YOUNG CONAWAY STARGATT & TAYLOR, LLP

Case Alert: John Manning, et al. v. DHP Holdings II Corp a/k/a DESA (Cayman) Holding, LLC, et al. (In re DHP Holdings II Corp, et al.)

Plaintiffs representing former employees of the debtors asserted claims under the Work Adjustment and Restraining Notification Act (the "WARN Act") against H.I.G. Capital, LLC ("HIG"), the debtors' parent company. The plaintiffs claimed that HIG and the debtors constituted a "single employer" because they "had common ownership, directors, and officers…" Upon HIG's motion for summary judgment, Judge Mary Walrath ruled that "[a]lthough HIG and the Debtors had common ownership, directors, and officers, the Court finds that the Debtors and HIG were not a "single employer" because HIG did not exercise *de facto* control over the Debtors' termination of employees and did not share personnel policies or operations with the Debtors." In so ruling, the Court relied upon a five-pronged litmus test promulgated by the U.S. Department of Labor under the WARN Act to determine whether HIG, as parent, should be considered a "single employer," which test evaluates (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.

With respect to issues of "common ownership" and "common directors and/or officers," HIG conceded and the Court agreed that both factors weighed in favor of plaintiffs. However, as the Court noted, satisfaction of those two factors "is not sufficient to establish WARN Act liability." The Court also found, and the parties similarly agreed, that the "unity of personnel policies" and "dependency of operations" factors weighed heavily in favor of HIG. Thus, the Court's conclusion turned on its disposition of whether HIG exercised *de facto* control, which required the Court to determine if "the decision maker was responsible for the employment practice giving rise to the litigation."

The plaintiffs asserted that the HIG directors controlled commencement of the bankruptcy cases and termination of business operations, and that while the debtors' chief restructuring officer (the "CRO") made the decision to terminate the employees (thus giving rise to potential WARN liability), he was "compelled to do so by the HIG directors." In response, HIG argued that in spite of its prepetition efforts to effect cost-cutting measures, the decision to close plants and terminate employees rested with and was made by the CRO and was necessitated by the debtors' lack of liquidity and uncooperative lender. The Court found "no evidence that HIG controlled the decision" to terminate the employees and concluded that "the fact that both [the CRO] and the HIG directors reached the same conclusion regarding cost-cuts and facilities closings is insufficient to support the conclusion that HIG directed the termination of the employees." The Court went on to note that "the fact that the Debtors' boards (including HIG directors) approved the bankruptcy filing is insufficient to establish that HIG ordered the terminations." As a result, the Court granted HIG's motion for summary judgment.

While the decision and analysis are necessarily fact intensive, the decision should provide parent/holding corporations with insight and direction regarding efforts to minimize the risk of exposure to WARN liability.

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.

Opinion

John Manning, *et al*. v. DHP Holdings II Corp a/k/a DESA (Cayman) Holding, LLC, *et al*. (In re DHP Holdings II Corp, *et al*.), Ch. 11 Case No. 08-13422 (MFW), Adv. No. 09-50023 (MFW) (Bankr. D. Del. April 26, 2011)

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