Case Alert: D'Amico v. Tweeter Opco, LLC (In re Tweeter Opco, LLC):

Plaintiffs representing former employees of the debtor asserted Work Adjustment and Retraining Notification Act (the "WARN Act") claims against Schultze Asset Management, LLC ("SAM"), which held indirect ownership interests in, and was a lender to, the debtor. The primary question presented was whether SAM and the debtor constituted a "single employer" for WARN Act liability purposes. In Pearson v. Component Tech. Corp., the Third Circuit described the single employer liability determination as "ultimately an inquiry into whether the two nominally separate entities operated at arm's length" and adopted the following five-factor U.S. Department of Labor test: (i) common ownership, (ii) common directors and/or officers, (iii) *de facto* exercise of control, (iv) unity of personnel policies emanating from common source, and (v) dependency of operations.

On Plaintiffs' motion for summary judgment, Bankruptcy Judge Mary Walrath determined that "in this case… the Plaintiff has shown common ownership, common directors and officers and the *de facto* exercise of control by SAM over the Debtor." With respect to the "unity of personnel policies" and "dependency of operations" prongs, the Court found in favor of SAM. However, the court concluded that the "*de facto* exercise of control" prong carries special weight in the five-factor test. Thus, the Court's "single employer" liability determination turned on the "*de facto* control" prong as it did in Judge Walrath's recent decision in John Manning v. DHP Holdings II Corp., where she ruled that the parent of the debtor was not liable as a single employer under the WARN Act. According to the Court, the focus of the *de facto* control inquiry is whether the parent or lender has specifically directed the allegedly illegal employment practice that forms the basis for the WARN Act claims (*i.e.* who was the culpable decision-maker).

In analyzing the *de facto* control of SAM over the debtor, the Court concluded that it "was particularly egregious because SAM exercised control over the debtor's hiring and firing decisions, particularly those relevant to this litigation." As proof, Plaintiffs introduced a letter from a SAM officer stating that SAM believed it "needed tighter control of Tweeter [the debtor] within our own organization." The Court further found that George Shultze – a director and/or officer of SAM and the debtor – repeatedly called for reductions in the debtor's payroll and directed a SAM employee to terminate the debtor's employees, which demonstrated control over the debtor's employment practices. "With SAM employees on the Debtor's board, SAM's inside counsel supervising their actions, and SAM employees directly involved in terminating employees of the debtor…" the Court found that SAM's *de facto* exercise of control was particularly egregious, thus warranting "single employer" WARN Act liability.

In addition, the Court found that the WARN Act notice provided to employees was insufficient to trigger the "faltering company defense" in favor of SAM since it simply

Opinion

In re Tweeter Opco, LLC., et al., Case No. 08-12646 (MFW)

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recited the statutory language and did not provide an explanation for the reduced notification period in the termination notice.

The decision and analysis are necessarily fact intensive. However, this decision combined with the In re DHP Holdings II Corp, et al. decision should provide parent/holding corporations and lenders with insight and direction regarding efforts to minimize the risk of exposure to WARN Act liability.

Click here for the DHP Holdings decision and Young Conaway's case alert analyzing it.

If you have any questions or would like to discuss the decision further, please contact any of the Bankruptcy and Corporate Restructuring partners 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.

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