DEFENDER
THE NADC NEWSLETTER

A Big V-8 Moment:
The Expansion of Successor Liability

Ronald C. Smith, Esq. and Jeffrey B. Halbert, Esq.

Ronald C. Smith

A few weeks ago, your client concluded a transaction in which the client acquired the assets of a dealership. All documents were executed, money exchanged hands and the new dealer is firmly ensconced in the operation of the company. Presumably everyone is happy with the transaction and life is good. Then one day out of the blue, he Equal Employment Opportunity Commission (EEOC) gives notification that it is asserting successor liability against your client for a previous claim of employment discrimination lodged against the prior dealership. One might think that this is a pure fictional scenario. Unfortunately that may not be the case. Federal, state, local agencies and courts are marching steadily on a course of making successor business entities responsible for certain obligations of the predecessor. This trend seems to have been hastened by the current economic climate, although the theory has actually been around for several years.

The general common law rule, designed to maximize the fluidity of corporate assets, is that "a corporation that merely

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Sidebar

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Dealer Obligations in a Factory Recall

Michael G. Charapp, Esq.

Michael G. Charapp

There have been a number of highly visible recalls recently. Federal law requires manufacturers to report safety related problems to the federal government. When there are a sufficient number of safety related problems reported, a requirement to recall affected vehicles is triggered.

A recall is an expensive process for a manufacturer. The manufacturer bears the expense of notifying owners and dealers. Replacement of parts and repairs must be done at no cost to the customer. Reputations of manufacturers have been made or broken over how effectively they handle their obligations.

Dealers also have obligations in the event of a recall campaign. Like a manufacturer, a dealer's reputation with its customers can rise or fall based on how it handles its obligations.

Sale of New Vehicles. It is a violation of federal law to sell a new motor vehicle on which recall replacements and/or repairs have not been done. The National Highway Transportation Safety Administration has made clear that a dealer may not deliver a new vehicle with a promise to repair it when the customer can return. A new vehicle subject to recall, but not yet sold to a consumer, must be

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President's Message

Rob Cohen

Your association's Board of Directors has been hard at work. Back in October, I spearheaded a project to completely revamp the NADC's website to allow our members better access to content and greater control over the NADC-related email they receive. I formed a web development committee which ultimately presented its recommendations to the Board of Directors during our telephonic Board meeting on January 12.

I am happy to say the Board of Directors approved a significant expenditure that is certain to result in a dramatically improved website with integrated list serve controls. More specifically, our new website will have the following functionality:

- NADC eForum

a. Members will be able to post comments, questions and documents within specific categories.
b. Members will receive email notifications that will contain the content of the post as well as a link to the forum where the original post was placed. The links will make it easy to respond to posts and the system will automatically create topical "threads."
c. Members will be able to subscribe to those categories of information that interest them and will only receive email notifications related to the categories to which the member subscribes. Members will be able to select the frequency of email notifications (e.g., real time, once per day (in digest form), or once per week (in digest form)).
d. The eForum will have robust search capabilities, allowing members to retrieve posts quickly and easily.

- NADC eLibrary

a. Members will be able to post files within specific categories.
b. Members who subscribe to this service will receive email links to postings within the categories to which they subscribe. Members will be able to select the frequency of email notifications.
c. The eLibrary will have robust search capabilities.

- Enhanced Membership Profile Management

- Enhanced Event Registration

I believe that the NADC has done a fairly good job of disseminating useful information to our membership. However, we have not done a very good job of archiving that information for research purposes. Our new website will not only enhance the usefulness of our existing list serve, but it will also preserve and properly index our valuable content for future use.

I am also happy to report that the Board has decided to participate at the NADA Convention and Expo in Orlando, Florida, February 13-15. We believe that a presence at NADA not only will expose our organization to more industry professionals, but it also shows our strong support for NADA. For those of you who have not attended an NADA Convention, I urge you to do so. There are innumerable networking opportunities, informative workshops (legal and otherwise), as well as a Federal Agency Outreach pavilion (booth #2013) featuring representatives from several federal agencies that regulate dealership operations. Representatives from IRS, FTC, EPA, NHTSA, and CCAR are expected. This is a great opportunity for dealer lawyers to talk to regulators in a casual setting.

Our booth will be staffed by Jack Tracey, our Executive Director as well as various NADC officers and Board members (including myself). Please drop by our booth (#2401) to say hello. To view our booth attendance schedule, please go to www.dealercounsel.com and click on the "NADC @ NADA" link.

Rob Cohen, President of Auto Advisory Services, Tustin, CA, is President of NADC.

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purchases for cash the assets of another corporation does not assume the seller corporation's liabilities." *Travis v. Harris Corp.*, 565 F.2d 443, 446 (7th Cir. 1977). Traditionally, this rule has been limited by four exceptions, and successors have been held liable where 1) there is an express or implied assumption of liability; 2) the transaction amounts to a consolidation, merger, or similar restructuring of the two corporations; 3) the purchasing corporation is a "mere continuation" of the seller; and 4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts. *Id.*

Application of successor liability has obtained some currency particularly in the areas of employment and state taxing authorities. This article deals primarily with the employment area.

The fountainhead case from which successor liability cases emanate is the 1973 United States Supreme Court case, *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). In *Golden State*, the Supreme Court held that liability under the National Labor Relations Act could be imposed on a successor for a predecessor's unlawful discharge of an employee. The Court ruled that an employer, who substantially assumes a predecessor's assets, continues the predecessor's operations without interruption or substantial change, and has notice of a pending unfair labor practice charge at the time of acquisition can be required to remedy the unfair labor practice. The Board's remedy in *Golden State* required reinstatement with back pay of the aggrieved employee, which the Court affirmed against the successor to promote the free exercise of employees' rights under the NLRA and make whole the victimized employee. Further, the Court found the imposition of liability to be of relatively minimal economic cost: because "the successor must have notice before liability can be imposed, 'his potential liability for remedying unfair labor practices is a matter which can be reflected in the price he pays for the business.'"

Golden State, as well as the Court's holding in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), are the foundation for a series of cases in which courts concluded that the balance between the need to effectuate federal labor and employment discrimination policies and the need, reflected in the traditional common law rule, to facilitate the fluid transfer of corporate assets is best reached by the imposition of successor liability. Recently a building management company, which assumed its own subcontract with a unionized janitorial services company and which hired most of the subcontractor's union representative employees, was required to arbitrate whether and to what extent it is bound by the substantive terms of the predecessor's union contract with the food and commercial workers' union. See *Food and Commercial Workers, Union Local 348-S v. Meridian Management Corp.*, 198 LRRM 2129, Second Circuit 07-0080, decided October 2nd, 2009.

The main theme of these cases deals with the continuity of operations of the former employer. The greater the number of employees that are hired by the successor, and the more that the same type of business is carried on by the successor, the greater the likelihood that a court will find a successor relationship and impose liability. The successor liability web has even encircled a company that was required to "consult" with a union before setting new employment terms even where the collective bargaining agreement with the predecessor had expired. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

The doctrine of successor liability has also been applied in a Title VII case. In *Wheeler v. Snyder Buick*, 794 F.2d 1228 (7th Cir. 1986), the court drew upon these justifications to impose liability upon a successor for a predecessor's Title VII violation. The court stated "in the context of Congressional prohibition of discrimination in employment, judicial importation of the concept of successor liability is essential to avoid undercutting Congressional purpose by parsimony in provision of effective remedies." *Id.*, at 1237. Relevant to the imposition of liability were the following factors: 1) whether the successor employer had prior notice of the claim against the predecessor; 2) whether the predecessor is able, or was

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mike.charapp@cwattorneys.com

NADC
National Association of Dealer Counsel

6th Annual NADC Member Conference

April 11 to 13, 2010

Four Seasons Dallas at Las Colinas

Make your plans now to attend the sixth annual meeting of NADC members in Dallas. Sessions are being developed to reflect the special interests of members and the realities of today's auto industry. The meeting opens with a reception Sunday evening, April 11, and will conclude by 1:00 pm on Tuesday, April 13. Register now on the events page at **www.dealercounsel.com**.

The conference is open to NADC members only. Registration is $495 per person and includes receptions, breakfasts, lunch and breaks. The receptions, lunch and breaks provide time for members to get to know each other.. CLE credit will be available.

Reserve your hotel room by March 18, 2010 for conference rates: Superior $235; Deluxe $260; Villa $285. All room rates are plus tax and, subject to availability. Contact the hotel by calling 972-717-2499 and referencing NADC.

NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL

Brief Agenda

Sunday, April 11 - There will be a meeting of the Board of Directors in the afternoon and the Opening Reception in the early evening.

Monday, April 12 - The day will begin with a continental breakfast followed by a day full of educational sessions punctuated by morning and afternoon breaks and a lunch. There will be ample time for questions and answers in all sessions. A cocktail reception caps off the day's events.

Tuesday, April 13 - A continental breakfast will be followed by the final sessions and will end by 1:00 pm.

Registration fee includes receptions, breakfasts, breaks and Monday's lunch.

Program updates are posted at www.dealercounsel.com as they become available.

Executive Director's Message

Jack Tracey

The new year has started with a flurry of messages sent through the three list serves. The lists are a members-only benefit and are proving to be valuable tools during these remarkable times. While on the topic of the lists, let me add one request. When replying to a message, please make sure you are sending it back to the list through which it came. Some members have opted out of the bankruptcy and/or arbitration issues lists and are not interested in receiving messages on these topics.

Open communication among members has characterized the NADC since its inception. The 6th Annual NADC Member Conference provides members with another opportunity to learn from, and share with each other. Conference sessions always include time for questions from the floor, and we expect lively conversations in Dallas in April.

When the NADC was founded in 2004, no one anticipated the turmoil the industry would suffer, nor how critical it would become to share problems and solutions with each other. The conference is open only to NADC members.

The upcoming conference presents a timely recruitment tool. If you know attorneys, in your practice or not, who are working with dealers, please invite them to become members of the NADC. Send their names and contact information to me, and I will get in touch with them immediately.

In his message this month, NADC President Rob Cohen mentions the next generation of communication tools. These valuable avenues of communication offer yet another member recruitment opportunity. Think of potential members who will benefit from joining and also of those whose expertise will benefit NADC.

Contact Jack Tracey, CAE, NADC Executive Director, at: jtracey@dealercounsel.com

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NADC
National Association of Dealer Counsel

Plan to attend!

6th Annual Member Conference

April 11-13, 2010

Dallas

See pages 4-5 for more information. For updates to the program, go to:

http://dealercounsel.com/events.php

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able prior to the purchase, to provide the relief requested; and 3) whether there is sufficient continuity in the business operations of the predecessor and successor. *Id*., at 1236.[1] The court found the first two factors to be critical believing that it would be inequitable to hold a successor liable when it was unable to take the liability into account in negotiating the acquisition price or when the predecessor was capable of paying and merely attempted to externalize the liability onto another property. *Id*.

Perhaps the most insidious use of successor liability has been where the doctrine was imputed against the successor for unfunded withdrawal liability of the predecessor under the Multi-Employer Pension Act. Simply stated, the rule is imposed where the prior employer has been a member of and a contributor to either a union or non-union multi-employer pension program. There have been numerous cases involving the sale of a company where the liability either has not been disclosed, or has not been uncovered by appropriate due diligence or the naiveté of the buyer, and the successor winds up with a large bill. The unfunded liability is calculated on a pro rata basis. The liability can range from several thousands of dollars per employee to tens of thousands of dollars per employee. A unionized client of our firm thought that it would decertify the union but, upon finding that the unfunded liability was $23,000.00 per employee (for over 100 employees), decided not to move forward with the decertification attempts. Recently a non-union employer paid over $2 million to get out of a multi-employer plan covering approximately 75 employees because fearing that the unfunded liability would worsen in the future. A recent case extending the doctrine even further came out of the 6th Circuit Court of Appeals in late October. Splitting from decisions in other circuits, the 6th Circuit, in *Central States Pension Fund v. International Comfort Products, LLC*, 187 LRRM 2321, 6th Cir. 08-5949, 10-23-09, held that a company, which was *not* signatory to a labor contract requiring contributions to a multi-employer pension plan, was responsible for making those contributions since it had contractually agreed with the unionized company to reimburse the unionized company for those contributions. This is a rather far reaching result because it is the first case of its sort which requires a party that is non-signatory to a union contract to pay unfunded liability. Hopefully that case will be appealed to the Supreme Court and overturned.

In the scenario described at the outset of this article, the successor employer would have a defense against the EEOC as to knowledge, and would have a claim against the seller for indemnification, since the EEOC claim was missing from the disclosure statement. However, if the money is gone (which many times is the case since there is little if any blue sky in today's transactions), the successor is left to defend and settle or pay at its own expense. This can be a costly "unbargained" for result in what appears to be an otherwise normal transaction. Since NLRB claims and EEOC claims have a relatively short time bar, if there are excess funds in the transaction, such funds might be escrowed for a bit or some sort of collateralization subject to future drawdown might be negotiated. In any event, there seems to be a definite uptick in these cases and buyer's counsel should proceed cautiously.

Ronald C. Smith, Equity Shareholder and past President of Stewart & Irwin, P.C., chairs the Business, Automotive Retail and Employment/Labor sections of the firm's practice. Ron represents numerous non-publicly traded companies of virtually every type and has specialized in representing hundreds of automobile dealerships throughout the Midwest, Southeast and Eastern United States, together with various vehicle trade associations, for over 39 years.

Jeffrey B. Halbert is a Shareholder and member of the Executive Committee with Stewart & Irwin, P.C. He heads the firm's Labor and Employment Department, handling litigation before all state and federal courts in Indiana. He also practices before numerous state and federal agencies, including but not limited to, the Equal Employment Opportunity Commission, the Indiana Civil Rights Commission, the National Labor Relations Board, the United States Department of Labor and the Indiana Department of Labor.

[1] *Compare Howard Johnson Co. v. Hotel Restaurant Employees Detroit Local Joint Board*, 417 U.S. 249 (1974) finding that there was no substantial continuity of identity in the work force hired by Howard Johnson and no express or implied assumption of the agreement to arbitrate. *See Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998), distinguishing Golden State and ruling that successor employer is not responsible for unfair labor practices committed by predecessor where the sale of assets occurred through receivership, preventing the successor from negotiating for indemnity or for a price that would compensate for the risk of unfair labor practices liability.

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removed from sale as quickly as possible. Federal law makes clear that a recalled product cannot be sold until remedied.

Parts. Replacement motor vehicle parts and assemblies in a dealer's inventory fall under the same rule. If there is a recall affecting inventory parts or assemblies, a dealer must not sell them for dealer repairs or to the public.

Used Cars. Used cars subject to recall pose a thorny issue for dealers. While the law does not specifically penalize sale of a used car subject to a recall as it does sale of a new car, a dealer who sells a used car of the brand for which it holds a franchise that has an unremedied recall runs the risk of significant liability. If there is an accident related to the unremedied defect, the dealer may well see a lawsuit for negligence for selling the vehicle with a defect it knew or should have known was subject to recall.

In publications, NHTSA has advised manufacturers that they should "encourage" their franchised dealers to ensure that the used vehicles of the manufacturer's brand have all applicable recall work completed before resale to the public.

What Should A Dealer Do?

Pretty clearly, in the event of a recall dealers must have procedures in place so that employees are aware of their obligations to protect the dealer from liability. In addition, customers' emotions may run from aggravation at the inconvenience to fear of the problem. While there may be limited upside for a dealer in helping emotional customers, there is a real downside if a dealer is not prepared and proactive.

• Any recall notification material received by the dealer should be forwarded to the sales department, to the parts department, and to the service department.

• In the sales department, the management should determine whether the dealership stocks any new vehicles subject to the recall. Remove all affected vehicles from sale. Mark them unavailable on the dealers' website inventory. Put indicators on inventory cards or computer listings. Move the keys to a secure area so that salespeople will not be tempted to demonstrate them. Train salespeople so that can understand the situation and can handle customer inquiries. The vehicles will become available for sale once remedied, so emphasize the importance of taking orders and include "sweeteners" to make it worth the wait for customers.

• In the parts department, management should determine whether motor vehicle parts or assemblies subject to recall are in inventory. They should be immediately removed from sale until they can be replaced. Order the parts necessary for performing recall repairs at expected levels.

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• In the service department, put in place a procedure to carefully and appropriately handle customer requests for performance of recall repairs and to handle repairs of dealer inventory. Train service advisers to do "triage" for customers who call – schedule the fearful customers quickly and provide loaners or pick-up assistance for customers who express annoyance. Respond with empathy to a customer's concerns. Once the rush subsides, contact customers who don't contact the dealership so that they know dealership personnel are looking out for them.

• In the used car department, identify vehicles affected by the recall. Those vehicles should be removed from sale until the recall remedy is done. The liability for selling a vehicle with an unrepaired recall that is then in an accident involving death or serious injury can be devastating for a dealer.

Michael G. Charapp is a lawyer in the Washington, D.C. metro area who represents car dealers and dealer associations. He is editor of The Defender. He encourages submissions for publication, and he can be reached at mike.charapp@cwattorneys.com.

New Members

NADC welcomes the following new members:

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NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL
Volume VI, Number 1
January, 2010
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