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Case Limits Obligations of a Parent to Honor Liabilities of Other Participating Employers in a Deferred Compensation Plan

by Arthur Kohn, Kathleen Emberger and Jeffrey Penn

An Eighth Circuit decision upheld the allocation of liabilities of participating employers in an umbrella deferred compensation plan maintained by a successor parent. The decision highlights the importance of specifying the obligors under these types of plans, including in an acquisition context.

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In *Bender et al. v. Xcel Energy, Inc.*[1] ("*Bender*"), the 8th Circuit affirmed a lower court's decision that five former executives of an energy company could not recover deferred compensation benefits from the parent of that company. Although there was some dispute regarding the facts (as discussed in more detail below), the deferred compensation plan in question generally provided that participants could only seek payment under the plan from their last employer.

Factual Background

The plaintiffs in this case were five long-term executives of NRG Energy Inc. ("NRG"), a subsidiary of Northern States Power Company ("NSP"). Four of the plaintiffs worked for NSP for several years before transferring to NRG. During their employment with NSP and NRG, the plaintiffs participated in a NRG severance plan, as well as a deferred compensation plan initially established and sponsored by NSP (the "NSP Deferred Compensation Plan"). In connection with the transfer of employment to NRG, NSP transferred its liabilities under the NSP Deferred Compensation Plan for each plaintiff who made such transfer to NRG.

In 2000, NSP spun-off NRG in an IPO. NSP continued to hold more than 70% of the stock of NRG after the spin-off. Several months after the NRG IPO, NSP merged with New Century Energies, Inc. to form Xcel Energy, Inc. ("Xcel"). In connection with the merger, NSP issued a statement (the "2000 Statement") in which it stated it would create a nonqualified, unfunded deferred compensation plan for select employees of NSP and select other participating employers. Whether or not the 2000 Statement constituted a stand-alone plan or a restatement of a prior plan was unclear at the time the statement was issued and this lack of clarity was seized upon by the plaintiffs in this case.

In 2002, Xcel repurchased the stock of NRG in a tender offer and merged NRG into a different wholly owned subsidiary of Xcel. Under the merger, NRG stock options were converted to Xcel stock options. The plaintiffs' employment with NRG terminated shortly after this merger.

Dispute

Following the termination of their employment, the plaintiffs sought to collect severance benefits from NRG, eventually instituting involuntary bankruptcy proceedings against NRG. Pursuant to a settlement agreement between NRG and the executives, NRG paid the executives $10 million in severance benefits, and the executives released further claims against NRG. However, the settlement agreement expressly provided that it did not affect any contractual obligations related to the executives' employment with any entity other than NRG, any of the participants' participation in any deferred compensation, pension, or other employee benefit plan maintained or sponsored by either NSP or Xcel. NRG subsequently filed a voluntary bankruptcy petition.

The plaintiffs then sought to recover their deferred compensation benefits from Xcel, arguing that by virtue of the merger with NSP

and Xcel's assumption of the role of plan administrator, Xcel was an employer to whom they could turn for satisfaction of these benefits. Xcel argued that the NSP Deferred Compensation Plan had been restated in 1992 and 2002, and that both versions of the restated Plan required participants to look to "the [p]articipating [e]mployer which last employed" them (or NRG) for payments under the plan. The plaintiffs initially argued that the term "employer" as used in the 1992 and 2002 restatements should be read broadly enough to include Xcel. On appeal, the plaintiffs also argued that the 2000 Statement should be read as an amendment to the NSP Deferred Compensation Plan, and applicable to them as prior employees of NSP. They noted that the 2000 Statement did not include the language of the 1992 and 2002 restatements requiring employees to look to the last employer for benefits. Xcel argued that the 2000 Statement created a new plan, which covered only persons who were selected to participate and completed the enrollment process after its adoption, and was not an amendment of the NSP Deferred Compensation Plan.

Holding

The district court held in favor of Xcel, finding that the 1992 and 2002 restatements of the NSP Deferred Compensation Plan clearly required the executives to look solely to NRG for payment of their deferred compensation amounts. The district court also found that any claims the executives may have had under the NSP Deferred Compensation Plan against NSP in respect of their employment with NSP were discharged by NRG's bankruptcy proceedings, because NSP had transferred these liabilities to NRG at the time the executives departed NSP.

The court of appeals affirmed the district court's holding. In its analysis, the court of appeals rejected the executives' argument that the 2000 Statement was an amendment to the NSP Deferred Compensation Plan. The court of appeals agreed with Xcel that the 2000 Statement created a separate plan for select NSP (Xcel) executives and was not intended to cover NRG employees. The court of appeals did not address whether pre-IPO liabilities of NSP were discharged by NRG's bankruptcy, as it concluded the NSP Deferred Compensation Plan clearly specified that the only entity with liability to the plaintiffs under the Plan was their "last employer," NRG, and that NSP (and its successors) had no liability to the plaintiffs under the Plan.[2]

Implications

Although the facts of *Bender* are complex and somewhat unique, this case illustrates the importance of specifying the obligor under an umbrella plan maintained by an entity for employees of that entity as well as subsidiary, parent or sister entities. In a merger/acquisition context, acquirors are often asked to "assume" the plans maintained by the target; the acquiror may wish to take care in memorializing this obligation to avoid causing the target entity (in this case, NSP) to assume a liability that is, under the applicable plan documents, a liability solely of a former target subsidiary (in this case, NRG). Finally, although the court of appeals did not reach the question of whether NSP's initial liabilities under the deferred compensation plan were automatically transferred to NRG as employees transferred employment between the entities, when transferring benefit obligations in connection with the transfer of employment among affiliated entities (or

reacquiring such obligations in the future), companies should take care to identify the subsidiaries, time periods, and when possible, individuals intended to be so assumed.

1 507 F.3d 1161 (8th Cir. 2007).

2 One side issue in the decision worth noting involved the attempted substitution by two of the executives of a less inclusive release for the release provided by NRG. Under the severance plan, the executives were offered an extended vesting period for certain stock options, conditioned upon the execution of a release in the form "provided by the Company." The two executives substituted their own release, which excluded claims that were unknown as of the date of the execution of the release. The court ruled against the executives, holding that an employer may validly condition the payment of severance benefits on the employee's execution of a release in the form provided by the Company, without modification by the employee.

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