Ninth Circuit Rejects Reverse Alter Ego Theory

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The "alter ego" and "single employer" theories of liability are designed to prevent a practice commonly known as "double breasting"—a ***union*** employer's use of ***non-union*** operations to avoid collective bargaining obligations. The Ninth Circuit Court of Appeals recently rejected an attempt to expand alter ego liability when it refused to apply a "reverse alter ego" theory to a non-union company shifting work to a union company.

Rodin and Benveniste each ran separate non-union painting businesses. Rodin's company performed commercial work, while Benveniste's company performed residential painting. When Benveniste expressed interest in expanding into commercial painting, Rodin suggested that Benveniste create a union company, which would allow Benveniste to capitalize on the union contractor market in which Rodin, as a non-union company, could not operate. Union operations would also offer Benveniste the benefit of the Union providing his workforce.

Benveniste formed SCP and executed the Union's Master Labor Agreement ("MLA"). The MLA specifically prohibited double-breasting. During SCP's startup phase, Rodin provided substantial assistance to Benveniste's SCP, such as the use of Rodin's staff, at no charge, to help set up bookkeeping, payroll and other administrative functions.

In addition, SCP received assistance from Rodin on at least two union jobs. First, on the "Ticketmaster job," SCP required an employee familiar with a specific product. After weeks of requesting such an individual from the Union with no success, SCP hired four non-union painters, some of whom had also worked for Rodin. Rodin did not receive compensation. Second, on the "Bank of America job," midway through SCP's performance the contractor issued a change order specifying that non-union contractor Rodin would complete the work.

The Union filed suit against Rodin and SCP alleging liability under both the alter ego and single employer doctrines. The Union claimed that Rodin and SCP were both bound by the MLA, and further that Rodin formed SCP in an effort to avoid Rodin's obligations under the MLA. On appeal from the district court's denial of the Union's motions for summary judgment, the Ninth Circuit assumed that the Union could prove that Rodin's company and SCP constituted a "single employer," an essential element under both theories.

The Ninth Circuit recognized that the Union's claim differed from a traditional alter ego claim. The alter ego doctrine dictates that **union employers** cannot create **non-union alter egos** in order to shift union work to a non-union company in an effort to avoid **existing** obligations under a collective bargaining agreement. The Union claimed, on the contrary, that Rodin, a **non-union employer**, had created union company SCP in order to avoid **future** collective bargaining obligations for Rodin. The court rejected this "reverse alter ego theory," reasoning that the alter ego rule is not intended to coerce a **non-union** company into complying with a collective bargaining agreement it never executed—but rather to prevent a **union** company from creating a non-union company to avoid its obligations under its collective bargaining agreement.

The Ninth Circuit also rejected the Union's claims under the single employer theory. The single employer doctrine extends the obligations of a collective bargaining agreement to a non-union shop where employees of the union and non-union companies constitute a single bargaining unit. A prerequisite to the claim is a finding by the NLRB that the employees from the two entities constitute a single bargaining unit. Because the Union failed to provide such evidence, the single employer claim failed as well.

Although the Court's decision provides some relief for non-union employers involved in starting up a union company to compete in the union market, it should be noted that both the "alter ego" theory and the "single employer" theory are extremely complicated and based on a number of factors rather than an absolute test. Great care should be taken if union and non-union companies share ownership, management, employees, tools or other factors since there is a great risk that courts or arbitrators might apply the union agreement to the non-union entity and seek backpay, trust contributions and other damages due under the union agreement for work done by the non-union company. Legal advice should therefore be sought in order to minimize this risk.

The full opinion may be found at
http://www.ca9.uscourts.gov/datastore/opinions/2009/03/10/0656246.pdf