Claims of Branding, Acquisition and Control Satisfy Single-Employer Test

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The Worker Adjustment and Retraining Notification Act (WARN Act) was enacted in 1988 to allow workers to adjust to the prospective loss of employment from a plant closing or mass layoff. It requires employers to give affected employees 60 days' advance notice of such events. Employers that violate the WARN Act's notice requirements are liable to the affected workers for each day that notice is not provided up to 60 days. Often, however, plant closings and mass layoffs presage an employer's demise, so workers look to affiliates of the employer, such as a solvent parent or lender, to show that they acted as a "single employer" in making the termination decision and share liability for the WARN Act violation.

The U.S. Court of Appeals for the Third Circuit has adopted a five-factor balancing test to determine whether companies should be treated as a single employer. One of those factors—the existence of de facto control of the parent or affiliate over the subsidiary—seems to count more than the rest. (See our previous article, "Single-Employer Test Emphasizes De Facto Control Factor," published July 10, 2013, in Delaware Business Court Insider.) A recent decision, *Hampton v. Navigation Capital Partners*, C.A. No. 13-747-LPS (D. Del. Aug. 19, 2014), shows the importance of this factor. In *Hampton*, the court refused to dismiss a putative class action against a private equity firm for mass layoffs conducted by its subsidiaries in violation of the WARN Act. The court also addressed the proper venue for WARN Act claims.

The five factors that the Third Circuit says should be considered in determining whether independent contractors and subsidiaries that are wholly or partially owned by a parent company should be treated as separate employers or as a single employer are: (1) whether the companies share common ownership, (2) whether the companies share common directors or officers, (3) the existence of de facto exercise of control by the parent over the subsidiary, (4) the existence of a unity of personnel policies emanating from a common source, and (5) the dependency of operations. Generally, if only the first two factors are present—common ownership and common management—there is no single-employer liability. Also, the fact that the top officers of the subsidiary report to the parent corporation, or that the parent exercises its ordinary powers of ownership over the subsidiary, such as electing directors and setting general policies, is also insufficient to establish single-employer liability.

The *Hampton* court had before it a motion to dismiss the complaint for failure to state a claim. In determining the motion, the court recognized that the third factor—de facto exercise of control—is the most important, and that a "particularly striking" show of de facto control can warrant liability even in the absence of the other factors. In reviewing the allegations in the complaint, the court found that the first two factors—common ownership and common directors and/or officers—were present, but the last two factors—unity of personnel policies and dependency of operations—were pleaded in a conclusory fashion and would not suffice to support the claim. However, the allegations regarding the third factor—the de facto exercise of control—tipped the scales in the plaintiff's favor.

The complaint alleged that Navigation Capital Partners (NCP), a private equity firm, sought to become the market leader in electricity grid services by acquiring companies in that sector. NCP constructed a brand (Metadigm) and used the "Metadigm" companies as alter egos in order to dominate a section of the energy market. Specifically, NCP hired an executive to identify prime acquisition companies, bought those companies, and then folded them into a single corporate chain: it created a holding company for the purpose of managing those companies; it populated at least one of the companies with enough NCP executives to comprise a majority of its board; and it installed the same executives in the same important positions in the other companies, including positions involving overseeing the operations, finances and strategy of the companies. According to the court, this pattern of branding, acquisition and control was sufficient to render plausible the claim that the relationship between the subsidiaries and NCP was not an arm's length relationship and supported a plausible inference that NCP disregarded the separate legal personalities of its subsidiaries when doing business. That showing was sufficient to support a claim of single-employer liability and to deny the motion to dismiss.

The court also considered whether the case should be dismissed for improper venue. The WARN Act's venue provision provides that a claim may be brought in the district court for a district in which the violation is alleged to have occurred or where the employer transacts business. Although NCP is a Delaware corporation, it argued that venue was improper in Delaware because the WARN Act violation was not alleged to have occurred there and NCP did not transact business there. The plaintiff argued that the WARN Act's special venue provision supplemented but did not supplant the general venue provision, and that venue was proper in Delaware under the general venue statute since NCP resides there. The court agreed with the plaintiff, noting the absence of any language of exclusivity or restriction in the WARN Act

venue provision. Since NCP, as a Delaware corporation, resides there, venue was proper in the Delaware district court.

While the court found that the allegations in the complaint stated a plausible claim for relief under the single-employer theory, it remains to be seen whether the allegations will be supported and whether they will carry the day. The case nevertheless underscores the singular importance of de facto control by the parent company over the subsidiary or other affiliate in establishing the existence of single-employer liability for WARN Act purposes. The case also may be a harbinger of more WARN Act cases to be brought in Delaware based on the holding that the act's venue provision supplements but does not replace the general venue statute, making the defendant's place of residence a proper venue for suit.

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