FundsTalk

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We are pleased to offer this issue of FundsTalk*, Kramer Levin's newsletter devoted to discussing legal issues facing alternative asset managers and funds. The alternative asset market has seen a broad convergence of previously distinct asset classes and strategies, such as private equity, hedge funds, debt and claims trading, etc., into a single class — alternative assets. Extending that theme of convergence, this newsletter focuses on multi-disciplinary themes that affect all asset managers, with particular attention paid to new developments and changes in the legal landscape in which the industry operates. We hope you find the information contained in this newsletter to be helpful and profitable, and welcome your thoughts and suggestions.*

In this Issue

1 **Should Sellers Now Push for an Increased Use of Arbitration in Private M&A Deals?**

3 **We're from the SEC…**

5 **PACE Financing — Municipal Finance Meets ABS**

7 **Second Circuit Clarifies How Private Equity Firms Can Insulate Against WARN Liability for Violations of Portfolio Companies**

Editors

If you have any questions or would like more information concerning any of these topics, please contact one of the authors or:

Robert N. Holtzman 212.715.9513
rholtzman@kramerlevin.com

Gilbert K.S. Liu 212.715.9460
gliu@kramerlevin.com

Russell J. Pinilis 212.715.9450
rpinilis@kramerlevin.com

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Should Sellers Now Push for an Increased Use of Arbitration in Private M&A Deals?

By James J. Moriarty, Partner, Corporate, Private Equity
212.715.9453, jmoriarty@kramerlevin.com
with the assistance of Harry Frank, a recent summer intern

Arbitration and other alternative dispute resolution (ADR) mechanisms are rarely used in private M&A deals to settle disputes other than purchase price and earn-out disputes. The present market is very clear on this point, so the idea of using arbitration to settle M&A disputes more generally is rarely even raised by either party in a deal. For example, the ABA's most recent (December 2013) Private Target M&A Deal Points Study notes that only 15% of M&A agreements have a general ADR-type dispute mechanism, and based on our experience, even that seems quite high. This article explores whether it would make sense for sellers in private deals (and especially private equity sponsor sellers) to push for an increased use of arbitration in deals.

Over the past few years, especially since the onset of the great recession, perhaps coincident with increased cases of buyers' remorse of different shapes and sizes, we have observed an increase in buyers pursuing post-closing indemnity claims for substantive claims that on the margin likely would not have been previously pursued. Deals that were modelled (and therefore priced) based on a certain level of projected EBITDA growth (which is, of course, a function both of the performance of the acquired business itself as well as the larger economy) tend to have a higher incidence of post-closing indemnity disputes when that projected level of EBITDA falls short (which has occurred more frequently over the past few years, compared to the period before the great recession). In a deal with a private equity sponsor seller, buyers of all types also now appear to be increasingly cognizant of the leverage they may have in post-closing disputes with a private equity sponsor seller most focused on maximizing its IRR (which is determined based on both the amount and timing of payments). A dragged-out and messy litigation process that may take several years to resolve will almost inevitably drag

continued on page 2

Should Sellers Now Push for an Increased Use of Arbitration in Private M&A Deals? *continued from page 1*

down anticipated IRR from the sale deal and as a practical matter may need to be reported to the limited partners of the applicable funds. As the holding period of portfolio companies has increased for private equity funds over the last several years, the need for sponsors to demonstrate cash-on-cash returns in connection with a planned fund-raising process for a "next fund" has increased and buyers also certainly sometimes sense this. Sponsor sellers therefore may often be inclined to settle post-closing disputes even if in their "heart of hearts" they do not believe the buyer's claims have any merit. In this environment, sponsor sellers may be better served if their post-closing disputes can be resolved through a more timely and streamlined arbitration process, rather than through a long and burdensome litigation process (or at least the threat of such a process). By briefly discussing the primary attributes of arbitration compared to litigation in the M&A context, this article explores whether sponsor sellers would be prudent to consider negotiating for arbitration covering a broader scope of post-closing private M&A disputes, rather than limiting arbitration to purchase price and earn-out disputes.

Specific Considerations for Dispute Resolution in M&A Deals

The parties to M&A agreements need to consider what forum will be used to settle their disputes. Typically neutral accounting firms (either a specific firm or by a specific process) are selected in an M&A agreement to settle ordinary course post-closing price adjustments, most typically working capital adjustments. Similarly, earn-out disputes are typically also resolved in the same manner and parties have become comfortable with this approach over time based on the particular expertise that accounting firms have in these areas. Indemnity disputes are often of a very different nature, as the resolution of an indemnity dispute may well rest on pre- or post-closing facts being applied to contract language for representations and warranties or covenants, all of which may be unclear and subject to various interpretations. The perception of the utility of arbitration varies dramatically from sponsor to sponsor. Merely raising the issue of potentially using arbitration more generally in a purchase agreement often elicits strong views from investment professionals at sponsors: while some are entirely ambivalent, others believe the process almost inevitably leads to an unprincipled "splitting of the baby" type resolution that is too difficult to handicap as to whether it is likely to be in their interest (or not). Therefore, some sponsor investment professionals may well be open to raising the increased use of arbitration as a possibility, while others will inevitably prefer to stick with the existing clear market position of using arbitration only within its present limited role.

Faster, Cheaper and Final

Arbitration matters are generally resolved faster (*i.e.*, often decided within a matter of months, rather than over several years) and for less cost than if the same disputed substantive matters were litigated. Arbitration proceedings generally have a more streamlined procedural and pleading process, limited discovery, shorter hearings than a trial, fewer expert witnesses on balance, and decisions that are not subject to a full-blown appeal process and are instead subject to limited judicial review under the Federal Arbitration Act. Parties that agree to the relative finality of arbitration are by definition accepting the structural risk that an arbitration decision that is substantively incorrect will not be freshly reviewed by another neutral party that a litigation system affords through its appellate process.

Confidentiality

While the great majority of private M&A indemnity disputes are settled, some do result in public litigation (with some public records), while arbitration can be conducted confidentially outside of the court system. For private equity participants, the privacy of arbitration provides a clear advantage over the public nature of litigation.

Selection of the Arbitrator

In a private M&A agreement, the parties may agree to use an arbitrator or numerous arbitrators, through various mechanisms, to settle the purchase agreement disputes. The parties are free to specify the number, qualifications and location of the arbitrators, which are located in all major commercial cities. For example, requiring an arbitration before such organizations as the American Arbitration Association (AAA), JAMS, International Chamber of Commerce (ICC) and the International Institute For Conflict Prevention & Resolution (CPR) can all be specified in the agreement, and model arbitration provisions (with numerous options) for specifying the arbitrator are readily available. In the litigation context, judges are most commonly former litigators, but M&A parties may prefer (or not prefer) to use an arbitrator who

continued on next page

is from the private M&A deal world and conversant in the practices, realities, expectations and terms of art from that world, such as the use of materiality scrapes, pro- and anti-sandbagging provisions, items that are "deemed" disclosed on all schedules, tipping baskets, deductibles, having different classes of indemnity caps for different classes of representations, *de minimus*/mini-basket exclusions and the like.

Flexible Process

Although these arbitration organizations all have their own set of default rules, these rules act more like guidelines, rather than hard and fast rules and they may be altered with the agreement of both parties. At the beginning of an arbitrated dispute, the parties are free (and generally much freer than would be possible in a litigated dispute before a court) to work with the arbitrator to craft a more specific process to fit the facts of the dispute that limits discovery, and the use of experts, etc. Of course, at such time the parties may have varying interests and such a mutually crafted approach may not then be feasible, in which case the default rules would instead apply.

Arbitration may well make sense for some sponsor sellers to consider using more broadly than they have in the past for M&A deals. While it is now rare to provide for arbitration as the means to resolve general disputes arising out of purchase agreements in the private M&A market, it may be timely for sponsor sellers that have experienced an unsatisfactory recent post-closing dispute process to consider using arbitration more broadly. ■

We're from the SEC…

By Alexandra Alberstadt, Special Counsel, Financial Services
212.715.9151, aalberstadt@kramerlevin.com and
Aviva Grossman, Special Counsel, Financial Services
212.715.7514, agrossman@kramerlevin.com

Only four words are needed to terrify an investment adviser: "We're from the SEC.…"[1]

The SEC's Office of Compliance Inspections and Examinations (OCIE) recently sent a letter to certain advisers alerting them about its new "Never Before Examined Initiative." Under this initiative, OCIE will examine some non-fund advisers that have been registered for more than three years but not yet examined. (Private fund advisers are still being examined under 2012's "Presence Exam" initiative.) In January, the SEC and FINRA released their annual letters identifying focus areas for examinations of investment advisers and dual registrants. As part of the annual compliance review, advisers may want to review their compliance programs in the following regulatory focus areas.

The National Exam Program (NEP) Priorities

The NEP's 2014 examination priorities were selected from SEC filings, examination findings, hotline tips, media and discussions with members of the industry and include:

- *Fraud Detection and Prevention* — using quantitative and qualitative tools, NEP looks for scams, theft, unfair advantage and other fraudulent conduct, including recreating model results. Two dedicated teams analyze data collected from reports, and advisers with aberrational performance may be targeted for examination.
- *Corporate Governance, Conflicts and Risk Management* — "tone at the top" and how senior management and fund directors identify, manage and disclose conflicts of interest and operational and investment risks.
- *Technology* — scrutinizing firms' technology supervision (including data protection and access), market access, information security and preparation for malfunctions and outages.
- *Dual Registrants* — in dual registrant exams, focusing on conflicts of interest when customers are placed in account types (advisory, brokerage) that may not be suitable.
- *New Laws* — reviewing general solicitation practices (including crowdfunding rules) and compliance with new rules for municipal advisers.
- *Retirement Vehicles* — focusing on practices in the retirement investor market, including sales practices when retirees roll over their 401(k) plans into IRAs or other higher cost investments, and, for dual registrants,

continued on page 4

We're from the SEC…

continued from page 3

misleading advertisements, suitability and churning in connection with employment changes.

The NEP has adopted new risk categories — core, new and emerging risks, and policy topics — and focus areas within each category.

Core risks are continuing business or operational risks identified in previous exams, including:

- *Custody* — advisers failing to realize that they have custody and failing to satisfy the custody rule (including on the timing of audited financial statements and account statements); confirmation of existence of assets remains an issue.
- *Conflicts inherent in adviser business models* — undisclosed compensation arrangements, allocation of investment opportunities, calculation and disclosure of performance-based fees, disclosures about illiquid investments and leverage, and targeting high-risk products to retirees and other investors.
- *Marketing and performance* — the accuracy and completeness of performance claims and marketing efforts in light of the new JOBS Act rules.

New and emerging risks include:

- *Wrap Fee Programs* — how advisers using wrap fee programs monitor risks, and identify and resolve conflicts and trading issues.
- *Quantitative Trading Models* — model compliance obligations for advisers who rely substantially on quantitative portfolio trading strategies.
- *Presence Exams* — focusing on marketing, portfolio management (drift), conflicts, safety of assets and valuation for advisers to hedge funds and private equity funds.
- *Payments for Distribution in Guise* — disclosure and board oversight of payments to fund distributors and intermediaries, including determining whether payments are for distribution or preferential treatment.
- *Fixed Income Investment Companies* — disclosures by bond funds about interest rates and the changing interest rate environment.

Policy topics include:

- *Money Market Funds* — targeted exams of funds, focusing on how they managed potential stress events, and funds that exhibit outlier behavior.
- *Alternative Investment Companies* — funds offering "alternative" strategies, focusing on (i) leverage, liquidity and valuation policies; (ii) staffing, funding and empowerment of boards and compliance personnel; and (iii) how these funds are marketed to investors (including suitability issues).
- *Securities Lending Arrangements* — compliance with applicable exemptive orders and no-action letters.

FINRA

FINRA also issued its annual regulatory and examination priorities letter. Advisers that offer investments through FINRA members should be aware of FINRA's focus areas for 2014:

- *Suitability* — broker recommendations, disclosure, and marketing of complex products to retail customers, including programs that reward brokers who place these products. In the crosshairs are complex structured products (including leveraged products), private REITs, frontier funds, and interest rate-sensitive securities (including MBS, long duration products, emerging market debt, municipal securities and baby bonds). [2]
- *Cybersecurity* — integrity of firms' policies, procedures and controls to protect firm infrastructure and customer data.
- *Conflicts of Interest* — how firms identify and mitigate conflicts of interest, focusing on new products and post-launch reviews, the impact of mitigation on customers, pressures to sell proprietary products or products with revenue sharing arrangements, and compensation structures.
- *Retirement Investors* — firm rollover practices (encouraging clients to roll 401(k)s into IRAs) including marketing materials, supervision and securities recommendations, and how firms and brokers engage with and communicate to senior investors.
- *General Solicitations* — private placement practices for compliance with due diligence and suitability rules, and general solicitation and filing requirements, focusing on distressed issuer placements, serial private placements and crowdfunding portals.
- *Microcap Fraud* — firm oversight of activities related to speculative microcap and low-priced over-the-counter (OTC) securities, including supervision of employees and traders, and all firm activities when a firm-affiliate serves as a transfer agent for these securities, focusing on AML responsibilities.

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- *Algorithmic Trading and Trading Systems* — concerns about how firms develop, implement, and supervise algorithmic trading systems, including the roles of legal, compliance and operational staff, focusing on market disruptions.
- *Best Execution* — best execution for equities, options, and fixed-income securities, including firms' compliance with their affirmative duty to regularly and rigorously review execution quality to assure that order flow is directed to markets providing the most beneficial terms for customers.

As always, advisers that establish and document a "culture of compliance" and embrace compliance obligations, including a well-documented annual review, will be better prepared for regulatory examinations, and typically receive a more favorable outcome. Firms with products placed by FINRA members should also understand FINRA's regulatory concerns, especially around disclosure and marketing. All firms should ensure that employees are trained to identify risks, and use controls to mitigate them, especially in these focus areas. Finally, FINRA-registered firms should ensure that suitability evaluations are properly conducted and documented.

Endnotes

[1] *See* Remarks of Ronald Reagan, The President's News Conference (Aug. 12, 1986), available at http://www.reaganfoundation.org/reagan-quotes-detail.aspx?tx=2079

[2] With respect to marketing materials and sales practices, FINRA expands its review if "high risk brokers" (recidivist brokers) are involved. ■

PACE Financing — Municipal Finance Meets ABS

By Laurence Pettit, Partner, Banking and Finance, Securitization
212.715.9458, lpettit@kramerlevin.com

PACE ("property-assessed clean energy") voluntary assessment programs have emerged recently as an intriguing method for property owners to finance energy retro-fit projects on their properties, whether residential or commercial. According to PACENow, a non-profit policy group supporting the build-out of PACE, 31 states (representing nearly 80% of the population) have already adopted legislation enabling PACE voluntary assessment programs.

As described below, the secured payment streams that arise from PACE programs are an attractive asset, and although there are challenges involved in developing the market for PACE programs and in understanding their unique legal and commercial features, the potential for rapid growth of PACE voluntary assessments as an asset class for securitization is strong. For any fixed-income investor in rated asset-backed securities or in residual cash flow from securitization trusts, or for equity investors interested in companies that originate financial obligations, PACE programs deserve special attention.

PACE programs are a specialized form of traditional "land-secured finance," a type of infrastructure financing in which land-secured revenues are raised to pay for public improvements, which has been in common use for many years throughout the U.S. "Land-secured revenues" are special assessments imposed on the real estate that benefits from the public improvements. Property owners on whose property the special assessments are imposed are generally required to pay their special assessments at the same time as their ordinary real estate taxes. The special assessments have a lien priority equal to real estate taxes and ahead of previously recorded mortgages. The obligation to pay any remaining assessment installments at the time of sale of the property is assumed by the subsequent owner. Land-secured financing has been applied to pay for a wide range of public projects, including bridges, roads, flood control, water supply, and many others.

One required element of land-secured financing is that there be a public benefit to the project being funded. Traditionally this requirement has meant that the improvements funded with land-secured financing are built on public land, or directly affect all property owners in a particular district. As a result, all properties within the related district are assessed a fixed amount, payable by the property owners with their other real estate taxes, for a limited period, to pay for the improvements.

PACE programs began to develop in California in 2008 with one significant change to the traditional land-secured financing approach. Once a municipal entity adopts a PACE program in its district, PACE improvements are

continued on page 6

PACE Financing — Municipal Finance Meets ABS

continued from page 5

only installed on a property in cases where the property's owner voluntarily agrees to participate. There are still public benefits associated with the PACE program, namely energy and water conservation, reduced reliance on carbon-based fuels, and job creation. However, a PACE assessment is levied only on a participating property and only in the amount needed to pay for the installation of the qualifying improvements on that property plus certain related administrative costs. The actual improvements that can qualify under a PACE program are fixed by the municipality that adopted the particular PACE program and include, among others, items that are energy efficient, use renewable energy sources, or reduce water usage. This element of consumer choice is one reason for the growing popularity of PACE voluntary assessment programs. The property owner selects the type of improvement and the contractor (subject to eligibility guidelines) and the length of the period in which the assessment installments will be payable, provided that the selected period does not exceed the useful life of the related improvement.

Once a PACE voluntary assessment has been levied on a property, the property owner begins paying fixed assessment installments for a specific period of time, secured by a lien on the property. The payment stream is similar to that of a mortgage, except for two key characteristics of assessments and taxes that are found in other land-secured financing arrangements: the PACE assessment has lien priority over a previously recorded mortgage, and non-payment of the PACE assessment does not result in acceleration of the remaining amounts due. As with other real property taxes and assessments, although non-payment does not result in acceleration of amounts due in the future, penalties and default interest rates do apply to late payments, and the public entity to whom the assessment is owed can ultimately foreclose on its lien and sell the property to pay delinquent amounts.

In order to pay for the costs of the improvements funded under its PACE program, the sponsoring public entity issues limited obligation improvement bonds. These bonds, which are coming to be known as "PACE bonds," are not general obligations of the municipality; payments on the PACE bonds are limited to the payments received by the municipality on the pool of PACE assessments securing the bonds. The limited obligation improvements bonds are a kind of municipal pay-through obligation and have many of the same characteristics as the underlying PACE assessments.

By acquiring a portfolio of PACE bonds, an investor acquires exposure to a diverse pool of priority-lien, real estate-backed obligations with a low assessment-to-value ratio. The maximum assessment-to-value ratio is specified by the operating guidelines of the PACE programs, which are intended to encourage prudent property owner behavior and also to make sure that the overall priority-lien obligations on the property remain at a reasonable level. PACE assessments are collected together with the property owner's real estate taxes by the local taxing authority and remitted to the trustee for the related PACE bonds. Given these characteristics, PACE bonds provide the kind of cash flow that typically would support securitization in considerable volume.

Creating a securitization of PACE bonds involves aspects of municipal finance, traditional ABS, and CDOs. One issue not found in other ABS transactions is the need to understand how the timing and operation of the relevant tax collection process actually works, including the potential effect of a bankruptcy proceeding by the tax collecting authority. Although the collection of the assessments is akin to the role of a servicer in a typical ABS structure, the fact that the "servicer" here is a municipal entity makes a significant difference. Replacing the tax collecting authority may not be feasible in practice, unlike in ABS where replacement service providers are usually readily available to perform all aspects of the servicing function. Similarly, the issuer of the PACE bonds itself will be another public body, making it important to understand how the issuer would be treated in a Chapter IX bankruptcy case, or whether the issuer is subject to the U.S. Bankruptcy Code at all.

Owners of PACE bonds have limited remedies against the issuer, as it may not (depending on the specifics of the program and state law) be possible to foreclose on the PACE assessments or sell them, hence the PACE bonds themselves (like the PACE assessments) may not be susceptible of acceleration. The underlying PACE assessments, if unpaid for a sufficient length of time, would, however, trigger a foreclosure remedy, which should ensure strong recoveries on delinquent assessments that are ultimately passed through to the owners of the PACE bonds, and then to an investor in ABS backed by the PACE bonds.

continued on next page

Investors also need to understand how the PACE assessments in each particular PACE program are originated and on what basis property owners' applications are approved. The scope of underwriting and eligibility guidelines may vary among PACE programs. Given the public purposes of the PACE programs, the programs are usually designed to encourage rather than limit participation. The small dollar amount of the assessments (in the case of residential assessments) relative to the overall property value is intended to keep the property owners' overall land-secured obligations at a manageable level.

PACE assessments are available for residential and commercial properties in a similar manner in terms of how the programs are designed, although the scale and credit issues associated with residential and commercial PACE assessments are significantly different. In terms of their market perception, PACE assessments on residential property also enjoy for the time being a certain controversial reputation, due to the warnings sounded by FHFA over the introduction of residential PACE programs. FHFA has on numerous occasions voiced its objection to residential PACE programs on the grounds that, if not responsibly designed and underwritten, residential PACE assessments could burden property owners with excess fixed costs secured by their property. In addition, in FHFA's view, the additional priority-lien obligations represented by PACE assessments could impair the value of mortgage obligations held in the portfolios of Fannie Mae and Freddie Mac.

FHFA's position has slowed the introduction of residential PACE programs, although certain local public bodies have pushed ahead regardless. For local governments, there are strong incentives to move forward given the growing demand for residential PACE programs from homeowners in places where the programs have found traction. In addition, residential PACE programs are already having a measurable impact on energy savings, carbon fuel reduction, and job creation in certain communities. It may also be possible by adopting a "loss reserve program" of the type currently being proposed in California to create an insurance scheme that would cover losses (if any) attributable to a PACE assessment and thus address the concerns raised by FHFA.

PACE programs have already attracted broad support from state and local governments across the U.S. and several active programs (commercial and residential) are under way with committed financial backing. A combination of three factors is likely to propel the origination of PACE assessments to new levels in 2014: local government commitment to promoting the benefits of PACE programs, greater awareness of the opportunity among investors, and addressing FHFA objections (to residential PACE programs only) through a "loss reserve" program or another negotiated commercial or political compromise. The momentum behind PACE programs at the local level, given its demonstrated popularity with consumers and its twin effects of energy savings and job creation, is already strong. The volume of PACE assessments is poised to grow, creating interesting investment opportunities. ■

Second Circuit Clarifies How Private Equity Firms Can Insulate Against WARN Liability for Violations of Portfolio Companies

By Robert N. Holtzman, Partner, Employment Law
212.715.9513, rholtzman@kramerlevin.com

Private equity firms and other alternative asset managers that become directly involved in the day-to-day business activities of portfolio companies run the risk of being held directly liable for the Worker Adjustment Retraining Notification ("WARN") Act violations of those entities. The Court of Appeals for the Second Circuit recently clarified the standards that apply to such liability, and other courts have further defined the contours of acceptable and riskier behavior.

In *Giuppone v. BH S&B Holdings LLC*, 737 F.3d 221 (2d Cir. 2013), York Capital, Bay Harbour Management, and certain of their affiliates faced possible liability for alleged violations by the successor entity to Steve and Barry's Industries, Inc. In analyzing the plaintiff's claims, the Second Circuit formally adopted a five-factor test created by the Department of Labor (the "DOL") to determine whether related entities should be considered

continued on page 8

NEW YORK
1177 Avenue of the Americas
New York, NY 10036
212.715.9100

SILICON VALLEY
990 Marsh Road
Menlo Park, CA 94025
650.752.1700

PARIS
47, avenue Hoche
75008 Paris
(33-1) 44.09.46.00

www.kramerlevin.com

Second Circuit Clarifies How Private Equity Firms Can Insulate Against WARN Liability for Violations of Portfolio Companies

continued from page 7

to be a single employer for purposes of the WARN Act. Under the five-factor test, a court considers: (1) common ownership; (2) common directors or officers; (3) *de facto* exercise of control; (4) unity of personnel policies emanating from a common source; and (5) dependency of operations. In adopting this standard, the court specifically rejected York Capital's suggestion that the test the court had applied in *Coppola v. Bear, Stearns & Co.*, 499 F.3d 144 (2d Cir. 2007), which by its terms applied to lenders to distressed companies, should also apply to private equity investors. While only a handful of cases relied upon the DOL's test prior to 2011, it has now become the prevalent analysis applied by courts analyzing the potential liability of related entities for violations of the WARN Act.

In analyzing the nature of the relationships between the private equity firms and the employing entity, the following factors were most significant:

- *Common Ownership:* The firms had different ownership than the employing entity, given that two separate private equity firms had invested. Note that a private equity sponsor that owns all of the equity of a portfolio company would be at risk with respect to this factor. *See, e.g., Young v. Fortis Plastic, LLC*, 294 F.R.D. 128 (N.D. Ind. 2013) (Monomoy Capital Partners' motion to dismiss WARN Act claims denied; Monomoy owned all of the equity of the employer).
- *Common Directors or Officers:* Because four of seven board members were appointed by the private equity firms, the court found that this factor favored the plaintiff. Nonetheless, it noted that this factor is of limited value, as courts assume that directors are wearing their "subsidiary hats" when acting on behalf of a downstream entity.
- *De Facto Control:* Courts repeatedly emphasize that this is the most important factor in the DOL's test. Here, the court found that the plaintiff failed to allege that the investors had controlled the decision-making process, ruling that the alleged conduct occurred at the level of the holding company, as the parent to the employing entity.

A Cautionary Tale

The fate of the investor in the *Young v. Fortis Plastics, LLC* case demonstrates how an investor may find itself subject to potential liability. There, the plaintiff alleged that Monomoy Capital Partners L.P. was the sole owner of Fortis, and the court thus found that this factor favored the plaintiff, but the plaintiff failed to make any allegations regarding overlapping directors and officers, unity of personnel policies, or dependency of operations. As to the *de facto* exercise of control factor, the plaintiff alleged the closing of the Fortis facility was "ordered by Defendants," which was defined to include both Fortis and Monomoy, named specific Monomoy employees he alleged were involved in the exercise of control over Fortis through weekly calls, and alleged that Monomoy received $500,000 in management fees from Fortis.

These relatively thinly-pleaded allegations were found to be sufficient to withstand a motion to dismiss. Of course, on a full factual record, Monomoy may well be able to establish facts that preclude liability and justify summary judgment dismissing the plaintiff's claims. In the meantime, it will be forced to incur the costs and distraction of defending the litigation.

Avoiding Liability

As discussed in the January 2012 edition of *FundsTalk*, to reduce the risk of liability investors should strive to ensure separation from the employer's decision to lay off employees or close facilities. Certainly, this does not require that the third party abstain from all involvement in the employer's financial matters, but specific decisions and determinations should be left to the management and board of directors of the employer. Direct orders or instructions to conduct layoffs or plant closings should be avoided; establishing expense reduction requirements or requiring financial covenant compliance are far less likely to lead to liability. Greater care is called for when a single private equity firm is the sole or primary investor in the employing entity.

Critically, the corporate formalities must be observed. Appropriate documentation should reflect that the relevant decisions were made by the employer's officers or board of directors, not the investor, including through board resolutions, minutes of meetings, and internal memoranda. Demonstrating a lack of control over the determination will go a long way toward insulating the third party from liability for any WARN violations by the employer. ■