey
Harvey and
Mumford LLP*

Congratulations to the new members of the NADC. We had 14 members at the organizing meeting in September, 80 members last month when I gave my first report in the initial newsletter of the National Association of Dealer Counsel, and by the time you receive this edition, there will be 153 members.

The online forum is up, running and remarkably useful for the entire membership. The list serve provides answers to questions otherwise difficult and sometimes impossible to find. The remarkable thing

I have spoken with a number of members regarding the Bankruptcy and Debt Collection, F&I and Warranty and Fixed Operations Sections and hope to name the remaining chairpersons by the end of next week. Each section will present at the First Annual Convention in April, and members are encouraged to let Jack Tracey, our executive director know on which section they would like to serve and of which section they wish to become a member.

My priority for 2005 is to help get the sections and committees off the ground, to increase the membership to at least 300 by the Convention, and to greet all of you in April. I hope you will tell your colleagues about us, and I look forward to welcoming many more members in my January

Standing Committees and Chairs

- Executive
Jonathan Harvey, Harvey and Mumford LLP, Albany, NY
- Finance
Patty Covington, CarMax Auto Superstores, Inc., Glen Allen, VA
- Meetings and Conferences
Gene Kelley, Arnstein & Lehr LLP, Chicago, IL
- Membership and Advancement
Mike Charapp, Charapp & Weiss, LLP, McLean, VA
- Sections Management Larry Young, HughesWattersAskanease, Houston, TX
- Newsletter Editor
Rob Cohen, Auto Advisory Services, Tustin, CA

is that this Association is doing exactly what it was designed to do and is functioning on all twelve cylinders. The enthusiasm I hear whenever a new member calls or writes, the interest in participating and the sighs of relief at finally having a professional group in which to network are palpable. We are an organization whose time has come, we are full of energy, and we have a remarkably bright future. The danger is that we rest on that premise alone, but I am pleased to tell you I see no sign of such a tendency.

I am able to report that we are in the active planning stages of our First Annual Convention in April of 2005, which we are hoping to hold in Atlanta. We have established standing committees and bar association type sections and have leadership in place for most (see insets above).

Sections and Chairs

- Bankruptcy and Debt Collection, vacant
- Buy/Sell Agreements
Oren Tasini, Haile, Shaw & Pfaffenberger, PA
- F&I, vacant
- Federal and State Regulatory Compliance
Tom Hudson, Hudson Cook, LLP, Linthicum, MD
- Labor Law for Dealers
Jerry Coker, Ford & Harrison LLP, Atlanta, GA
- Litigation
Len Bellavia, Bellavia Gentile & Associates LLP, Mineola, NY
- Manufacturer Relations and Franchise Issues
Ron Coleman, Davies Pearson PC, Tacoma, WA
- Sales and Advertising
Gary Adams, Greater Cleveland Auto Dealers Association, Brecksville, OH
- Taxation
Stephen A. Moore, McNees Wallace & Nurick, Harrisburg, PA
- Warranty and Fixed Operations, vacant

report. It is clear that NADC is the place to be and the organization to join if you have anything to do with dealers.

I conclude by reminding all of us that the members of this Association are the reason it was formed, the lifeblood of the organization and the ones who will most benefit. May the New Year bring peace to the world, and to each of you, a rich, full and busy professional life.

Happiest of Holidays and kindest personal regards to all of you.

Recent topics on the members only online forum at www.dealercounsel.com include:

- ***Import disclosures***
- ***Safeguards and telemarketing rules***
- ***Handling flat rate chargebacks***
- ***Self funded health insurance***
- ***Negative equity***
- ***Refusal to honor manufacturer's warranty***

Check in every day to follow and to participate in the discussions.

continued from page 1

ees comprise a majority of the purchaser's employees in an appropriate unit. Once the obligation arises, the successor cannot make unilateral changes in wages, benefits or other terms and conditions of employment without first meeting with the union and making a good-faith effort to reach agreement with regard to the proposed changes.

An important aspect of pre-sale due diligence is to examine the seller's collective bargaining agreements for the presence of successorship clauses. Such clauses vary, but generally purport to require a purchaser to be bound by the contract. Depending on the specific language, the seller may be liable to the union for damages if it fails to secure the purchaser's agreement to be bound by the union contract. Also, the union may seek to enjoin the sale pending arbitration of a grievance alleging breach of the successor clause.

The seller should be alert to the possibility that the collective bargaining agreements may impose financial obligations. For example, some agreements obligate the seller to make severance payments to its employees, to pay accrued vacation pay, or to continue health and welfare benefits for a certain period of time after the sale or closure of the business. The NLRA also requires the seller of a business to notify and to bargain with the union representing its employees over the effects of the sale on those employees. Although this is usually not burdensome, the seller's failure to give the union sufficient advance notice of the sale or to engage in "effects bargaining" can create substantial liability under the NLRA.

The NLRB also has broad discretion to hold a "successor employer" liable for its predecessor's unfair labor practices. A purchaser can address this risk by securing an appropriate indemnification clause in the sales agreement.

Issues arising under federal and state anti-discrimination laws also require advance consideration and due diligence. Title VII of the Civil Rights Act of 1964 prohibits discrimination in

employment on the basis of race, color, sex, religion and national origin, and the Age Discrimination in Employment Act prohibits employment discrimination against persons age 40 and above. The Americans with Disabilities Act provides similar protections for qualified individuals with disabilities. Although the doctrine of successor liability was developed in the context of violations of the NLRA, it also applies to claims under these and other anti-discrimination statutes. The purpose underlying successor liability in the anti-discrimination setting is to ensure that a sudden change in the employer's business does not deny an employee's statutory rights, by allowing the employee to enforce claims against the successor employer that it could have secured against the predecessor.

To protect itself from liability for acts of the seller, the successor employer should conduct a thorough due diligence with respect to all pending and potential claims of discrimination. The purchase agreement can include an express provision relating to the non-assumption of liability for pending charges as well as a provision whereby the predecessor will indemnify the successor for damages resulting from such claims.

In acquisitions involving facility closures or mass layoffs, the seller may have obligations under the federal Worker Adjustment and Retraining Notification Act (WARN). Covered employers who fail to comply with notice requirements may have to pay monetary remedies to affected employees, as well as a civil penalty. In addition to the federal WARN requirements, some states and municipalities have enacted their own plant closing/mass layoff laws which are, in some instances, more onerous than WARN.

Due diligence also should include a thorough examination of all employee retirement and benefit plans. Most retirement and benefit arrangements are subject to complex rules under the Employment Retirement Income Security Act of 1974 and the Internal Revenue Code. Additional benefits

considerations for both purchasers and sellers arise in the context of various welfare benefit plans, obligations to provide continuation coverage under Consolidated Omnibus Budget Reconciliation Act (COBRA) and specific benefits issues arising out of any collective bargaining agreements between the seller and its employees. If a seller has adopted a union multi-employer pension plan, there may be significant liability to the seller, or even to the buyer, if the pension plan is underfunded.

Finally, an issue often ignored in an acquisition is the sale's effect on the eligibility of foreign employees to continue working in the United States. Many visas for foreign workers are employer-specific and allow the individual to work only for the named employer in a specific capacity. The terms and timing of the transaction may affect the status of an existing or prospective foreign employee by changing his or her job location, duties or compensation. Under such circumstances, successor employers may have an obligation to amend a foreign worker's visa petition. In addition, a successor employer must be certain that all documentation on I-9 forms for employees of the seller is in order, ensuring that they remain eligible to work in the United States.

By taking steps early in the process to identify and address these important areas, and by expressly allocating duties and responsibilities related to labor and employment issues in the agreement of sale, the parties can prevent unexpected problems and liability, as well as costly litigation down the road.

*Mr. Coker, a partner in the Atlanta office of the national labor and employment firm of Ford & Harrison LLP, regularly works with dealership corporate counsel on the labor/employment aspects of acquisitions. This is a condensed version of an article Mr. Coker co-authored and which previously appeared in **The National Law Journal**.*

Message from Executive Director



Jack Tracey, CAE

As growth in the Association continues, it is important to remember a few housekeeping rules to keep the flow of information moving successfully among the members. The two primary means of communicating among the membership are through the list serve and on-line forum. Both of these vehicles are great ways to facilitate rapid communication.

To make certain that members recognize the email as a list serve message, be sure to type NADC at the start of your subject line, preceding the topic of your mail. Your subject line should look something like this:

Subject: NADC: Your Topic Here

By using this approach members will be able to set up their spam blockers to recognize communication from NADC. Be sure to take a few minutes to set your spam blocker program so that it does not block NADC mail.

The on-line forum is another great way to communicate. Go to www.dealer-counsel.com, log-in, click on forum and see what topics are under discussion. Posting an issue or responding to a posted item is easy; just follow the on-screen instructions. Check on the forum throughout the day to see how the discussion develops.

Finally, we hope that this newsletter becomes a valuable way to communicate. Relevant and timely articles will be provided by members and published here. The first such contribution has been made by Jerry Coker, at Ford & Harrison LLP and is published in this issue.

If you have an article that you would like to share with the membership please contact The **Defender** editor, Rob Cohen, at Auto Advisory Services (rob.cohen@autoadvisory.com) or send it to me at:

jtracey@dealer-counsel.com.

To a great extent, the success of our Association will be based on communication, so be sure to participate.

Litigation Defense Strategy Services

gvo3 Consulting, LLC specializes in assisting auto dealers with the development and implementation of a litigation defense strategy to assist in the defense of litigation and governmental inquiries using a structured, comprehensive risk management approach to forms, processes, documentation, auditing and training. This strategy becomes part of a dealer's overall risk management plan, and in some cases may lead to a reduction in the dealer's garage keeper's premium.

The gvo3 Consulting, LLC Litigation Defense Strategy includes:

- An exhaustive risk assessment, including:

Analysis of the dealership's sales and F&I forms, operating processes

and procedures

Initial deal jacket review

In-depth review of compliance with dealer-lender agreements, dealer's safeguard program Truth In Lending and Consumer Leasing Deceptive Trade Practices Acts

- Development of the F&I policy and procedure and compliance training program
- Facilitation of the compilation of a corporate diary and ongoing maintenance
- Quarterly audits of deal files for compliance with F&I policy and procedure, present state laws, federal regulations, recurring litigation theories
- Expert witness services

gvo3 is an associate member of the NADC. Contact Gil Van Over, president, gil@gvo3consulting.com or 312-961-9065.

NADC Board of Directors

Officers:

President - Jonathan Harvey, Harvey and Mumford LLP, Albany, NY
First Vice President - Rob Cohen, Auto Advisory Services, Tustin, CA
Second Vice President - Mike Charapp, Charapp & Weiss, LLP, McLean, VA
Treasurer - Patty Covington, CarMax Auto Superstores, Inc., Glen Allen, VA
Secretary - Larry Young, HughesWattersAskana, Houston, TX

Board Members:

Gary Adams, Greater Cleveland Auto Dealers Assoc., Brecksville, OH
Lawrence Anito, DeGraff, Foy, Kunz & Devine LLP, Albany, NY
Ronald Coleman, Davies Pearson PC, Tacoma, WA
Gregory Gach, Gregory H. Gach, Charlotte, NC
Tom Hudson, Hudson Cook, LLP, Linthicum, MD
Gene Kelley, Arnstein & Lehr LLP, Chicago, IL
John Oyler, McNeese Wallace & Nurick LLC, Harrisburg, PA
Oren Tasini, Haile, Shaw & Pfaffenberger, PA, North Palm Beach, FL
J. Cary Tharrington, Sonic Automotive, Inc., Charlotte, NC
Jack Tracey, CAE, Pittsburgh, PA;
Executive Director

NADC
NATIONAL ASSOCIATION
OF DEALER COUNSEL

Volume I, Number 2
December, 2004
Rob Cohen, Editor

rob.cohen@autoadvisory.com
Defender, The NADC Newsletter
is published monthly by the
National Association of Dealer
Counsel

217 St. Charles Place
Pittsburgh, PA 15215
412-781-9366
Fax 412-781-5607
www.dealer-counsel.com