



YOUNG CONAWAY  
STARGATT & TAYLOR, LLP

YCST BANKRUPTCY LITIGATION GROUP TREND WATCH



## THE IMPORTANCE OF AVOIDING DE FACTO EXERCISE OF CONTROL IN MANAGING RISK OF EXPOSURE TO LIABILITY UNDER THE WARN ACT

Since YCST's 2011 Case Alert addressing the Court's decision in *Manning v. DHP Holdings II Corp a/k/a/ DESA (Cayman) Holding, LLC, et al.*, several opinions have issued in bankruptcy cases in the District of Delaware addressing claims under the Worker Adjustment and Retraining Notification Act (the "WARN Act"). In large part, these opinions have focused on the question of when a debtor's parent company will be considered a "single employer" for purposes of being held liable for WARN Act violations. While courts within the Third Circuit consistently follow the five-pronged litmus test promulgated by the U.S. Department of Labor in order to determine whether a parent qualifies as a "single employer," recent opinions reflect a growing trend toward giving almost definitive weight to just one of those factors: de facto exercise of control. Accordingly, companies concerned about possible WARN Act liability should take care to avoid taking actions that could be considered the exercise of de facto control.

Just a few months after her decision in *DHP Holdings*, Judge Walrath issued another WARN Act opinion in *D'Amico v. Tweeter Opco, LLC (In re Tweeter Opco, LLC)*, 453 B.R. 534 (Bankr. D. Del. 2011), where she again considered the question of "single employer" liability. In *Tweeter*, plaintiffs asserted that the debtor's indirect owner and substantial lender, Schultze Asset Management, LLC ("SAM") was liable with the debtor for WARN Act violations. The Court applied the DOL's five-factor test, considering: (1) common ownership, (2) common directors and/or officers, (3) the de facto exercise of control, (4) unity of personnel policies emanating from a common source, and (5) the dependence of operations between the entities. Finding the first two factors weighed in favor of plaintiffs and the final two factors weighed in favor of defendants, the Court's conclusion turned on its findings regarding de facto control...

[READ FULL ARTICLE HERE](#)

*If you have any questions or would like to discuss the decision further, please contact any of the Bankruptcy Litigation Group members at Young Conaway. The Firm is also available for complimentary Delaware Update CLE programs to address any aspects of Delaware law that are of interest to our friends and colleagues around the country.*

[View as Web Page](#)

[Unsubscribe](#)

[Forward to a Friend](#)

### Opinions

[In re Tweeter Opco LLC](#)

[Woolery et al. v. Matlin  
Patterson Global Advisors](#)

[In re Jevic Holding Corp](#)

### The Bankruptcy Litigation Group

[John T. Dorsey, Chair](#)  
[Rolin P. Bissell](#)  
[Travis G. Buchanan](#)  
[Michele Sherretta Budicak](#)  
[Emily V. Burton](#)  
[Curtis J. Crowther](#)  
[Mary F. Dugan](#)  
[Erin Edwards](#)  
[C. Barr Flinn](#)  
[Danielle Gibbs](#)  
[Margaret Whiteman Greecher](#)  
[James L. Higgins](#)  
[Patrick A. Jackson](#)  
[Martin S. Lessner](#)  
[Michael S. Neiburg](#)  
[Elena C. Norman](#)  
[Justin H. Rucki](#)  
[Robert M. Vrana](#)  
[Sharon M. Zieg](#)

### About Young Conaway Stargatt & Taylor, LLP

Young Conaway Stargatt &  
Taylor, LLP with offices in

---

New York and Delaware, counsels and represents national, international and local clients, handling sophisticated advisory and litigation matters involving bankruptcy, corporate law and intellectual property. Nearing its sixth decade, Young Conaway also guides regional businesses and individuals through a myriad of employment, real estate, tax, estate planning, environmental, and banking issues from the firm's offices in downtown Wilmington, DE.

---

Copyright © 2013 Young Conaway Stargatt & Taylor, LLP. All rights reserved.