

# FLSA: Buyer of Assets Beware – Or You Might Get "Teed" Off

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Practices: Employment, Labor & Benefits

The purchaser of a company's assets has been held liable for the company's alleged violations of the Fair Labor Standards Act by virtue of the Doctrine of Successor Liability. While the Seventh Circuit Court of Appeals recognized that the buyer of a company's assets, not its stock, does not generally assume its liabilities, the Court nevertheless held the defendant liable for \$500,000 in damages, attorneys' fees and costs based on the plaintiffs' former employer's alleged violation of the FLSA. *Brian Teed et al v. Thomas & Betts Power Solutions, L.L.C.* (3/26/13).

The case presented a rather convoluted set of facts: Plaintiff Brian Teed was employed by JT Packard & Associates. In 2006, all of Packard's stock was acquired by S.R. Bray Corp, which retained Packard's name and corporate identity and continued operating it as a stand-alone entity. The FLSA suit was filed in 2008. Several months later, Bray defaulted on a \$60 million dollar secured loan that had been guaranteed by Packard. Bray's assets, including its stock in Packard, were placed in a receivership under Wisconsin law and auctioned off. Thomas & Betts Corporation was the highest bidder, paying approximately \$22 million dollars for Packard's assets. One condition specified in the transfer of the assets to Thomas & Betts pursuant to the auction was that the transfer be "free and clear of all Liabilities." There was also a specific condition that Thomas & Betts would not assume any of the liabilities that Packard might incur in the FLSA litigation. After the transfer, Thomas & Betts placed Packard's assets in a wholly-owned subsidiary, Thomas & Betts Power Solutions, L.L.C. ("T&B Power Solutions"). T&B Power Solutions continued to operate Packard and hired most of Packard's employees.

The district court allowed the plaintiffs to substitute T&B Power Solutions for the original defendants. T&B Power Solutions appealed from the district court's rejection of its objection to the substitution. A final judgment for some \$500,000 in damages, attorneys' fees, and costs was entered, which, pursuant to a settlement agreement, was conditional on the outcome of the appeal.

The Court applied a federal common law standard of successor liability in reaching its decision. It noted that Wisconsin, the state whose law would apply if the underlying claims were based on state law, expressly limits the liability of a buyer that acquires a company's assets without assuming the seller's liabilities. However, because the claims arose under federal employment law, the Court applied the following five factors:

1. Whether the successor had notice of the pending lawsuit;
2. Whether the predecessor would have been able to provide the relief sought in the lawsuit before the sale;

3. Whether the predecessor could have provided relief after the sale;
4. Whether the successor can provide the relief sought in the suit; and
5. Whether there is continuity between the operations and workforce of the predecessor and the successor.

After analyzing these factors, the Court held that successor liability is appropriate in suits to enforce employment or labor laws, even when the successor acquires assets and disclaims liability, unless there are good reasons to withhold such liability. It cited the buyer's lack of notice of the potential liability as one example of a good reason. Significantly, the Court ruled that the FLSA applies rather than the contract language.

After rejecting all of T & B Power Solutions' arguments, the Court simply stated that there is no good reason to reject successor liability in suits to enforce federal labor or employment laws. The Court looked at the purpose of the FLSA, which was passed to protect workers' standards of living through regulation of working conditions, and noted that without successor liability, an employer could escape liability by selling its assets without an assumption of liabilities by the buyer and then dissolving. Key to the Court's ruling was the fact that the employer, Packard, was a profitable company when it was sold and Bray could have found a buyer for Packard willing to pay a good price even if the buyer had to assume the company's FLSA liabilities, which the Court characterized as modest.

While the Court's holding may be limited to the set of facts presented, buyers are well advised to assume that they could be liable as a successor for known liabilities arising from violations of federal labor and employment laws even where the transaction is structured as an asset purchase.